Validity of attachment of shares to found or confirm jurisdiction

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The South African common law, read with the Superior Courts Act, No 10 of 2013 (the Superior Courts Act), provides for the rules pertaining to the attachment to either found or confirm jurisdiction in South Africa. The attachment of property to found or confirm jurisdiction is regarded as an extraordinary remedy and, according to case law, should be granted with caution.

Section 28 of the Superior Courts Act further prohibits the attachment of property against a person who is a resident in South Africa in order to found jurisdiction. However, the common law provides for the attachment of the property of a person who is not a resident, whether such property is immovable, movable or incorporeal (such as shares).

This brings us to the recent High Court decision of *Gavin Cecil Gainsford NO (Joint Trustees of Tannenbaum Estate) (Case Number 55517/2014)*, which was handed down on 26 August 2015. The case arose after the High Court in Pretoria granted to the South African Revenue Service (SARS) a provisional order in terms of s163 of the Tax Administration Act, No 28 of 2011 on an *ex parte* basis and *in camera* for the preservation of certain assets belonging to Dean Rees (Rees) and Doggered

Investments (Pty) Ltd (Doggered) (the Preservation Order).

The alleged debt owed to SARS was stated to be the amount of R194,423,966.69 and SARS therefore sought to preserve the assets to secure this debt. It was argued that Doggered was Rees' alter ego and therefore SARS also sought to preserve the assets of Doggered to secure the debt. Pursuant to the Preservation Order, the curator *bonis* took control and possession of the assets, *inter alia* the 322 shares owned by Doggered in Promac Paints (Pty) Ltd (Promac) (the Shares).

The joint trustees of the insolvent estate of B.D. Tannenbaum (the Trustees) instituted the application in question in the High Court for an order excluding the Shares from the operation of the Preservation Order, and discharging the Preservation Order in respect thereof on the basis that the Sheriff had already attached the Shares in August 2011. The latter attachment occurred pursuant to an order obtained by the Trustees in July 2011 to found or confirm jurisdiction in their action against Rees and Doggered (the Attachment Order).

The main issue in this instance was, if the Preservation Order was not discharged and if the Court found that SARS established that Doggered was Rees' alter ego, whether the Trustees had attached the Shares in August 2011 in terms of the Attachment Order. It was submitted by the Trustees that, if this was the case, the curator *bonis* was not entitled to take possession and control of the Shares in terms of the Preservation Order.

The issue considered by the Court was therefore whether the Shares were validly attached to found jurisdiction. Pursuant to obtaining the Attachment Order, the Trustees had instructed the Sheriff to attach the Shares. The Attachment Order specifically authorised the Sheriff to do so at the address specified in the Attachment Order. The Sheriff attended at the specified address and allegedly attached the Shares by notifying Promac of the Attachment Order, and issued the

notice of attachment.

The Trustees, Promac and Doggered acknowledged that the Shares were attached, however, SARS and the curator *bonis* contended that the attachment was not proper or lawful as it did not take place at the *situs* of the share register or share certificates, and because the Sheriff did not take the certificates into his possession or cause an entry to be made into Promac's share register. The Trustees argued that there was no such requirement in the Uniform Rules of Court and that the essential requirement for the attachment of shares in a company for the purpose of founding or confirming jurisdiction was that notice of the attachment must be given to the company. It was common cause that such notice was given by the Sheriff.

The curator *bonis* argued that Rule 45(8) applied in the instance and that attachment could only be complete once the Sheriff had given notice of the attachment in writing to all interested parties and had taken possession of the share certificates, or had certified that he could not locate them despite a diligent search. It was further argued that the attachment of incorporeal property required the Sheriff to attach the document evidencing such rights – an incorporeal moveable asset could not be attached merely by the intention or decision of the Sheriff. Even though the right was incorporeal, some document or similar item representing the right had to be attached. In addition, the share certificates or share register had not been kept at the address where notice of the attachment was given. SARS agreed with this argument.

It was argued on behalf of the Trustees that Rule 45(8) only applies to execution proceedings and that all that was required to found jurisdiction was written notice to all interested parties, and that this had been given. It was agreed that physical possession of the share certificates had not been proven but that this was unnecessary.

The Court disagreed with the argument that Rule 45(8) applied in the instance, however, the Court also disagreed with the argument presented by the Trustees that no actual possession of the relevant property was required in attachment proceedings to found or confirm jurisdiction. The Court held that, having regard to the purpose of attachment and the requirements of the common law, an actual attachment is required to found or confirm jurisdiction. There must be the element of possession or control present, and it was common cause that this did not occur in this case.