

SOUTH AFRICA / JUDGMENT

Burger v Rand Water Board and Another (392/05) [2006] ZASCA 150; 2007 (1) SA 30 (SCA) (20 September 2006)

[2006] ZASCA 150

COURT

Supreme Court of Appeal

BEFORE

Brand, Mlambo, Combrinck

CASE / FILE NUMBER

392/05

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THE

SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No: 392/05

REPORTABLE

In the matter between:

IZAK JOHANNES BURGER
APPELLANT

v

RAND WATER BOARD
FIRST RESPONDENT
CLUB TWELVE (aka KLUB
12) SECOND RESPONDENT
Coram: Brand, Mlambo JJA
and Combrinck AJA

Heard: 21 August 2006

Delivered: 20 September
2006

Summary: Procedure – special
plea of non-joinder insisting that individual members of second
respondent be joined – exception
against special plea upheld on
the basis that situation catered for by the provisions of court rule
14.

Neutral citation: This case may be
cited as Burger v Rand Water Board [2006] SCA 104 (RSA)

JUDGMENT

BRAND and MLAMBO JJA/

BRAND and MLAMBO JJA:

- [1] First respondent (plaintiff in the court a quo) instituted action in the Free State High Court. It sought an order directing appellant (first defendant in the court a quo) to demolish certain habitable and other structures (the structures) erected on his land, situated on the banks of the Vaal River, on the Free State side, in the district of Heilbron (the property). First respondent joined second respondent (second defendant in the court a quo), an association known as Club Twelve (Club Twelve) in the suit. Though no relief is sought against Club Twelve, its joinder, purely for any interest it may have in the matter, is pivotal in this appeal. The basis of first respondent's suit is that after 6 August 1982 the appellant erected the structures below a flood control line without obtaining its written consent as required by a Regional Structure Plan devised in terms of the Physical Planning Act, Act No 125 of 1991.
- [2] The appellant raised a special plea based on the non joinder of the members of Club Twelve alleging that they were the owners of the structures sought to be demolished and that as such they had a direct and substantial interest in the outcome of the action. First respondent belatedly excepted to the special plea on two bases:
- (a) that it lacked averments necessary to sustain a defence in that the appellant sought the joinder of persons that he was unable to identify, whom first respondent could not identify and whom appellant did not allege first respondent could identify; and (b) that having joined Club Twelve there was no requirement in law to also join its individual members.
- [3] The matter came before Kruger J who condoned the late filing of the exception and went on to uphold it. The learned Judge then struck the special plea out with costs inclusive of the costs of two counsel. His underlying reasoning was that the members of Club Twelve derived their rights to the structures by virtue of their membership of Club Twelve and that as such they were in no better category than sub-lessees. He further found that the interest of the members in the proceedings was not adverse to that of Club Twelve thus rendering it unnecessary to join them. This appeal, with leave from this court, is directed at those

orders.

- [4] At the outset consideration must be given to the special plea, as it stands, it being the pleading successfully excepted to. *Salzman v Holmes* 1914 AD 152 at 156; *Lewis v Oneatte (Pty) Ltd and another* [1992] ZASCA 174; 1992 (4) SA 811 (AD) at 817F-G; *Wellington Court Shareblock v Johannesburg City Council*; *Agar Properties (Pty) Ltd v Johannesburg City Council* 1995 (3) SA 827 (AD) at 833E and *Minister of Safety and Security and another v Hamilton* 2001 (3) SA 50 (SCA) at 52G-H.

[5] The case made out in the special plea is that on dates before 6 August 1982 the appellant and individual members of Club Twelve at the time, concluded individual oral agreements with the following material terms:

5.1 Each member acquired the right to erect, own and occupy a habitable or other structure on that portion of appellant's property leased by the latter to Club Twelve;

5.2 appellant accorded these rights only to persons who were or became members of Club Twelve;

5.3 any member of Club Twelve who acquired these rights was entitled to transfer his/her rights to any person who became a member of Club Twelve;

5.4 any member or successor in title held these rights for as long as a lease concluded between appellant and Club Twelve remained in force and that on termination of the lease members were entitled to remove their structures;

5.5 on the basis of their individual agreements with appellant members of Club Twelve erected the structures on appellant's property.

[6] The names of the original members with whom appellant concluded individual oral agreements are set out in the special plea coupled with an allegation that save for two of them, appellant is unaware of the identities of the successors in title of the other members. The special plea concludes with a contention that on the strength of the rights acquired by the original members and their successors in title to the structures, current members are the owners of the structures sought to be demolished and that as such they have a direct and substantial interest in the issues to be determined in the action.

[7] The right to demand joinder is limited to specified categories of parties such as joint owners, joint contractors and partners and where the other party(s) has a direct and substantial interest in the issues involved and the order which the court might make. In *Kock & Schmidt v Alma Modehuis (Edms) Bpk* 1959 (3) SA 308 (A) Steyn CJ stated at 318E-F:

‘So ‘n verpligting tot voeging is erken by gesamentlike eienaars, gesamentlike kontrakterende partye en vennote, op grond van gesamentlike vermoënsbelang (*Morgan and another v. Salisbury Municipality*, 1935 A.D.

167) en ook waar die betrokke party ‘n direkte en wesenlike belang het by die uitslag van die geding (*Collin*

v. *Toffie*, 1944 A.D. 456 op bl. 464; *Home Sites (Pty.) Ltd. v. Senekal*, 1948 (3) S.A. 514 (A.D.) op bl. 521). In die algemeen genome moet die beswaar van nie-voeging binne die bestek van genoemde kategorieë gebring kan word, want die reg om so ‘n beswaar te opper is in ons regspraktyk ‘n heel beperkte (*Sheshe v. Vereeniging Municipality*, 1951 (3) S.A. 661 (A.D.) op bl. 666).’

See also *United Watch & Diamond Co v Disa Hotels* 1972 (4) SA 409 (CPD) at 415E-F.

- [8] In the present context the succinct question is thus, whether the individual members of the club can be said to have ‘a direct and substantial interest’ in the outcome of the proceedings. As indicated, the court a quo’s conclusion that they had not, was based on the analogy drawn between their position and that of a sub-tenant. We find ourselves in agreement with the court a quo’s conclusion as to what the outcome of the matter should be. But we cannot agree with its underlying reasoning that, on a proper construction of the special plea, the position of the individual members of Club Twelve is no different from that of a sub-tenant and that, in consequence, the members have no direct and substantial interest in the outcome of the proceedings.
- [9] From the history of the proceedings between the parties, one’s distinct impression is that the purpose of the special plea is to cause frustration and delay. Nevertheless, because the first respondent chose to follow the exception route, we must decide the matter on the facts set out in the special plea. According to those facts, the members of Club Twelve, inter alia, became the owners of the structures that first respondent seeks to demolish. As explained by Corbett J in *United Watch & Diamond Co v Disa Hotels Ltd* supra 417B-C, the reason why a sub-tenant is said not to have the required interest in ejectment proceedings, is because his right of occupation is a derivative one. It is entirely dependent on the tenant’s right of occupation. We do not think the same can be said of the members of Club Twelve. The right of ownership of the structures allegedly held by the individual members of the club cannot, in our view, be described as derivative. What is more, we do not believe that an owner’s interest in his property can in the present context be said to be anything but direct and substantial. Unlike in the case of a sub-tenant where there is no privity of contract between him and the landlord, in this matter the contract to erect and retain ownership of the structures is alleged to be directly between the owner and the members of the club. Broadly stated our view is thus that, unless the situation is met by the provisions of rule 14 of the Uniform Rules of Court, the exception against the special plea should not have succeeded.
- [10] For present purposes the key provision of rule 14 is that an entity, described as an ‘association’ can be cited as plaintiff or defendant in its own name. ‘Association’ is then defined in the rule itself as ‘any unincorporated body of persons, not being a partnership’. It is common cause on the pleadings that Club Twelve is indeed an association as defined.
- [11] Prior to the introduction of rule 14, the citation of unincorporated associations of natural persons presented difficulty. In essence, each individual member of the association had to be joined and cited by name. If not, the summons would fall foul of the non-joinder rule (see eg *Sliom v Wallach’s Printing and Publishing Co Ltd* 1925 TPD 650 at 655). The purpose of the rule is therefore to simplify procedure by avoiding technical defences of non-joinder. After all, as is the situation in the present case, on the facts pleaded, the plaintiff may not even know who the individual members of the association are. At the same time, as Harms JA said in *D F Scott (EP)(Pty) Ltd v Golden Valley Supermarket* 2002 (6) SA 297 (SCA) 301H-J, the rule does not turn an association into a juristic person and it has no impact on substantive rights at all.

- [12] Therefore, if we find that rule 14 applies in this case, we do not suggest that it will make any inroad into the substantive rights of the members of Club Twelve. If for example, the individual members are in fact the owners of the structures involved, they will retain those rights. The only effect of such finding will be that the appellant will be able to avoid the citation of all the individual members whose names are to it unknown. Otherwise stated, the members of Club Twelve will be regarded as if they had been cited individually by name which would, of course, provide a conclusive answer to the appellants' special plea.
- [13] The pivotal question is thus whether it can be said that rule 14 applies. That depends, in our view, on whether the members' rights that may potentially be affected by the court order sought, including their rights of ownership over the structures, are held by virtue of their membership of the club. On the facts pleaded in the special plea their rights can, in our view, be so described. According to these facts (as set out in para 5 above) members' rights to the structures are so intertwined with their membership, that the two simply cannot have a separate existence. No-one, so it is said, can erect and own a structure on the appellant's property without being a member of Club Twelve. If someone acquires a structure from a member, the purchaser must first become a member before he can acquire ownership while, conversely, the seller immediately ceases to be so. In short, membership of Club Twelve is the only gateway through which individual members can attain any rights in the structures.
- [14] According to the first respondent's particulars of claim, Club Twelve is joined for any interest it may have in the matter. On the facts pleaded such interest can consist of nothing else but the aggregate of the interests of the individual members of the club in the outcome of the case. It follows that, in our view, this is precisely the type of case for which rule 14 was designed and that the rule therefore allowed the first respondent to cite Club Twelve in lieu of its individual members.
- [15] Consequently the appeal is dismissed with costs, including the costs of two counsel.

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F D J BRAND and D MLAMBO

JUDGES OF APPEAL

Concur:

COMBRINCK AJA

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