

SOUTH AFRICA / JUDGMENT

Frederik v Properties 4 All CC and others (CIV APP FB 02/2021) [2021] ZANWHC 27 (19 August 2021)

[2021] ZANWHC 27

COURT

North West High Court, Mafikeng

BEFORE

Hendricks, Petersen, Snyman

CASE / FILE NUMBER

CIV APP FB 02/2021

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IN

THE NORTH WEST HIGH COURT, MAFIKENG

CASE

NO: CIV APP FB 02/2021

Reportable:	YES / NO Circulate
to Judges:	YES / NO Circulate to Magistrates: YES / NO Circulate
to Regional Magistrates:	YES / NO In
the matter between:	COETZER WILLEM FREDERIK Appellant and PROPERTIES 4 ALL CC 1st Respondent NOVEL PROPERTIES (PTY) LTD 2nd Respondent MAGDA

LE
ROUX
3rd
Respondent
HENDRIK
LOUWRENS
JACOBS
4th
Respondent
ADREANA
ALETTA
JACOBS
5th
Respondent
CORUM: HENDRICKS DJP
et PETERSEN J et SNYMAN J
DATE
OF HEARING
:
23 JULY 2021
DATE
OF JUDGMENT
:
19 AUGUST 2021
FOR
THE APPELLANT
:
ADV. VERSTER
FOR
THE RESPONDENT
:
ADV. BREDENKAMP SC

Delivered:

This judgment was handed down electronically by circulation to the parties' representatives via email. The date and time for hand-down is deemed to be 10h00 on 19 August 2021.

ORDER

(i)

The appeal is upheld.

(ii)

The order of the court a quo dated 07 May 2020 is set aside.

(iii)

The matter is remitted to the court a quo for the joinder of PayProp and the landlords as well as the determination of

all other outstanding disputes.

(iv)

The respondents

are ordered to pay the costs of the appeal including the costs of the application for leave to appeal, jointly and

severally the one paying

the other to be absolved. Such costs to be taxed on a party-and-party basis.

JUDGMENT

HENDRICKS DJP

Introduction

- [1] Mr. Willem Frederik Coetzer (appellant) and Ms. Magda Le Roux (3rd respondent) each hold 50% shares in Properties 4 All CC (1st respondent), a close corporation conducting business in the property market in the Potchefstroom area, in the North West Province. Novel Properties (Pty) Ltd (2nd respondent) is likewise a company conducting business in the property market also predominantly in the Potchefstroom area. Mr. Hendricks Louwrens Jacobs (4th respondent) and Andrea Aletta Jacobs (5th respondent) are married and were both employed by the 1st respondent. The 3rd and 4th respondents are both directors and shareholders in the 2nd respondent, following the 4th respondent's resignation from the 1st respondent on 20th June 2019. The 5th respondent now also works for the 2nd respondent. The appellant contends that the 3rd respondent is in breach of her fiduciary duty towards the 1st respondent because of her involvement in the business of the 2nd respondent, which is a competitor of the 1st respondent.
- [2] The 5th respondent whilst employed by the 1st respondent as an administrator, was further responsible for loading payments onto the PayProp system, which is a bookkeeping system. This system is linked to the 1st respondent's trust account which the 5th respondent similarly operated on. The 5th respondent allegedly transferred money from the 1st respondent to the 2nd respondent. This includes money that was paid by tenants as security deposits and rentals due in respect of leases. This prompted the appellant, as 50% shareholder in the 1st respondent, to launch an application to court for interdictory relief and repayment of certain amounts of money to the 1st respondent. In addition, relief was sought that the 3rd respondent be declared to be in breach of her fiduciary duties towards the 1st respondent and be declared a delinquent director.

The finding of the court a quo

- [3] The application which served before the court a quo was opposed by the respondents. In the court a quo, a point in limine was raised, inter alia, about the non-joinder of PayProp and the landlords whose monies are kept in the trust account. The court a quo adjudicated the point raised in limine and upheld it. The application was resultantly dismissed with costs.

An application for leave to appeal was successfully brought and this appeal is consequently with leave having been granted by the court a quo. This Court, as court of appeal, needs to determine whether the court a quo was correct in upholding the point in limine of non-joinder and to dismiss the application on that basis. It is also called upon to determine all the issues and disputes raised by the respective parties in the interest of justice and for a speedy resolution of the said disputes.

- [4] The court a quo in dealing with this issue stated that the appellant (as applicant) is seeking an order for repayment into the 1st respondent's trust account of the cash deposits and rental payments that were made to the 1st respondent. PayProp were to be instructed to effect such payments as it administers the trust accounts of both the 1st and 2nd respondents in respect of the deposits and rentals made on behalf of their respective clients and knows in whose favour each payment is made and when it was made. This was found to be crucial by the court a quo. If PayProp is not before court, no such order can be made for it to comply with. The joinder of PayProp to these proceedings were found to be not one of convenience but necessity. The 2nd to the 5th respondents cannot be ordered to make the payment without joining PayProp in this matter. The same applies to the landlords who gave the mandates as to which company (1st or 2nd respondent) must administer their leases. They have a financial interest in the matter and their non-joinder is fatal to the applicant's case and cannot be sustained. These are, inter alia, the reasons advanced by the court a quo for the order granted.

The law applicable to joinder

- [5] In the matter of Judicial Service Commission v Cape Bar Council 2013 (1) SA 170 (SCA), relied on by the court a quo the following is stated:

"[12] It has by now become settled law that the joinder of a party is only required as a matter of necessity – as opposed to a matter of convenience – if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned (see eg Bowring NO v Vrededorp Properties CC 2007

- (5) SA 391 (SCA) para 21). The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea. The right of a party to validly raise the objection that other parties should have been joined to the proceedings, has thus been held to be a limited one..."

The substantial test is whether the party that is alleged to be a necessary party for purpose of joinder has a legal interest in the subject matter of the litigation, which may be affected prejudicially by the judgment of the court in the proceedings concerned.

See: Bowring NO v Vrededorp Properties CC 2007 (5) SA 391 (SCA)

Gordon v Department of Health, Kwazulu-Natal [2008] ZASCA 99; 2008

- (6) SA 522 (SCA).

- [6] It behoves no argument that PayProp is a necessary party to these proceedings and it has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned. The same applies to the landlords. To this extent the court a quo was correct in its findings. However, the next question is whether the court a quo was correct in summarily dismissing the application and whether the applicant should not rather have been granted an opportunity to join the parties concerned.

Discussion

- [7] The appellant contends that since a court should not entertain the merits before it was satisfied that all interested and necessary parties were before it, the upholding of the point in limine of non-joinder of an interested and necessary party would simply imply that the proceedings cannot be heard until such interested and necessary party(ies) are heard. It would therefore follow that once such a point in limine is upheld, the court becomes functus officio and cannot make any further order on the proceedings until the joinder has been effected, thereby effectively staying the proceedings. Although it is correct that an opportunity be afforded that the interested and necessary parties to these proceedings be joined, it is not entirely correct that the court hearing the application becomes “functus officio and cannot make any further order on the proceedings until the joinder has been effected,...” I am of the view that the court a quo should not have summarily dismissed the application but should have afforded the appellant (applicant) the opportunity to join the interested and necessary parties to the proceedings. This the court a quo was empowered to do even mero moto, in the interest of justice.
- [8] The appellant contends further that this Court, sitting as court of appeal, should determine all the other issues and dispose of the matter in order to expeditiously bring the dispute to an end. In hold a different view. Whilst being mindful that there are instances where an appeal court can dispose of a matter rather than refer it back to the trial court for adjudication, this is not such a matter.

Conclusion

- [9] In my view, the matter should be remitted to the trial court (a quo) to deal with the joinder of the interested and necessary parties and to bring the matter to its natural and logical

conclusion.

There are many issues for determination and adjudication and the trial court (a quo), rather than this court as an appeal court, is best suited to deal with all those issues.

Order

- [10] Consequently, the following order is made:

R D HENDRICKS

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG

I agree

A H PETERSEN

JUDGE OF THE HIGH COURT,

F M M SNYMAN

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Prepared on 28 October 2026 · Esheria