REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 1192/2014

In the matter between:

JOSEPH & SNYMAN (PTY) LTD
PLAINTIFF

And

FREEDOM SQUARE (PTY) LTD **DEFENDANT**

Neutral citation: *Joseph and Snyman v Freedom Square* (I 1192-2014) [2015] NAHCMD 161 (9 July 2015)

Coram: MILLER AJ

Heard: 20 April 2015
Delivered: 9 July 2015

Flynote: Application to join two third parties to an action. Both parties are *peregrini*. No attachment made to confirm or found jurisdiction. Held that an attachment to confirm or found jurisdiction necessary before a *peregrinus* can be joined as a third party.

ORDER

That the application is dismissed with costs. These costs will include the costs of one instructing and one instructed counsel.

JUDGMENT

MILER, AJ:

[1] The plaintiff in this matter issued summons against the defendant for payment of the sum of N$ 1 246 875 together with interest on that amount at the rate of 20 percent per annum calculated from 15 February 2014 the date of payment as well as an order for the costs of the action.

[2] The plaintiff alleges that during June 2011, a certain Mr Rau acting on behalf of the defendant orally given mandated the plaintiff to procure purchasers is for certain pieces of land described as portions of Erf 7772, Windhoek.

[3] It alleges that in pursuance of the mandate it introduced the Social Security Commission to the defendant as a potential purchaser.

[4] The plaintiff alleges further that as a result of its efforts the Social Security Commission purchased Erf 8679 being a portion of Erf 7772 from the defendant for a purchase consideration of N$ 41 562 500.

[5] The plaintiff alleged that in terms of the mandate which it fulfilled, it became entitled to a commission calculated at 3 percent of the purchase price which is the amount claimed following the defendant's failure to pay the amount.

[6] In its plea the defendant in essence denies the existence of any agreement or mandate as alleged by the plaintiff.

[7] The matter took its course through the process of case management, including an unsuccessful attempt at mediation.

[8] As part of the case management procedures witness statements were filed by the plaintiff exchange in anticipation of the trial.

[9] Following the delivery of the witness statements by the plaintiff, the defendant launched an application to serve two third party notices on Redefine Properties Limited and Mr Xander Rau. The defendant contends that if any liability does arise, which is still denied, such should be the liability of Redefine Properties Ltd and Mr Rau.

[10] The plaintiff opposes the application and it is this matter that is the subject of this judgment.

[11] The basis upon which the plaintiff opposes the application is a crisp one of jurisdiction. The plaintiff states that both the intended third parties are *peregrini* based in or residing, as the case may be, in the Republic of South Africa. That fact is common cause between the parties. The plaintiff's argument continues to state that in casu there has not in respect of either of the third parties an attachment to either found or confirm the jurisdiction of this court. That is likewise not placed in issue by the defendant. In the absence of an attachment to found or confirm jurisdiction, the plaintiff contends that this court does not have jurisdiction over the third parties, despite the fact that according to the defendant the cause of action arose within this courts area of jurisdiction.

[12] The stance adopted by the defendant is that an attachment is not necessary. The defendant submits firstly that between Namibia and South Africa there has been some legislative intervention in the form of legislation providing for the reciprocal enforcement of judgments. In Namibia there is the Enforcement of Foreign Civil Judgment Act, Act 28 of 1994. In South Africa one finds the Enforcement of Civil Judgment Acts, Act 32 of 1988. In terms of these legislative provisions civil judgment from a court in Namibia can be enforced in South African and vice versa. The difficulty I have with this argument is that the relevant pieces of legislation to which I have referred, do not contain any provision either express or implied, seeking to create jurisdiction of the courts of either country over the *incolae* of the other. The legislation is directed at and deals with entirely different matters which arise past judgment.

[13] The defendants further contends that in South Africa Sections 26 and 28 of the Supreme Court Act, Act 59 of 1959 as well as its predecessor Act 27 of 1912 did away with the requirement that an attachment was necessary to confirm or found jurisdiction by a division of the Supreme Court over a person resident in another division of the court. Likewise I fail to understand how this can assist the defendant. In my view the point is devoid of merit.

[14] As a further argument the defendant argues that the third parties had consented to the jurisdiction of this court, making it unnecessary to make an attachment. I agree with counsel for the defendant that if a *peregrinus* consented to the jurisdiction of this court, such consent cannot be withdrawn and as a further consequences renders an attachment unnecessary (*Cinemark (Pty) Ltd v Transkei Hotel 1984*(2) SA 332 (W)). For this submission the defendant relies on a written agreement concluded between the defendant on the hand and Redefine Properties Ltd and United Property Management (Pty) Ltd on the other. The defendant if I understand counsel correctly states that the agreement is basis for the liability of Redefine Properties Ltd.

[15] Clause 18.2 of this agreement provide in type as follows:

'18.2. The parties hereby consent to the non-exclusive jurisdiction of the Namibian High Court for the purpose of the clause 11 or having an arbitration award made an order of court'.

[16] Clause 11 of the agreement deals with and regulates the issues of confidential information. Clause 12 deals with issues relating to breaches of the agreement.

[17] Counsel for the defendant invited me to rectify the agreement by construing the reference in clause 18.2 to clause 11 as being a reference to clause 12. Counsel argues that it would be logical to do so. The difficulty is what that may seem logical to me on the face of it and without any other facts is not by necessary implication what the parties to the agreement intended. There is the further difficulty that Mr Rau is not a party to the agreement. In *Spier Estate v Die Bergkelder Bpk and Another* 1988 (1) SA 94(C), the court confirmed the principle that it cannot permit the joinder of a party over whom it has no jurisdiction. In order to assume jurisdiction over a peregrinus I am guided and agree with the dictum in *SOS Kinderdolf International vs Effie Lentin Architects* 1992 NR 390 HC. The judgment is in any event one of a full bench of this court consisting of Levy J who wrote the judgment in which Hannah AJ and Muller AJ (as they then were) concurred. The passage I have in mind reads as follows.

[18] 'In terms of our law, a court will not have jurisdiction against a *peregrine* defendant unless the plaintiff, even though he may be an *incola*, attaches the property of the defendant either to confirm or to found jurisdiction. ' [1]

[19] This judgment being a judgment of the full bench in any event binds me even if I were to disagree with it, which I don't. In the result I make the following order:

That the application is dismissed with costs. These costs will include the costs of one instructing and one instructed counsel.

[1] At page 401 of the Judgment.

PJ MILLER

Acting Judge

APPEARANCES

PLAINTIFF:	Mr G Dicks Instructed by Dr Weder, Kauta & Hoveka inc. Windhoek
DEFENDANT:	Ms C Van Der Westhuizen Instructed by Du Plessis, Roux, De Wet & Co Windhoek

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