

# Freedom from arrest for the foreign debtor: A jurisdictional perspective

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## OPSOMMING

### Vryheid van arres vir die buitelandse skuldenaar: 'n Jurisdiksionele perspektief

Die gemeenregtelike prosedure ten opsigte van die arres van 'n *peregrinus* verweerder om jurisdiksie te vestig of te bevestig, is ongrondwetlik verklaar in *Bid Industrial Holdings (Pty) Ltd v Strang*. In hierdie artikel word 'n oorsig van die geskiedenis, algemene beginsels en ontwikkeling van die prosedure gegee met die oog daarop om 'n kritiese ontleding te maak van die praktyk wat in *Bid Industrial Holdings* in die plek van die prosedure aanvaar is. Daar word aan die hand gedoen dat dié praktyk nie voldoende is nie en deur 'n ander prosedure vervang behoort te word. Verskillende prosedures word oorweeg. Ten slotte word aanbeveel dat die nuwe prosedure by wyse van 'n wysiging aan die Wet op die Hooggeregshof ingevoer behoort te word.

## 1 INTRODUCTION

Traditionally, the arrest of the person of a debtor in a civil case entailed three species:<sup>1</sup>

- (a) *Ad fundandam vel confirmandam jurisdictionem* (to found or confirm jurisdiction);
- (b) *in securitatem debiti* (to secure payment of a debt); and
- (c) to secure the civil imprisonment of a defaulting judgment debtor.

This article proposes to provide a jurisdictional perspective on arrest *ad fundandam vel confirmandam jurisdictionem* and its replacement following the decision of the Supreme Court of Appeal in *Bid Industrial Holdings (Pty) Ltd v Strang*<sup>2</sup> where it was held that such arrest is unconstitutional, that the common law is developed by abolition thereof, and in its stead, *where attachment is not possible*, the adoption of a *practice* according to which a South African High Court will have jurisdiction if the summons is served on the defendant while he or she is in South Africa *and* there is sufficient connection between the suit and the area of jurisdiction of the court concerned so that disposal of the case by the court is appropriate and convenient. The court also held that the new *practice* could itself be subject to development over time.

<sup>1</sup> Nathan *The common law of South Africa* (1907) Vol 4 para 2273.

<sup>2</sup> 2008 3 SA 355 (SCA).

The discussion that follows firstly focuses on the history, general principles and development of arrest *ad fundandam vel confirmandam jurisdictionem* prior and subsequent to its reception in South African law. Secondly, the *Bid* decision is discussed briefly, as well as the replacement procedure adopted by the Supreme Court of Appeal. Lastly, some possible alternatives to the *Bid* replacement procedure will be considered.

In conclusion, it will be contended that the replacement *practice* adopted by the Supreme Court of Appeal is in principle without any justifiable foundation. It will also be argued that this replacement *practice* should be substituted through legislative intervention in order to make it clear in what circumstances a court will found or confirm jurisdiction in respect of a foreign national who possesses no assets in South Africa or who possesses assets in South Africa which are of such minimal value as to render an attachment thereof for purposes of founding or confirming jurisdiction worthless.

## 2 HISTORICAL BACKGROUND

The rule that arrest could found or confirm jurisdiction was for example applied in Holland as an exception to the rule of Roman law *actor sequitur forum rei*.<sup>3</sup> Fundamentally, both rules related to the jurisdiction of a court, that is, the power and competence of a court to hear and determine issues between parties.<sup>4</sup> *Actor sequitur forum rei* applied transnationally and subjected the foreign plaintiff to the jurisdiction of the court where the defendant was resident.<sup>5</sup> The rule that arrest (and attachment) founded or confirmed jurisdiction did not apply transnationally. It subjected a foreign national, as defendant, to the jurisdiction of the court of the *incola* plaintiff pursuant to an order of that court, and whilst being within the territory of that court for the time being. The arrest was primarily aimed at founding or confirming jurisdiction and commencing proceedings.<sup>6</sup> Both rules were therefore jurisdictional requirements.<sup>7</sup>

In addition to its primary aim, arrest was aimed at inducing the foreign debtor to pay the plaintiff creditor (or to provide security for such creditor's claim), rather than endure the worry of arrest.<sup>8</sup> In this way lawsuits could purportedly be cut short and time and costs could be saved. It is submitted that this aim was secondary to that of founding or confirming jurisdiction in the local court. In this secondary sense, the foreign debtor, by means of the arrest, became related to the judgment of the local court.<sup>9</sup>

3 See Wessels "History of our law of arrest to found jurisdiction" 1907 *SALJ* 390.

4 As to this meaning of jurisdiction, see *inter alia* Vromans *Tractaat de foro competenti* 1 3 2 fn 1; Voet 2 1 1; *Graaff-Reinet Municipality v Van Ryneveld's Pass Irrigation Board* 1950 2 SA 420 (A) 424; *Ndamase v Functions 4 All* 2004 5 SA 602 (SCA) 605H; *Gcaba v Minister for Safety and Security* 2010 1 SA 238 (CC) 263B.

5 *Bid Industrial Holdings (Pty) Ltd v Strang* *supra* 362E.

6 See *Tsung Industrial Development Corporation of SA Ltd* 2006 4 SA 177 (SCA) 180G.

7 This is recognised in *Bid* 362E 367B 367E-F.

8 *Tsung v Industrial Development Corporation of SA Ltd* *supra* 180G-181A. In summarising the position in Holland in *Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd* 1969 2 SA 295 (A) 306H-307A, Potgieter JA stated that "the attachment . . . served to found jurisdiction and thereby enabled the Court to pronounce a not altogether effective judgment" (emphasis added).

9 *Thermo Radiant Oven Sales Ltd v Nelspruit Bakeries (Pty) Ltd* *supra* 306A-B.

From a jurisdictional perspective the principle of arrest extended the jurisdiction, that is, the power of adjudicating upon causes and enforcing decrees relating thereto, of a local court to foreigners within its jurisdictional territory for the time being.

### 3 SOUTH AFRICAN LAW

The principle of arrest was taken over by the Dutch in the Cape Colony and became part of the law of South Africa.<sup>10</sup> It eventually obtained statutory force when it was enacted in section 19(1)(c) of the Supreme Court Act<sup>11</sup> by section 6 of the Judicial Matters Second Amendment Act.<sup>12</sup> At the time of its introduction, the relevant provisions of section 19(1)(c) read as follows:

- “(c) Subject to the provisions of section 28 . . . any High Court may –
- (i) issue an order for . . . arrest of a person to confirm jurisdiction . . . also where . . . the . . . person concerned is outside its area of jurisdiction but within the Republic: Provided that the cause of action arose within its area of jurisdiction; and
  - (ii) where the plaintiff is resident or domiciled within its area of jurisdiction, but the cause of action arose outside its area of jurisdiction and the . . . person concerned is outside its area of jurisdiction, issue an order for . . . arrest of a person to found jurisdiction regardless of where in the Republic the . . . person is situated.”

In a long line of cases before and after the rule of jurisdictional arrest was enacted in section 19(1)(c) of the Supreme Court Act,<sup>13</sup> its purpose was held in the case of an arrest *ad fundandam jurisdictionem*, to be twofold: first, to found, that is, create, jurisdiction where no other ground of jurisdiction existed at all; and, second, to provide an asset in respect of which execution could be levied in the event of a judgment being granted in favour of the *incola* plaintiff.<sup>14</sup> The purpose of an attachment of property *ad confirmandam jurisdictionem* was also held to be twofold: to strengthen or confirm a jurisdiction which already existed and to provide an asset in respect of which execution could be levied in the event of a judgment being granted in favour of the *incola* plaintiff.<sup>15</sup>

Historically, the rule of jurisdictional arrest was treated by South African courts as being closely related to the principle of effectiveness, that is, to ensure that proper execution could be levied to satisfy the judgment of the court “so that

10 *Springle v Mercantile Association of Swaziland Ltd* 1904 TS 163 167.

11 59 of 1959.

12 122 of 1998. For a discussion on how this insertion changed the former position pertaining to the procedure of arrest to found or confirm jurisdiction, see Dendy “Attachment to found or confirm jurisdiction, and arrest *tanquam suspectus de fuga*: A long-standing lacuna filled” 1999 *SALJ* 586.

13 59 of 1959.

14 See eg *Thermo Radiant Oven Sales Ltd v Nelspruit Bakeries (Pty) Ltd supra* 305–308; *Banks v Henshaw* 1962 3 SA 464 (D) 466; *Cargo Motor Corporation Ltd v Tofalos Transport Ltd* 1972 1 SA 186 (W) 193; *MT Tigr: Owners of the MT Tigr v Transnet Ltd* 1998 3 SA 861 (SCA) 870; and *Tsung v Industrial Development Corporation of SA Ltd* 2006 4 SA 166 (SCA) 181A.

15 See eg *Thermo Radiant Oven Sales Ltd v Nelspruit Bakeries (Pty) Ltd supra* 300; *Murphy v Dallas* 1974 1 SA 793 (D) 796; *Telecom Electrical Engineering Services (Pty) Ltd v Berriman* 1982 1 SA 520 (W) 523–524; *Agro-Grip (Pty) Ltd v Ayal* 1999 3 SA 126 (W) 128I–129A; *Saaiman NO v Air Operations of Europe AB* 1999 1 SA 217 (SCA) 230D–E.

the sentence of the Court might not be void of result”.<sup>16</sup> The principle of effectiveness has, however, been considerably eroded by the long-established practice of our courts to permit the attachment of property whose value bears no realistic relationship to the amount of the claim advanced in the proposed litigation.<sup>17</sup> It is for this reason that Leon J suggested in *Murphy v Dallas*<sup>18</sup> that the true reason for an attachment (and, it is submitted, an arrest) *ad confirmandam jurisdictionem* “is not in order to render a judgment effective but in order to complete the court’s jurisdiction which, without such attachment, is only notional but not complete”. It is submitted that this suggestion applies *mutatis mutandis* to arrest *ad fundandam jurisdictionem* and, further, that it marks a distinct return to, and recognition of, the fundamental reason for arrest referred to in paragraph 1 above, that is, to found or confirm jurisdiction in respect of a foreign debtor. The powerlessness of an arrest itself to bring about effectiveness was recognised, and illustrated, in the *Bid* decision.<sup>19</sup>

## 4 BID DECISION

### 4.1 Background

Judgment in the *Bid* case was delivered on 23 November 2007. At that stage the Constitution of the Republic of South Africa, 1996, having been adopted on 8 May 1996 and amended by the Constitutional Assembly on 11 October 1996, had already been in operation for more than two years. In delivering judgment in *Tsung v Industrial Development Corporation of SA Ltd*<sup>20</sup> on 23 March 2006, the Supreme Court of Appeal in relation to jurisdictional arrest remarked that “the arrest of a person has a constitutional dimension”, thereby echoing the remark in *Himelsein v Super Rich CC*<sup>21</sup> some years earlier that the procedure of jurisdictional arrest was open to constitutional challenge.

### 4.2 Judgment

The Supreme Court of Appeal, *inter alia*, held that:

- jurisdictional arrest unquestionably was aimed at limiting the arrestee’s liberty;<sup>22</sup>
- arrest in itself was powerless to bring about an effective judgment – that is, deprivation of liberty does not in itself serve to attain effectiveness;<sup>23</sup>
- the subject’s right to freedom and security of the person, as entrenched in section 12 of the Constitution of the Republic of South Africa, 1996, was infringed as there was an absence of “just cause” for such an arrest;<sup>24</sup>

16 See *Zakowski v Wolff* 1905 TS 32 33, cited with approval in *Thermo Radiant Oven Sales Ltd v Nelspruit Bakeries (Pty) Ltd supra* 307E. See also eg *Schlimmer v Executrix in Estate of Rising* 1904 TH 108 112; *Thomson, Watson & Co v Poverty Bay Farmers’ Meat Supply Co* 1924 CPD 93 95; *Bedeaux v McChesney* 1939 WLD 128 132 and *Banks v Henshaw supra* 466.

17 See Erasmus *Superior court practice* vol A1-31/32 and the cases cited.

18 *Supra* 797.

19 365D–E.

20 *Supra* 181C.

21 1998 1 SA 929 (W) 936C.

22 364G.

23 365D–E.

24 364G–H 365I.

- jurisdictional arrest would cause extensive infringement of various other fundamental rights such as rights to a fair civil trial, human dignity and equality;<sup>25</sup>
- there were less restrictive means to establish jurisdiction than by way of arresting a person;<sup>26</sup>
- the common-law rule that arrest was mandatory to found or confirm jurisdiction could not pass the limitations test set by section 36(1) of the Constitution of the Republic of South Africa, 1996, and, in this regard, that the common law was developed by the abolition of jurisdictional arrest and the adoption, in its stead, where attachment was not possible, of the practice according to which a South African High Court would have jurisdiction if the summons were served on the defendant while he or she was in South Africa and there was sufficient connection between the suit and the area of jurisdiction of the court concerned so that disposal of the case by that court was appropriate and convenient;<sup>27</sup>
- section 19(1)(c) of the Supreme Court Act provided the legislative machinery by means of which the common-law requirement could be fulfilled and, once that requirement was abolished, the relevant words in section 19(1)(c) would become redundant;<sup>28</sup>
- the relevant words in section 19(1)(c) did not require a declaration of invalidity, but they could be removed by legislative amendment and, until then, be read down.<sup>29</sup>

In the premises the words “or arrest of a person” and “or person” where they respectively appear in section 19(1)(c)(i) and (ii) of the Supreme Court Act have become redundant and could be removed by legislative amendment. Until then, they should be read down.

## 5 CRITICAL ANALYSIS OF THE *BID* REPLACEMENT

In considering the replacement *practice* adopted by the Supreme Court of Appeal, the following should be accepted:

- the historical distinction between the rules *actor sequitur forum rei* and arrest to found or confirm jurisdiction;
- the distinction between the primary and secondary aims of jurisdictional arrest;
- the fact that the principle of effectiveness has become so eroded that it simply has a very limited, if any, justifiable foundation: it is in most instances purely symbolic;
- the fact that the law is nowadays applied and developed in the context of a global village that is light years away from the provinces and/or kingdoms in which the two rules originated.

The first point of criticism that can be levelled against the replacement adopted by the Supreme Court of Appeal is that it is a “practice”, or at least, described as such. Jurisdiction is conferred upon courts not by means of practices but by rules

25 366B–C.

26 366H.

27 370B–C.

28 370H.

29 370H.

of substantive law. This is trite. The rule relating to jurisdictional arrest was also a rule of substantive law (albeit substantive procedural law), as is the rule *actor sequitur forum rei*. Any replacement of jurisdictional arrest must therefore be of a substantive and not merely procedural nature.

Secondly, the primary aim of jurisdictional arrest was to found or confirm jurisdiction and to commence proceedings. Any replacement should therefore have a similar aim.

Thirdly, despite the Supreme Court of Appeal realising that it should move away from the principle of effectiveness, as it is outdated,<sup>30</sup> the court still embarked upon a replacement based, *inter alia*, upon “sufficient links between the suit and this country” albeit for the purpose of the disposal of the case on the basis of appropriateness and convenience.

Once it is accepted that the principle of effectiveness simply has a very limited, if any, justifiable foundation, any replacement which still calls for “sufficient links between the suit and this country” is also without any justifiable foundation. So too is the string that was attached, namely “so that disposal by that court is appropriate and convenient”.<sup>31</sup> Questions such as the following arise:

- What exactly is meant by “appropriate and convenient”?
- Why should factors such as appropriateness and convenience have any role to play in determining the original competency of a court in contradistinction to, for example, only being factors to be taken into account when proceedings are removed from one court having jurisdiction to another?<sup>32</sup>
- Whose convenience is it?
- What is the position in other jurisdictions where the common law has been re-accepted and possibly been developed after the abolition of arrest to found or confirm jurisdiction?

30 Howie P stated the following (369B–D): “Obviously the jurisdictional principles we are concerned with here have originated because courts have always sought to avoid having to try cases when their judgments will, or at least could, prove hollow because of the absence of any possibility of meaningful execution in the plaintiff’s jurisdiction. It seems to me that, firstly, one has to apply reasonable and practical expedience in moving away, where necessary, from historical practices that cannot achieve what they were intended to. Secondly, the responsibility for achieving effectiveness, absent attachment, is essentially that of the parties, and more especially the plaintiff. Economic considerations will dictate whether a South African judgment has prospects of successful enforcement abroad and thus influence a plaintiff in deciding whether to attach and sue here or to sue there (leaving aside, of course, other costs considerations). And if the plaintiff decides in favour of suing here it is open to the defendant to contest, among other things, whether the South African court is the *forum conveniens* and whether there are sufficient links between the suit and this country to render litigation appropriate here rather than in a court of the defendant’s domicile.” Howie P stated 369G–H: “As to the principle of effectiveness, despite its having been described as ‘the basic principle of jurisdiction in our law’ it is clear that the importance and significance of attachment has been so eroded that the value of attached property has sometimes been ‘trifling’. However, as I have said, effectiveness is largely for the plaintiff to assess and to act accordingly.”

31 370C.

32 In terms of s 9(1) of the Supreme Court Act if, in any civil cause, proceeding or matter, it is made to appear to the High Court concerned that the same may be more conveniently or more fitly heard or determined in another High Court, that court may, upon application by any party thereto and after hearing all other parties thereto, order such cause, proceeding or matter to be removed to that other High Court.

- Why can the court within the area of which the plaintiff is an *incola* not have jurisdiction irrespective of whether it is appropriate or convenient for the case to be heard by that court?
- Why can the court within the area of which the cause of action arose not have jurisdiction irrespective of whether it is appropriate or convenient for the case to be heard by that court?

The *Bid* decision, unfortunately, neither provides answers nor a fully reasoned judgment in its development of the common law in relation to questions such as the above. Consequently, the concept of a connection between the suit and the area of jurisdiction of the South African court from the point of view of appropriateness and convenience is too vaguely described for the purposes of founding or confirming jurisdiction in respect of a foreign national. A more precise approach is required in order to make it clear in what circumstances a court will found or confirm jurisdiction in respect of a foreign national who possesses no assets in South Africa or who possesses assets of such minimal value as render their attachment for purposes of founding or confirming jurisdiction not worthwhile. There appears to be no cogent reason why there must be an adequate connection between the suit and the area of the jurisdiction of the South African court concerned “from the point of view of the appropriateness and convenience of its being decided by that court”. The rule of jurisdictional arrest was an exception to the rule *actor sequitur forum rei*. From the point of view of the plaintiff who has to follow the foreign defendant to the latter’s court of residence, appropriateness and convenience play no role. In fact, it is quite inappropriate and inconvenient for such a plaintiff to do so. Why then, in the case of a foreign debtor, appropriateness and convenience should play a role is unclear. It is submitted that by excising this requirement from the replacement, plaintiffs and defendants who respectively have to litigate in foreign forums are put in an equal position from a jurisdictional perspective.

Fourthly, modern communication, technology and modes of transport make it less cumbersome than in Roman and historical Dutch times to adhere to the principle of *audi alteram partem* and, for example, to serve summonses or applications swiftly almost anywhere in the country, and at any time.<sup>33</sup> There is simply no cogent reason why the summons or application must be served on the defendant, as required by the replacement, “while in South Africa”.<sup>34</sup>

## 6 POSSIBLE ALTERNATIVES TO THE *BID* REPLACEMENT

### 6.1 Transient or tag jurisdiction

This jurisdictional concept, which originated in English common law during the sixteenth century, entails that a court in England will assume jurisdiction over a *peregrinus* by the mere personal service of a summons, or any other originating process, while such *peregrinus* is physically present within the court’s area of jurisdiction or territorial boundary, no matter how fleeting the presence there

<sup>33</sup> In terms of s 26(1) of the Supreme Court Act the civil process of any High Court runs throughout the Republic and may be served or executed within the jurisdiction of any other High Court.

<sup>34</sup> 370B–C.

was.<sup>35</sup> American courts have labelled this as “transient” or “tag” jurisdiction.<sup>36</sup>

It is submitted that transient or tag jurisdiction is justifiably criticised by Schulze, albeit with reference to the enforcement of foreign judgments, who points out that:<sup>37</sup>

- litigants should not be encouraged to sue their opponents randomly in any court; and
- the notion of transient jurisdiction has lately been harshly criticised by English commentators as being misleading.<sup>38</sup>

## 6.2 *Forum non conveniens*

In *Bid* the court made the following remark:<sup>39</sup>

“And if the plaintiff decides in favour of suing here it is open to the defendant to contest, among other things, whether the South African court is the *forum conveniens* and whether there are sufficient links between the suit and this country to render litigation appropriate here rather than in the court of the defendant’s domicile.”

Eiselen<sup>40</sup> argues that this statement, although somewhat ambiguous and probably *obiter*, opens the door for the acceptance of the *forum non conveniens* doctrine in South African law. This doctrine, which exists in mostly common law legal systems, allows a certain court of *competent jurisdiction* to decline to adjudicate a matter on the basis that there is a more appropriate court that can do so. It has already been pointed out above that section 9 of the Supreme Court Act provides for the removal of a case from a High Court of competent jurisdiction to another High Court if it is made to appear to the court concerned that the case may more conveniently or more fitly be heard or determined by the other High Court. However, it is true that section 9 operates only between High Courts in South Africa. There is accordingly scope for the development of the *forum non conveniens* doctrine in South African law as suggested by Eiselen<sup>41</sup> if it is more convenient that a foreign court determines the case.<sup>42</sup>

35 Theophilopoulos “Arresting a foreign peregrinus: *Bid Industrial Holdings (Pty) Ltd v Strang* and a new jurisdictional *lacuna*” 2010 *Stell LR* 132 139–140.

36 *Idem* 133. Schulze “International jurisdiction in claims sounding in money: Is *Richman v Ben Toven* the last word?” 2008 *SA Merc LJ* 61 71 points out that transient or tag jurisdiction is based on the notion that the foreigner who visits a foreign state owes temporary allegiance to the sovereign of that state and is therefore subject to the jurisdiction of that state during his presence there.

37 71–72.

38 These commentators, as Schulze 72 points out, argue that the function of service was always to summon the defendant to court to answer the claim against him, but that, even though service may be regarded as a prerequisite to the assumption of jurisdiction by the court, the court’s jurisdiction itself is based on the rules of law, and more specifically, the four recognised grounds for jurisdiction in English law, namely (a) the presence of the defendant within the court’s area of jurisdiction; (b) submission by a party outside the court’s area of jurisdiction; (c) the cases laid down in rule 6.20 of the English Civil Procedure; and (d) the provisions of various statutes, which are mostly based on international conventions. For further criticism, see Theophilopoulos 155–156.

39 369D–E.

40 “Goodbye arrest *ad fundandam*. Hello *forum non conveniens*?” 2008 *TSAR* 794 799.

41 799.

42 Eiselen 799 is of the view that it is possible that the South African High Courts may in future resort to the principles set out in the English case of *Spiliada Maritime Corp v Cansulex Ltd* 1986 3 All ER 843 (HL) 854–856.



### 6.3 Statutory jurisdiction

It has been pointed out above<sup>43</sup> that:

- any replacement of jurisdictional arrest must be of a substantive and not merely a procedural nature; and
- the primary aim of any replacement should be to found or confirm jurisdiction and to commence proceedings.

For the purposes of founding jurisdiction, there appears to be nothing wrong in principle in adopting, instead of the principles of appropriateness and convenience that was adopted in the *Bid* decision, a requirement that a plaintiff must be an *incola* of the area of jurisdiction of the court where process is issued against a foreign national. This would be, in other words, a reverse kind of *actor sequitur forum rei*: the defendant follows the plaintiff to the court of the latter's residence.

For the purposes of confirming jurisdiction, there also appears to be nothing wrong in principle in adopting, instead of the principle of appropriateness and convenience, a requirement that the cause of action must have arisen wholly within the area of jurisdiction of the aforesaid court.

Lastly, there appears to be nothing wrong in principle to require that any substitute for the principle of appropriateness and convenience be adopted by means of legislative intervention, that is, an appropriate amendment to section 19 of the Supreme Court Act.

It is, however, contended that any legislative intervention must not close the door to the development of the *forum non conveniens* doctrine in South African law, especially as far as foreign courts are concerned.

## 7 CONCLUSION

The practice adopted by the Supreme Court of Appeal should, by means of legislative intervention, be converted into substantive law without the requirement that, in addition to service of the summons upon the defendant, there must be "an adequate connection between the suit and the area of jurisdiction of the South African court concerned from the point of view of the appropriateness and convenience of its being decided by that court".

It is contended that the legislative intervention should entail an amendment to section 19 of the Supreme Court Act to the effect that High Courts may hear and determine issues between local plaintiffs and foreign national defendants if the summons or application (i) was issued out of the court of the area of jurisdiction of which the plaintiff is an *incola* in order to found jurisdiction; or (ii) was issued out of the court in the area of jurisdiction of which the whole cause of action arose in order to confirm jurisdiction *and* the summons or application (a) was served on such foreign national whilst being anywhere in the country as a non-resident (that is, for the time being) in terms of Uniform Rule of Court 4, or (b) was caused to be served by means of edictal citation and, if necessary, substituted service in terms of Uniform Rule of Court 5 on such foreign national whilst being outside the country.

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43 Para 5.