IN THE COURT OF APPEAL OF THE REPUBLIC OF BOTSWANA
HELD AT LOBATE

CIVIL APPEAL NO. 42 OF 1995
[HIGH COURT MISCA APP. Nos.' 148/95 & 201/95]

In the matter between:

SILVERSTONE [PTY] LIMITED	1st Appellant
SAPRO [PTY] LIMITED	2nd Appellant

and

LOBATSE CLAY WORKS [PTY] LIMITED	Respondent

Advocate Tuchten SC. for the Appellants
Advocate Hoffman [with him Mr. S.M. Hardisty] for the Respondent

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JUDGMENT

CORAM: **A.N.E. AMISSAH, J.P.**
W.H.R. SCHREINER, J.A.
P.H. TEBBUTT, J.A.

TEBBUTT J.A.;

This is essentially a case about jurisdiction. Its main feature is whether a company is an incola of Botswana if it is incorporated within Botswana and has its registered office here but has no shareholders who are Botswana residents and has its administrative centre outside the country.

First Appellant and Respondent entered into a written agreement on 5 April 1993 in terms of which 1st Appellant was to manufacture, supply and install and commission certain equipment

for Respondent at its premises in Lobatse. The Respondent is a brickmaker and the equipment was designed to produce gas which the Respondent was to use to fire its brick kilns. The agreement was for a period of ten years from 29 September, 1993. Ownership of the equipment was to remain vested in 1st Appellant but Respondent was given an option to purchase the equipment at any time after a period of nine years and eleven months from 29 September 1993, subject to certain conditions set out in the agreement. Clause 5.6 of the agreement provided that if the Respondent did not exercise the option to purchase the 1st Appellant was obliged to remove the movable equipment ["shall remove the movable plant"] and make good any damage caused to Respondent's property by such removal. No compensation was to be payable by Respondent for any immovable property not removed by 1st Appellant.

1st Appellant duly placed certain equipment on Respondent's site and certain additional equipment was also brought on to the site. This equipment belonged to 2nd Appellant.

During 1994 a dispute arose between 1st Appellant and Respondent with regard to the implementation of the agreement and the operation of the equipment. It is not necessary to set out the nature of the dispute. Suffice to say that on 20 April 1995 Respondent wrote to 1st Appellant cancelling the agreement and

1st Appellant accepted such cancellation. Respondent averred that 1st Appellant had breached the agreement and that it had, as a result, suffered damages. 1st Appellant denied both the breach and that Respondent had suffered damages. In terms of the agreement that dispute has been referred to arbitration and an arbitrator has been appointed.

1st and 2nd Applicants thereupon launched an application before Lesetedi AJ. in the High Court for the return of the equipment. The Respondent resisted it. It in turn launched a counter-application against the 1st Appellant for an order for the attachment of the equipment to confirm jurisdiction. It alleged that the Appellants were peregrines and did not have any properties, other than the equipment, to satisfy any award for damages that may be made by the arbitrator in its favour against 1st Appellant.

Lesetedi AJ. found that the property brought on to the site belonging to the 2nd Appellant had been brought there pursuant to the agreement between Respondent and 1st Appellant and should be treated as being owned by 1st Appellant.

He came to the conclusion that 1st and 2nd Appellants were entitled to the restoration of the equipment and to remove it from Respondent's site and so ordered. He furthermore interdicted Respondent from utilising or in any way dealing with

any of the equipment. He did so because he also found that Respondent was entitled to an order to attach the equipment ad confirmandam jurisdictionem in order to enforce any award by the arbitrator, or an order of Court, in respect of any damages suffered by Respondent. The restoration to, and removal by, 1st and 2nd Appellants of their equipment was accordingly subject to such attachment which is to endure until finalisation of the arbitration proceedings. He further ordered that each party should bear its own costs.

The 1st and 2nd Appellants now appeal to this Court against the orders of Lesetedi AJ.

At the hearing of the appeal Respondent conceded that the Appellants are the owners of the equipment which they sought to vindicate, and that they are therefore entitled to remove the equipment subject to the attachment order and that Respondent is not entitled to use the equipment concerned. It further conceded that the equipment to which 2nd Appellant lays claim belongs to it and that it is entitled to remove such equipment and that the attachment of its goods to confirm jurisdiction should not have been granted by the learned Judge a quo as 2nd Appellant was not a party to Respondent's attachment application, such application having been brought against 1st Appellant only.

The sole issues before this Court are therefore [i] whether

the Court a quo was correct in granting the attachment order and [ii] the question of costs. As to the first of these, two points arise:

[i] is the 1st Appellant an incola of Botswana or a peregrinus?

[ii] If it is a peregrinus, was it competent for the Court a quo to grant an order for the attachment of the goods of a peregrinus to confirm jurisdiction in arbitration proceedings between the parties and not an action between them in the High Court.

In considering these points it is obvious that if the 1st Appellant is found to be an incola then it is unnecessary to consider and decide the 2nd point, because no need for any attachment of its goods to confirm jurisdiction would arise.

1st Appellant, to whom for convenience I shall hereinafter refer as "Siverstone", was incorporated in Botswana according to the Company Laws of Botswana, on 8 May 1992. Its registered office is in Gaborone. It has an authorised share capital of P3000, of which 200 shares of P1 have been issued. The share-holders are two non-resident companies viz Flintside Ltd that owns 152 of the shares and Cartley Trading Ltd that owns 48 of the shares. Both companies are situated in the British Virgin Islands.

Counsel for Respondent contended that apart from being incorporated in Botswana and having its registered officer here, the company was administered outside Botswana. He sought to

infer this from the following facts [a] that the managing director, Nigel Roake-Barefoot, was apparently based in Johannesburg. He said he deduced this from the fact that Silverstone had a firm of Johannesburg attorneys, Werksmans, acting for it and that Roake-Barefoot had asked that copies of certain of the correspondence with Werksmans be faxed to him at a Johannesburg address, the directors' meeting of Silverstone at which the resolution to launch the application for the return of its equipment was taken, was held in Johannesburg and, if the company's managing director was ostensibly based in Johannesburg, it was likely that other director' meetings would have been held outside Botswana. In my view, although these facts go some way to suggesting that Silverstone is administered outside Botswana, it cannot be found conclusively solely on those facts that this is so. Board meetings may well be held in Botswana and Roake-Barefoot may come regularly to Botswana to attend to the management of the company. I will, however, for the purpose of the present judgment assume that what has variously been described as "its principal place of business" or "its administrative centre" [see **Henochberg** on the **Companies Act 4th Edition [1985] Volume 1 at 256**] or "the centre of management and control of the corporations affairs" [see Professor Ellison Kahn in **The Annual Survey of South African Law [1976] at 524**] is

outside of Botswana. I started this judgment by saying that this is a case about jurisdiction. It is therefore convenient to set out how a Court comes to get jurisdiction in a particular cause.

As a preliminary observation it is to be noted that the common law of Botswana is the Roman-Dutch law. Although this was laid down as long ago as 1909 [by **Proclamation No. 36 of 1909**] when Botswana was still the Bechuanaland Protectorate, the Roman-Dutch law had continued to this day to be applied and is still so applied in Botswana. In the classic passage in the Privy Council judgment in **PEARL ASSURANCE CO. V. UNION GOVERNMENT 1934 A.C. 570 [P.C.]** at 579, Lord Tomlin said:

> "Roman-Dutch law is a virile living system of law, ever seeking, as every such system must, to adapt itself consistently with its inherent basic principles to deal effectively with the increasing complexities of modern organised society."

In applying the principles of Roman-Dutch law, the Courts of Botswana have constantly adapted them to the "complexities of modern organised society". The Courts of Botswana have never been reluctant, in their own adaptation of the common law to the requirements of modern times, to have regard to the approach of the South African Courts and to the writings of authoritative South African academics. I shall do the same herein.

What then in the Roman-Dutch law gives a Court jurisdiction? It is the exercise by the Court of the territorial sovereignty

of the State over those persons who are within its boundaries [see per Bristowe J. in **SCHLIMMER V. RISINGS EXECUTRIX 1904 T.H. 108 AT 111**]. Such persons are incola of the State and are such by reason of their domicile or residence there. **Forsyth Private International Law 2nd Edition [1990] at 175-6** sets out the legal position thus:

> "Provided that the defendant is an incola of the court's area of jurisdiction, the court will be prepared to hear the case....Accordingly, if the defendant is either domiciled or resident in the area, this will be a sufficient jurisdictional connecting factor. Neither of these requirements predicates the actual physical presence of the defendant within the court's area. If the defendant is present, he may be brought to court by summons in the ordinary manner; if he is absent, then, subject to the Rules of Court, summons may be effected by edictal citation or substituted service, as the case may be. Domicile and residence suggest no more than a notional connection with the court's area. Absence is relevant only in regard to the procedural matter of service."

That passage has received judicial approval in the South African Appellate Division in **BISONBOARD LTD V. K. BRAUN WOODWORKING MACHINERY [PTY] LTD 1991 [1] SA 482 [A] AT 488 B-D**. I shall be referring to the latter case extensively herein and shall call it for convenience, "Bisonboard".

The principle of jurisdiction based upon domicile and residence in respect of a natural person in actions for a judgment sounding in money [which will be the effect of any

judgment for damages in Respondent's favour arising from the arbitration proceedings in casu] has also been described in the **South African Law of Jurisdiction** by Pollak, who is regarded as the leading South African authority on the subject, as follows, at 24-25.

> "If the defendant, although not physically present within the State, is domiciled therein, a judgment against him sounding in money can usually be made effective against him. If a person is domiciled in a State he usually has his home there. Such a person can therefore be expected to return to the State and to have the bulk of his possessions within the State. A judgment sound in money can therefore normally be made effective against a person who is domiciled in a State without having his home there, and in such a case it may be unlikely that a judgment sounding in money can be made effective against him in such State. This, however, is an unusual case; normally a person is domiciled in the State which is in fact his home. It is therefore not unreasonable to disregard the unusual case and to say that the domicile of the defendant within the State is a sufficient basis for jurisdiction in an action in which a judgment sounding in money is claimed.
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> What has been said in favour of domicile as a basis for jurisdiction applies equally to residence. If the defendant is resident within the State, then, although he is not physically present within the State at the time of the commencement of the action, a judgment sounding money will normally be effective against him."

That passage, too, was cited with approval in **Bisonboard**, supra, at 487 D-G.

It is therefore, I think, now well established that an incola is a person who is either domiciled or resident within a

court's jurisdiction.

What I have said so far applies to natural persons. It also applies to companies.

Although a company is a creation of law and exists only in abstracto, being an artificial legal person which has no physical existence but which exists only in contemplation of law [per **BUCKLEY** L.J. in **CONTINENTAL TYRE AND RUBBER CO. [GREAT BRITAIN] LTD V. DAIMLER CO. LTD [1915] 112 LTR 324 AT 333**] it has been held that in considering the conception of domicile and residence, particularly the latter, in regard to a company, one must proceed as nearly as one can on the analogy or an individual or human being [see e.g. per Lord Loreburn in **DE BEERS CONSOLIDATED MINES V. HOWE [1906] A.C. 455 AT 459**; per Watermeyer JA. in **ESTATE KOOCHER VS. COMMISSIONER FOR INLAND REVENUE 1941 AD 256 AT 260**] Hoexter JA. in **Bisonboard** supra at 484 D-E quotes with approval the following passage from **Martin Wolff: Private International Law 2nd Edition [1950] at 295**:

> "...[I]t is useful to realise that conceptions used in the case of natural persons, such as nationality, domicile, or residence, can be applied to legal persons only by way of analogy and not without distortion of their original and genuine meaning. Yet it seems impossible to do without these conceptions. For every legal system contains some rules which attach certain consequences to a person's nationality, domicile, or residence without distinguishing between natural and artificial persons."

Where a company resides has been the subject of conflicting decision in the South African Courts. In some it has been said to be the principal place of business of the company [see e.g. **TW BECKETT AND CO. LTD V. H. KROOMER LTD 1912 AD 324**; **ESTATE KOOCHER** case supra; **HENOCHSBERG loc cit**], the "principal place of business" being said to be "its administrative centre" or "where the administrative business of the company is conducted" or "the place of central control"; in others it has been held that in law a South African domestic company resides at the place of its registered office [see **DAIRY BOARD V JOHN T RENNIE & CO [PTY] LTD 1976 [3] SA 768 [W]**; **BRISONBOARD** supra]. The conflict has now been finally resolved in **Bisonboard** where the South African Appellate Division in a majority judgment [Hoexter JA and Botha and Goldstone JJA concurring, Milnie JA and Nicholas AJA dissenting] has decided that while a company can be said to reside at the place of central control it can also have for jurisdictional purposes its place of residence at its registered office. The court held that a company is resident for jurisdictional purposes where it has its registered office even if such a company's sole or main place of business or its place of central control is outside the area of jurisdiction of the Court concerned.

In a careful and well-reasoned judgment, Hoexter JA. who gave the reasons of the majority of the Court, exhaustively examined and analysed the cases where the principal place of business was held to be the residence of a company. He concluded that they had not had pertinently, and for the purposes of their decisions, to deal with the problems the Court faced in **Bisonboard**. He also dealt extensively with the arguments used by Nicholas AJA. who wrote the dissenting judgment of himself and Milne JA. Those arguments relied heavily on the judgments in the cases dealing with a company's residence at the principal place of business or as set out by Hoexter JA. "the place where its general administration is located i.e. at the seat of its central management and control, from where the general supervision of its affairs takes place and where consequently it is said that it carries on its real or, principal business" Hoexter JA. called this the company's "place of central control". Referring to those judgments and also to the Appellate Division judgment in **VANDERBIJL PARK HEALTH COMMITTEE AND OTHERS V. WILSON AND OTHERS 1950 [1] SA 447 [4] AT 466-7** where it was also accepted that a company resides at its place of central control, Hoexter JA. said that that principle was well established in the South African law and he could see no warrant for departing from it. He also accepted that it applied in matters of jurisdiction.

If, therefore, jurisdiction in respect of a company also depended upon a company being resident at the place of its registered office, it would necessarily involve the acceptance of the principle that a company can for purposes of jurisdiction, be resident at two places at the same time. He accordingly found at 496 E that a company -

> "Can and does have a dual residence for jurisdictional purposes, where its central control and its registered office are located at different places"

None of the cases deciding that a company resides at its place of central control, the learned judge said, precluded the acceptance of such a principle.

It is clear that a natural person can have more than one place of residence [see **EX PARTE MINISTER OF NATIVE AFFAIRS 1914 AD 53 AT 58-9**] and if the analogy of a natural person is to be followed, the concept of dual residence for a company is not out of place.

Hoexter JA. pointed out in this regard that for certain purposes, such as income tax, the English law recognises the possibility of dual residence. In **SWEDISH CENTRAL RAILWAY CO. LTD V. THOMPSON [1925] AC 495 [HL] AT 50** Lord Cave said in relation to the earlier case of **DE BEERS CONSOLIDATED MINES LTD V. HOWE**, supra.

> "The effect of this decision is that when the

> central control and management abides in a particular place the company .....has a residence at that place; but it does not follow that it cannot have a residence elsewhere. An individual can clearly have more than one residence .... and in principle there appears to be no reason why a company should not be in the same position."

Hoexter JA. also referred to the decision in **APPLEBY [PTY] LTD V DUNDAS LTD 1948 [2] SA 905 [E]** where the Court at 910-911 recognised a dual residence of a company for jurisdictional purposes.

The reasoning in the cases mentioned commends itself to me and I am accordingly in agreement with the principle that a company, like a natural person, can have more than one place of residence.

The question, however, is whether that other place of residence is the company's registered office. The majority of the Appellate Division in **Bisonboard** found the reasoning of Eloff J. as he then was, in **DAIRY BOARD V. JOHN T. RENNIE & CO** supra compelling.

Eloff J. cited provisions in the South African Companies Act which prescribe that the registered office is the place where all process against a company may be served and where are kept all official documents and records of the company such as its share register, its register of members and directors and officers, its minute books, its books of account, its register of assets and

so forth. Such provisions led **Eloff J**. to draw the inference that the Legislature had intended to endow the registered office with the quality of being the place to which the world might look as the company's legal home and administrative centre. At 771 E-H, the learned Judge said:

> "[T]o view the registered office as the residence of a company is to create certainty and to bring about commercial convenience....
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> To hold that the registered office is the place of residence for purpose of jurisdiction is to remove all doubt as to the Court in which a person intending to sue a company conducting business at various places may do so. In this regard it is not inappropriate to remark that in these days companies sometimes conduct their affairs so that it may be difficult to determine where its "general administration is centred". And although it may in fact have been true in 1912 that a company and a person had only one residence, one finds it said in Palmer's Company Law 21st ed at 66 that:
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> "Moreover, a company-like an individual-may have several residences at the same time."
>
> In my view, a company registered in South Africa resides in law where the registered office is. If its principal place of business is situated elsewhere it may also reside at the latter place. I accordingly hold that this Court had jurisdiction in the present matter"

The minority of the Appellate Division in **Bisonboard** did not find **Eloff J's** reasoning convincing. **Nicholas AJA**. had this to say about it at 506 H-507 B:

> "The records referred to are not the *lares et penates* of a company's home. They are kept at the company's registered office only because the Companies Act requires it, presumably in order

> that they should be accessible at a fixed and ascertainable place for inspection by those entitled to inspect them. A company's registered office is frequently situated at the offices of an attorney or auditor, whose connection with the company may be no more than professional, and who may not otherwise exercise his mind in the administration of the company's affairs. The presence of the registered office is usually indicated by a board affixed to the wall outside the reception office, frequently among a number of similar boards for other companies. And no more is required of the attendant employee concerned, than that she should accept service of process, and receive communications, and produce for inspection the records above referred to. In **GRIMSHAW V. MICA MINES LTD 1912 TPD 450** Bristowe J referred at 456-7 to the fact that the registered office is usually the place where the company is controlled and where the general superintendence of its affairs takes place, but added:
>
> > '...But it is not necessarily so. The registered office may be merely a place where notices and summonses can be served on the company, a mere address for service, at which no business at all is carried on. It cannot be said that, because the company has a registered office where nothing more than that is done, it carries on business there'"

With great respect to Nicholas AJA I do not agree with his rejection of the reasoning of Eloff J. He does not deal with the latter's statement as to the fact that having a company's registered office as its place of residence creates certainty and brings about commercial convenience as far as jurisdictional questions are concerned. Moreover, later at 507 he accepts that a company can have a "presence" in an area of jurisdiction. That

"presence" he says, is the registered office. I fail to see the distinction between a company being "present" in the area of jurisdiction and its residing there.

In my view what Eloff J said would apply with equal persuasiveness in Botswana where the Companies Act Cap 42:01 contains similar provisions to those mentioned by the learned Judge and where the registered office, too, would be a certain place of residence for jurisdictional purposes for any person intending to sue a company.

Hoexter JA. also found it noteworthy, at 493, that there had been various judicial pronouncements in the English Courts to the effect that when the problem was viewed purely as one of principle, untrammelled by judicial precedent and legislative enactment, the notion that the residence of a company is its registered office had much to commend it. He referred to the judgment of the Master of the Rolls in **EGYPTIAN DELTA LAND AND INVESTMENT CO. LTD. V. TODD [1928] 1 KB 167-8** where the Court of Appeal in an income tax case held that a company regulated by the English Companies Act of 1908 had a residence [though not necessarily its sole one] at its registered office, he also quoted from the judgments in that case in the House of Lords [1929] AC 1. There at 35 Lord Buckmaster said:

> "The difficulty....is due to the fact that residence is essentially a condition applicable

> to men, and the tests for its determination, such as living and sleeping, can have no proper counterpart in an abstract entity such as an incorporated company which can neither live nor sleep. It must, however, be assumed that a company has a residence, and if the question is looked at entirely apart from authority, I should have thought that the place of the registered office was also the place where the abstraction known as "a company" resided."

And at 40 Lord Warrington of Clyffe said:

> "Independently of authority, and in the absence of any relevant provision of the Income Tax Act, 1918 throwing light on the meaning attributed by the Legislature to the words "residing" and "resident" as used in the Act, I should probably have been of the opinion that the provisions of the Companies Act to which I have referred lead to the conclusion that, whatever other residence the company may have, the Legislature has provided that the registered office shall be a residence."

Like Hoexter JA., I find the reasoning of Eloff J. sound and I am persuaded, like the majority of the Court in **Bisonboard**, that a company can also have a place of residence at its registered office.

I said earlier in this judgment that I would assume that Silverstone's place of central control was outside Botswana. That does not, however, as I have found, preclude it from also having a place of residence which is its registered office. That registered office is in Botswana. I accordingly hold that Silverstone is, on the basis of residential jurisdiction, an incola of Botswana.

I would arrive at the same conclusion on the existence of jurisdiction based on domicile. The concept of domicile embraces both the physical element of residence and the mental element of intention and is therefore, in the case of a corporation, as opposed to a natural person, a more difficult question to determine than that of mere residence. One must, however, since, in the words of Hoexter JA. "the ascription of either residence or domicile to a company derives from the equiparation, of a natural person and a judicial entity", apply by legal necessity the notional fiction of the natural person to a company. This not only the legal writers, but also the Courts, have attempted to do. A natural person can have a domicile of origin, usually his or her domicile of birth, but can also acquire a domicile of choice. It can, I think, however, be said with a considerable measure of certainty from the various authorities that in so far as a company is concerned, it has a domicile of origin and that never varies; in other words, that a company cannot acquire a domicile of choice. This would appear to be the view of the Courts in England. In **GASQUE V. COMMISSIONERS FOR INLAND REVENUE [1940] 2 KB 80**, MacNaghten J. said at 84-5:

> 'It was suggested by Mr. Needham on behalf of the appellant that by the law of England a body corporate has no domicil. It is quite true that a body corporate cannot have a domicil in the same sense as an individual any more than it can have a residence in the same sense as an

> individual. By analogy with a natural person the attributes of residence, domicil and nationality can be given, and are, I think, given by the law of England to a body corporate....the domicil of origin, or the domicil of birth, using with respect to a company a familiar metaphor, clings to it throughout its existence...
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> The Solicitor-General called my attention to the case in the American Courts of **BERGNER & ENGEL BREWING COMPANY V. DREYFUS [[1898] 70 Am REP 25]**. The judgment in that case was delivered by Holmes J. Any opinion of that very eminent Judge, more particularly on any question relating to the common law of England, is entitled to the highest respect in any English Court. The headnote to that case, which correctly represents the decisions, is this: "A corporation has its domicil in the jurisdiction of the state which created it, and, as a consequence, has no domicil anywhere else."'

Forsyth [op, cit] at 156 states the position thus:

> "A corporation is notionally domiciled at its place of incorporation."

In **Bisonboard**, supra, at 502 A, Hoexter JA. said:

> "That in conflict of law a company incorporated in South Africa with its registered office some where within the Republic will have a South African domicile is manifest."

Nicholas AJA. in the same case while, as I have said, differing from the majority of the court on the residence of a company being its registered office, agreed that a company's domicile is determined by its incorporation.

1st appellant, Silverstone, is incorporated in Botswana and has its registered office here. It is therefore, I hold, also domiciled in Botswana for jurisdictional purposes and is,

accordingly an incola on the basis of rationale domicili.

Mr, Hoffman, who appeared for the respondent, while conceding that technically Silverstone may be regarded as an incola of Botswana, invited this court to embark upon the exercise of what has been described as "piercing" or "lifting" the corporate veil. He referred to **Halsbury: Laws of England 4th Edition Re-issue Volume 7[1] p. 72 para 90** where the following appears:

> "Notwithstanding the effect of a company's incorporation, in some cases the court will pierce the corporate veil' in order to enable it to do justice by treating a particular company, for the purposes of the litigation before it, as identical with the person or persons who control it. This will be done not only where there is fraud or improper conduct but in all cases where the character of the company or the nature of the persons who control it, is a relevant feature."

Were the court to lift the corporate veil in this case, so Mr. Hoffman contended, it would find behind that veil a shell company with a very small share capital; controlled by peregrini, both of its shareholders being domiciled and resident outside Botswana, and whose management is ostensibly also outside Botswna; and with no assets other than those in Botswana viz the equipment owned by it and used for the purposes of the agreement with respondent and which is presently under attachment. Those factors would show, so his argument proceeded, that Silverstone was a peregrinus in fact and that it was therefore liable to have

its goods attached at the instance of an incola, such as respondent, in order to confirm jurisdiction in the arbitration proceedings which are pending.

The piercing of the corporate veil has also been resorted to in a large number of cases both in South African and in Botswana. It is however, an exceptional procedure and should not be embarked upon unless special or exceptional circumstances exist. The general rule is that a corporate entity should be recognised and upheld except in the most unusual circumstances. That has been frequently emphasised by the South African courts [See e.g. **Law of South Africa [First Reissue] Vol 4 Part 1 para 43** and cases there cited; **THE SHIPPING CORPORATION OF INDIA LTD V. EVDOMON CORPORATION AND ANOTHER 1994 [1] SA 550 [A] at 566 C-F; BOTHA V. VAN NIEKERK EN IN AUDER 1983 [3] 513 [W] at 524 A]**. That it is a salutary principle that the courts should not lightly disregard a company's separate personality but should strive to give effect to it and that a Court has no general discretion to disregard a company's separate legal personality wherever it considers it just to do so, has been stressed once more in the recent case before the South African Appellate Division of **CAPE PACIFIC LTD V. LUBNER CONTROLLING INVESTMENTS [PTY] LTD AND OTHERS 1995 [4] SA 790 [A] AT 802F-804D**. Piercing or lifting the corporate veil is usually done in order to fix

liability elsewhere for what are ostensibly acts of the company. Generally an element of fraud, dishonesty or improper conduct would have to be present in the establishment or use of the company or the conduct of its affairs. In this connection the words "device", "stratagem", "cloak" and "sham" have been used [See **THE SHIPPING CORPORATION OF INDIA** case, supra; the **CAPE PACIFIC LTD** case supra]. It has been said that piercing or lifting the corporate veil can occur when the courts apply the rules attributing residence or domicile to a company. [See **LAWSA op cit para 41 note 8]**. The cases cited by the learned authors for this proposition do not, however, bear it out. As authority for it the case of **T W Beckett,** supra and **Bisonboard** are quoted. In neither case, however, did the question of the piercing of the corporate veil arise nor was it even mentioned in the passages cited. The concept is, in my view, not appropriate in deciding the jurisdictional nature of the company unless there are unusual circumstances involving the elements I have mentioned present in either the company's incorporation or in the establishing of its registered office or its central place of control. Nothing of that sort has been suggested in the present case nor I think, could there be. There was nothing apparently deceitful in Silverstone's incorporation. It was not it seems, as might be suggested, incorporated merely for the purpose of the present

contract with respondent. It was incorporated on 8 May 1992. The contract was concluded on 5 April 1993. Furthermore, according to Roake-Barefoot, the company is engaged in activities similar to those with which it was involved with respondent at other sites in the Republic of South Africa. This would also militate against the suggestion that Silverstone's only assets are the equipment in Botswana presently under attachment. Roake-Barefoot says Silverstone owns the equipment on the sites in South Africa. The fact that Silverstone has a limited share capital is also no warrant for lifting the corporate veil [cf **BOTHA V. VAN NIEKERK EN IN AUDER 1983[3] SA 513[W] AT 524D**]. Nor do I think that the court should necessarily and without more, do so merely because the company's shareholders are non-residents of Botswana. In any event, having found that the first appellant is an incola, piercing or lifting the corporate veil would not enable this court to find that it is a peregrinus. And, I repeat, this case is about jurisdiction and nothing else.

Mr. Hoffman also submitted that the attachment of Silverstone's goods was necessary to lend effectiveness to any award which the arbitrator may in future hand down. Otherwise the respondent would run the risk, so he argued, of being left in a situation where it spends a considerable sum of money in the arbitration and then recovers nothing in all likelihood in the

event of an award being handed down in its favour. The basis of our law for an attachment whether to found or to confirm jurisdiction, he said, is effectiveness. This is undoubtedly so. The doctrine of effectiveness is an essential feature of jurisdiction. A judgment would not be effective if it should yield an empty result and that would occur if judgment were obtained against a foreign peregrinus who owned no assets in the country in which judgment is given against him. The attachment of an asset of his within the jurisdiction would however, render the judgment effective since execution could then be levied against it. The attachment would then make the peregrinus amenable to the court's jurisdiction [See per Nienaber AJA. in **EWING MCDONALD CO. LTD V. M AND M PRODUCTS CO.1991[1] SA 252[A] AT 259 E-F]**.

However, such attachment could only be made against assets of a peregrinus. As Nienaber AjA in the last quoted case correctly, with respect, sets out the legal position:

> "While effectiveness may be the rationale for jurisdiction, it is not necessarily the criteria for its existence. It is true that effectiveness is, as Potgieter JA. said in **THERMO RADIANT OVEN SALES [PTY] LTD V. NELSPRINT BAKERIES [PTY] LTD** [supra at 307A] 'the basic principle of jurisdiction in our law'. [See, too, **HUGO V. WESSELS 1987 [3] SA 837 [A] AT 849J; 855G-I**.] But it is as true that'...effectiveness does not per se confer jurisdiction on a Court' [per Viljoen JA. in **VENETA MINERARIA SpA V. CAROLINA COLLIERIES [PTY] LTD [IN LIQUIDATION]**."

The 1st appellant, as it has been held herein, is an incola and therefore no order for the attachment of its assets can be made. In any event, I feel that the doctrine of effectiveness can be satisfied in this case. In terms of the Companies Act a company may be wound up by the court if it is unable to pay its debts. If the 1st appellant cannot pay the respondent the amount of any award made by the arbitrator in respondent's favour, the latter can invoke the winding up procedures. As Hoexter JA also remarked in **Bisonboard** at 500 A, winding up therefore represents a potent means of enforcement of a judgment and would be effectual against 1st appellant should it not pay the amount of any award.

Finally I would say this. Mr. Hoffman contended that incolae of Botswana are entitled to be protected in their dealings and in their litigation with companies set up in this country but controlled by peregrini. That is, of course, quite true but the laws of Botswana also provide for the incorporation of companies most, if not all, of whom will do business in Botswana with the consequent beneficial effect on the country's economy. In many instances the investment via such companies will come from investors outside Botswana. The economy undoubtedly requires such investment and it is to be encouraged. It will, I feel, not be a source of encouragement if such

investors who bona fide set up companies and incorporate them in Botswana are made to feel that, should they be involved in any litigation here, their assets are likely to be attached particularly when as in this case the court finds that their companies are incolae of the country.

In view of the latter finding it is not necessary to consider the second point raised viz whether the court can order the attachment of assets where the pending proceedings are those of arbitration.

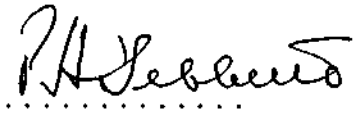
In the result, therefore, the appeal succeeds, with costs. In consequence the order of attachment contained in paragraph 3 and the execution thereof provided for in paragraph 4 of the order of the court a quo must be set aside, as must the order for costs made in paragraph 5 of the order of the court a quo. It is therefore ordered as follows:

1. The appeals of both first and second appellants succeed, with costs.

2. Paragraphs 3, 4 and 5 of the order of the court a quo are deleted and there is substituted therefor the following order:

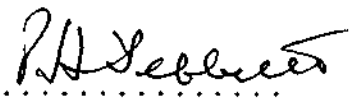
   The application for the attachment of the goods and equipment of first and second respondents ad confirmandam jurisdictionem is dismissed, with costs.

DELIVERED IN OPEN COURT AT LOBATSE THIS 5TH DAY OF FEBRUARY, 1996.



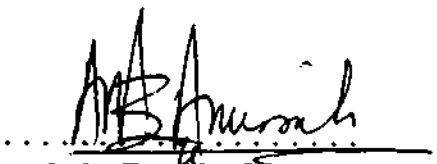
P.H. TEBBUTT
[JUDGE OF APPEAL]

I agree:



for. **W.H.R. SCHREINER**
[JUDGE OF APPEAL]

Having regard to the authorities referred to by my brother Tebbutt, I concur in this judgment. The application of the law as set out in those authorities may, however, on occasion appear to operate harshly.



A.N.E. AMISSAH
[JUDGE PRESIDENT]