

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK  
RULING ON APPLICATION FOR JOINDER

I 2527/2014

In the matter between:

**UNITED AFRICA GROUP (PTY) LTD**

**PLAINTIFF**

and

**URAMIN INCORPORATED**

**FIRST DEFENDANT**

**ERONGO DESALINATION COMPANY**

**(PTY) LTD**

**SECOND DEFENDANT**

**URAMIN NAMIBIA (PTY) LTD**

**THIRD DEFENDANT**

**Neutral Citation:** *United Africa Group (Pty) Ltd v Uramin Incorporated* (I 2527/2014) [2017] NAHCMD 315 (3 November 2017)

**CORAM: MASUKU J**

Heard: 25 September 2017

Delivered: 3 November 2017

**Flynote:** **Civil Procedure** – Application for joinder of parties – Rules of Court – Rule 40 – Jurisdiction of the court over persons who are not domiciled

nor have property in Namibia – the doctrine of effectiveness – edictal citation – amendment of pleadings and procedure required in Rule 52.

**Summary:** The plaintiff lodged an application for the joinder of three prospective defendants in the main suit. These additional defendants are companies registered and incorporated in France, according to French company laws. The application for joinder was opposed by the current defendants, principally by filing a notice in terms of Rule 66. They alleged that the prospective defendants had not been served with the joinder application and that it was improper to join the parties without them being subject to the court's jurisdiction, before the granting of the joinder sought.

*Held* – that it is imperative that a party sought to be joined in proceedings needs to be served with the application and be informed of the bases upon which it is claimed it has an interest as a necessary party or even for purposes of convenience. An application for joinder not served on the persons sought to be joined was found to be bad.

*Held further* – that the proposed defendants were not *incolae* of this court and that they had no property within this jurisdiction, which could serve to found or confirm this court's jurisdiction. For that reason, the court could not properly issue the application for joinder, as the court cannot exercise its jurisdiction over the proposed defendants.

*Held* – that it was imperative for the plaintiff to have first ensured that the court has jurisdiction before it moved the application for joinder. In this regard, it was held that the plaintiff should have made an application to found or confirm the court's jurisdiction and if that hurdle is overcome, could the plaintiff then apply for joinder and the rest of the relief it sought, including amendment of pleadings and edictal citation proceedings.

*Held further* – that the court cannot properly grant an application for leave to amend in circumstances where the provisions of rule 52 had not been followed. Found that in the instant case, the nature of the amendment and its

extent were not disclosed for the parties affected to know same and decide whether or not to oppose the proposed amendment.

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### **ORDER**

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1. The plaintiff's application as prayed for in the notice of motion is dismissed.
  2. The plaintiff is ordered to pay the costs of the application, including costs consequent upon the employment of one instructing and two instructed counsel.
  3. The matter is postponed to 1 December 2017, at 10h00 for a status hearing.
  4. The parties are ordered to file a joint status report not less than three (3) days before the date stipulated in paragraph 3 above.
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### **RULING**

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#### **MASUKU J:**

#### Introduction

[1] Serving before court for determination, is an application by the plaintiff, primarily for the joinder of certain parties mentioned below as co-defendants with the above-named defendants, together with some ancillary relief. The application for joinder is made in terms of the provisions of rule 40 of this court's rules.

#### The parties

[2] The plaintiff, which is the applicant in terms of the application for joinder, is United Africa Group (Pty) Ltd, a company with limited liability and incorporated in terms of the company laws of this Republic. It has its place of business situate at 51-55 Werner List Street. Gutenberg Plaza, Windhoek.

[3] The 1<sup>st</sup> defendant, Uramin Incorporated, is a company registered in the British Virgin Islands. Its place of business is described as care of Codan Trust Company (BVI) Limited, Romasco Place, Wickhams Cay Road Town, Tortola in the British Virgin Islands as aforesaid. It is said to be trading as 'Areva Resources Sothern Africa'.

[4] The 2<sup>nd</sup> defendant, Erongo Desalination Company (Pty) Ltd, on the other hand, is a company incorporated and registered in accordance with the company laws of this Republic and has its place of business situate at 24 Orban Street, Klein Windhoek, in this Republic. The 3<sup>rd</sup> defendant, Uramin Namibia (Pty) Ltd, is also a company that is registered and incorporated in accordance with this Republic's company laws, having its principal place of business situate at 2<sup>nd</sup> Floor, Office 2, Hidas Centre, Klein Windhoek in this Republic.

#### Relief sought

[5] The plaintiff seeks the following relief, as stated in its notice of motion:

'1. An order directing that **AREVA NC, AREVA MINING** and **AREVA SA** be joined as Fourth, Fifth and Sixth Defendants respectively in this pending action under case number I 2527/2014;

2. That leave be granted to the Plaintiff to amend its particulars of claim (intendit) under case number I 2527/2024;

3. An order condoning the Plaintiff's failure in the judicial case management proceedings when the order of 22 February 2017 was issued, to specifically also refer to **AREVA SA** as a party to be joined;

4. That directions be issued, regarding the time within which joinder be effected, to effect service outside Namibia of the amended particulars of claim (intendit) and

further related pleadings and/or amendments of pleadings, and for leave to sue by way of edictal citation, including directions under rule 40 (6), read with rule 32 (4) and 12 (4);

5. That such further relief, or alternative relief or directions, be granted as the Honourable Court may deem fit.

6. That costs of the application, if unopposed, be borne by the Plaintiff; alternatively, if the relief is unopposed, that the costs of the application be borne by the first to third defendants, jointly and severally, on such scale as the Honourable Court may deem fit.'

### The plaintiff's case

[6] The plaintiff's case is predicated on the founding affidavit of Mr. Haddis Tilahun, who describes himself as an adult male and executive director of the plaintiff. It appears from his affidavit that the parties in this case signed a shareholders' agreement in December 2009. The plaintiff then instituted an action against the defendants seeking specific performance under the said shareholders' agreement. In particular, it sought the transfer and control of a desalination plant established by the Areva Group of Companies in Wlotzkasbaken, within this Republic.

[7] He contends in his affidavit that the application for joinder before court is owed to the fact that Areva NC SA, Areva Mines SA and Areva SA sought to join issue with the plaintiff by filing a claim against the plaintiff before an arbitration forum in Geneva, Switzerland. In this claim, it is further alleged, the proposed defendants, particularly Areva NC and Areva Mines seek to reclaim a mobilisation fee under the second memorandum of understanding.

[8] It must be mentioned of necessity, as appears in the plaintiff's founding affidavit, that the three Areva companies sought to be joined, which I will refer to as the proposed defendants, are registered and incorporated in terms of French laws. I find it unnecessary, for present purposes, to set out their respective addresses in France.

[9] It is further alleged by the plaintiff that as a result of the defendants' failure to perform under the shareholders' agreement, the plaintiff, as stated above, was compelled to issue a summons in this court for specific performance. It is in this regard contended that the very facts and circumstances that found the claim by Areva NC and Areva Mines underlie the basis of the matter submitted by the proposed defendants to the arbitration forum in Switzerland.

[10] Finally, it is alleged by the plaintiff that the determination of the relief sought by the plaintiff in the main action which is pending before this court, will determine the rights of the plaintiff to obtain orders for the transfer of control over the desalination plant to the 2<sup>nd</sup> defendant to allow for the due performance of all the obligations under the shareholders' agreement. It is accordingly contended, for the above reasons, that the proposed defendants hold a direct and substantial interest in the action and that the resolution of this matter by this court will finally determine the matter finally among the parties. It is on that account that an order to join them as the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants to the main action.

[11] A further point made by the plaintiff in support of the joinder is that it would prevent the multiplicity of actions and would also serve to avoid conflicting judgments on the very same issued by different *fora*. The plaintiff further makes the point that it is advised that because Namibia is not a signatory to the New York Convention, she would not recognise a foreign arbitral award. This would necessitate that any award in favour of the prospective defendants be established and confirmed by this court in the event same is sought to be enforced in this jurisdiction.

[12] The plaintiff claims that the defendants, through its Areva holding companies failed to perform their respective obligations that were due to be performed under the shareholders' agreement. It was alleged further that because of non-performance by the Areva NC and Areva SA, the funder of the 3<sup>rd</sup> defendant, the funding structure required in terms of the shareholders

agreement. It was accordingly submitted that the prospective defendants have direct and substantial interests in the proceedings pending before court. It is further submitted that the said prospective defendants have a material interest in the matters and questions that this court has to determine.

#### The defendants' position

[13] The defendants are opposed to the application for joinder and it would seem that the mainstay of their argument, at the present moment, is grounded on points of law that they raised. This was done in terms of the provisions of rule 66 (1) (c), the contents of which I shall traverse at the appropriate juncture in this ruling. In this regard, the defendants did not file any affidavit dealing with the allegations made by the plaintiff pound for pound in respect of the grounds and on which the application for joinder is predicated. An affidavit dealing with an application to confirm or found jurisdiction in respect of the 1<sup>st</sup> defendant was filed and I will deal with it at the appropriate juncture.

[14] The defendants argue that the court does not have any jurisdiction over the companies sought to be joined by the plaintiff as those are foreign entities and are therefor *peregrinii* of this court. It is contended in this regard that this court does not have jurisdiction over the proposed defendants and that for that reason, the plaintiff has put the cart before horse as it were. It is contended that the plaintiff should have ensured that the issue of the court's jurisdiction over the proposed plaintiffs was cleared before they could seek for the said proposed defendants to be joined in the proceedings.

[15] It is further contended that the application for joinder, has not been served or delivered on any of the prospective defendants. It is in this regard, pointed out that the parties, being Areva NC SA and Areva SA have not been afforded any opportunity to answer to the allegations made and on the basis of which the application for joinder is predicated.

[16] That is not all. The defendants further argue that should the court come to conclusion that the issue of this court's jurisdiction over the proposed

defendants is established, by way of concession to jurisdiction, which is expressly denied by the defendants, that the defendants contend that there was an application to confirm jurisdiction to which the plaintiff may be referring and significantly, that application concerned only the 1<sup>st</sup> defendant.

[17] The defendants also claim that the application under consideration is two-fold. It is, first of all to join the foreign companies to the proceedings, coupled with an application for leave to amend its particulars of claim. In that regard, it is contended very so forcefully too, that the court is being asked to grant an amendment, whose nature, effect and ambit is not presently known to the court or the other parties and should therefor not be allowed.

[18] The defendants also make the point that in their view, to the extent that the defendants would argue that they wish the court to grant an application to join the prospective defendants, then no case has been made for relief in term so of the provisions of rule 12 (2) in particular. I will revert to the requirements of this rule when a determination of the issues that arise is undertaken.

[19] Last, but by no means least, it is the defendants' contention that when one has regard to the papers filed by the plaintiff, read *in tandem* with the annexures relied on, particularly the memorandum of understanding referred to, and the presently obscure nature and effect of the amendment sought to be made; the obscurity of the relief sought against the proposed defendants, it is submitted that the foreign companies sought to be joined do not, therefor, have any direct and substantial interest in the current action proceedings.

[20] In addition to the notice in terms of rule 66, referred to above, the 3<sup>rd</sup> defendant filed a supporting affidavit deposed to by Mr. Tommy Gouws, who describes himself as the Finance Manager of the said 3<sup>rd</sup> defendant. The main issue raised in the said affidavit relates to an *ex parte* application to found or confirm jurisdiction, which was moved by the plaintiff under case no. A 76/2014 in which the plaintiff sought the 1<sup>st</sup> defendant's property to be attached to found or confirm jurisdiction.



[21] The deponent states that this court, on 11 April 2014, issued a rule *nisi* in terms of which the Deputy Sheriff was authorised to attach 1<sup>st</sup> defendant's right, title in and to its shares in Uramin Namibia (Pty) Ltd to found or confirm jurisdiction. The court further authorised the Deputy Sheriff to attach the 1<sup>st</sup> defendant's right, title in and to its shares in Erongo Desalination Company, pending the final determination of the main action. There was further relief that was granted in the rule *nisi*, including institution of proceedings against the 3rd defendant by way of edictal citation.

[22] Mr. Gouws further deposed that although the application was initially opposed by the 1<sup>st</sup> defendant, it eventually was discovered that the agreement on which the plaintiff relied for the relief it sought against the 1<sup>st</sup> defendant contained a clause in terms of which the 1<sup>st</sup> defendant submitted to this court's jurisdiction, thus rendering the issuance of the rule *nisi* unnecessary. The plaintiff subsequently filed a notice of withdrawal of the said application dated 17 September 2014, before the hearing of the application on the return date, i.e. on 30 September 2014. Mr. Gouws further deposes that the said rule, which had been issued, was thereafter discharged and the plaintiff tendered costs occasioned thereby.

[23] Mr. Gouws further makes the point in his affidavit that the issue of jurisdiction in the said application related only to the 1<sup>st</sup> defendant and that the prospective defendants, who are also *peregrinii* of this court, now sought to be joined in the proceedings, were not party to that particular application. It is accordingly stated that this court does not have jurisdiction over the prospective defendants as the application to found or confirm jurisdiction was confined to the 1<sup>st</sup> defendant and not the new parties now sought to be yoked to the present proceedings.

The plaintiff's reply

[24] In reply, the plaintiff took the position that since the defendants, in opposition to the application decided to only file a notice in terms of rule 66, then the averments and allegations of fact they made remained unchallenged and should therefor stand. The only question in issue, the plaintiff, proceeded to state, was in relation to paragraph 78 of its founding affidavit, which deals with the issue of concession to this court's jurisdiction by the 1<sup>st</sup> defendant. It accordingly persisted in its position as stated in paragraph 78. Nothing of consequence was stated in relation to the affidavit of Mr. Gouws. The plaintiff accordingly persisted in its application, contending that it had made as case for the relief it seeks. Is the plaintiff on good legal ground in its contentions as recounted above?

#### Rule 40

[25] Rule 40 is entitled, 'Joinder of parties and causes of action. The most relevant subrule to the issue at hand appears to be subrule (5), which has the following rendering:

'Any party who seeks a joinder of parties or causes of action must apply for such joinder to the managing judge for directions in terms of rule 32(4).'

Rule 32(4), on the other hand provides the following:

'In any cause of or matter any party may make application for directions in respect of an interlocutory matter on which a decision may be required, either by notice on a managing judge's motion court day or case management conference, status hearing or pre-trial conference.'

[26] It is stated by the plaintiff that there was an application for directions in this matter as envisaged by the above subrules. This was when the matter was being case-managed by Mr. Justice Miller. Whatever may have been the case regarding the application for directions, it is clear what the plaintiff has done is to file an application, which appears to comply with the provisions of rule 65, seeking the relief I set out earlier in this ruling.

[27] To my mind, the application for directions in terms of rule 40(5), as read with rule 32(4), is separate and distinct from the application for joinder, proper. I say so for the reason that in the application for directions, all that the party needs to do, is to mention the application the party intends to make, together with the parties thereto. This is to enable the court to set out a programme for the carrying out of the necessary steps, which will culminate in the application for joinder proper, and the grounds upon which such joinder is sought.

[28] The words 'must apply for joinder to the managing judge for directions' in my view deals with one issue, namely the seeking of directions in furtherance of the application for joinder proper, that may be applied for later, after directions in that regard have been given by the court. This does not mean that the application for directions must be equated with or should be moved simultaneously with the application for joinder proper. The application for directions in respect of the joinder sought is not dual in effect, namely, being one for directions and also for granting the application for joinder properly so called.

[29] With this preliminary issue having been dealt with, I will now proceed to deal with the application before court, and will, in that regard, consider the relief sought by the plaintiff, together with the bases upon which the defendants have moved this court to dismiss it.

Has the plaintiff made a case for the relief it seeks?

*Non-service of the application for joinder on the proposed defendants*

[30] The first point taken by the defendants relates to the procedure adopted by the plaintiff in this matter. What is plain from the notice of motion is that the plaintiff seeks the joinder of the said defendants, who are *peregrinii* of this court and are, for that reason, not before court or within its jurisdiction for that matter. The plaintiff's application appears to be one made in terms of

the provisions of rule 65 for all intents and purposes. In this regard, there is a notice of motion accompanied by an affidavit, which sets out the bases upon which the relief sought is predicated.

[31] Rule 65(2) provides the following:

‘Where relief is sought against a person or where it is necessary or proper to give a person notice of such application, the notice of motion must be addressed to both the registrar and that person, otherwise, the notice must be addressed to the registrar only.’

[32] This subrule, in my view, reinforces a very fundamental tenet of justice, namely that a person who may have an interest in any order sought, should be afforded an opportunity to be heard in respect of that relief sought. The exception may be if the application is *ex parte* and the relief sought does not have any bearing or detrimental effect on any other person’s rights or interests. There may well be cases, which are an exception, where although a party may be prejudicially affected by the order sought, the court may be convinced that it is proper to grant a rule *nisi* without hearing that party for stated reasons, which may include notice of the application serving to defeat the avoidance of harm sought to be forestalled.

[33] The current application leaves a bad aftertaste in my mouth and shocks the sensibilities of my judicial palate. I say so for the reason that the application seeks to have certain parties joined on specified reasons but they have not been served with the application and are not before court. Certain allegations have been made about them and their interests and rights that may be prejudicially affected if they are not joined have been placed before court on affidavit. Sadly, these persons have not been served with the application and they are, from present indications, totally oblivious to the relief sought and the grounds upon which it is being sought.

[34] I am accordingly of the considered view that the application for joinder cannot and should not be granted in the present circumstances, where the parties affected by it are not cited and have not been served with the

application to enable them to place their position before court and try as they may, to influence the direction that a proper order, which caters for all the interested parties' rights and interests is made. I would be loathe to make an order in terms of which the proposed defendants are faced with a *fait accompli*, not having seen the inside of the courtroom that has made a judgment that affects them and may commit them in terms of legal fees and other matters.

[35] Even if the plaintiff was to be correct in its allegations about the rights and interests of the proposed defendants to be joined in the proceedings, and even if it would be beneficial to have them joined, it would not be proper to issue an order for their joinder, in circumstances where a case for same, even being *ex parte* is made without them being heard at all.

[36] Regardless of how compelling, convincing and sensible a case may be made by the plaintiff in its allegations on oath, which are not coloured at all, in any shape or form nor to any degree, by the in-put from the proposed defendants, we must not forget the time honoured excerpt in *John v Rees* [1970] Ch345, 402, where Megarry J stated as follows:

'As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; unanswerable charges which, in the event, were completely answered; and of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.'

[37] I have also considered a judgment, which touches on joinder, by Mr. Justice Ueitele in *Martin v Diroyal Motors Namibia (Pty) Ltd t/a Novel Ford And Others*.<sup>1</sup> Although the judgment was cited by Mr. Möller in support of a different proposition, what is plain is that in that case, the parties sought to be joined, were given notice of the application, together with an opportunity to oppose the relief sought. I would, in view of the foregoing, be of the view that

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<sup>1</sup> 2013 (2) NR 463 (HC).

on this basis alone, sufficient cause exists not to grant the orders sought, as a fundamental principle of justice, has been violated by the plaintiff in process.

[38] I am accordingly in respectful disagreement with Mr. Möller for the plaintiff when he submits that it follows under rule 40 that the application for joinder must first be entertained before any further directions can be made as to amendments to pleadings etc. He posits that the application for joinder must first be obtained, followed, it is argued, by the directions.<sup>2</sup> The directions contemplated in this rule, as I understand it, are to deal with the very application for joinder, namely, when it is to be filed and matters related to its service and hearing. I do not understand the rules to give the applicant for joinder leave to file an *ex parte* application in which the party sought to be joined is literally reduced to a lamb led to the shearers, or worse still, to the slaughter house, as it were.

[39] The rights of the proposed defendants to be parties to the application to join them cannot in law be abrogated and this is a fundamental issue. There cannot, as the plaintiff submits, be uncontested facts regarding the joinder of the proposed defendants without them being afforded an opportunity to place information and their views, before court. The present defendants are not emissaries or plenipotentiaries of the proposed defendants.

[40] I have read the numerous cases Mr. Möller referred the court to regarding the issue of joinder. I do not find in any of them, in dealing with the requisites for deciding whether a party is a necessary party or one to be joined for convenience, a proposition that the party sought to be joined does not have a right to be heard by the court in relation to the nature and extent of their interests - that responsibility lying only with the party seeking to join them, being the sole dancer in the theatre and whose entreaties the court must consider, to the express exclusion of the party who is the subject of the very application and should ordinarily join in the dance. It would be eminently

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<sup>2</sup> Para 19 of the plaintiff's heads of argument.

fair for the court to declare its results, on the basis of the performance of both parties on stage, announcing, as it were, the victor and the vanquished.

[41] In what appears to be a concession that service of the application for joinder is necessary, Mr. Möller says the following at paragraph 86 of his heads of argument:

‘It is correct that the application for joinder has not been served on the fourth to sixth defendants. Under prayer 4, which is disregarded by the defendants, directions in this regard, is (*sic*) sought as part of the papers before this Honourable Court in the application pending.’

[42] It does not make sense to me that one can make and obtain an application for the joinder of a party in its absence and then seek an order for directions in that regard. In this case, the directions sought have nothing to do with the service of the joinder simpliciter but directions regarding steps post the joinder stage, like the amendments, service of the amended particulars of claim; pleadings and leave to apply suing by way of edictal citation. It would appear, with respect, that the plaintiff, is in this regard, blowing hot and cold on this fundamental issue.

*The court's jurisdiction over the proposed defendants*

[43] Another point taken by the defendants in opposition to the application for joinder, relates to the incontrovertible fact that the proposed defendants are not *incolae* of this court. This points inexorably to the conclusion that unless legal steps are taken to have the court's jurisdiction extended to them, the court may not grant any order in relation to them. The question, that needs to be answered at this juncture, is whether Mr. Heathcote was correct in his submission that the plaintiff has put the cart before the horse by seeking to join the proposed defendants before they are properly before this court and it can legally exercise its jurisdiction over them.

[44] The learned author Pistorius<sup>3</sup> deals with the issue of effectiveness and points out the following:

'The general rule of the Roman law with regard to jurisdiction was *actor sequitur forum rei*, and this rule was taken over by the Roman-Dutch law. The Roman law also relied upon the rule that *extra territorium ius dicenti impune non paretur* and taken together these two rules lead to the conclusion that the court must, within its territory, have authority over the defendant sufficient to be able to enforce its orders. In *Schlimmer v Executrix in Estate of Rising* the court emphasised that territorial limits of its power as follows:

"The jurisdiction of the courts of every country is territorial in its extent and character, for it is derived from the sovereign power, which is necessarily limited by the boundaries of the state over which it holds sway. Within those boundaries the sovereign power is supreme, and all persons, whether citizens, inhabitants or casual visitors, who are personally present within those boundaries and so long as they are so present, and all property (whether movable or immovable) for the time being within those boundaries are subject to it and to the laws which it has enacted or recognised. All such persons and property are therefore subject to the jurisdiction of the courts of the country which the laws have established, so far as the law gives them jurisdiction. Over persons not present within the country jurisdiction can only be exercised to the extent of any property they may possess in the country: and over persons who are not in the country, and have no property in the country, no jurisdiction at all can be exercised.' (Emphasis added).

[45] Further below, on the same page, the learned author makes the following points about the doctrine of effectiveness:

'Effectiveness was recognised in the definitions of jurisdiction given by Voet and Vromans and Huber points out that the object of the rule is that judgments should be given where they can be enforced because a judgment which cannot be enforced is illusory. This doctrine that jurisdiction depends upon the power of the court to give an effective judgment has long been approved by South African judges and regarded as an essential ingredient in determining the existence or otherwise of jurisdiction. As early as 1904, *Steytler NO v Fitzgerald* De Villiers JP held that:

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<sup>3</sup> Pollak on Jurisdiction, Juta & Co. Ltd, 2<sup>nd</sup> edition, 1993 at p.3.



“A court can only be said to have jurisdiction in a matter if it has the power not only of taking cognizance of the suit, but also of giving effect to its judgment,” and in *Morten v Van Zuilecom* Dove-Wilson J stated:

“The greatest test of the jurisdiction of a court is its power to make its decree effective.”

[46] Later authorities appear to have eased somewhat on the emphasis on the doctrine of effectiveness as being the sole criterion for the court exercising jurisdiction. The learned authors Herbstein and Van Winsen<sup>4</sup> posit the following on the issue:

‘It would appear, however that effectiveness is not the sole consideration determining jurisdiction. Thus in *Estate Agents Board v Lek Trollip* JA referred to previous authority to the effect that the procedural provisions of the Supreme Court Act rendered the processes and judgments of a division effective beyond the area of its jurisdiction, and said that effectiveness may be a factor to be taken into account, in conjunction with other factors, in considering whether some common law *ratio jurisdictionis* exists, conferring jurisdiction on the division in respect of the particular proceedings. The Appellate Division has since affirmed that view, holding that effectiveness does not per se confer jurisdiction on a court. The enquiry is a dual one in that the court must consider first whether there is a recognised ground of jurisdiction; and if there is, then whether the doctrine of effectiveness is satisfied.’

[47] I should pertinently mention that the legal principles enunciated in the foregoing paragraphs are highly persuasive in this Republic and also accurately reflect the position in Namibia as reflected in a number of local decisions by our Judges. This position is trite and I need not cite authority in support thereof.

[48] Section 16 of the High Court Act<sup>5</sup> provides the following:

‘The High Court shall have jurisdiction over all persons residing or being in and in relation to all causes arising and all offences triable within Namibia and all

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<sup>4</sup> The Civil Practice of the High Courts of South Africa, Vol. 1, Juta & Co., 5<sup>th</sup> ed., 2009 at p 64.

<sup>5</sup> Act No. 16 of 1990.

other matters of which it may according to law take cognisance, and shall, in addition to any powers of jurisdiction which may be vested in it by law, have power - . . .’

In this regard, it becomes clear that this court exercises jurisdiction over all persons, and this in my view, includes juristic persons, residing or being in Namibia. It is apparent from the papers that the prospective defendants neither reside nor are present within Namibia.

[49] In the instant case, what is abundantly clear, as earlier intimated, is that the proposed defendants are *peregrinii* of this court. They do not reside in Namibia and from all indications, have no property, which can be attached to found or confirm this court’s jurisdiction. This accordingly means that whatever judgment this court may be minded to issue, may be meaningless, as it may not be made effectual and enforceable, in the absence of the said defendants and/or their property in this jurisdiction. It is for that reason that before a court can issue an order of any nature, it must ask itself if that order is capable of being enforced by it. Where it cannot because of the person not being subject to its jurisdiction and where that person has no property within its territorial limits, the court will decline to exercise its jurisdiction in that case.

[50] That being the case, it seems to me that the defendants in this case are eminently correct in their submission that the plaintiff has put the proverbial cart before the horse. The first thing the plaintiff should have done, was to ensure that this court, first and foremost, has jurisdiction over the persons and/or the property of the proposed defendants before it could be in a position to issue any order that may be regarded to be binding and enforceable by the court and its processes on the defendants. This includes an order for joinder of the said defendants. I cannot be party to the issuance of orders that are nothing but *brutum fulmen* and which the proposed defendants may ignore with glee, knowing that their conduct is without any adverse consequences to them. Court orders should not be reduced to meaningless paper, in which case they can be used to start a fire in winter with no attendant consequences or reprisals.

[51] I am accordingly of the considered view that the defendants' contention in this regard, is meritorious and must be upheld. What is clear is that in relation to the 1<sup>st</sup> defendant, it is not disputed from the papers that the 1<sup>st</sup> defendant is also a *peregrinus* of this court. This fact necessitated that the plaintiff issued an application to attach its local shares to found or confirm jurisdiction in this very matter. From the affidavit of Mr. Gouws, referred to earlier, it is clear that the said defendant consented to the court's jurisdiction, thus obviating the need to proceed with the application to found or confirm jurisdiction. The court will not entertain the entreaties of the plaintiff to join the defendants when the court cannot enforce its orders against them.

[52] It appears to me that the 1<sup>st</sup> defendant, in respect of which the consent to jurisdiction was eventually accepted, is an entity that is in law separate from the proposed defendants. Whatever the relationship between the prospective defendants and the 1<sup>st</sup> defendant may be, I am of the view that the prospective defendants are sought to be joined in their own right as juristic entities and in the absence of proof that they in fact consented to jurisdiction, it is unsafe to uphold the plaintiff's argument. In this regard, the plaintiff, in reply, for the first time alluded to the proposed defendant Areva SA acquiesced to this court's jurisdiction, which the defendants have not been afforded an opportunity to respond to.

[53] In any event, the issue regarding whether the proposed defendants or any of them did, as alleged by the plaintiff, consent or acquiesce to jurisdiction as alleged, are matters that should have been put to the proposed defendants and they should have been allowed to deal with these allegations. The fact that they are not before court and they are unaware in all probability, of these proceedings and the allegations made against them, must return to haunt the plaintiff as it had a duty to bring these parties and make those allegations in the face of the said defendants as it were.

*Rule 66(1) (c) notice*

[54] The plaintiff took issue with the defendants' approach of not filing an affidavit and relying on legal argument, with a reservation of their rights in due course, to file affidavits in response to the application. In view of the direction the matter has taken, and that the defendants have been successful in warding off the application with the minimal effort that did not require the filing of answering affidavits, I find it unnecessary to deal with that issue, save to say a cautionary word that it may, in some circumstances prove to be a risky approach if the court should be of the view that the points of law *in limine* fail. To then postpone the matter to allow the filing of answering affidavits and further replying affidavits by the applicant would, on first principles, seem to run counter to the overriding objectives of judicial case management encapsulated in rule 1(3).

#### The relief sought

[55] I find it appropriate to comment on some of the prayers that the plaintiff seeks in its notice of motion. I do this to deal with some difficulties that arise therefrom. I deal with those in need of comment in turn below.

#### *Leave to amend*

[56] In prayer 2, the plaintiff applies for leave to amend its particulars of claim under case No. I 2527/2014. As far as I understand, rule 52 stipulates the procedure that should be followed by a party seeking to amend any pleadings. In this regard, the nature and extent of the amendment must be disclosed and served on the parties affected thereby, in order to afford them an opportunity to consider the amendment and any deleterious effect it might have on their case and to thereafter indicate whether or not, they oppose the intended amendment.

[57] In the instant matter, the plaintiff seeks leave to amend without following the stipulated procedure. The prejudice to be suffered by the other parties to the action and those proposed to be joined is manifest. The court is asked to grant, what would appear on present indications, to be a *carte*

*blanche* leave to amend, whose nature, scope and extent is known to and kept in the deep recesses of the plaintiff's bosom. The parties to be joined would not know the extent of the relief sought and how it may affect them and/or their interests, if any. Such leave cannot be granted in the present circumstances, where the mandatory provisions of rule 52, with their fair and equitable requirements, have not been followed, and no explanation therefor proffered.

*Directions in terms of prayer 4*

[58] In this prayer, the plaintiff seeks an order regarding the time within which joinder should be effected and service of the process outside Namibia, of the amended particulars of claim and for leave to sue by way of edictal citation, including directions in terms of rule 40(6) and 12(4).

[59] I have already made my views known regarding the issue of the joinder in earlier parts of this ruling. I have also dealt with the issue of the amendment of pleadings immediately above. I do not need to add anything thereto. The issue that I intend to address at this juncture, relates to the provisions of rule 12, which deal with edictal citation.

[60] The difficulty I have with issuing directions relating to edictal citation goes back to the very issue regarding whether this court has jurisdiction over the defendants proposed to be sued by edict. Rule 12(2)(b) requires the applicant for edictal citation to stipulate the grounds upon which the claim is based and on which the court has jurisdiction to entertain the claim. This requirement, it seems to me, takes it for granted that the court already has jurisdiction over the party sought to be sued.

[61] It is clear from what I have stated earlier that this is not the position in this matter. The proposed defendants, it has not been shown, reside within this court's jurisdiction nor that they have any property in this jurisdiction in terms of which this court can lawfully exercise its jurisdiction over them accordingly.

[62] In his heads of argument, Mr. Heathcote helpfully referred the court to the works of Erasmus<sup>6</sup> where the learned author states the following about applications for edictal citation:

‘The purpose of edictal citation is to provide means for the institution and prosecution of actions against those in respect of whom the court has jurisdiction but on whom the process of the court cannot be served because they are outside the jurisdiction of the court. The court, must therefore, have jurisdiction to hear the proposed action before it can grant leave to sue by edict. In certain circumstances an attachment *ad fundandam jurisdictionem* may be necessary before leave to sue by edictal citation will be granted.’ (Emphasis added).

[63] It is clear from the foregoing that, as I have earlier held, the plaintiff has put the cart before the horse. Applications for edictal citation and directions in relation thereto, should relate to persons over whom the court already exercises jurisdiction but who are not, at the time of commencement in the court’s jurisdiction to be served in the normal manner, therefore requiring them to be sued by edict.

### Conclusion

[64] I am of the considered view, in the light of all the adverse findings I have made in regard to the plaintiff’s application, that it is not appropriate to grant the relief the plaintiff seeks at the present moment on the facts before me. The application cannot be granted without doing violence to the court’s own rules and its ability to see to it that orders it issues are enforceable. More importantly, it is imperative that the parties, in respect of whom the order is sought, must first be heard.

### Disposal

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<sup>6</sup> Superior Court Practice, Electronic Version, OS, 2015, D1-45.

[65] In the circumstances, I am of the considered view that the appropriate order to issue is the following:

- (a) The plaintiff's application is dismissed.
- (b) The plaintiff is ordered to pay the costs of the application, consequent upon the employment of one instructing and two instructed counsel.
- (c) The matter is postponed to 1 December 2017, at 10h00, for a status hearing.
- (d) The parties' representatives are ordered to file a joint status report not less than three (3) days before the date stipulated in paragraph (c) above.

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T.S. Masuku  
Judge

## APPEARANCES:

PLAINTIFF: A. Möller SC (with him R. Maasdorp)

Instructed by: Theunissen, Louw & Partners

DEFENDANTS: R. Heathcote SC (with him B. De Jager)

Instructed by: Francois Erasmus & Partners