

PHILLIP ERNEST KAHAN and

(P) A 329/99
LEVY. AJ
2000/05/30

ELIANE LIDCHI
CHRISTOPHER
RAYNER

in re:

PHILLIP ERNEST

KAHAN and

CLARA KAHAN
DIALE LIDCHI
ELIANE LIDCHI
CHRISTOPHER RAYNER
FARREL WAINER
OFFSHORE DIAMOND (SWA) LTD

DIAMOND DREDGING & MINING COMPANY (PTY)

LYF PRACTICE

SUMMARY JUDGMENT - This is the Return Day of a Rule nisi in an Application made by the Peregrinus to sue another Peregrinus by Edictal Citation.

Applicant must apply to attach property of Defendant situated in Namibia and show that the cause of action arose within the jurisdiction of this Court. The Applicant must also show that it has a prima facie case.

An agreement cannot be interpreted on motion or on application of this nature, but only in an action.

Prescription is an issue for the trial Court. Rule *nisi* made absolute.

CASE NO.: (P) A329/99

IN THE HIGH COURT OF NAMIBIA

In the matter between: PHILLIP

ERNEST KAHAN

APPLICANT

and

ELIANE LIDCHI

FIRST RESPONDENT

CHRISTOPHER RAYNER in re:

SECOND RESPONDENT

PHILLIP ERNEST KAHAN and

PLAINTIFF

CLARA KAHAN

DIALE LIDCHI

FIRST DEFENDANT

ELIANE LIDCHI

SECOND DEFENDANT

CHRISTOPHER RAYNER

THIRD DEFENDANT

FARREL WAINER

FOURTH DEFENDANT

OFFSHORE DIAMOND (SWA) LTD

FIFTH DEFENDANT

DIAMOND DREDGING & MINING COMPANY

SIXTH DEFENDANT

(SWA) LTD

SEVENTH DEFENDANT

CORAM: LEVY, A.J.

Heard on: 2000.05.19

Delivered on: 2000.05.30

Adv. D. F. Smuts and the

Respondent by Adv G H

Oosthuizen.

JUDGMENT

LEVY, A.J.: The Applicant herein is represented by

The territorial jurisdiction of the High Court of Namibia extends throughout the Republic of Namibia up to the Republic's geographical boundaries, but no further.

For the purposes of litigation, anyone residing within the said boundaries, whose residence is not temporary, even though it may be indefinite, is said to be an incola of Namibia. Such person need not be a citizen of, nor even domiciled in, Namibia. A person not so residing is said to be a peregrinus.

c.f. Joosub v. Salaam 1940 T.P.D 177 at 179

Kallos a Sons (Pty) Ltd v.Mavromati 1946 W.L.D 312 at 315.

Because the jurisdiction of the High Court does not extend beyond the geographical boundaries, any litigant whether an incola or a peregrinus desirous of suing out of the High Court of Namibia, a peregrinus, such litigant must obtain the leave of the High Court to sue by edictal citation. Originally Courts, in the aforesaid circumstances, were reluctant to permit such an action, in that effect to a judgment, could not be given. The Courts therefore required that when the litigant applied for leave to sue by edictal citation, such litigant must also attach property belonging to the peregrinus which was situate within the Court's jurisdiction. Such attachment was

referred to as an attachment ad confirmandam jurisdictionem or ad fundandam jurisdictionem, depending upon the circumstances of each case.

For a number of reasons immaterial hereto, the requirements of effectiveness became irrelevant, and property of any value, could be attached.

Where the litigant who is suing is itself a peregrinus, in addition to the attachment of the property, the litigant must rely on a cause of action which arose within the Court's jurisdiction. Only then will the court grant the attachment and permit the litigant to sue the peregrinus by edict. There is, however, another requisite.

The applicant for leave to

attach and to sue, must satisfy the Court that he has a prima facie case.

Respondent, Christopher Rayner, also a peregrinus .

Because there is no jurisdiction until the property is attached and the litigant has leave to sue, the application to Court must by necessity be ex parte.

The property, the Applicant sought to attach was

Time, costs and the duplication of proceedings are saved by joining different parties instead of bringing separate actions. Apart from consideration of convenience, if a third party has a direct or substantial interest in any order the Court might make in proceedings, or if such an order cannot be sustained or carried into effect without prejudicing that party, such party is deemed to be a necessary party and must be joined in the proceedings.

A. First Respondent's assets situate in Namibia comprising. :-

Amalgamated Engineering Union v. Minister of Labour 1949 (3) SA 637(A).

- a) 1264 400 shares in Offshore Diamonds (S.W.A) Ltd
- b) 6666 shares in Moly Copper Mining and Exploration Company (SWA) Ltd 3. 3400 shares in Diamond Dredging and Mining Company (SWA) Ltd

Even if some defendants are incolae while others are peregrini, they must all be joined.

On 15 December 1999, the Applicant (who is a peregrinus) applied to the High Court of Namibia for leave to attach certain property (more fully set out hereunder) and for leave to sue by edict First Respondent, Eliane Lidchi, a peregrinus and Second

The share registers, Applicant

said, are at the registered offices of the respective companies being the office of one Van Schalkwyk & Co, 1st floor N G Church Center, 17 Luderitz Street, Windhoek.

B. Second Respondents assets in Namibia comprising:-

- c) one share in Diamond Dredging and Mining Company (SWA) Ltd;
- d) one share in Moly Copper Mining and Exploration Company (SWA) Ltd.

The share registers of the said Companies, Applicant said, were also at their registered offices which was the office of the aforesaid Van Schalkwyk and Co.

A copy of the intendit wherein the Applicant set out its cause of action was annexed to its Application for leave to attach and for leave to sue.

In terms of the intendit (which Applicant described as Particulars of Claim), Applicant alleged, as far as is relevant to the present proceedings that:-

1 The Plaintiff (Applicant) resides in Johannesburg and is therefore a peregrinus and sues:-

- e) in his personal capacity, and
- f) in his representative capacity as beneficiary of the Clara Kahan Family Trust, a trust registered in South Africa and on its behalf. The trust is registered in terms of the Trust Moneys Protection Act 34 of 1934, alternatively, the Trust Property Control Act 57 of 1988.

2. First Defendant is a widow Clara Kahan residing at 9 B Promenanden Street, Windhoek, and who is therefore an incola and is sued,

- g) in her personal capacity, and,
- h) in her capacity as

trustee of the Clamodaniel Trust, a trust registered in Namibia in terms of the Trust Moneys Protection Act, 34 of 1934.

estate Olivier Micheal Powell and Norman Simon and

3. Second Defendant is Diane Lidchi who was sequestrated in South Africa but who resides at 9 B Promenanden Street Winhoek and is therefore an incola, and she is sued;

j) in her capacity as trustee of the said Clara Kalan Family Trust and

i) in her personal capacity and where necessary with the assistance of the trustee of her insolvent

k) in her capacity as trustee of the Clamodaniel Trust

4. The Third Defendant is Eliane Lidchi, an architect residing in Johannesburg

l) in her personal capacity,
m) in her capacity as trustee of the Clara Kahan Family Trust
n) The said Powell and Simon agreed to abide the judgment of this Court.

o) The n residing in Johannesburg and h a peregrinus, in his Defen dant and in his capacity is as trustee of or Christ alternatively as a opher former trustee of Rayn the said Clara er an Kahan Family adult Trust. busin The Fifth Defendant is Farrel

Wain er of Johan nesbu rg, a pereg rinus and sued in his capac ity as trustee

	e of the said	afores	by reason of their	Defen
	Clamodaniel Trust.	aid,	substantial	dant
		and is	interests in the	who
q)	The Sixth	theref	outcome of the	were
	Defendant is	ore an	proposed action.	broth
	Offshore	incola 11.	At all material	er and
	Diamonds (SWA)	of times: -		sister.
	Ltd a duly	this t)	Sixth Defendant	v) The
	registered	Court	was the holding	Plaint
	company with its	.	company of a	iff is
	registered office at		group of	a
	the office of the	s) No	companies	memb
	aforesaid Van	relief	including Seventh	er of
	Schalkwyk,	was	Defendant.	the
	Windhoek, and is	sough		Kaha
	therefore an <u>incola</u>	t u)	The Sixth and	n
	of this Court.	again	hence the other	famil
		st	companies in the	y, the
r)	Seventh Defendant	Sixth	group including the	First
	is Diamond	and	Seventh Defendant	Respo
	Dredging and	Seven	were directly or	ndent
	Mining Co. (SWA)	th	indirectly	is his
	Ltd, duly	Defen	controlled by the	grand
	registered with its	dants	Kahan and Lidchi	mothe
	registered office at	who	families headed by	r and
	the office of Van	were	one George Kahan	Secon
	Scalkwyk at	joined	and First	d and

	Third Defendant	"P.2")	Defendants and the	days
	(being mother and		said Levenberg in	after
	daughter) are	x)	their capacity as	the
	members of the		aforsaid the cash	death
	Lidchi family and		sum of R1000.00	of the
	the Plaintiffs aunt		upon trust for the	last
	and cousin		intents and	surviv
	respectively.		purposes of the	or of
			agreement, and on	the
w)	On or about 8	impli	the terms set out	Secon
	January 1987, and	ed or	therein,	d
	in Johannesburg	tacit z)	the trust fund	Defen
	First Defendant	were	would comprise	dant
	acting as donor,	<u>inter</u>	the amount so	and
	concluded a trust	<u>alia</u> ,	donated, all	the
	agreement with	that:-	additions and	said
	Second, Third,	y)	accruals thereto	Georg
	Fourth Defendants	Depe	and all property	e
	and one Max	ndent	and moneys vested	Kaha
	Levenberg as	s	in them in terms	n and
	trustees. Plaintiff	donat	thereof.	the
	annexed the trust	ed to aa)	the trust thereby	Third
	deed to his	and	created was to be	Defen
	pleadings and	settle	known as The	dant
	marked it "P2" (I	d on	Clara Kahan	(whic
	shall also refer to	the	Family Trust, and	hever
	the trust deed as	said	would terminate 90	was

	the later) or 90 days after their simultaneous deaths,	to	,	could
		proprietor)	"the trust fund" as constituted and remaining on the termination of the	in their absolute
bb)	"The DL beneficiaries" were defined to mean only beneficiaries who were lawful descendant of the Second Defendant including the Second Defendant herself.	other than money, and the trust fund meant the property	Trust would then be awarded by the trustee to such beneficiaries as the trustees may choose, and if to more than one, in any proportions determined by the trustees, provided	and unfettered discretion to make award of capital from
cc)	"the PK beneficiaries" were defined to mean any beneficiary who was a lawful descendant of the Plaintiff (including the Plaintiff himself),	erty of the trust for the time being, includ	that 50% of the total award at any one time was made to the PK beneficiaries and 50% thereof was simultaneously made to the DL beneficiaries.	the trust fund to any beneficiary or beneficiarie
dd)	"the trust capital" was defined to include reference	money and rights	during the subsistence of the trust, the trustees	s, and if to more

<p>than one, in any proportions determined by the trustees. There would be no limit to the extent of such capital award, or any such capital award, and it would even be within the discretionary power of the trustees to exhaust the trust fund entirely by this means, should they so think fit; provided that 50% of the total award at any one time was made to the PK beneficiaries and 50% thereof was simultaneously made to the DL</p>	<p>14.</p>	<p>Sub-clause 5.1 and 5.2 of "P2" (the Clara Kahan Family Trust) were initially incorporated in the trust deed witho- ut the</p>	<p>beneficiaries, the provisos referred to in 13.7 and 13.8 supra. As in evident form "P2" the provisos are in a typescript which differs from the main body of the said sub-clauses. On a proper construction of sub-clause 5.2 of "P2" and in the light of the background and surrounding circumstances the proviso contained therein was inserted in substitution of the words "the trustees may in their absolute and unfettered</p>	<p>discretion make award of capital from the trust fund to any beneficiary or beneficiary and if to more than one, in any proportions determined by the</p>
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	trustees		the	15.3.1 295 000		conte
	"		said	shares in the Sixth		mplat
			Leven	Defendant		ed
15.	Pursuant to the said		berg jj)	3000 shares in the		therei
	trust deed:		resign	Seventh Defendant		n.
			ed,			
gg)	the Clara Kahan	ii)	at all kk)	N\$ 100,000.00	nn)	At all
	Family Trust was		mater			mater
	registered with the		ial ll)	the Plaintiff		ial
	Master of the High		times	accepted the		times
	Court of South		the	benefit conferred		hereto
	Africa, Transvaal		trust	upon him in terms		, the
	Provincial		fund	of the Clara Kahan		Secon
	Division;		was	Family Trust and		d,
hh)	the Second, Third		consti	he has no		Third
	and Fourth		tuted	descendants as		and
	Defendants and the		of	contemplated by		Fourt
	said Levenberg		both	the trust deed, and		h
	were appointed as		incom	is accordingly the		Defen
	trustees by the		e and	sole "PK		dants
	Master of the High		capita	beneficiary" as		were
	Court of South		l at all	contemplated		oblige
	Africa, Transvaal		mater	therein;		d to
	Provincial		ial mm)	the Second and		admin
	Division, who		times	Third Defendants		ister
	issued them with		includ	are the sole "DL		the
	letters of Authority,		ing;	beneficiaries" as		Clara
	and subsequently					

	Kahan Family	manages the	the beneficiaries,	entitle
	Trust in the interest	affairs of rr)	keep and maintain	d
	and for the benefit	another. 17.3	full books, records,	theret
	of the	administer the	accounts and	o in
	beneficiaries,	settled	documents relating	accor
	including the	moneys and	to the	dance
	Plaintiff, and in	trust fund	administration of	with
	accordance with	diligently and	the trust, disposal	the
	the terms of "P2"	properly	of it property,	terms
	(the Trust Deed)	pp) perfor	investment thereof,	of the
	the provisions of	m	safe custody,	trust
	the Trust Money	their	control,	deed,
	Protection Act, 34	duties	administration,	
	of 1934, the Trust	in a	alienation or uu)	avoid a
	Property Control	due	distribution	positi
	Act, 57 of 1988	can	thereof,	on
	and the common	faithf	satisfactorily	where
	law.	ul	perform any duty	the
			imposed upon them	truste
			by or under the said	e's
			legislation and the	duties
			trust deed,	and
		mann ss)	conserve the trust	privat
		er,	property in	e
oo)	In particular, the	qq)	accordance with	duties
	said Defendants	from	the provisions of	and
	were obliged to:	preju	the trust deed,	privat
17.1	exercise their	dicing tt)	pay the income and	e
	powers with the care,	the	deliver or transfer	intere
	diligence and skill which	intere	the capital thereof	sts
	can	st of	to the persons	confli
	reasonably be			
	expected of a person who			

	cted	incom	agreement with herself,	Clam
vv)	disclose to the	e and	the Second and Fifth	odian
	beneficiaries all the	expen	Defendants as trustees.	el
	information needed	diture	(A copy of	Agre
	for them to form a	durin	the agreement was also	emen
	judgment as to	g the	annexed to the interdict	t
	whether a proposed	perio	marked "P3" and is the	
	cause of action for	d	Clamodaniel trust)	zz) T
	which their consent	cover		h
	was required or	ed,	20. In terms of the	e
	asked was in the	suppo	Clamodaniel Trust	tr
	interest of all the	rted	agreement:	u
	beneficiaries,	by the	20.1 The First	st
	furnish to the co-	releva	Defendant donated	fu
	trustees and/or any	nt	and settled upon	n
	beneficiary on	vouch	the said	d
	request an	ers,	Defendants as	of
	accounting for the		trustees:-	th
	state of the	19. During or		is
	administration of	ww)	295 000 shares in	tr
	the trust, and of	about	the Sixth	u
	any dealings with	Septembe	Defendant	st
	the trust property,	r 1996,		w
	such account to be	xx)	3000 shares in the	o
	comprehensive and	the First	Seventh Defendant	ul
	to give a true	Defendant	certain other	d
	picture both of	as donor,	assets, for	c
		concluded	purposes of the	
		a trust		

	omprise the	w	Second	b
	monies and	er	Defendant and	e
	shares so	e	Third	n
	donated as	d	Defendant, but	ef
	well as	ef	did not include	ic
	additions and	in	the PK	ia
	accruals.	e	beneficiaries,	ri
aaa)	The	d	ccc) "the capital",	es
	Clamodaniel	to	"trust fund"	a
	Trust would	in	and "income"	n
	continue after	cl	and the powers	d
	the death of	u	as the trustees	5
	the First	d	to award same	0
	Defendant and	e	to the	%
	would	th	beneficiaries	to
	terminate 90	e	were defined	th
	days after the	Fi	in substantially	e
	death of last	rs	the same terms	D
	survivor of the	t	as appear in	L
	Second and	D	the Clara	b
	Third	ef	Kahan Family	e
	Defendants or	e	Trust; but	n
	90 days after	n	without the	ef
	their	d	proviso that	ic
	simultaneous	a	any award	ia
	deaths,	nt	should be as to	ri
bbb)	"beneficiaries"	,	50% to the PK	es

	Third,	(the Plaintiff at	purpo
	Fourth	present being	rted
21.	h and	uncertain as to	to
Pursuant to the	Fifth	which) such	wron
Clamodaniel Trust	Defen	delivery was	gfully
Agreement	dants	unlawful for the	termi
21.1	delive	reasons set out	nate
the Master of the	red	below. If the	the
High Court of	the	delivery was	Clara
Namibia,	assets	affected to the First	Kaha
Windhoek,	of the	Defendant then she	n
appointed First,	Clara	was a mere conduit	Famil
Second and Fifth	Kaha	for delivery to the	y
Defendants as	n	Clamodaniel Trust	Trust,
trustees of the	Famil	and in fact	and
Clamodaniel Trust,	y	delivered such ggg)	purpo
and issued them	Trust	assets to that Trust.	rted
with letters of	to the		to
authority,	First 22.	During or about	award
ddd) the said	Defen	January 1997, and	the
Defendants	dant	without the	full
assumed the duties	or to	knowledge and	extent
previously listed	the	consent of the	of the
above in relation to	Clam	Plaintiff	trust
the Clamodaniel	odian fff)	the Second, Third	fund
Trust and its	el	and Fourth	of the
beneficiaries,	Trust	Defendants	Clara
eee) the First, Second,			

<p>Kahan Family Trust (including the said 295 000 shares in the Sixth Defendant and 3000 shares in the Seventh Defendant) to the First Defendant, alternatively, via the First Defendant to the Clamodaniel Trust without the consent of the Plaintiff and without awarding 50% thereof, or any portion to the Plaintiff as the PK beneficiary and pursuant to such award caused the delivery of the assets of the Clara Kahan Family Trust.</p>	<p>23. Plaintiff says that the aforesaid conduct was unlawful, was in breach of the duties of a trustee and was ultra vires the trust.</p>	<p>terms of the Clara Kahan Family Trust, and in breach of the provisions of the said Trust, or it was made in error and in the absence of a valid cause and brought about an unjust enrichment of the Clamodaniel Trust.</p>	<p>Plaintiff says that the personal interests of Second and Third Defendants with whom Fourth Defendants acted jointly conflicted with their duties as trustees of the Clara Kahan Family Trust and that the said transactions were not for the benefit of the Clara Kahan Trust or its beneficiaries</p>
	<p>24. Plaintiff alleges that by reason of the aforesaid conduct the Clara Kahan Family Trust has in fact not terminated.</p>		
	<p>Plaintiff concludes his intendit making five claims the first three in the alternative.</p>		

but for the benefit of inter alia Second and Third Defendants. As a consequence Plaintiff says the transactions are voidable, and the Clamodaniel Trust is obliged to restore the said 295 000 shares to Sixth Defendant and 3000 shares in the Seventh Defendant to the Clara Kahan Family Trust as well as all additions accruals thereto. Plaintiffs first claim i.e. Claim A, is for an order that the Clamodaniel Trust as represented by First, Second and Fifth Defendants in their capacity as trustees restore the aforesaid shares and accruals to the Clara Kahan Family Trust. Plaintiffs Second Claim i.e.

Claim B, the aforesaid shares was made in the NS1500 000.00 and that alternative to Second, Third and Fourth A, is that the Defendants jointly and severally, the one paying Trust was the other to be absolved are unjustifiably obliged to compensate the enriched by Plaintiff for the damages he not less than has suffered, and which N\$1 500 000 amount to half of the value 00 and that of the said shares in the that trust is said Defendant companies, obliged to amounting to the sum of replay the NS750 000 00 which Clara Kahan would have accrued to him Family Trust had the trustee complied the said with the provisions of the amount. Clara Kahan Family Trust In the and their duties in terms alternative to thereof and he accordingly both claims A claims the said sum from and B, and as Second, Third and Fourth his third Defendants in their Claim i.e. personal capacities jointly claim C, and severally the one Plaintiff says paying the other to be the value of absolved.

Plaintiffs fourth claim i.e. claim D is that Second, Third and Fourth Defendants account to him supported by vouchers for all their dealings with the Trust Fund of the Clara Kahan Family Trust from the date of their appointment to date. Plaintiffs fifth claim i.e. claim E, is for payment by Second, Third

and Fourth Defendants in their personal capacities jointly and severally the one paying the other to be absolved the sum N\$50 000 00.

The Application of the Plaintiff with the said draft intendit and the annexures thereto which included The Clara Kahan Family Trust Agreement, were placed before the Court and the Court therefore granted the Rule Nise referred to above, the return day whereof was postpone from time to time. On 20 January 2000, First and Second . Respondent (i.e. Eliane Kahan and Christopher Rayner) gave notice of intention to oppose and an affidavit by the aforesaid Eliane Kahan was filed. Therein she

contended Family Trust to the that the cause of action of which Trust is Namibia relied on byand the Master of the High Applicant didCourt of Namibia not ariseappointed the trustees in within the respect of the said Trust. jurisdiction of the High Court of Namibia and that therefore the Rule Nisi should be dismissed. In the application of the Applicants alleged that First, Second, Third, Fourth and Fifth Defendants delivered the assets of the Clara Kahan

the said Trust, the High Court would have jurisdiction to hear an action arising therefrom. If the aforesaid assets were wrongfully and unlawfully removed from The Clara Kahan Family Trust and delivered to the Clamodaniel Trust which is wrongfully and unlawfully retaining same and if such wrongful and unlawful conduct is actionable at the instance of Applicant/Plaintiff, then indeed, the cause of action arises within the jurisdiction of the High Court. Furthermore, if the said acquisition of those assets by the Clamodaniel Trust unjustifiably enriched

Furthermore First and Second Respondents who are trustees of the said Clamodaniel Trust are incolae of Namibia. Adv Oosthuizen representing First and Second Respondents

argued vigorously that there was no prima facie case in that the Applicants claim if any had been prescribed.

Prescription must be pleaded by a Defendant. It is therefore a matter for decision by the Trial Court and Applicant in his replying affidavit says that the evidence will disclose that Plaintiff could not reasonably have acquired knowledge of the circumstances giving rise to the indebtedness of the First and Second Respondents more than three years prior to the service on them of the *intendit*. Furthermore if the evidence established that

the were transferred to the Clamodaniel Clamodaniel Trust, such Trust may be transfer was not wrongful, retaining unlawful nor ultra vires.

assets to which it is not entitled, agreements, no matter what prescription there nature is, is by way of may well not be an issue. pleadings, and then evidence at the trial.

Mr Oosthuizen also presented an argument that on a proper interpretation of the Clara Kahan Family Trust Agreement if the said assets

Interpretation I am satisfied that Applicant has made out a prima facie case in this application and that the Rule Nisi issued on 15 December 1999 should be made final.

In the Application, Applicant had asked that costs of the application (unless opposed) be costs in the main action.

I am of the view that Respondents were entitled to present their case and that a fair and just order would be to make the costs, costs in the cause.

Accordingly the Order of this Court is:-

hhh) The Rule Nisi issued on 15 December 1999, the return day whereof postponed from time to time, is hereby made final

iii) The costs of this Application shall be costs in the cause.

ON BEHALF OF APPLICANT

ADV D F SMUTS

Instructed by:

Lorentz & Bone

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