



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK  
RULING**

Case no: I 2527/2014

In the matter between:

**UNITED AFRICA GROUP (PTY) LTD**

**PLAINTIFF/APPLICANT**

and

**URAMIN INCORPORATED**

**1<sup>ST</sup> DEFENDANT/RESPONDENT**

**ERONGO DESALINATION**

**COMPANY (PTY) LTD**

**2<sup>ND</sup> DEFENDANT/RESPONDENT**

**URAMIN NAMIBIA (PTY) LTD**

**3<sup>RD</sup> DEFENDANT/RESPONDENT**

**AREVA MINES**

**4<sup>TH</sup> DEFENDANT/RESPONDENT**

**AREVA NC**

**5<sup>TH</sup> DEFENDANT/RESPONDENT**

**AREVA SA**

**6<sup>TH</sup> DEFENDANT/RESPONDENT**

**Neutral citation:** *United Africa Group (Pty) Ltd v Uramin Incorporated* (I 2527/2014)  
[2019] NAHCMD 123 (18 April 2019)

**Coram:** USIKU, J

**Heard on:** 18 September 2018 and 18 April 2019

**Delivered:** 18 April 2019

**Released:** 26 April 2019

**Flynote:** Jurisdiction – Attachment to found or confirm jurisdiction – *Peregrini* defendants – Plaintiff contesting existence of the claim it seeks attachment of – Plaintiff cannot approbate and reprobate – Onus on the party seeking the attachment of a claim or debt to prove, on balance of probabilities, the existence of such claim or debt – Plaintiff's application for attachment to found or confirm jurisdiction dismissed.

**Summary:** The plaintiff sought to attach certain two claims allegedly being the property of the fourth, fifth and sixth proposed defendants who are *peregrini* of this court, to found jurisdiction. In regard to the first claim the plaintiff avers that the fourth and fifth proposed defendants have instituted arbitration proceedings against the plaintiff in Geneva, Switzerland, for payments of USD 3,450,000. The plaintiff disputes that claim. The plaintiff now seeks to have the alleged claim against itself attached to found jurisdiction over the fourth and fifth proposed defendants.

As regard the second claim, the plaintiff alleges that the third defendant is indebted to the sixth proposed defendant in the amount of USD 250 000 in terms of loan agreement. The third defendant avers that it has reimbursed the alleged loan in July 2013 and it is no longer indebted to the sixth proposed defendant. The court held that the plaintiff has not established entitlement to the relief it seeks. The application for attachment to found jurisdiction dismissed.

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## ORDER

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1. The plaintiff's application for condonation of the late filing of its replying affidavit (in the main application) and answering affidavit (in the counter- application) is granted.
2. The defendants' application for condonation of the late filing of their replying affidavit (in the counter- application) is granted.

3. The “surrejoinder” affidavit filed by the plaintiff on 17 September 2018, is hereby declared to be an irregular step or proceeding within the meaning of rule 61, and is hereby set aside,
4. The plaintiff is hereby ordered to pay the defendants’ costs in respect of the rule 61 application, on the scale as between attorney and client, such costs to include the costs of one instructing and two instructed legal practitioners. It is further ordered that, in respect to the rule 61 application, the limitation placed on the costs in terms of rule 32(11) shall not apply.
5. The plaintiff’s application for attachment to found or confirm jurisdiction, as prayed for in the notice of motion, is dismissed.
6. The plaintiff is ordered to pay the defendants’ costs for opposing the application, and such costs include costs consequent upon the employment of one instructing and two instructed legal practitioners.
7. The words “*opportunistically and deceitfully*” in paragraph 60.5 of the plaintiff’s founding affidavit are struck-out from the plaintiff’s founding affidavit, with costs and such costs to include costs occasioned by employment of one instructing and two instructed legal practitioners.
8. The defendants’ counter-application is dismissed.
9. The defendants are ordered to pay the costs of plaintiff for opposing the counter-application, jointly and severally the one paying the other to be absolved, such costs to include the costs of one instructing and one instructed legal practitioner.
10. The matter is postponed to 26 June 2019 at 15:15 for status hearing.
11. The parties are directed to file a joint status report on or before the 20 June 2019.

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**RULING**

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USIKU, J:

Introduction

[1] This is an application by the plaintiff for attachment to found and confirm jurisdiction; to sue by way of *edictal citation* and for joinder. Also before the court for determination, is a counter-application launched by the first, second and third defendants for delivery by the plaintiff of a written payment guarantee from a financial institution within Namibia, to demonstrate that plaintiff is willing and able to comply with its obligation in terms of a written shoulders' agreement allegedly entered into between the parties.

[2] The application for attachment to found and confirm in jurisdiction concerns the fourth, fifth and sixth proposed defendants who are *peregrini* of this court and the plaintiff alleges that they have property within the jurisdiction and seeks an order attaching such property to found jurisdiction. The fourth, fifth and sixth respondents are not before court. I shall, therefore, refer to them herein as the "*proposed defendants*".

[3] The application for leave to sue by way of *edictal citation* relates to the required service of pleadings and documents on the proposed defendants. The application for joinder is in respect of the joining of the proposed defendants to the existing action.

[4] The plaintiff has also filed an application for condonation of the late filing of its replying affidavit in the main application, which affidavit also constitutes the answering affidavit to the defendants' counter-application. This application is not opposed. The plaintiff has explained satisfactorily the reasons for its delay. The application for condonation, therefore, stands to be granted. Similarly, the defendants have filed a

condonation application for the late filing of the replying affidavit (incorporating their answering affidavit) in the counter-application. The application is unopposed. The defendants have sufficiently explained the reasons for the delay. The defendants' application for condonation also stands to be granted.

### Background

[5] On or about 27 April 2017 the plaintiff launched an application ("the initial application") whereby it sought the joinder of the proposed defendants as additional defendants to the pending action. That application was heard by this court on 25 September 2017. In that application, the defendants opposed the application for joinder on the basis, among other things, that the court does not have jurisdiction over the proposed defendants as they are foreign entities and are therefore *peregrini* of this court. The defendants further contended that the plaintiff should have ensured that the issue of the court's jurisdiction over the proposed defendants was cleared before they could seek for the proposed defendants to be joined in the proceedings.

[6] The court delivered its judgment on 3 November 2017, in which it held, among other things, that the proposed defendants did not reside within this court's jurisdiction, nor did they have any property in this jurisdiction in terms of which the court could lawfully exercise its jurisdiction over them. The court, therefore, declined to exercise its jurisdiction over the proposed defendants.

[7] On or about the 31 January 2018, the plaintiff launched the present main application.

### The application

[8] In its application, the plaintiff prays for orders in the following terms:

1. That the Sheriff of this Honourable Court be and is hereby authorised and directed to attach the right, title and interest in and to the claim of Areva Mines SA and Areva NC

- SA that they hold against the Plaintiff in the sum of USD 3 450 000 (Three Million Four Hundred and Fifty Thousand United States Dollars) in relation to repayment of a mobilization fee paid by Areva NC to the Plaintiff;
2. That the Sheriff of this Honourable Court be and is hereby authorised and directed to attach the right, title and interest in and to the loan claim of Areva SA against the Third Defendant, Uramin Namibia (Pty) Ltd t/a Areva Resources Namibia in the sum of approximately USD 250 000 000 (Two Hundred and Fifty Million United States Dollars);
  3. That the debts so attached (or any security deposited in lieu thereof) shall be held pending the final outcome of the action and the claims sought by Plaintiff;
  4. That the attachments authorised herein shall found and confirm *ad fundandam et confirmandam* this Court's jurisdiction over the Fourth, Fifth and Sixth Respondents respectively in relation to the pending proceedings under the above case number;
  5. As to service of this application on the Fourth, Fifth and Sixth Respondents, it is respectfully submitted that service be effected through:
    - 5.1 Service of this application with annexures; scanned in digital format; alternatively in hard copy (printed) format;
    - 5.2 Service of a full set of all pleadings filed to date, scanned in digital format, alternatively in hard copy (printed) format; and further
    - 5.3 Service of all ancillary documentation before this Honourable Court provided through discovery in these proceedings to date, scanned in digital format; alternatively in hard copy (printed) format; and
    - 5.4 Alternatively that such further and/or alternative directions as the Honourable Court may deem fit, be issued; and
  6. That the Honourable Court issue and make such further directions as may be appropriate at the next status hearing for the hearing of this application.
  7. The Applicant be granted leave, (in due course on the hearing of this application, upon the hearing and service of this application on the Fourth, Fifth and Sixth Respondents, and as may be directed by the Honourable Court):
    - 7.1 to amend the Intendit (the amended particulars of claim) dated 29 June 2016 as set out in annexure "HT6"; and
    - 7.2 to cite the Fourth, Fifth and Sixth Respondents as the Fourth, Fifth and Sixth Defendants in the pending action under the above case number I2527/2014 and
    - 7.3 to effect the amendments to the papers, consequent upon such joinder;

- 7.4 to file the amended Intendit (under the amendment annexed hereto as annexure 'HT7") providing for the citation of the Fourth, Fifth and Sixth Defendants and the relief sought therein;
8. That the amended Intendit shall be served as set out above, together with all other pleadings in the pending action and in this application in English on the Fourth to Sixth Defendants:
  - 8.1 by a duly admitted and qualified legal practitioner in France, whose signature and stamp and/or seal of office on the return of service reflecting such service shall be deemed to be sufficient proof of such service; and/or
  - 8.2 alternatively, that service be authorised in accordance with the provisions of the Rules of Court, and/or as the court may direct and which service on proof thereof, shall then be deemed to be sufficient service; and
9. That service as directed by the Honourable Court, be effected on the addresses of the Fourth, Fifth and Sixth Defendants as follows, at:
  - 9.1 AREVA MINES SA: Fourth Respondent at its registered office: Tour AREVA – 1 Place Jean Miller, 92400 Courbevoie, France.
  - 9.2 AREVA NC SA: Fifth Respondent at its registered office: Tour AREVA –1 Place Jean Miller, 92400 Courbevoie, France.
  - 9.3 AREVA SA: Sixth Respondent at its registered office: 33 Rue Lafayette 75009 Paris, France
10. Upon service of papers filed in this application and/or any such further papers as may be directed by this Honourable Court, that the Fourth, Fifth and Sixth Respondents are provided with thirty court days from the date of service within which to enter appearances to defend, if any;
11. Alternatively to paragraph 10 above, and in any event further, that a rule *nisi* be issued calling upon the Fourth, Fifth and Sixth Respondents to file a notice of opposition to the relief sought herein and to appear on a date to be determined by this Honourable court to show cause why orders as prayed for in paragraphs 1 to 10, 12 and 13 should not granted;
12. An order directing that such further and/or alternative relief be granted as the Honourable Court in the circumstances may deem fit.
13. That the costs of this application on opposition, in due course be borne by the respondents so opposing the application, alternatively that an order be issued directing

that the costs of this application be costs in the main action under the above case number;'

### The counter-application

[9] The defendants opposed the plaintiff's application and launched a counter-application. In the counter-application the defendants seek relief in the following terms:

- '1. United Africa Group (Pty) Ltd ("the applicant") shall, within 30 court days as defined in the rules of court, provide the first, second and third respondents with a suitable written payment guarantee from a financial institution situated within the Republic of Namibia that it (the applicant) is willing and able to:
  - 1.1 pay in full in immediately available funds the par value of the B shares in and to Erongo Desalination Company (Pty) Ltd plus the share premium for a total purchase price of N\$ 8,133 600.00; and
  - 1.2 acquire the UAG shareholder loan for an amount up to USD 20 000,000.00;

as envisaged in clause 7.4 of the shareholders' agreement as amended (according to the applicant) by clause 11 of the amendment number 1, failing which the applicant's action instituted under case number I2527/2014 is deemed dismissed.

2. The applicant shall pay the first, second and third respondents' costs, such costs to include the costs of one instructing and two instructed legal practitioners.
3. The allegations contained in paragraph 60.4 to 60.6 and 61 of the founding affidavit are struck with costs on the scale as between legal practitioner and client, such costs to include the costs of one instructing and two instructed legal practitioners.
4. Further or alternative relief.'

### The plaintiff's case

[10] The plaintiff and the defendants executed, in December 2009, a shareholders agreement. The plaintiff claims that the defendants are, in terms of such agreement, obliged, among other things, to transfer a certain Desalination Plant (at Wlotzkasbaken, Erongo Region, Namibia,) to the second defendant. The first defendant and the plaintiff



each holds 50% of the issued shares in the second defendant. The plaintiff alleges that the defendants fail or refuse to perform their obligations in terms of the shareholders agreement. In the pending action, the plaintiff therefore, primarily, seeks specific performance under the said shareholders agreement.

[11] The plaintiff avers further that the fourth and fifth proposed defendants have instituted an arbitration claim in Geneva, Switzerland in 2016, against the plaintiff. In these arbitration proceedings, the fourth and fifth proposed defendants claim from the plaintiff payment of a “mobilization fee” in the amount of USD 3,450,000 with interest and costs, arising from a written agreement allegedly entered into between the plaintiff and the fifth proposed defendant on the 1<sup>st</sup> July 2009. The plaintiff contests liability to the fourth and fifth proposed defendants in respect of the alleged debt.

[12] The plaintiff further contends that the repayment of the “mobilization fee” is not due and payable and that the trigger for the repayment of the “mobilization fee” would only arise upon the failure of the acquisition of the desalination plant, under the shareholders agreement. The determination of the existence of this debt, the plaintiff argues, lies in the future and has not yet been finalised and that the enforceability of this claim is subject to the determination by this court whether or not the acquisition of the desalination plant process had failed.

[13] The plaintiff further asserts that the third defendant is indebted to the sixth proposed defendant in the amount of USD 250,000,000 being a loan advanced for the purpose of financing project costs in terms of the aforesaid shareholders agreement.

[14] The plaintiff, therefore, contends that:

- (a) the claim of the fourth and fifth proposed defendants against the plaintiff (an *incola*) for payment of USD 3,450,000 plus interest, being a claim of a *peregrini* for a debt (“albeit contested”), and,
- (b) the claim of the sixth proposed defendant against the third defendant (an *incola*) for payment of USD USD 250,000,000;

are attachable as set out in the Notice of Motion, and be attached to found and/or confirm jurisdiction.

The defendants' case

[15] The defendants raised a *point in limine* that the application for joinder by the plaintiff was lodged previously, on the 27 April 2017 and was dismissed by this court on 03 November 2017. The parties in the initial joinder application are the same parties in the present joinder application. The order pertaining to the initial application was final. The joinder application is *res judicata* and the plaintiff is estopped from the relief sought on the basis of *issue estoppel*. As a result, the defendants argue, the application should be dismissed on this point alone.

[16] As regards the application to found or confirm jurisdiction, the defendants contend that the plaintiff, on its own version, disputes the debt in the amount of USD 3,450,000, which the fourth and fifth proposed defendants claim against the plaintiff. A disputed debt cannot be attached and is not attachable. The defendants submit that the plaintiff cannot approbate and reprobate at the same time.

[17] In regard to the second alleged debt in the amount of USD 250,000,000 in respect of a loan due by the third defendant to the sixth proposed defendant, the defendants maintain that the third defendant has, in July 2013, fully reimbursed the loan to the sixth proposed defendant and that the third defendant is no longer indebted to the sixth proposed defendant. No other funds or loan were made available by any other party.

[18] In their counter-application, the defendants assert that they believe that the plaintiff will not be able to make payment in respect of its obligations in terms of the shareholders agreement, in the unlikely event that the plaintiff succeeds in the pending action. The defendants contend that the plaintiff must demonstrate to the court that it is able and willing to comply with its obligations in terms of the alleged shareholders agreement.

[19] The plaintiff on the other hand, submits that the defendants are not entitled to any payment guarantee, because the guarantee is dependent on the performance by the defendants in respect of their obligations in terms of the shareholders agreement

[20] In response to the plaintiff's founding affidavit, the defendants have applied for the striking-out of paragraphs 60.4 to 60.6 and 61 on the ground that the allegations contained therein are scandalous, vexatious and/or irrelevant. The defendants also alleged that they will be prejudiced in their case if such allegations are not struck-out.

[21] The plaintiff resisted the application to strike-out on the ground that the allegations in question lie at the root of the disputes between the parties and the defendants failed to address the allegations to show that they are incorrectly founded or otherwise unsustainable.

#### The defendant's rule 61 application

[22] On the 17 September 2018, a day before the hearing of the main interlocutory application and the counter application, the plaintiff filed a "surrejoinder" to the defendants' replying affidavit. Thereafter, the defendants filed a rule 61 application on 02 October 2018, seeking to set aside the aforesaid "surrejoinder" affidavit, on the ground that it amounted to an irregular step or proceeding within the meaning of rule 61.

[23] The chronology of papers filed and events occurring, insofar as is relevant to the rule 61 application are as follows:

- a) the plaintiff filed the application for attachment to found and confirm jurisdiction, to sue by way of edictal citation and for joinder of additional defendants on 31 January 2018;
- b) On the 08 March 2018, the defendants filed a notice of intention to oppose the above application;

- c) On 27 April 2018, the defendants filed a counter-application, accompanied by an affidavit which constitutes a founding affidavit to the counter application and also as an answering affidavit to the plaintiff's application referred to above;
- d) On the 10 August 2018, the plaintiff filed a replying affidavit, which constitutes plaintiff's answering affidavit to the defendants' counter application;
- e) On 24 August 2018, the defendants filed a replying affidavit, which constitutes a replying affidavit to the counter application (and as founding affidavit to a condonation application for the late filing of the replying affidavit);
- f) The plaintiff filed its heads of argument on 05 September 2018;
- g) The defendants filed their heads of argument on 11 September 2018;
- h) On the 17 September 2018, the plaintiff filed the "surrejoinder" to the defendants' replying affidavit;
- i) The hearing of the plaintiff's application and the defendants' counter application took place on the 18 September 2018 at 09:00, and the matter was postponed to 07 December 2018 for ruling;
- j) On 02 October 2018, the defendants filed a notice in terms of rule 61 in respect of the filing by the plaintiff of the aforesaid "surrejoinder" affidavit;
- k) On the 11 October 2018, the plaintiff filed a notice of intention to oppose the defendants' rule 61 notice;
- l) On the 20 November 2018, the court gave directions regarding the hearing of the rule 61 application initiated by the defendants, in the following terms:

'Having heard **Mr. Kenny**, counsel for the Plaintiff and **Adv. De Jager**, counsel for the Defendant(s) and having read the documents filed of record in chambers:

**IT IS RECORDED THAT:**

The Defendant(s) has filed a Rule 61 application, after the hearing which was held on 18 September 2018. The Plaintiff has opposed the Rule 61 application. The parties pray that the Rule 61 application be heard before the court delivers the ruling in respect of the hearing held on 18 September 2018.

**IT IS ORDERED THAT:**

1. The ruling in respect of the hearing held on 18 September 2018, which was scheduled to be delivered on 07 December 2018, shall stand over until after the hearing of the Rule 61 application;
  2. The Plaintiff is directed to indicate, on or before the 03 December 2018, whether or not it shall continue its opposition to the Rule 61 application;
  3. Should the Plaintiff continue with its opposition to the Rule 61 application, then the Rule 61 application shall be heard on 18 April 2019 at 09:00;
  4. Should the Plaintiff indicate on or before 03 December 2018 that it shall abandon its opposition to the Rule 61 application, then the Plaintiff shall remove the cause of complaint raised in the Rule 61 application, in which event the Defendant(s) shall withdraw the Rule 61 application;
  5. In the event of the withdrawal of the Rule 61 application, as set out in order 4 above, then the Ruling previously scheduled for 07 December 2018, shall be delivered on 18 April 2019 and 09:00;
  6. In the event of the Plaintiff not abandoning its opposition to the Rule 61 application, then:
    - a) The Defendant(s) shall file its heads of argument on or before 11 April 2019
    - b) The Plaintiff shall file its heads of argument on or before 15 April 2019;
  7. The matter is postponed to 18 April 2019 at 09:00 for Ruling contemplated in order 5 above or hearing of the Rule 61 application.'
- m) By status report filed on 03 December 2018, the plaintiff confirmed that it shall proceed with its opposition to the defendant's rule 61 application. In its status report, the plaintiff indicated, among other things that it seeks directions from the managing judge, in respect of its intended application(s):
- (i) to set aside or strike out the defendants' notice in terms of rule 61;
  - (ii) for condonation in respect of the service and filing of the plaintiff's surrejoinder affidavit, filed by the plaintiff on 17 September 2018.

n) On the 6 December 2018, the defendants filed a status report in which they objected to the directions sought by the plaintiff (as summarised above) on the ground, among other things, that the plaintiff's main interlocutory application and the defendants' counter-application have already been heard, and that the only issues standing for hearing and determination is the defendants' rule 61 application in respect of which directions were already given on 20 November 2018. The hearing of the defendants' rule 61 application is set down for the 18 April 2019.

o) On the 11 April 2019, the defendants filed their heads of argument in respect of their rule 61 application.

p) The plaintiff filed its heads of argument on the 15 April 2019. The plaintiff argues, inter alia, that the defendants' rule 61 application ought to have been brought on notice of motion, supported by affidavit. The defendants failed to file a supporting affidavit to their rule 61 (2) application. Therefore, the plaintiff argues, the defendants' rule 61 (2) notice must be struck from the roll on that account.

[24] The defendants argue, among other things, that:

- (a) they only became aware of the filing of the purported surrejoinder affidavit on 18 September 2018, after the main interlocutory application and the counter-application were heard in court earlier that day;
- (b) they approached the plaintiff in terms of rule 32(9) in an attempt to resolve the issue amicably, but without success;
- (c) the rules of court do not provide for surrejoinder affidavits over and above the affidavits provided for in the rules of court;
- (d) the surrejoinder affidavit was filed without leave of the court;
- (e) the surrejoinder affidavit was filed a day before the hearing of the main interlocutory application and the counter-application;

(f) the purported surrejoinder affidavit amounts to an irregular step or proceeding as envisaged in rule 61;

### Analysis

[25] In respect of the directions that the plaintiff sought, as referred to hereinbefore, I am of the view that the plaintiff's request should not be granted in the circumstances. The court has already granted directions on 20 November 2018 in respect of the speedy finalisation of the defendants' rule 61 application. The defendants' rule 61 application is pending and must be determined first, and the plaintiff may seek further directions thereafter, if so inclined.

[26] The relevant authorities are clear that when a litigant wishes to file affidavits, additional to those provided for in the rules, such litigant must make a formal application for leave to do so. Such litigant cannot simply file such additional affidavit, as the plaintiff did in the present case. The filing of an additional affidavit as in the present matter, prejudices the defendants as they are not afforded opportunity to meet a case arising from the "surrejoinder" papers. The plaintiff has not furnished acceptable reasons why it was necessary for it to furnish an additional affidavit or why the court should exercise its discretion in favour of allowing a further affidavit in the circumstances.

[27] As regards the plaintiff's contention that the defendants' rule 61 notice ought to have been on notice of motion accompanied by an affidavit, there is plenty of authority to the effect that a notice in terms of rule 61 does not require to be supported by an affidavit.<sup>1</sup> All that rule 61(2) requires is that the notice must specify the particulars of

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<sup>1</sup> See *Louw v Khomas Regional Council* (A164/2015) [2015] NAHCMD 187 (10 August 2015) at para.6.; *Chelsea Estates and Contractors CC v Speed -O- Rama* 1993(1) SA 198 E at 202 E-F; *Scott and Another v Ninza* 1999 (4) SA 820 (E) at 823 A-D.

the irregularities or impropriety complained of. The rule 61 (2) notice is analogous to an exception and does not require any form of reply. The argument by the plaintiff to the effect that the defendants' rule 61 (2) notice is defective, must therefore be rejected.

[28] For the foregoing reasons, I am of the view that the "surrejoinder" affidavit filed on 17 September 2018 by the plaintiff falls to set aside as an irregular step or proceeding.

[29] In regard to costs of the rule 61 application, I am of the view that, on the facts of this case, the plaintiff was not entitled to persist in proceeding to oppose the rule 61 application, in the face of the clear overtures by the defendants in terms of rule 32 (9) and in the light that the rules of court clearly do not provide for filing of "surrejoinder" affidavits.

[30] For the above reason, I am of the view that the matter justifies the granting of costs against the plaintiff on the scale as between attorney and own client, and for such costs to include costs of one instructing and two instructed counsel. Furthermore, and for the same reason I will direct that, in respect of the defendants' application in terms of rule 61, the limitation placed on the costs in terms of rule 32(11) shall not apply.

#### Legal principles

[31] To succeed in an application for attachment to found jurisdiction, the plaintiff must satisfy the following requirements, namely that:

- (a) the plaintiff is an *incola* and the proposed defendants are *peregrini*;
- (b) the plaintiff has a *prima facie* cause of action;
- (c) the property to be attached belongs to the proposed defendant(s)<sup>2</sup>

[32] The requirement of a *prima facie* cause of action, in relation to an attachment to found jurisdiction, is satisfied where there is evidence which, if accepted, will show a

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<sup>2</sup> *Labuschagne v Gaerdes* A 63/2014 [2014] NAHCMD 277 (22 September 2014) para 21.



cause of action. The mere fact that such evidence is contradicted would not disentitle the plaintiff to the remedy. Even where the probabilities are against the plaintiff, the requirement would still be satisfied. It is only where it is quite clear that the plaintiff has no action or cannot succeed, that an attachment should be refused.<sup>3</sup>

[33] The purpose of an attachment to found jurisdiction is to enable the court to pronounce a judgment which will not be void of result.<sup>4</sup> The effect of attaching the property is to preserve it until after judgment so that execution can be levied thereon.<sup>5</sup>

[34] The onus is on the plaintiff to establish, on the balance of probabilities, that the proposed defendant(s) is/are the owner(s) or has/have some other attachable interest in the property in question.<sup>6</sup> Should there be a dispute of fact on any issue e.g ownership of the property to be attached, the test to be applied is the well-known rule laid down in *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd 1957(4) SA 234 at 235 E.G and refined in Plasco – Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623A at 634G – 635G.*<sup>7</sup>

#### Application of the legal principles to the facts

[35] It seems to me that it is preferable, in the circumstances of this case, to deal first with the issue of jurisdiction, because unless the court has jurisdiction over the proposed defendants, the court may not grant any of the orders prayed for in relation to them.

[36] It is common cause that the plaintiff is an *incola* and that the proposed defendants are *peregrini*.

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<sup>3</sup> *Bradbury Gretorex Co Ltd v Standard Trading Co Pty Ltd 1953 (3) SA 529 at 533D.*

<sup>4</sup> *Thermo Radiant Oven Sales Pty Ltd v Nelspruit Bakeries Pty Ltd 1969 (2) SA 295 at 310 H.*

<sup>5</sup> *Ibid* at p.306 F

<sup>6</sup> *Labuschagne v Gaerdes* para 48.

<sup>7</sup> *Labuschagne v Gaerdes* para 49.

[37] In regard to the issue of whether the plaintiff has established a prima facie cause of action against the proposed defendants, in relation to the attachment to found jurisdiction, I am satisfied that the plaintiff has put forth evidence which, if accepted, will show a cause of action.

[38] I now come to the issue of whether the plaintiff has shown that the property sought to be attached exists or is the property of the proposed defendant(s).

[39] Insofar as the debt in the amount of USD 3,450, 000.00 is concerned, on the plaintiff's own version, the plaintiff contests the existence of this debt. The issue then is, whether the plaintiff may attach a claim which it contends is unfounded.

[40] In the matter of *Thermo Radiant Oven Sales (Pty) Ltd* at 302C, the court observed that where it is implicit in the plaintiff's action that the defendant's claim which is sought to be attached does not exist at all, then the court should decline to permit the plaintiff to approbate and reprobate, and should decline to authorize the attachment.

[41] I am in agreement with the sentiments expressed in the matter of *Thermo Radiant Oven Sales (Pty) Ltd* cited above. The attachment of the USD 3,450,000 sought in respect of a claim which the fourth and fifth proposed defendants allegedly hold against the plaintiff therefore stands to be declined.

[42] As regards the debt in the amount of USD 250,000,000 in respect of a loan allegedly due by the third defendant to the sixth proposed defendant, there is evidence given by the defendants that such debt has been repaid in full, in July 2013. The plaintiff denies the repayment of the debt without establishing a foundation upon which such denial is based. The plaintiff bears the onus to show that the alleged debt exists. I am of the opinion that the plaintiff has not discharged such onus. The application to attach the alleged debt of USD 250,000,000.00 must, therefore, also fail.

Defendants' application to strike-out

[43] In terms of *rule 58*, the court may, on application, order to be struck-out from any affidavit any matter which is irrelevant, scandalous or vexatious. The court may not grant the relief sought unless it is satisfied that the applicant will be prejudiced in their case if the relief is not granted.

[44] I now turn to consider the relevant paragraphs in the plaintiff's founding affidavit to which the defendants have objected. The relevant paragraphs read as follows: (I underline certain words in the quotation to facilitate adjudication below of the application to strike-out):

'60. At all times material to the establishment of the Desalination Plant, the Organs of State, representing the Government of Namibia, had required that the AREVA Group take in a Namibian joint venture partner:

.....

60.4 When the demand for uranium crashed, the Sixth Respondent's AREVA Group suffered financial losses, which are continuing today. It now appears that, after the Fukushima Daiichi nuclear disaster in 2011 (when the Shareholders' Agreement was still being performed), the First Defendant and Sixth Respondent (the AREVA Group) had clearly lost its commitment to honestly continue to perform the Shareholders' Agreement.

60.5 Instead of performing under the shareholders' Agreement through the First Defendant, the AREVA Group sought to opportunistically and deceitfully sell the Desalination Plant to the Namibia Government.

60.6 From these proceedings it is clear that the Respondents will do and/or say anything on record to avoid their obligations under the Shareholders' Agreement, and not to transfer the Desalination Plant to the control of the Second Defendant.

61. It is submitted with respect that the Plaintiff ought to be empowered by this Honourable Court to duly represent the participation of Namibian persons in the Desalination Plant as the 50% Namibian shareholder of the Second Defendant, in control of the Desalination Plant.'

[45] Insofar as paragraph 60.4 is concerned, I see no basis for the objection. In my view the plaintiff comments on what they believe to have prompted the defendants to

display certain conduct towards the agreement in question. Such remarks, in my view, fall short of casting the financial position of the defendants in a negative light. They also fall short of alleging dishonesty on the part of the defendants' conduct towards the agreement, whose validity the defendants question any way.

[46] In regard to paragraph 60.5, I am of the opinion that the allegations of "*opportunism*" and "*deceit*" on the defendants (as part of the Areva Group) are, in their nature, serious and prejudicial. In my view, a party in the plaintiff's position could well present factual evidence under oath without attaching labels of "*deceit*" or "*opportunism*". What may appear at first sight to be "*deceitful*" or "*opportunism*" may well turn out to be the opposite when the other side of the case is heard. It is therefore preferable, in the circumstances as these, to leave it to the court to pronounce itself on the inferences to be drawn from certain displayed conduct, after all the facts have been considered.

[47] I, therefore, rule that the words "*opportunistically and deceitfully*" in paragraph 60.5 of the plaintiff's founding affidavit are scandalous, vexatious and or irrelevant comments about the defendants and should be struck-out from the plaintiff's founding affidavit.

[48] In regard to paragraph 60.6 and 61 of the plaintiff's founding affidavit, I am of the view that there is no basis for objections thereto. I do not see any prejudice befalling the defendant in the conduct of their case if the relief they seek is not granted. Furthermore, the defendants have not pointed out the nature of the prejudice they are likely to suffer, if the relief they seek is not granted. I will therefore not strike-out paragraphs 60.6 and 61.

[49] Insofar as costs in relation to the application to strike out are concerned, I am not satisfied that costs on the scale as between legal practitioner and client are justified in the circumstances. I would therefore grant costs at the ordinary scale and that such costs are to include costs of one instructing and two instructed counsel.

### Defendants' counter-application

[50] In their counter application, the defendants pray that the plaintiff be ordered to furnish a written payment guarantee in respect of certain amounts specified in the alleged shareholders agreement. The defendants deny the existence of a valid shareholders agreement alleged by the plaintiff. The defendants further deny the existence of a valid share-purchase agreement alleged by the plaintiff.

[51] It appears that the counter-application is founded upon the defendants' belief that the plaintiff would, in any event, not be in position to honour its obligations in terms of the alleged shareholders agreement, should the plaintiff succeed in its action. On the basis of such belief, it appears, the defendants want the plaintiff to demonstrate "to the court" that it is capable of complying with its obligations. The defendants do not go as far as asserting that the demonstration of such capability would bring the disputed agreement(s) between the parties to life.

[52] I am of the opinion that the defendants have not shown that they are entitled to the relief they seek in the counter-application and the counter-application, therefore, stands to be dismissed for that reason.

### Conclusions

[53] Due to the conclusion I have reached, to the effect that the plaintiff has not established that the proposed defendants have attachable claims within the court's jurisdiction, and that this court, therefore, does not have jurisdiction over the proposed defendants, it is not necessary to deal with other aspects of the plaintiff's application, including joinder and the issue of *res judicata*.

[54] In the premises, I make the following order:

1. The plaintiff's application for condonation of the late filing of its replying affidavit (in the main application) and answering affidavit (in the counter-application) is granted.
2. The defendants' application for condonation of the late filing of their replying affidavit (in the counter-application) is granted.
3. The "surrejoinder" affidavit filed by the plaintiff on 17 September 2018, is hereby declared to be an irregular step or proceeding within the meaning of rule 61, and is hereby set aside,
4. The plaintiff is hereby ordered to pay the defendants' costs in respect of the rule 61 application, on the scale as between attorney and client, such costs to include the costs of one instructing and two instructed legal practitioners. It is further ordered that, in respect to the rule 61 application, the limitation placed on the costs in terms of rule 32(11) shall not apply.
5. The plaintiff's application for attachment to found or confirm jurisdiction, as prayed for in the notice of motion, is dismissed.
6. The plaintiff is ordered to pay the defendants' costs for opposing the application, and such costs include costs consequent upon the employment of one instructing and two instructed legal practitioners.
7. The words "*opportunistically and deceitfully*" in paragraph 60.5 of the plaintiff's founding affidavit are struck-out from the plaintiff's founding affidavit, with costs and such costs to include costs occasioned by employment of one instructing and two instructed legal practitioners.
8. The defendants' counter-application is dismissed.

9. The defendants are ordered to pay the costs of plaintiff for opposing the counter-application, jointly and severally the one paying the other to be absolved, such costs to include the costs of one instructing and one instructed legal practitioner.
10. The matter is postponed to 26 June 2019 at 15:15 for status hearing.
11. The parties are directed to file a joint status report on or before the 20 June 2019.

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B Usiku  
Judge

## APPEARANCES

PLAINTIFF: A P Möller  
Instructed by Theunissen, Louw and Partners,  
Windhoek

1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> DEFENDANTS: R Heathcote (SC) (Assisted by Ms De Jager)  
Instructed by Francois Erasmus and Partners,  
Windhoek