Journal for Juridical Science 2009: 34(1)

CF Swanepoel

The demise of the Roman-Dutch '*kommer-recht*': Interpretation of statutes so as to conform to the spirit, purport and objects of the South African Bill of Rights

Summary

The Supreme Court of Appeal (in a judgment dated 23.11.07) in the case of *Bid Industrial Holdings v Strang* (2007) SCA 144 (RSA) (now cited as 2008(3) SA 355 (SCA)) held that the common-law requirement of arrest to found or confirm jurisdiction where an *incola* plaintiff wishes to sue a foreign *peregrinus*, which procedure is authorised in section 19(1) (c) of the *Supreme Court Act* 59/1959,[1] is unconstitutional. In essence it was so held because such an arrest restricts a person's liberty and freedom (as entrenched in section 12 (1) of the Constitution) without a just cause. This article evaluates the judgment and highlights the importance of the full historical context and rationale for the existence of a common-law rule as yardstick against which to measure its constitutional justifiability. In this instance the rationale for the existence of the common-law rule of jurisdictional arrest was also, in essence, premised on the unequal treatment of foreigners *vis à vis* citizens, and predictably, this could not have passed the standard set by section 39(2) of the Constitution. The article investigates the method employed by the SCA in its interpretation of the alleged unconstitutional stipulations of the *Supreme Court Act* so as to bring it in line with the spirit, purport and objects of the South African Bill of Rights. Special attention is paid to the criticism of the judgment that it failed to comply with the peremptory stipulations of section 172 of the Constitution. The article concludes that such criticism is unwarranted.

Die verval van die Romeins-Hollandse 'kommer-recht': Die uitleg van wetgewing sodat dit voldoen aan die gees, strekking en oogmerke van die Suid-Afrikaanse Handves van Regte

Die Hoogste Hof van Appèl het in 'n uitspraak gedateer 23.11.07 in die saak van *Bid Industrial Holdings v Strang* (2007) SCA 144 (RSA) nou gerapporteer as 2008(3) SA355 (SCA) beslis dat die gemeenregtelike vereiste van arrestasie om jurisdiksie te vestig of te bevestig waar 'n *incola* eiser 'n vreemde *peregrinus* in die hof wil dagvaar, welke prosedure gemagtig word in Artikel 19(1)(c) van die *Hoogggeregshofwet* 59/1959, ongrondwetlik is. In wese het die hof so beslis omdat arrestasie 'n persoon se vryheid en veiligheid inperk (soos verskans in Artikel 12 van die Grondwet) sonder dat 'n geldige rede daarvoor bestaan. Die artikel evalueer die beslissing en beklemtoon die belang van die volledige historiese onstaans- en bestaansrede van 'n gemeenregtelike reël om behulpsaam te wees wanneer

1 The name of the Act was amended by Government Gazette No 31948 to the High Courts Act 30/2009 that came into operation on 1 March 2009.

CF Swanepoel, Senior Lecturer, Faculty of Law, University of the Free State.

die grondwetlikheid daarvan beoordeel word. In hierdie geval is die historiese regverdiging van die reël deels te vinde in die ongelykmatige behandeling van vreemdelinge *vis à vis* burgers, en was die verdwyning van die reël in die lig van die Suid Afrikaanse grondwetlike bestel, eintlik voorspelbaar. Die artikel evalueer ook die metode wat gevolg is deur die Hoogste Hof van Appèl in sy uitleg van die beweerde ongrondwetlike bepalings van Artikel 19 ten einde dit in versoening met die Suid Afrikaanse Handves van Mensesregte uit te lê. Bepaalde aandag word gegee aan die kritiek teen die uitspraak, naamlik dat dit nagelaat het om die gebiedende bepalings van Artikel 172 van die Grondwet te volg. Die artikel kom tot die slotsom dat hierdie kritiek ongeregverdig is.

1. Introduction

In *Bid Industrial Holdings*,[2] a well-settled South African rule of civil procedure, derived from Roman-Dutch law, came under constitutional scrutiny by the Supreme Court of Appeal. The court convincingly seized the opportunity to develop the common law, which power it has in terms of section 173 of the South African Constitution,[3] and in doing so, was guided by section 39(2) of the Constitution which directs that when such development is undertaken by the court, it be guided by the spirit, purport and objects of the Bill of Rights.

The case raised a number of interesting points. There are three in particular that warrant focus and which will be entertained in this article. The first is the fact that the SCA chose not to follow the general rule laid down in the case of *S v Mhlungu*,[4] namely that of constitutional avoidance; the second is the importance of evaluating the full rationale and historical context for the existence of a common law rule when interpreting legislation in the light of the South African Constitution, and the third is the use by the SCA of the interpretation mechanism of "reading down" instead of following the route as laid down in section 172 which determines that a finding of constitutional invalidity by the SCA or a High Court has no force unless it is confirmed by the Constitutional Court. The latter methodology employed by the SCA *in casu* has attracted criticism which is evaluated in this article.

2. Background

The facts in *Bid Industrial Holdings* may be briefly set out as follows:[5]

The appellant is a South African company with its registered head office in Johannesburg, South Africa. The two respondents, John and Andrew Strang, are

2 Available online at http://www.supremecourtofappeal.gov.za/judgments/sca 2007/sca07-144.PDF. Further reference to the case is made in footnotes by referring to the page number and paragraph as they appear in the electronic format. The case is further referred to as *Bid Industrial Holdings*, and has since been reported as *Bid Industrial Holdings v Strang* 2008(3) SA 355 (SCA)

3 Act 108/1996, Section 173 reads: "The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process and to develop the common law, taking into account the interests of justice".

4 1995(3) SA 867 (CC).

5 *Bid Industrial Holdings v Strang:* 2(1-5).

Australian citizens, domiciled in that country. Two of the companies of which they are directors have extensive Southern African interests. The appellant was at the time of the judgment intending to sue the respondents in the Johannesburg High Court for delictual damages. In order to either establish or confirm the latter court's jurisdiction in the impending case, and relying on section 19(1) (c) of the South African *Supreme Court Act*,[6] the appellant applied for an order for the arrest of the respondents.

In essence the respondents' opposition to the application was twofold. Firstly, they contended that no *prima facie* case on the merits was made out by the appellant and, secondly, that they as foreign nationals present in South Africa enjoyed the protection of the South African Constitution in as much as their arrest to found or to confirm the court's jurisdiction would be contrary to various provisions in the South African Bill of Rights. Therefore, the legislation (section 19(1)(c))[7] which empowered their arrest was unconstitutional.[8] From this the

6 59/1959.

7 Prior to the extension of section 19 in 1998, a High Court had no jurisdiction to order the arrest or attachment of a person or property that were within the jurisdiction of another South African High Court. The extension of section 19 was preceeded by a lengthy debate on whether an extension was feasible. See Kahn 1969:422 and further, 1978:690 in which Kahn argues: "The law ought to be changed by legislation to permit the arrest of a person physically present or the attachment of property situated in the area of another division, to found or confirm jurisdiction; this would be a further step towards the attainment of the ideal of a true Supreme Court of South Africa", 1982:491 and 1993:785. See also Dendy 1999:586 who provides a useful summary of the position prior to and after the 1998 amendment.

8 The respondents argued that a range of constitutional rights were infringed upon by the arrest. These are: section 9(1): guarantee of equality before the law; section 9(3): the right against unfair discrimination; section 10: the right to human dignity; section 21: the right of freedom of movement, and section 34: the right to a fair trial. It was further contended by the respondent that any restriction on these constitutional rights could not be justified by the limitation inquiry in terms of section 36 of the Constitution.

The relevant parts of section 19, titled: *Persons over whom and matters in relation to which provincial and local divisions have jurisdiction*, of the *Supreme Court Act* 59/1959 determines as follows:

"(1)(a) A provincial or local division shall have jurisdiction over all persons residing or being in and in relation to all causes arising and all offences triable within its area of jurisdiction and all other matters of which it may according to law take cognizance of, ...

(b)…

(c) Subject to the provisions of section 28 and the powers granted under section 4 of the *Admiralty Jurisdiction Regulation Act*, 1983 (Act No. 105 of 1983), any High Court may:

> (i) issue an order for attachment of property or arrest of a person to confirm jurisdiction or order the arrest suspectus de fuga also where the property or 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 property or

argument followed that the legislation, which derives from a South African common law rule, had to be developed by abolishing the rule so as to bring it in line with the spirit and purport of the South African Bill of Rights.

The application came before Trengrove AJ in the High Court who dismissed it for lack of a *prima facie* case. In taking this approach, Trengrove AJ applied the principle laid down in *Mhlungu*,[9] that where it is possible to decide a case without deciding a constitutional issue, that route must be followed.[10] This is also a settled rule in other constitutional jurisdictions, such as in the United States of America. There the rule is based on the rule against prematurity of cases, as was stated in *Webster v Reproductive Health Services*:[11]

> …(w)here there is no need to decide a constitutional question, it is a venerable principle of this Court's adjudicatory processes not to do so, for the Court will not anticipate a question of constitutional law in advance of the necessity of deciding it ...

3. Avoidance by the SCA of the *Mhlungu* rule

A number of issues led the SCA not to apply the general rule set out in *Mhlungu*.[12]

The first is that the intended claim by the appellants could quite easily be brought into line with what counsel for the appellants argued that it intended to be. In such a case, Howie P reasoned, the matter would be back in court on the constitutional issue. This line of reason cannot be faulted in the light of the "interest of justice" criterion laid down in *Mhlungu* itself. Secondly, the court contended that *Mhlungu* was decided at a time:

---

person concerned is outside its area of jurisdiction, issue and order for attachment of property or arrest of a person to found jurisdiction regardless of where in the Republic the property or person is situated."

Paragraph (c) of the present section was added in 1998 after a Law Commission Report in 1993 which recommended the extension of section 19.

9 1995(3) SA 867 (CC)

10 In *Mhlungu*, par. 59, Kentridge AJ provided the motivation for this general rule it was establishing at the time; it was based on considerations of "interest of justice". So, for example, it was argued by the learned judge, that it would be contrary to the interests of justice in a criminal case to interrupt or delay the trial by an untimely referral to the Constitutional Court. What is significant in the context of this article and which follows on to what is discussed later on, is the following statement by Kentridge AJ (Par.59): "In any event, the convenience of a rapid resort to this court would not relieve the trial Judge from making his own decision on a constitutional issue within his jurisdiction".

11 492 U.S.490, (1989). See also *Ashwander v Tennessee Valley Authority* 297 US 288 (1936) in which that court stated that: "... when the validity of an act of the Congress is drawn in question, and even if serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question can be avoided".

12 *Bid Industrial Holdings v Strang:* 4 (7 and 8)

> … when this court had no constitutional jurisdiction. Accordingly attention was not given to the input which this court might be able to make on a constitutional issue were such jurisdiction one day to exist.[13]

Thirdly, the court reasoned that the demarcation of what "a constitutional issue" may be had become substantially blurred since *Mhlungu* was decided. Since *Mhlungu*, cases have been admitted to the Constitutional Court because they have been considered "to be in the interests of justice" rather than strictly involving "a constitutional issue". This inevitably leads to the conclusion that "constitutional issue" has been assigned a broader application since that case was decided.

Fourthly, the SCA reasoned that the reach of a constitutional issue also extends to many other cases such as *in casu* where a resident plaintiff required to sue a foreign defendant. Therefore, it reasoned, it is necessary to resolve the question of constitutionality as "a matter of practice and principle and not just for the purposes of the present litigation".

This case may therefore be useful to constitutional law practitioners who seek to persuade a court to decide a constitutional issue which could be avoided on the reasoning followed in *Mhlungu*.[14] An argument for constitutional avoidance would therefore, on interpretation of *Bid Industrial Holdings*, rely greatly on expediency in resolving a matter "in the interest of justice".

The issue determined by the judge in the court *a quo* was therefore left undecided (whether the appellants did in fact make out a *prima facie* case on the merits) by the SCA and the court decided the matter on the constitutional issue raised by the respondents.

4. The rationale for the common-law jurisdictional arrest rule as interpretative aid[15]

Before the SCA's judgment on the constitutionality of jurisdictional arrest is evaluated, it is opportune to have regard to the history and reason for the existence of the jurisdictional arrest rule. Such historical rationale and historical context for the existence of a rule in law often provides a valuable yardstick in terms of which its constitutionality can subsequently be measured by a court when called upon to do so. This has specifically also been recognised in the jurisprudence of the United States of America.[16]

---

13 *Bid Industrial Holdings v Strang:* 7(14).

14 Friedman & Hofmeyer 2007: *Jutastat Quarterly Review of South African Law*.

15 Where the attachment of property or the arrest of a foreign *peregrinus* is made, in the absence of any other *ratione jurisdictionis*, it is said to "found" jurisdiction — *ad fundandam jurisdictionem*. Where there is another *ratione jurisdictionis* present, however, such that the foreign *peregrinus* "resides" within the court's jurisdiction, or the cause of action arose within the court's jurisdiction, the arrest or attachment is said to "confirm" the court's jurisdiction — *ad confirmandam jurisdictionem*. See Theophilopoulos *et al*. 2006:54.

16 See for example *Lawrence v Texas*, 539 U.S. 558, 586 (2003) and *Cruzan v Missouri Department of Health*, 479 U.S. 261,292.

In a modern context, almost all that is known about the rationale for and the history of the existence of the common law rule of jurisdictional arrest is owed to the research of Wessels undertaken at the beginning of the 20th century.[17] His research has been extensively quoted in subsequent South African case law.[18] The courts in Holland recognised two kinds of arrest: the one was typified as *ex necessitate* and the other as *ex utilitate*. Arrests *ex necessitate* were granted against both the citizen and the non-resident stranger, for example where the defendant was *suspectus de fuga*.[19] It was further granted for the purpose of conserving a thing or a debt. The latter was granted to found a court's jurisdiction. Arrest *ex necessitate* was perceived as consonant with Roman Law principles whilst arrest *ex utilitate* was introduced into Dutch law through reception from Western European law after the fall of the Roman Empire.

In Holland and in several other Dutch provinces an *incola* was allowed to arrest the *peregrinus* or his property and to bring him before a local court in order to compel him to provide security for appearance in that court when the matter was tried and to pay whatever the amount of the judgment might be. The reason for the existence of the rule, according to Peckius,[20] was to avoid the costs that citizens would have to incur if they had to sue the foreigner in his forum of domicile. Merula[21] called the practice a "*kommer-recht*" and stated that the practice of arrest established the local court's jurisdiction. Bort, as quoted by Wessels,[22] stated:

> Arrests have been introduced by us in order that the arrested person, affected by the worry of his arrest, may appear before the local judge and pay the debt or give security that he will appear before the court and pay the amount of the judgment, so that lawsuits may be cut short and the costs of expenses avoided which are necessarily incurred when a foreign debtor domiciled in another country has to be sued there.

There was, however, another reason for the rule allowing arrest of *peregrini*,[23] which in terms of this article is quite significant. This is that a foreigner was not regarded in the same light as an *incola* in many countries of Western Europe. The foreigner suffered several other disabilities besides being subject to arrest. Wessels[24] concludes:

> The origin of the practice of arresting a foreigner in order to make him pay his debts is therefore to be sought in the fact that the early Germans, the Franks and the people of the Netherlands, before the fourteenth century at any rate, regarded the foreigner to a certain extent as outside of the protection of the law.

17 Wessels 1907:390 and Wessels 1908:674. See also Bodenstein 1917:193 and further.
18 See for example *Tsung v Industrial Development Corp of SA Ltd* [2006] SCA 27 (RSA).
19 Wessels 1908:674.
20 As quoted by Wessels 1907:393 and further.
21 As quoted by Wessels 1907: 393 and further.
22 Wessels 1907:393.
23 Wessels 1908:394 and further.
24 Wessels 1908:394.

The unequal protection of foreigners by the law in some Western European countries, which allowed for their arrest to found or confirm jurisdiction, is therefore significant in the light of the respondent's argument *in casu* that they, as foreigners, were in terms of the South African Constitution entitled to equal protection from it.

More recently and according to Harms JA:[25]

> The arrest of a *peregrinus*, it would appear, was used not only for founding or confirming jurisdiction but also to coerce the *peregrinus* to pay. Today arrest still serves to found or confirm jurisdiction but can, obviously, no longer serve as security for a debt and, at least in this regard, there is a difference between arrest and attachment. There are other aspects. As long as a century ago Van Zyl's Judicial Practice recognized that an arrest 'affects the liberty of the subject'; and at present the arrest of a person has a constitutional dimension.

Therefore, not only was the possible infringement by jurisdictional arrest of individual liberties recognised early by the courts, also with reference to the case of *Himelsein v Super Rich CC*,[26] but it should additionally be noted that the South African Bill of Rights mostly provides rights for the benefit of "everyone". This denotes a universal according of these rights, which would include foreigners present in South Africa.[27]

5. The court's judgment on the constitutionality of Section 19(1)(c)

At the outset, the court noted that, although in line with general jurisdictional principles, a court has jurisdiction over a matter if it has the power of not only taking cognisance of the suit, but also giving effect to its judgment.[28] However, it was important to note that the question before the court was the constitutionality of jurisdictional arrest and not the question of jurisdictional effectiveness. The

25 In *Tsung v Industrial Development Corp. of SA Ltd* (2006) SCA 27(RSA) at 3(5). See further on a general note: Erasmus 1994:A1-21 and further.

26 1998 (1) SA 929 (W). In this case Cameron J at 936 alluded to the possibility that the procedure of jurisdictional arrest was open to constitutional challenge.

27 There are, however, other rights that are afforded to a narrower category of beneficiaries. Examples are: the political rights accorded in section 19, certain of the rights regarding freedom of movement and residence, freedom of trade, occupation and profession accorded in section 22 which reserves these rights for "every citizen".

28 Pistorius 1993:3: The general rule of the Roman law with regard to jurisdiction was settled in the maxim *actor sequitor forum rei*, which rule was taken over by the Roman-Dutch law. The Roman law further relied on the rule that if a court exercised jurisdiction beyond its territory, it could be disobeyed; expressed in the maxim of ... *extra territorium ius dicenti impune non paretur*. Taken together, these two rules led to the conclusion that a court must within its territory have sufficient authority over the defendant so that its (eventual) orders are enforced. This was confirmed by South African Courts as early as 1904 in the case of *Schlimmer v Executrix in Estate Rising* 1904 TH 108. See also, *Steytler NO v Fitzgerald* 1911 AD 295, *Thermo Radiant Oven Sales Ltd v Nelspruit Bakeries* 1969 (2)SA 295 (A), and *Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd.* 1987(4) SA 883 (A).

reasoning is quite clear: even if by some stretch of the imagination, jurisdictional arrest *may* serve the purpose of jurisdictional effectiveness, it cannot be allowed if the arrest is found to be unconstitutional.[29] If the question was to concern attachment of the property of a *perigrinus,* however, a court would deal with it squarely on the basis of jurisdictional effectiveness.[30] This is clear because unlike arrest, attachment of property belonging to a foreigner is not a mere symbolic act, but serves the purpose to found jurisdiction and thereby allows the court to render a "not- altogether ineffective judgment".[31] And so the court concluded:[32]

> On the basis of the conclusion in *Thermo Radiant*, the crucial jurisdictional purpose of attachment and arrest in Holland was to enable an effective judgment. Plainly, if there was no effective judgment or security to be obtained by, or following upon, attachment or arrest then no jurisdiction could be established. And if, then as now, an attachment or arrest were merely empty symbolism there would be no basis on which it could found jurisdiction.

The court then proceeded to deal with the various alleged infringements of their constitutional rights as advanced by the respondents.

Counsel for the appellant contended that arrest would be a mere symbolic act. The argument was further advanced that in any case an arrested defendant could secure a prompt release by either consenting to the court's jurisdiction by offering security or even paying the alleged debt. However, so the court reasoned, every lawful arrest could only cease if there was a lawful reason for cessation of arrest, and that invariably, between arrest and release there was a restriction on the arrestee's liberty.[33] The court continued:

> It is beside the point whether a defendant can secure release by providing security or payment. The present question has to be approached on the basis that there is no legal obligation on a foreign defendant to consent

29 Section 2 of the *Constitution of the Republic of South Africa* 108/1996: "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid; and the obligations imposed by it must be fulfilled".

30 12.(24) What precisely is meant by "effectiveness" was to an extent elucidated on in the case of *Thermo Radiant Oven Sales Ltd. v Nelspruit Bakeries* 1969 (2) SA 295 (A) at 309F-310A, Potgieter JA, stated: "Jurisdiction is however a somewhat abstract notion and I do not think that the word 'effectiveness' should be taken too literally. It should, I consider, not be equated with a guarantee that in every case the judgment of the court would be satisfied completely. It has never been disputed that in our law, as in English and American law, a court has jurisdiction in respect of a resident i*ncola* on the principle of effectiveness; and the reason why the court can give an effective judgment is because it is considered that usually a person's possessions are where his home is, and that execution can be levied against those possessions. Yet it may happen that the amount of the judgment may to some considerable extent exceed the value of his possessions and that execution thereon will, therefore, not satisfy the judgment. It has never been suggested that a court can exercise jurisdiction in respect of a resident *incola* only if he has sufficient assets in the court's territorial jurisdiction which will, on execution, completely satisfy the debt".

31 *Bid Industrial Holdings v Strang:* 13(28).

32 *Bid Industrial Holdings v Strang:* 14(29).

33 *Bid Industrial Holdings v Strang:* 16(34).

> to jurisdiction or to provide a monetary basis whereby to avoid arrest or its consequence. That consequence can only be detention.

By necessity, the court found that jurisdictional arrest aims to limit an arrestee's liberty. This is not, however, the end of the inquiry. This particular entrenched constitutional right can only be justified if there were present a "just cause" or "a fair trial". "Trial", at the stage of jurisdictional arrest, is not in question and therefore the court inquired whether a jurisdictional arrest can be said to be a "just cause". This, in turn, in the court's reasoning, leads to the question whether the arrest of a foreigner enables a court to render an effective judgment. "Effectiveness" as an outcome achieved by jurisdictional arrest, in the court's reasoning, would thus constitute "just cause". Jurisdictional attachment of property as opposed to jurisdictional arrest of a defendant differs in the sense that, in attachment, the purpose may be jurisdictional effectiveness (unless of course the property is worthless); in that it provides security for eventual execution against that property, should it be necessary. Attachment, ordinarily, therefore constitutes no infringement of constitutional rights, unless, for example, a person's livelihood is attached.[34] Arrest, according to the court, achieves no such purpose:

> Security or payment will only be forthcoming if the defendant chooses to offer one or another in order to avoid arrest and ensure liberty. It is therefore not the arrest which might render any subsequent judgment effective but the defendant's coerced response.[35]

A coerced response by an arrested person may never be described as "just cause".[36]

The second reason why jurisdictional arrest can never serve or be a "just cause" is, according to the court, illustrated by the "impotence" of arrest itself. Arrest itself does not result in an effective judgment, and is further enforced by the court's reasoning that pending civil judgment, there is no legal mechanism to enforce security or payment of the amount claimed by a plaintiff and "failure to pay the judgment debt does not expose the defendant to civil imprisonment".[37] Therefore deprivation of liberty by arrest does not serve the purpose of attaining effectiveness of judgment.[38] And further, if there can be no legal justification as was decided by the Constitutional Court in *Coetzee*, to imprison a person who was found civilly liable, there can be no justification for putting a person in prison whose liability has not yet been proven.[39] So, although establishing jurisdiction in a civil case may be said to be a constitutionally permissible objective, to achieve this by deprivation of a foreigner's liberty would be to breach his/her section 12 entrenched rights.

---

34 *Bid Industrial Holdings v Strang:* 17(38).
35 *Bid Industrial Holdings v Strang:* 17 and 18(38).
36 *Bid Industrial Holdings v Strang:* 18(41).
37 This the court observed in the light of the judgment *Coetzee v Government of the RSA, Matiso v Commanding Officer, Port Elizabeth Prison* 1995(4) SA 631 (CC).
38 *Bid Industrial Holdings v Strang:* 18(40).
39 *Bid Industrial Holdings v Strang:* 19(41).

6. Alternatives. Can jurisdiction in a suit against a foreign defendant be established without either arrest or attachment?

To the question as to whether the purpose of jurisdictional arrest may not be found in the justification that it enables the court to *take cognisance* of the case brought before it,[40] the court's response was that there are less restrictive ways to achieve the same purpose such as serving the summons on the foreign defendant whilst in South Africa. Another possibility of course, is the attachment of the foreigner's property where that is possible.[41] But can jurisdiction of a South African Court in a civil case against a foreign defendant be found or confirmed without either arrest or attachment?

To initialise this investigation, the court made two observations. Firstly, that for purposes of reciprocal enforcement of foreign judgments, South African courts have accepted that a foreign defendant's mere physical presence within the foreign jurisdiction when the action was instituted, are sufficient to confer jurisdiction on that foreign court.[42] Secondly, the court noted that in England, service on a foreign defendant, even temporarily present there, and on condition that a link exists between the case and the country, is sufficient to establish jurisdiction. These, according to the court, "are pointers to the acceptability — subject to the presence of sufficient evidential links — of mere physical presence as being an acceptable substitute for detained presence".[43]

The court then proceeded to examine the reference in section 19(1)(a) of the phrase "being in" as an indication that mere physical presence within the court's jurisdiction is sufficient to give that court jurisdiction over such a person. With reference to the case of *Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd*,[44] the court found that for purposes of interpretation of section 19(1)(a) a court's jurisdiction requires at least residence of the defendant within the court's jurisdiction. If the defendant "resides" within the court's jurisdiction, it is one of the situations where the "cause arises" within the court's jurisdiction; the defendant being amenable to the jurisdiction.[45]

Despite the court's finding as set out in the previous paragraph, the court reasoned that, in the present matter, a South African court would have jurisdiction if the matter could be said to involve "a cause arising" or be described as a matter of which the court "may according to law take cognisance" of. Whether these

40 See *Ewing Mc Donald? + Co Ltd v M + M Products Co.* 1991(1) SA 252 (A) in which at 260 the court stated: "A court will have the power of 'taking cognizance of the suit' if the relevant cause of action arises within its jurisdiction".

41 *Bid Industrial Holdings v Strang:* 21(47).

42 *Bid Industrial Holdings v Strang:* 24(52).

43 *Bid Industrial Holdings v Strang:* 24(52).

44 1991(1) SA 482 (A).

45 *Bid Industrial Holdings v Strang:* 25(53). See further *Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd.* 1991 (1) SA 482 at 486 where the court stated: "In a long line of cases the words 'causes arising' have been interpreted as signifying not 'causes of action arising' but 'legal proceedings duly arising', that is to say, proceedings in which the court has jurisdiction under common law". See further Pistorius 1993:6.

criteria are met, one has to resort to the common law. This inquiry depends on whether the South African court is the *forum conveniens* and whether there are sufficient links between the suit and the country as to make institution of suit appropriate.[46] The court then concluded as follows:

> In my view it would suffice to empower the court to take cognizance of the suit if the defendant were served with the summons while in South Africa and, in addition, there were adequate connection between the suit and the area of jurisdiction of the South African court concerned from the point of view of appropriateness and convenience of its being decided by the court. Appropriateness and convenience are elastic concepts which can be developed case by case. Obviously the strongest connection would be provided by the cause of action arising within that jurisdiction.

For the reasons set out above, the court then held that the common-law rule that arrest is mandatory to found or confirm jurisdiction cannot pass the limitation test as set out by section 36(1) of the Constitution. The common law is thus developed by the abolition of the rule and the adoption in its stead, where attachment is not possible to find or confirm jurisdiction, of the practice according to which a South African court will have jurisdiction if the summons is served on the defendant whilst present 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 that court may be said to be convenient and appropriate.[47]

In the light of the abolition of the common-law rule, the court held that the words in section 19(1) (c) which related to the arrest of a person had become redundant and could be removed by legislative amendment. Until such time, the words had to be read down.[48]

7. Reading down as opposed to a declaration of constitutional invalidity

The *Bid Industrial Holdings* judgment has attracted criticism for the fact that the SCA used the "reading down" mechanism of interpretation of legislation so as to give effect to the Constitution as envisaged in section 39(2), as opposed to the mechanism laid down in section 172(1) which requires that when a court declares any law or conduct inconsistent with the Constitution, such an order of unconstitutionality must in terms of sub-section (2) be confirmed by the Constitutional Court.[49] In this regard, Friedman and Hofmeyer[50] comment as follows:

46 *Bid Industrial Holdings v Strang:* 26(55).
47 *Bid Industrial Holdings v Strang:* 28(59).
48 *Bid Industrial Holdings v Strang:* 29 and 30(61).
49 Du Plessis 2002:140 and further typifies "reading down" as a "reading strategy". He states: "Verfassungskonforme Auslegung, that is, the interpretation of legislation in conformity with a justifiable constitution, is a widely adhered to reading strategy associated with constitutional interpretation. Strictly speaking, however, it is a procedure of statutory rather than of constitutional interpretation incidental to the requirement of judicial self-restraint."
50 *Juta's Quarterly Review of South African Law*.

> If courts engage in just the same sort of analysis when determining whether a law is inconsistent with the Constitution as they do when they determine that a law is "contrary to the spirit, purport and objects of the Bill of Rights", but avoid the need for the Constitutional Court to confirm that determination by calling what they have done interpretation of section 39(2), the oversight role which our Constitution clearly sets out for the Constitutional Court may be undermined.

Is this criticism valid?

When is it incumbent upon a South African High Court to develop the common law by promoting the spirit, purport and objects of the Bill of Rights (as set out in section 39(2) of the Constitution) as opposed to fulfilling this function by a declaration of constitutional invalidity in which case the peremptory stipulations of section 172(2) (a) of the Constitution are triggered?

Should the answer not firstly relate to the nature of the dispute itself and whether the court is called upon to either directly or indirectly apply the Constitution? It is clear that *in casu*, the SCA was faced with the duty to apply indirectly, as opposed to directly, the provisions of the Constitution to existing legislation. The difference between direct and indirect application of the Constitution is explained by De Waal *et al*.[51] Direct application of the Constitution would be applicable to legal disputes where the Constitution itself is the direct applicable law. In such a case the Constitution itself provides its own set of remedies such as those provided for in section 172. Here, it is important to note what these "remedies" in terms of section 172 are, and in which cases they are applicable. Is the possible reason followed by the SCA in *Bid Industrial Holdings* in the interpretation of section 19 of the *Supreme Court Act* (for this was not explained in the judgment by Howie JP) found in the fact that the court was interpreting a particular common law rule, as contained in legislation, which was readily severable from the unaffected parts of that same legislation? Thus, when a South African High Court is called upon to resolve a dispute based on legislation of which certain parts (postulating hitherto accepted common law) are challenged as unconstitutional, it becomes an indirect application of the Constitution. In these instances, the Constitution does not override ordinary law or generate its own remedies. All that is required in these cases is that the Constitutional values be furthered through the operation of ordinary law, that is, existing law other than constitutional law and an equitable remedy in the interests of justice, be granted.

What then are the remedies in cases where the Constitution is indirectly applied and legislation (or parts of it) is found to be inconsistent with the spirit, purport and objects of the Bill of Rights? Put another way: what are the limits on the court's power to reinterpret statutes in accordance with section 39(2)? It appears that a particular mechanism of statutory interpretation known as "reading down" (which was employed by the SCA *in casu*) has its roots in South Africa, in particular, in terms of section 35(2) of the Interim Constitution of the

51 De Waal *et al* 2001:37 and further.

Republic of South Africa.[52] This section created a way of restricted statutory interpretation by the courts which would allow such a court to interpret that statute in line with the spirit, purport and objects of the Bill of Rights by "reading down" the offending words. Here it is noteworthy that section 39(2) of the Final Constitution is an exact mirror stipulation of that contained in section 35(3) of the Interim Constitution. Although the stipulations of section 35(2) of the Interim Constitution were not repeated in the Final Constitution, this restricted option of interpretation of legislation, "always encapsulated the notion of reading down without any need for it to be expressly spelled out…" (in the present section 39(2)).[53] Similar provisions exist in the United Kingdom and in the New Zealand Bill of Rights Act.[54] Section 3 of the *Human Rights Act* 1998 (UK) provides that:

> [S]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.[55]

What is interesting to note from the UK analogy, is that the mechanism of interpretation by reading down in the UK derives directly from section 3 of the *Human Rights Act*, the meaning of which strongly resonates in the wording of section 39(2) of the South African Final Constitution. This is opposed to the more specific wording of section 35(3) of the Interim Constitution, which allowed courts to restrictively interpret in order to interpret in line with Constitutional values. This all indicates that the mechanism of interpretation by "reading down" in terms of the Final Constitution finds itself well settled and grounded in the authority provided for it in section 39(2). It is further firmly entrenched and internationally associated with "constitutional interpretation".[56] Referring to section 3 of the UK *Human Rights Act* referred to above, Edwards[57] is of opinion that before the commencement of section 3, UK Courts would have applied the ordinary "canons" of interpretation to ascertain the intention of the legislator. It is, however, no longer clear whether these ordinary rules of interpretation apply and the conclusion may well be that that the pre-existing canons of interpretations are now of "secondary importance" in the light of the status of section 3. This is classically illustrated in the case under discussion: the original intention of the legislator is quite clear; however, in the light of

52 Act 200/1993. Section 35(2) of the Interim Constitution, the terms of which were not included in the final Constitution, determine: "No law which limits any of the rights entrenched in this Chapter, shall be constitutionally invalid solely by reason of the fact that the wording used *prima facie* exceeds the limits imposed in this Chapter, provided such a law is reasonably capable of a more restricted interpretation which does not exceed such limits, in which event such law shall be construed as having a meaning in accordance with the said more restricted interpretation".

53 De Waal *et al*. 2001:71.

54 *Bill of Rights Act* 1990. Section 6 provides: "… wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning".

55 See Edwards 2000:353 and further and Debeljak 2003 on http://www.austlii. edu. au/au/journals 7/7/2008.

56 Du Plessis 2002:140.

57 Edwards 2000:356.

"constitutional interpretation" of legislation, "intention of the legislator" as one of the principle canons of interpretation, becomes secondary.

It is clear that the impugned parts of section 19 of the *Supreme Court Act*[58] were also an example of legislation which was clearly capable of being read down in such a way as to make it consistent with the Constitution. Put differently, it was an example where the "bad" parts of legislation were clearly capable of severance from the "good". This is so because attachment of property of a peregrine defendant (as opposed to arrest), as was illustrated by the judgment, is constitutionally defendable, for the reason that it serves some valid purpose, which purpose does not unduly inhibit any rights under the South African Bill of Rights.

In the final analysis two points need to be made. Firstly, the Constitutional Court itself urges Courts with jurisdiction to do so, to play their full role for the proper development of the law under the Constitution rather than inexpediently referring to it questions of constitutionality.[59] Secondly, the relief granted by the Court in Bid Industrial is clearly expedient and in the interests of justice.

8. Conclusion

One must agree with the court's decision, in essence that "a right" may only exist if there is sufficient justification (a just cause) for the existence of such a right. For a "just cause" to exist there ought to be, among other things, a valid reason for the existence of such a right. This was stated by Kriegler J in the *Coetzee* case:[60]

> At the very least a law or action limiting the right to freedom must have a reasonable goal and the means for achieving that goal must also be reasonable.

Neither a just cause nor valid reason can be demonstrated for the existence of the common-law right of jurisdictional arrest. There are further reasons why the common-law jurisdictional arrest rule should have been abolished. If regard is had to the origins of the Roman-Dutch *kommer-recht*, which was also essentially premised on the unequal treatment of foreigners, its demise in a constitutional society, sooner or later, was to be expected.

With its judgment in *Bid Industrial Holdings (Pty) (Ltd) v Strang*, the SCA not only boldly changed the common law to bring it in line with the South African Constitution, but seized the opportunity to provide valuable guidance in the interpretation of some of the most fundamental entrenched rights of the South African Constitution. It may just also signal an encouragement to South African High Courts to be actively involved in the development of South African common law in terms of the goals of the Bill of Rights instead of routinely deferring a matter to the Constitutional Court.

58 59/1959.
59 Devenish 1999:32 and further.
60 1995(4)SA 643(11).

As South Africa's legal system, substantially derived from Roman-Dutch law, continues to develop so as to encapsulate the spirit, purport and objects of the Bill of Rights, it is to be expected that our High courts will be increasingly seized with the opportunity to develop our common law in line with those ideals. "Reading down" as method of statutory interpretation is well settled in South African and international law and the remedies afforded in terms thereof (as in *Bid Industrial Holdings*) cannot be said to be a purposeful avoidance of section 172 of the Constitution.

BIbliography

BODENSTEIN HDJ
1917. Arrest to found jurisdiction. Is arrest by itself a *ratio competentiae*? *South African Law Journal* 34(2): 193-201.

DEBELJAK J
2003. The *Human Rights Act* 1998 (UK): the preservation of parliamentary supremacy in the context of rights protection. *Australian Journal of Human Rights*. Accessed on http://www.austlii.edu.au/au/journals.

DENDY M
1999. Attachment to found jurisdiction or confirm jurisdiction, and arrest *tamquam suspectus de fuga*: a long-standing lacuna filled. *South African Law Journal* 116(3): 586-612.

DEVENISH GE
1999. *A commentary on the South African Bill of Rights*. Durban: Butterworths.

DE WAAL J *ET AL*.
2001. *The Bill of Rights Handbook*. Lansdowne: Juta and Co.

DU PLESSIS L
2002. *Re-interpretation of statutes*. Durban: Butterworths.

EDWARDS RA
2000. Reading down legislation under the *Human Rights Act*. *Legal Studies* 20(3): 353-371.

ERASMUS HJ
1994. *Superior court practice*. Lansdowne: Juta and Co.

FRIEDMAN A & HOFMEYER K
2007. Constitutional law. *Jutastat Quarterly Review Constitutional Law*.

KHAN E
1969. Conflict of laws. *Annual Survey of South African Law*: 407-425.

1978. Conflict of laws. *Annual Survey of South African Law*: 688-693.

1982. Conflict of laws. *Annual Survey of South African Law*: 488-495.

PISTORIUS D
1993. *Pollak on jurisdiction*. 2nd edition. Cape Town: Juta.

THEOPHILOPOULOS C *ET AL*.
2006. *Fundamental principles of civil procedure*. Durban: LexisNexis Butterworths.

WESSELS JWW
1907. History of the law of arrest to found jurisdiction. *South African Law Journal* 24(4): 390-404.

1908. *History of the Roman Dutch law*. Grahamstown: African Book Company.