Coram:
MORICE, J.
In camerâ.

Coram:
KOTZÉ, C.J.
AMES-HOFF, J.
GREGO-ROWSKI, J.
In Appeal.

1896
25 *November.*
1897
12 *January.*

THE MIDDELVLEI BLACK REEF GOLD PROSPECTING AND DEVELOPING SYNDICATE, LIMITED

v.

S. A. TUCKER.

ARREST *AD JURISDICTIONEM FUNDANDAM*—APPEAL FROM INTERLOCUTORY ORDER—EFFECT OF THE CLAUSE "FURTHER AND OTHER RELIEF."

Where an incola of this State applied for an arrest ad jurisdictionem fundandam, *pending action for the delivery of shares, such action being founded on a contract entered into beyond the jurisdiction with a foreign syndicate domiciled abroad, the execution of the contract having to take place beyond the jurisdiction, the Court granted the arrest.*

An appeal lies from an interlocutory order which nevertheless has the force of a definitive sentence. (*Donoghue* v. *Van der Merwe, ante, p.* 1, *followed.*)

With regard to the salutary clause of general relief reference was made to Cohen v. *Shires, McHattie and King* (Kotzé, Rep. 1881-84, p. 45).

THIS was an application for the setting aside of an arrest *ad jurisdictionem fundandam* granted by Jorissen, J., on 13th September, 1895, in favour of Sarah Ann Tucker, pending an action to be instituted by her against the Middelvlei Syndicate for the delivery of certain shares. The Syndicate in its petition urged the following grounds for setting aside (the arrest) :—

(a) The Syndicate (defendant) is domiciled at Kimberley and not in this Republic.
(b) The contract sued upon was entered into in the Cape Colony and its execution had to take place there.
(c) It would be greatly inconvenient for the Syndicate to defend any action in this State, by reason of the heavy costs.
(d) The arrest was obtained upon false statements.

Coster (with him *Muller*), for the Syndicate: Neither the *domicilium rei* nor the *forum solutionis* is here. (*Einwald* v. *German West African Company*, 5 Juta, p. 86.) In that case Einwald was a *peregrinus*. (*Schunke* v. *Taylor and Symons*, 8 Juta, p. 70.) The Chief Justice of the Cape Colony says the theory of the Roman-Dutch writers is adopted in practice. None of the three requisites

mentioned by the Cape Chief Justice are present here. The respondent is registered in the Cape Colony. The shares are to be issued at Kimberley. The property has nothing to do with the case. The *ratio contractûs* does not exist. The contract was entered into at Kimberley and has to be carried out there. Moreover, no alternative request is made. Delivery of shares alone is asked. The Court cannot compel that.

Curlewis, for Mrs. Tucker: Delivery of shares or other relief is asked. If the Court deems it necessary he would apply for leave to amend the claim in the summons, so that it may contain an alternative claim for 1,000*l.* as damages. The property can remain subject to arrest until the judgment is complied with: *McBride and Thompson* v. *Vause*, decided in this Court in 1889 (*a*). In that case McBride and Thompson bought shares in Natal. It was also followed in a subsequent case. The defendant gets certain shares as vendor. The business of the company must be carried out here.

Coster, in reply.

Cur. ad. vult.

Postea. 2nd November, 1895.

MORICE, J., gave the following judgment: The application of *McBride and Thompson* v. *R. W. Vause*, decided by the full Court on 12th February, 1889, appears to me to stand on the same footing as the present one. In that case an arrest *jurisdictionis fundandae causa* was granted, although the contract sued upon was entered into at Maritzburg (Natal), was to be carried out in Maritzburg, and the defendant resided in Maritzburg. No precise decision against this has been cited, although the remarks of Chief Justice De Villiers, in *Einwald* v. *German West African Company* (5 Juta, p. 86), and in *Schunke* v. *Taylor and Symons* (8 Juta, p. 70), may be taken to indicate that he would not have been disposed to grant an arrest in such a case. It is possible that in extreme cases an arrest would not be granted. It seems to me that in the present instance no great inconvenience will be caused by having the case heard in this country. So far as the circumstance is concerned, that no alternative claim for damages is made but only shares are required, it is argued that, as the company is not domiciled here, it cannot be compelled to issue shares. I would advise the respondent to institute

(*a*) S. C. Rep. Transv. vol. 3, p. 3.—TR.

1896, 1897

MIDDELVLEI SYNDICATE v. S. A. TUCKER.

Morice, J.

an alternative claim for damages, although it appears to me that she is not obliged to do so. The application is therefore refused with costs.

The appeal of the applicant from this decision was heard on 25th November, 1896.

Esselen (with him *Muller*), for the appellant: The company is domiciled at Kimberley, and had for its object the purchase of Middelvlei. Tucker received four shares, which he transferred to Mrs. Tucker, and these shares were declared to have become lapsed on reconstruction. Mrs. Tucker obtained an arrest against the property of the company. She was an *incola* when the shares were refused. She also obtained leave to sue by edict. The action which she has brought is only for the shares and no more. (*McBride and Thompson* v. *Vause*; *De Villiers* v. *Benjamin*, Kotzé's Rep. 1881-84, p. 224.)

The Court thereupon intimated that it seemed to be a matter of an interlocutory order.

Esselen maintained that the order decides the question of jurisdiction, and there is no (other) remedy, for, as decided in the case of *De Marillac*, we can not plead in regard to jurisdiction if the order in chambers remains in force.

Wessels (with him *Curlewis*), for the respondent: This is a judgment *in rem*. (*Black on Judgments.*) The question of jurisdiction or no jurisdiction does not arise, for the summons contains the salutary clause. The Court can execute what is asked in this action. (*Norden* v. *Rennie*, Buch. 1879, p. 155; *Cohen* v. *Shires*, *McHattie and King*, Kotzé Rep. 1881—84, p. 41; *Alexander* v. *Armstrong*, Buch. 1879, p. 239.)

Cur. ad. vult.

Postea. 12th January, 1897.

KOTZÉ, C. J., delivered judgment as follows: This is an appeal from the judgment of Morice, J. Mrs. Tucker has on an *ex parte* application obtained an arrest *ad fundandam jurisdictionem* on a certain portion of the farm Middelvlei, situate within the Krugersdorp goldfields, and also leave to sue the Middelvlei Black Reef Syndicate by edict for the delivery of certain shares in the Syndicate. On the 1st November, 1895, after summons had already been

issued, the Syndicate applied for the setting aside of this arrest on its property upon the following grounds:—

1. That the Syndicate is domiciled in the Cape Colony.
2. That the agreement between the parties was entered into in the Cape Colony and was to be carried out there.
3. That according to the summons only delivery of the shares or such other and further relief is claimed, but no damages.

The Judge in chambers, however, decided against the Syndicate, and hence this appeal. It has been objected that the order of the Judge, granting the arrest *jurisdictionis fundandae causa*, was only provisional or interlocutory, and that consequently it is not subject to appeal. This is, however, untenable. In the preceding case of *Donoghue* v. *Van der Merwe* I have already pointed out that instances may occur where an order or judgment, although given at the commencement or during the progress of a suit and quite apart from the merits of the principal case, may yet have the effect of a definitive sentence. The present instance falls within this category. It is sufficient to refer to Gail (I. *obs.* 130, *n.* 9) and Zutphen (*Neerl. pract. sub voce appèl.*, *n.* 16). There we read that a decision, with regard to the competency or jurisdiction of a Judge, although preliminary and apparently interlocutory, has actually the effect of a final sentence, for it is not definitely reparable. An appeal, therefore, clearly lies in the present instance.

It has further been argued that, as the defendant is domiciled and the contract has likewise been entered into and is to be executed out of the country, this Court cannot exercise jurisdiction between the parties. Inasmuch as the plaintiff, Mrs. Tucker, has her domicil within the Republic, I cannot agree with this contention. It has indeed been said during argument that Mrs. Tucker, when the contract was entered into, lived at Kimberley, beyond the jurisdiction of the Court. But no evidence with regard to this was submitted to us, and whether, indeed, this circumstance would have made any difference is a point which I need not now touch upon. The usual rule, as observed in *Cloete* v. *Benjamin* (Kotzé, Rep. 1884), is *actor sequitur forum rei*, yet upon the application of a person residing in this country an arrest can be granted against the property of an alien found within the Republic; this being an exception to the general rule, and introduced in favour of the inhabitants or citizens of the

1896, 1897

MIDDELVLEI SYNDICATE v. S. A. TUCKER.

Kotzé, C.J.

place where the arrest is prayed. (*Voet*, 2, 4. 22.) In the subsequent case of *De Villiers* v. *Benjamin* (Kotzé, Rep. 1884) this Court consequently decided in accordance with this exception. It was contended that it would be very inconvenient and difficult for the Syndicate to come and defend itself here in this country. With that the Court is not concerned. The simple question is whether by our (*a*) law the applicant or plaintiff is entitled to prefer her request to the Court as she has done. Nor do I see any force in the objection that the summons only prays for delivery of the shares, or such other and further relief, and does not contain any alternative claim for damages. During argument the question was put, how will the Court be able to enforce its judgment beyond the jurisdiction in the event of an order being made for the delivery of the shares? I need not consider whether or not the Court is competent to award damages under the salutary clause in the summons, but my answer to the question put is very simple. The Court ought not to presume that its judgment will not be obeyed, and in any event the property arrested can be dealt with, and in this way compliance with any judgment which the Court may pronounce against the Syndicate be secured. I am accordingly of opinion that the appeal should be dismissed with costs.

GREGOROWSKI, J., gave the following judgment: On 13th September, 1895, Tucker made an *ex parte* application to sue the Middelvlei Black Reef Gold Prospecting and Developing Syndicate, Limited, by edict for the delivery of 480 shares in the Syndicate or damages, and with this view for an arrest *ad fundandam jurisdictionem* on the portion of the farm Middelvlei No. 610, situate in the district of Potchefstroom within the Krugersdorp goldfields, and registered in the name of the said Syndicate. The application was granted. On 1st November, 1895, after the summons had already been issued, the Syndicate appeared to oppose the application granted on 13th September, and asked for the setting aside of this order upon the ground (1) that the Syndicate was domiciled in the Cape Colony; (2) that the contract had been entered into between the parties in the Cape Colony, and was to be carried out there; (3) that the summons had already been served, and that it appears therefrom that only judgment for the

(*a*) The original has *deze*, which is clearly a misprint for *onze*.—TR.

shares, and further relief and costs are asked; (4) that it will be extremely inconvenient for the Syndicate to defend an action in this State.

The dispute between the parties relates to certain 480 shares in the Syndicate to which the applicant considers herself entitled. The applicant is an inhabitant of this State, and domiciled at Johannesburg. It was said that when the contract was entered into Mrs. Tucker resided at Kimberley, but there is no proof of this, nor is it one of the grounds on which the Syndicate relies. On 25th November, 1895, the Judge in chambers confirmed the order granted on 13th September, and against this decision the appeal is brought. A preliminary objection was made to the prosecution of this appeal, on the ground that we have here to deal with an interlocutory order granted by a Judge in chambers. On behalf of the Syndicate it was answered that a question of jurisdiction was involved, and that this could only be decided by way of appeal. I will take it that the Syndicate is right, and that the question of jurisdiction cannot be raised afterwards in the principal case, and then, for the reasons fully set out by me in *Donoghue* v. *Van der Merwe*, I think that this application can be heard in appeal.

On the merits, the question is whether the applicant, being domiciled in this State, is entitled to sue the foreign Syndicate here upon a contract entered into in the Cape Colony and to be performed there. The usual rule is *actor sequitur forum rei*, but it is contended that an exception has been grafted on to it giving the domestic creditors the right of citing a foreign debtor before this Court, by laying an attachment *ad fundandam jurisdictionem* on any property (or on the person) of the defendant if found within this State. This point has already been decided in *McBride and Thompson* v. *Vause* (not reported) (*b*). The applicants, McBride and Thompson, domiciled in this country, considered that they had an action against Vause, residing in Natal, in regard to certain Paarl-Pretoria shares sold by them to him in Pietermaritzburg, Natal. The contract was entered into in Natal and had to be performed there. Vause had a share in the business of Vause & Nourse, in Johannesburg, and the applicants sought to attach this in order to found jurisdiction. The question was argued, and it was decided

(*b*) Subsequently reported in 3 S. C. Rep. Transv., p. 3.—TR.

1896, 1897

MIDDELVLEI SYNDICATE v. S. A. TUCKER.

Gregorowski, J.

that this Court ought and was bound to assume jurisdiction in favour of an *incola*. The same point had already been decided in the same way in *De Villiers* v. *Benjamin* (Kotzé, 1881-84, p. 259). In *Cloete* v. *Benjamin* (Kotzé, 1881-84, p. 202) Chief Justice Kotzé says: "It appears from Voet (2, 4. 22), that only at the request of a person residing in this country can an arrest be granted against the property of a stranger found within the Republic, this being an exception to the general rule, *actor sequitur forum rei*, introduced in favour of the inhabitants or citizens of the place where the arrest is sought."

These authorities are conclusive on this point. But it is said that by reason of the way in which the summons is framed the Court can only pronounce a sentence for the delivery of the shares, and that such a sentence is not executable in this State. The plaintiff should have asked damages; but this difficulty is of no practical value in the present instance, for, if the Court should give judgment for the delivery of the shares, it may be said that the judgment will not be ignored, and it is not necessary to go outside of the jurisdiction in order to have the judgment satisfied, for the land under arrest is of far greater value than the shares which are claimed. In *Cohen* v. *Shires, McHattie and King* (Kotzé, 1881-84, p. 41), the question of the salutary clause is touched upon, and reference made to two cases decided in the Supreme Court of the Cape Colony: *Norden* v. *Rennie* (*Buch.* 1879, *p.* 155) and *Alexander* v. *Armstrong* (*Ib. p.* 239). In *Norden* v. *Rennie*, under the prayer for general relief, the Court awarded 25*l.* as damages, as the defendant was unable to complete specific performance. In *Alexander* v. *Armstrong* the claim was wrongly instituted, and consequently damages (in the alternative) could not be granted; but the remarks in the judgment of the Cape Chief Justice are not easily reconcilable with what was done in *Norden* v. *Rennie*. I do not see that it lies in the mouth of the foreign debtor, as it were, to defy this Court, once having obtained jurisdiction, to carry out the judgment pronounced on the summons. The appeal must be dismissed with costs.

AMESHOFF, J., stated that he concurred in the above judgments.

Attorneys for appellant: *Roux* and *Bollot*.

Attorney for respondent: *J. H. L. Findlay*.