

Business and Human Rights: Forum non conveniens and the mystery of the assumed host state jurisdiction

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This is a presentation that was delivered by Lise Smit during the March 2022 conference on the topic of the "[Impacts of Business and Human Rights on Public International Law](#)" on the occasion of Robert McCorquodale's retirement from the University of Nottingham.

The concept of *forum non conveniens* is of relevance again now since the UK left the EU, insofar as the Brussels I Recast Regulation no longer applies to claims brought in UK courts. (The Brussels I Recast Regulation establishes jurisdiction against parties that are domiciled in EU Member States.) Questions have been raised as to whether and how *forum non conveniens* arguments may resurface in UK litigation.

The idea behind *forum non conveniens* is that a court that does have jurisdiction over a matter can and should refuse to exercise this jurisdiction in the event where there is another forum that also has jurisdiction, and would be a more appropriate and convenient forum to hear the matter.

The legal test as defined in the case law is two-fold: firstly, there has to be "two competing jurisdictions" - so there has to be another court that does, in law, have jurisdiction over this matter - and secondly, not only is there a competing jurisdiction, but it would actually be more convenient for this other court to hear the matter.

As with all things civil procedure, it would usually be for the party who seeks to have the action stayed or dismissed on the basis of *forum non conveniens* to persuade the court that these two legs of the test have been met.

And yet - interestingly - we see that this is not always the case.

Our example today is from a South Africa-English host state-home state scenario.

In terms of the South African civil procedure legislation and the rules, South African courts do not have jurisdiction over foreign defendants, even if the harm arose in South Africa. The only way that jurisdiction can be either 'confirmed' or 'founded' is through the attachment of the foreign defendant's assets. If there are no assets to attach, there is no jurisdiction.

This is not a grey area. The case law is clear that [my emphasis]:

- "[J]urisdiction **does not come about until** the ... attachment is made." [*Erasmus Superior Court Practice* RS 15, 2021, A2-107, fn 226, referring to *Tedecom Electrical Engineering Services (Pty) Ltd v Berriman* 1982 (1) SA 520 (W) at 524.]
- A plaintiff must bring an ex parte application for attachment **before summons** is even issued. "[I]f a plaintiff discovers after proceedings have been instituted that the defendant is a [non-resident], [the plaintiff] should withdraw [their] **summons and commence de novo** by **first applying for an attachment** and thereafter issuing [another new] summons." [*Erasmus Superior Court Practice* RS 8, 2019, A2-111]
- The value of the attached asset does not have to match or correspond with the value of the claim. The main purpose of the attachment is to ensure effective implementation - not wasting the court's time with an action that has not chance of being enforced. [*Erasmus Superior Court Practice* RS 15, 2021, A2-107]

- Foreign defendants can **submit to jurisdiction** in order to avoid their assets being attached, but an applicant...is **under no obligation first to invite** the non-resident respondent to submit to the jurisdiction before seeking an attachment order. [*Erasmus Superior Court Practice* RS 8, 2019, A2-116; *Associated Marine Engineers (Pty) Ltd v Foroya Banki* PF 1994 (4) SA 676 (C) at 688G-J; *Naylor v Jansen*; *Jansen v Naylor* 2006 (3) SA 546 (SCA) at 560C-D.]
- The onus to show that the court has jurisdiction is on the plaintiff.

To be clear, therefore: if you try to sue a foreign company in South Africa, which does not have presence or assets there, you will not proceed to pleading stage. The company will take an exception to your summons and have it struck out, with costs probably. And you will walk away from the court, with no legal action, no pleadings, and a cost order against you.

Also: A company that has no presence and no assets will not have any real incentive to voluntarily consent to jurisdiction. If it has no assets that are under threat of being attached, and no actual operations or presence there, why would it agree to be sued there?

So in short: suing a foreign company with no presence or assets in South Africa is effectively 100% out of the question. And probably for this reason, there is also very little case law on this - it is a really clear and well-established area of law.

Now, looking at this through the lens of the two-point test about forum non conveniens, one can easily answer the first leg of the test about whether there is a "competing jurisdiction" on the face of this law. If the company is a foreign company, with no presence and no assets to be attached in South Africa - then the answer is clearly "no", the South African courts do not have jurisdiction. You do not even have to move to the second leg of the test.

And one would simply need to look at these paragraphs that I have just mentioned from the rules and the jurisprudence. To cite Lord Briggs in *Vedanta v Lungowe* [2019] UKSC 20 [para 6], who in turn was citing Lord Goff, this is the kind of question that can be decided "in the quiet of [the judge's] room without expense to the parties...and that submissions will be measured in hours and not days."

And yet we find that sometimes this very basic first question is skipped over entirely - moving straight onto second part of the test, the "convenience" part. **There is a mysterious assumption that courts of the host state will have jurisdiction simply because the facts took place there.**

In contrast, the second part of the test about whether it is more convenient to hear the matter in the other court, often turns on more factual or subjective questions. We have heard arguments made in UK courts regarding the host state's rule of law, availability of legal representatives, experts, costs, corruption, capacity of the judiciary, and so on. However, as we have seen, one does not even have to go there, if on the first leg of the test, there is clearly no competing jurisdiction at all, by virtue of the host state's civil procedure rules.

Now, just to mention that these rules will not be relevant if there is an active registered subsidiary in South Africa (or the relevant host states as the case may be). In those cases, a subsidiary will most likely qualify as an "asset", and/or the foreign company can be joined as a party to proceedings against the local company, over which the court will have jurisdiction.

So this dilemma only really arises in the factual scenario where a company either a) used to operate there but has now left, or b) was never registered there, such as in the case of a buyer-supplier relationship, for example, or another kind of value chain relationship.

One example that falls squarely within the first of the above scenarios and raises many questions relating to this mystery is the English House of Lords decision in *Lubbe and Others v Cape* [2000] UKHL 41 - a July 2000 judgment.

It was a claim in tort against a UK company for harms suffered in South Africa. At the time when the action was commenced in England, the relevant mines in South Africa had been closed for almost a decade and the UK company no longer had any presence or assets in South Africa.

And yet, the English court of first instance found that everything pointed to South Africa as the natural forum. There was no enquiry as to whether South African courts have jurisdiction.

Instead, this issue was first pointed out on appeal by the Court itself. The first Court of Appeal enquired during the appeal hearing

whether the South African courts would actually even have jurisdiction, and was then offered undertakings by the company's counsel that the company would henceforth submit to such jurisdiction.

Evans LJ described the situation with a few key points [my emphasis]:

- "Because [the defendant company is incorporated and domiciled in the UK] the plaintiffs bring the proceedings in [the English] jurisdiction '**as of right**'; [para 7]
- Therefore "**the defendant has the burden of proving** that South Africa is an '**available forum** which is clearly or distinctly more appropriate than the English forum' for the trial of the action..."; [para 7]
- "**[J]urisdiction must exist at the time when the action is instituted by issue of summons...**"; [para 9]
- In this case the South Africa courts do **not** have jurisdiction, without the defendant company's consent [para 8], and such consent "was **first offered during the hearing** before the judge and therefore came **after the defendant's summons was issued**"; [para 10]
- And that this **timing may be relevant** to the question whether it should be taken into account. [para 10]

So this is the first Court of Appeal in *Lubbe v Cape*, and it all makes sense so far in terms of what we know about the legal test. But then, the House of Lords kind of rolls back on this.

In the House of Lords decision, Lord Hope specifically looks into this question. He considers a line of Scottish cases from the 19th century, in all of which the court did look at whether there was a "competing jurisdiction", and where the court considered this to be something that the defendant had to prove - and in all these cases the Scottish courts then refused a dismissal based on *forum non conveniens* on the basis of that other court did not have jurisdiction.

The cases related respectively to the jurisdiction of Texas courts, Jamaican courts, and - interestingly - another one also about the South African courts [*Sim v Robinow* (1892) 19 R. 665]. That claim was against a private individual who stated that he is only visiting Scotland temporarily, and that he is a permanent resident of South Africa, that he intends to return there and is asking to be sued there instead.

(Let us contrast this with a company that had left a decade ago and has no intention of returning - while courts in South Africa are almost certainly going to have personal jurisdiction over a South African permanent resident individual.)

However, the Scottish court nevertheless found in 1892 [at p 669] that:

"I do not think that the pursuer can be asked to wait till the defender carries out his intention [of returning to South Africa], or that he ought to be sent to a court which may be unable to exercise any jurisdiction on consequence of his continued absence from South Africa."

And yet, directly following this line of cases, which all effectively rejected the *forum non conveniens* arguments, Lord Hope concludes that in the *Lubbe* case, the defendant's undertakings to submit to the South African court's jurisdiction given during the appeal do suffice to establish jurisdiction in South Africa - and moreover [at para 50] that:

"Nothing turns on the time when the undertakings were given. It is sufficient that they were before the judge when he was considering the question of *forum non conveniens*."

I have to admit it is not clear to me how Lord Hope comes to this conclusion from the authorities cited above, which seem to point in the other direction. In any event, the case is effectively decided on another point, leaving us no further clues as to how this kind of scenario would be dealt with in a similar matter today.

So this case raises many question marks on this crisp point.

Why is this relevant? It might seem that this is a peculiarity of South African civil procedure law. However, it is not really.

All legal systems have rules about when their courts have jurisdiction over foreign parties. The range of these rules are not very wide either (leaving aside universal jurisdiction, which is rare). On the more flexible side, there usually has to be some sort of ostensible link, for example at least that the cause of action (or part of it) arose there. On the other stricter, or more defined side of the rules spectrum, some jurisdictions have additional criteria, such as physical or financial presence or assets of the non-resident party. (And we need to also remember that in either scenario, if an order is successfully obtained against a foreign defendant, the claimants would still usually have to have it enforced - in whole or in part - in the defendant's home state jurisdiction.)

Now lastly, how does this relate to today's topic on Business and Human Rights and Public International Law?

This is about access to remedy for human rights harms caused by transnational business. We are talking about scenarios where claimants' human rights are harmed and they are seeking remedies in court, in other jurisdictions than their own. This brings us within the sphere of not only human rights law, but also it triggers all three the pillars of the [UN Guiding Principles on Business and Human Rights](#): access to remedy, the corporate responsibility and also the state's responsibility to reduce legal and procedural barriers for those seeking access to remedy for human rights harms.

In the meanwhile, when *forum non conveniens* arguments are applied, we need to remember that all jurisdictions - host state and home state - have some sort of rules that determine when their courts have jurisdiction over foreign defendants. **Given what we know about barriers to access to remedy, it is important that this enquiry is not skipped on the assumption that just because the alleged harms arose in that territory, those courts will have jurisdiction.**

We are considering undertaking comparative research on this topic at BIICL. Please get in touch with the [BIICL Business and Human Rights team](#) if you would like to share the rules regarding courts' jurisdiction against foreign parties in your jurisdiction, and if you would be interested in funding such comparative research.

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