

SOUTH AFRICA / JUDGMENT

Leatile Construction and Projects CC v Christo Bekker Inc Attorneys and Another (13850/23) [2024] ZAGPPHC 212 (19 March 2024)

[2024] ZAGPPHC 212**COURT**

North Gauteng High Court, Pretoria

BEFORE

RJ Groenewald

CASE / FILE NUMBER

13850/23

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, PRETORIA****CASE****NO: 13850/23****(1)****REPORTABLE: YES****(2)****OF INTEREST TO OTHER JUDGES: YES****(3)****REVISED: NO****DATE:**

19 March 2024

SIGNATURE

In

the matter between

LEATILE

CONSTRUCTION AND PROJECTS

CC

Applicant

and

CHRISTO

BEKKER INC ATTORNEYS

First Respondent

CHRISTO

BEKKER

Second Respondent

Coram: Groenewald, RJ (AJ)
Heard

on: 11 March 2024

Delivered: 19 March 2023 - This judgment was
handed down electronically uploading to Caselines.

JUDGMENT

GROENEWALD AJ

Summary:

- Application seeking the joinder of the Respondents on grounds of convenience. The relief seeking consolidation of two actions was granted on 13 November 2013. The remaining relief deals with whether the Respondents should be joined as parties to the consolidated actions.
- General observations on allegations of fact in application proceedings – the distinction between primary and secondary facts in motion proceedings. Discussion of the legal principles and the impact on secondary facts in the absence of primary facts.
- The principles relation to joinder of parties and the distinction between a joinder out of necessity juxtaposed to a joinder based upon convenience. Consideration of the factors which are relevant in considering an application for joinder.
- The Court's discretion when dealing with joinder on grounds of necessity. The discretion in respect of joinder on grounds of necessity, juxtaposed to discretion in respect of joinder on grounds of convenience. Application of the legal principles to the facts of the present case.
- Joinder of a party as a co-defendant with the view of instituting a counterclaim against that co-defendant. Legal principles and application of the applicable Rules of Court discussed.

Introduction:

1. The Applicant seeks the joinder of the Respondents as parties to the now consolidated actions under case numbers 13850/2023 and 16285/2023. The relief relating to the consolidation of the two action was granted on 13 November 2013. The application for joinder is premised on a joinder based upon convenience opposed to a joinder of necessity.
2. In essence what remains to be adjudicated upon is the following relief as set out in the Applicant's notice of motion:
 - 2.1. The joinder of the Respondents to the actions instituted under case numbers 13850/2023 and 16285/2023.
 - 2.2. Granting of leave to all parties to amend the headings of all the documents filed on record in the Main Action to reflect such joinder directions; and

2.3. The cost of the application.

3. The Applicant in the present application is the First Defendant in the respective consolidated actions. The Second Defendant was not joined as an applicant to the application, but he deposed to a 'supporting affidavit'.
4. As stated above the application is not one premised upon the proposition that there has been a non-joinder of a party, in other words a joinder based upon necessity.
5. The Respondents have made it clear that they do not wish to be joined to the action and, if joined, they have no intention of seeking any relief (save conceivably a cost order) in those proceedings.
6. The applicant seeks the joinder of the Respondent on the basis that such a joinder would be convenient.
7. Before dealing with the issue of joinder, it would be appropriate to first deal with certain general principles relating to presenting evidence in motion proceedings. The implication of these principles is not unimportant as they have a bearing on the findings which the Court ultimately makes.

General observation on allegations of fact in application proceedings:

8. Facts in application proceedings[1] can be either primary or secondary. Primary facts are those capable of being used for the drawing of inferences as to the

existence or non-existence of other facts. Such further facts, in relation to primary facts, are called 'secondary facts'. Secondary facts, in the absence of primary facts, are nothing more than a deponent's own conclusions and do not constitute evidential material capable of supporting a cause of action.

9. In *Bates & Lloyd Aviation*[2] Nicholas JA held as follows:

"Inference, it was observed by Lord Wright in Caswell v Powell Duffryn Associated Collieries Ltd [18] must be carefully distinguished from conjecture or speculation:

There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.'...

From both inference and speculation must be distinguished hypothesis. This is a theory advanced in explanation of the facts in evidence as a basis for an inference. To be logically sound, it must be consistent with all the proved facts, and it must not postulate facts which have not been proved. It may be advanced by a legal representative or, where the subject is a technical one, by an expert witness. The process of reasoning by inference frequently includes consideration of the various hypotheses which are open on the evidence and in civil cases the

selection from them, by balancing probabilities, of that hypothesis which seems to be the most natural and plausible (in the sense of acceptable, credible or suitable)." (Own emphasis added.)

10. In Swissborough Diamond Mines[3] the following is stated:

"A distinction is drawn between primary facts and secondary facts. "Facts are conveniently called primary when they are used as the basis for inference as to the existence or non-existence of further facts, which may be called, in relation to primary facts, inferred or secondary facts." [4]

11. The same principles also apply in interlocutory applications and in applications for joinder.

12. In Anti Climb Africa (Pty) Ltd v Purchasing Consortium South Africa NPC and Another (2023-115449) [2024] ZAGPJHC 94 (29 January

2024) the court observed at par 9 that:

"A party that wishes to rely on a legal position has to state facts on which the legal principle is to be applied. A party cannot adopt a spraying and praying approach, i.e. spraying of facts and praying that one of them will hit the target. That approach is unhelpful and cannot succeed."

13. The facts must be set out simply, clearly and in chronological sequence, and without argumentative matter, in the affidavits which are filed in support of the notice of motion.[5] It is well established that 'it is ... imperative that a litigant should make out its case in its founding affidavit, and certainly not belatedly in argument'.[6]

The Rule 7 notice:

14. In addition to the main disputes between the parties, there arose a peripheral issue in respect of the Deponent's authority to depose to the founding affidavit on behalf of the Applicant and the authority of the attorney representing the Applicant. The Respondents delivered a notice in terms of Uniform Rule 7 challenging the authority of both the deponent and the Applicant's attorney.

15. It must be kept in mind that the Deponent to the founding affidavit

alleged that she is 'a member' of the First Respondent which allegation was not placed in dispute by the Respondents.

The Second Defendant deposed to a confirmatory affidavit styled to be a 'supporting affidavit' to the present application.

16. After the delivery of the Respondents' heads of argument, the Deponent to the founding affidavit also deposed to an affidavit in response to the Rule 7 notice.[7] In this affidavit the Deponent confirms that she is the sole member of the First Respondent, and she attached in support of the allegation the results of an electronic search conducted on the records of the Companies and Intellectual Property Commission. The report confirms that she holds 100% member's interest in the Applicant. The contents of the report were not challenged by the Respondents.

17. In light of the aforementioned affidavit and the facts referred to above, the Rule 7 challenge was properly met by the Applicant, and I am satisfied that the deponent and the Applicant's attorney have the authority to act. It is therefore appropriate to proceed to deal with the merits of the matter and the relief sought by the Respondents to stay the application pending compliance with the Rule 7 notice cannot succeed.

The joinder issue:

18. I now turn to deal with the issue relating to joinder and the remaining relief sought in the notice of motion.
19. Save for the prayer relating to the consolidation of the actions, the balance of the relief sought in the notice of motion was opposed by both the Respondents.
20. The Applicant does not contend that there was a non-joinder in respect of the Respondents in the two actions but contends that it would be convenient to join the Respondents. Neither in the Founding Affidavit nor in the Notice of Motion did the Applicant indicate in what capacity the Respondents should be joinder, but rather adopted the attitude that it is for the Court to decide in what capacity the Respondents should be joined. Although

ultimately the discretion is the Court's to exercise it is my view that a party seeking the joinder of third party should indicate in what capacity the third party should be joined and should properly motivate why the third party should be joined in such a capacity. It does not necessarily follow that the failure to do so is dispositive of the application, but such an omission may ultimately act to the detriment of the applicant. Every application must be considered upon the facts set out in support thereof.

21. In motivation for the joinder the Applicant contends that:

21.1. Both the Plaintiffs instituted legal actions against the First and Second Defendants for alleged loans and the alleged breach of acknowledgments of debt;

21.2. In both actions, Bekker and CBI (the Second and First Respondents respectively) initially acted 'as attorney of record' for the Plaintiffs "turning against its (erstwhile) own clients", being the First and Second Defendants in those actions.; and

21.3. That in both actions Bekker (the Second Respondent) was supposedly acting for and on behalf of the Defendants during all the processes of negotiating the alleged loans, and never indicated to the Defendants that he would make an about turn and act against these erstwhile clients.

22. Although it is an objective fact the First Respondent was, at the launching of the respective actions, the respective Plaintiffs' attorney of record it is denied by the Respondents that when those actions were launched that the Respondents were also at the same time the Defendants 'attorney of record' in the same proceedings. The denial appears to be premised on the contention that the First Respondent would only become the attorney of record when

he either represents a party when proceedings are launched or presents a party in the delivery of a notice of intention to oppose.

23. The Applicant contends that the Respondents had represented the Defendants over many years and had played an active role in the events which preceded the conclusions of the agreements forming the subject matter of the actions. The long-term involvement of the Respondents with the affairs of the Defendants was not contested, save to state that such historical facts were irrelevant for purposes of the joinder.
24. The Applicant gave an overview of Bekker's involvement in paragraphs 17 to 30 of the Founding Affidavit. The Respondents noted, therefore not disputing, several of these allegations, whilst at the same time dismissing the allegations as irrelevant for purposes of the joinder. These allegations include amongst

others the following:

24.1 Paragraph 25 of the Founding Affidavit:

"Bekker, as their attorney, enticed the defendants into a cash loan amounting to R 4 million from a third party, SM Willemse, the plaintiff in Case number 16285/2023."

24.2 Paragraph 28 of the Founding Affidavit:

"Very bizarrely, Bekker or CBI, on 18 April 2021, deposited an amount of R 1 million into the first defendant's account, but demanded the defendants to sign an acknowledgement of debt for this amount. This being one day before the defendants were expecting the R 4 million loan amount from Wiilemse. Bekker demanded that the defendants sign the AOD on behalf of his own company, Bioko, the plaintiff under case number 13850/2023."

25. Mr Bester on behalf of the Applicant contended that the admission of these allegations, by merely noting the allegations and stating that they are irrelevant demonstrates why the Respondents should be joined. It may be that the way in which the Respondents have dealt with these allegations and the failure to address the

allegations head-on may come to haunt the Respondents in the future, but whether this justifies a joinder is a different matter.

26. Essentially the Applicant contends that Bekker abused his position as their long-term attorney, confidant, and business partner to the Defendants detriment. The Applicant further contends that the Respondents are in possession of information and documents relating to the Defendants' own business, financial, and personal affairs which may be relevant in the actions. There is however scant detail of what these documents would be. The Applicant's attorney had some difficulty during argument in providing specific details of what these documents could be – in fact, he conceded that the Applicants are not entirely sure what documents the Respondents, or the unidentified related companies, might have in their possession. Save for a reference to the trust account bank statements, the Applicant presented very few primary facts as to what documents would be in the Respondents

possession and what the relevance would be.

27. These 'related companies' and their involvement in the dispute was not dealt with in the Founding Affidavit and the Applicant would be hard pressed to rely on such submissions from the bar to justify the relief sought. The importance of presenting primary facts once again comes strongly to the fore. A party must present evidence to support its averments, it does not help to speculate.
28. The Applicant placed considerable emphasis in argument on the allegation that Bekker, as the Defendants' attorney, enticed the Defendants into a loan agreement of some R4 million from a third party, SM Willemse, the Plaintiff in case number 16285/2023. Pursuant thereto, so the Applicant contends, the Defendants proceeded to sign the acknowledgement of debt in anticipation of receiving the loan amount but contends that the amount was never received from Willemse.
29. Within the context of the above allegations, the Applicant contended that Bekker's conduct, and actions should be placed before the court and the trial court should be placed in a position to hear and consider Bekker's version and involvement.
30. In the Applicant's heads of argument, several contentions were advanced, including several factual averments which do not appear from the papers. Obviously, a party is limited to the case made in its affidavits and evidence cannot be supplemented by way of heads of argument. Where a party fails to place the necessary primary facts before the court, he runs the risk of failing to make out the case for the relief which he seeks.
31. In summary, the crux of the Applicant's case appears to be that:
 - 31.1. It is 'necessary', and in the interest of justice, that the Respondents be joined to ensure that they are subjected to proper cross-examination and the mechanisms provided for in terms of discovery in trial proceedings;
 - 31.2. That the Defendants in the actions would be at a procedural disadvantage if the Respondents were not party to the consolidated actions; and
 - 31.3. That it is necessary for the Respondents to be joined to ensure that the conduct of the Respondents be fully ventilated in the trial.
32. The Respondents oppose the joinder application, and the relief associated therewith, and they in turn contend that:
 - 32.1. The Applicant has failed to demonstrate that the Respondents have either a direct, and substantial interest in the subject matter of the Main Actions, or that such interests may be prejudicially affected by a judgment;

32.2. The Applicant has failed to demonstrate that a court order in the Main Action may affect the rights and interests of either Respondents or that the subject matter of the Main Action is of such a nature that it can reasonably be continued to finality in the absence of both the Respondents; and

32.3. That the Applicant has, in addition, failed to demonstrate, formulate and/or substantiate the manner and extent to which the Respondents should be joined in the Main Actions.

33. The Respondents contend that the Applicant has confused the principles and applicable available remedies relating to the alleged conflict of interest with the requirements and purpose in respect of the joinder of parties to litigation and/or the giving of evidence by those parties in the main trial proceedings.

34. Joinder in terms of Rule 10 of the Uniform Rules of Court is not a mechanical or technical process which “must be ritualistically applied” regardless of the circumstances of the case. [8]

35. This Court held in *Ronnie Dennison Agencies (Pty) Ltd t/a Water Africa SA v SABS Commercial Soc Ltd* (10136/14) [2014] ZAGPPHC 998 (19 December 2014) at par 10 that:

‘our law recognises three distinct categories for joinder of parties, being

- (1) joinder of necessity in terms of the common law;
- (2) joinder of convenience in terms of Rule 10, and the applicable common law rules and (3) Third-party joinder in terms of Rule 13 of the Uniform Rules’.

I hasten to observe that I do not read the above observation as impairing the general discretion of the Court, but that it serves as a summary of the categories of joinder which may apply.

36. In *Philippi Horticultural Area Food and Farming Campaign v MEC for Local Government, Western Cape* 2020 (3) SA 486 (WCC) it was reiterated (at paragraph [29]) that an order sought (e g a declaratory order) ought not ordinarily to be granted where any other person’s interests may be directly affected without formal judicial notice of the proceedings having first been given to such person and, where an order may be binding on all parties whose interests its terms affect, and not just some of them, it may be mandatory for a party that institutes proceedings to join every person who has a direct and substantial interest in the relief sought. If the parties do not themselves raise a point of non-joinder when it is indicated, the court should do so *mero motu*.

Discretion when dealing with joinder on grounds of necessity:

47. Where a party has a material interest in the outcome of proceedings there is no question of a discretion.

48. In *Watson NO v Ngonyama and Another* 2021 (5) SA 559 (SCA) the Court held at par 51 and 52 that:

“[51] This court has consistently insisted from as far back as 1949 that it would not deal with matters where a third party that may have a direct and substantial interest in the litigation was not joined in the suit or where adequate steps could not be taken to ensure that its judgment will not prejudicially affect that party's interests. It is clear that an order without the involvement of such a party will not be res judicata against it. See in this regard Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A) at 659 – 660; Old Mutual Life Assurance Company (SA) Ltd and Another v Swemmer 2004 (5) SA 373 (SCA) ([2004] ZASCA 140) para 12; and Transvaal Agricultural Union v Minister of Agriculture and Land Affairs and Others 2005 (4) SA 212 (SCA) ([2005] ZASCA 12) paras 64 – 67.

[52] It is clear from the cited authorities that even were it to be averred that a third party had waived its right, it should nevertheless be heard on that aspect as well as on whether it would submit to the judgment. An agreement between the remaining parties does not excuse the non-joinder of an essential third party, in this case the provisional liquidators, who might very well have a different perspective on the erstwhile asserted defences to Ngonyama's claim, and might well be in possession of relevant documentary or other information on which they ought to be heard.”

49. In *Insamcor (Pty) Ltd v Dorbyl Light & General Engineering (Pty) Ltd Dorbyl Light & General Engineering (Pty) Ltd v Insamcor*

(Pty) Ltd 2007 (4) SA 467 (SCA) at par 27 BRAND JA held as follows in dealing with the third parties who may suffer prejudice as a result of an order:

“In the premises it is, in my view, self-evident that third parties who will or may be prejudiced by the restoration order must be given the opportunity to persuade the Court not to exercise its discretion in favour of a restoration order. Alternatively, they may endeavour to persuade the Court to make the order subject to such directions under s 73(6)(b) as may serve to alleviate its prejudicial consequences. The inevitable conclusion I draw from all this is that third parties who will or may suffer prejudice as a result of the restoration order, have a 'direct and substantial interest' in the outcome of the application for such an order. It follows that they should be joined as necessary parties to the application (see eg Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A) at 659)”

50. The apex Court held in *SA Riding for the Disabled Association v Regional Land Claims Commissioner* 2017 (5) SA 1 (CC) at 5A–D that:

“[10] If the applicant shows that it has some right which is affected by the order issued, permission to intervene must be granted. For it is a basic principle of our law that no order should be granted against a party without affording such party a predecision hearing. This is so fundamental that an order is generally taken to be binding only on parties to the litigation.

[11] Once the applicant for intervention shows a direct and substantial interest in the subject matter of the case, the court ought to grant leave to intervene. In *Greyvenouw CC* this principle was formulated in these terms:

‘In addition, when, as in this matter, the applicants base their claim to intervene on a direct and substantial interest in the subject matter of the dispute, the Court has no discretion: it must allow them to intervene because it should not proceed in the absence of parties having such legally recognised interests.’” (Own emphasis.)

Joinder as a matter of convenience:

51. Apart from the obligatory joinder of a party who has a direct and substantial interest in the subject matter of litigation, a Defendant may be joined under the common law on grounds of convenience, equity, the saving of cost and the avoidance of multiplicity of actions.[9]
52. Under the common law the court has the inherent power to order the joinder of further parties in an action which has already begun, to ensure that persons interested in the subject matter of the dispute and whose rights may be affected by the judgment are before the court. In *Matjhabeng Local Municipality v Eskom Holdings Limited* 2018 (1) SA 1 (CC) the apex court stated at 33D-E:

“At common law courts have an inherent power to order joinder of parties where it is necessary to do so even where there is no substantive application for joinder. A court could, mero motu, raise a question of joinder to safeguard the interest of a necessary party and decline to hear a matter until joinder has been effected. This is consistent with the Constitution.”

53. As I have already held, this is not an application premised upon an obligatory joinder or upon a point raised of non-joinder. The legal representatives on behalf of the parties, Mr Bester for the Applicant and Mr Propy on behalf of the Respondents, both stated in argument that this is not a case of joinder of necessity.

What relief is to be sought against the Respondents if joined:

54. When considering joinder, the relief which is to be sought against a party is not unimportant, in fact, it plays a central role.
55. In *Lottostar (Pty) Ltd and others v Ithuba Holdings (Pty) Ltd And Others* (Case No 624/22 And 630/22) [2023] ZASCA 119 (5 September

2023) the Court in dealing with joinder held in par 13 that:

“As Fagan AJA pointed out in Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A) at 656:

“The question of joinder should surely not depend on the nature of the subject-matter of the suit ..., but ... on the manner in which, and the extent to which, the Court’s order may affect the interests of third parties’.

Indeed, as observed by the full court (per Cilliers AJ (Goldstein and Joffe JJ concurring) in *Rosebank Mall (Pty) Ltd v Cradock Heights (Pty) Ltd* 2004 (2) SA 353 (WLD) para 37:

‘There is a distinction between the case of a party whose rights are derived purely from ‘the right which is the subject-matter of the litigation’ and in which he has no legal interest, on the one hand, and the case where the third party has a right acquired aliunde the right which is the subject-matter of the litigation and which would be prejudicially affected if the judgment and order made in which he was not a party were carried into effect ...’” (Own emphasis.)

56. When asked what relief the Defendants would seek against the Respondents if joined, Mr Bester initially indicated that no order would be sought against them. Mr Bester proposed that the Respondents be joined as Plaintiffs in the first action (that of Boiko) and as Defendants in the second action (that of Willemse).
57. Mr Bester later advanced that the Defendants would consider in the Willemse action (where there is a counterclaim) to also counterclaim against the Respondents (ostensible if joined therein as co-defendants). I have a difficulty with this submission: Firstly, no such case is made in the founding affidavit even alluding to any order which would be sought against the Respondents if joined; and Secondly, it is not generally competent to for one defendant to counterclaim against another defendant.
58. In *Tahilram v Kayser and Others In re: Kayser and Others v Tahilram* (2020/10390) [2021] ZAGPJHC 751 (26 November 2021) the court held that where a defendant wishes to counterclaim, Rule 24(1) permits the defendant to deliver with the plea a claim in reconvention. However, the rules of court do not permit a defendant to pursue, by way of a claim in reconvention, a claim against the plaintiff and a person who is not a plaintiff (“a third person”), unless a court has granted leave to the defendant in terms of Rule 24(2) of the Uniform Rules of Court to do so. Absent such leave, a defendant may not by way of a claim in reconvention, pursue the claim against such third person. The only way in which a defendant can bring a claim against a co-defendant in the absence of a claim in reconvention against the plaintiff would be by virtue of the provisions of Rule 13. It follows that such a claim would have to fall within the specific ambit provided for in Rule 13(1) and does not present a blanket invitation to join parties.

59. In *Soundprops 1160 CC and Another v Karlshavn Farm Partnership and Others* 1996 (3) SA 1026 (N) the Court held [with reference to Rule 24(2)] at 1031C that:[10]

“It is apparent on a proper reading of this Rule that it is limited to a claim in reconvention against the plaintiff and the other person and cannot be invoked where there is no claim in reconvention against the plaintiff. It also requires the leave of the Court.”

60. In *K & S Dry Cleaning Equipment (Pty) Ltd and Another v South African Eagle Insurance Co Ltd and Another* 1998 (4) SA 456 (W) Levenson J in dealing with Uniform Rule 10(3) held at 462C that:

“Our Rule permits the joinder of parties in the same proceeding but it does not direct the hearing of evidence as between all defendants, so that the extent of liability is determined between all parties, and particularly not where no vestige of liability in one defendant is shown. Indeed I am not persuaded that

determination of such issue is incumbent on the Court merely on the averment of the plaintiff. It seems to me that the situation described by Corbett AJ, as incorporated by me herein, is the more appropriate. Indeed, the purpose of the Rule may have been rather to avoid multiplicity of actions (cf Vitorakis v Wolf 1973 (3) SA 928 (W)) than to extend the Rule to requiring a defendant to be put on his defence when no case has been made out against him.”

61. There is no indication in the founding affidavit that there is any intention to claim any specific order or relief against the Respondent in either of the now consolidated actions. The highwater mark of the Applicant's case is that the remedies available to procure the evidence, either in the form of giving evidence or in obtaining documents in the possession of the Respondents are not sufficient to protect the rights of the Applicant.
62. The allegations levelled against the Respondents appear prima facie to be of a serious nature. The fact that a number of these allegations have not been denied is not lost in the wash. Certainly,

if the allegations were proven to be true, and this court is not called at this stage to adjudicate thereon nor make findings in

respect thereof, they may theoretically give rise to a complaint to the Legal Practice Council or, arguably, if a proper case is made out give rise to a claim against the Respondents.

63. There is of course the risk that adverse findings may be made in the consolidated action in respect of the conduct of the Respondents. The Respondents have however clearly made the election that they do not wish to participate, as parties, in the trial action.
64. In *Fluxmans Incorporated v Lithos Corporation of South Africa (Pty) Ltd and Another* (No 2) 2015 (2) SA 322 (GJ) the erstwhile client sought to join the advocates in an action against it for unpaid fees with the purpose of proving its allegations of fraud. Victor J held at paragraph 33 of the judgment that the demand to join the advocates to prove this material allegation of a fraudulent misrepresentation is bad in law and that the allegations of the concealment of a material fact does not justify the joinder.
65. The joinder of the Respondents would likely lead to additional legal costs and may very well extend the duration of the anticipated trial. Ultimately, from a cost perspective, the joinder of the Respondents could be to the detriment of the Defendants.

What other remedies would be available to the Defendants:

66. A central question is whether there are sufficient remedies available to the Applicant to address the Defendants alleged prejudice, without the joining the Respondents.

67. The Rules of Court provide several mechanisms to obtain both the evidence of witnesses and documents which may be in the possession of parties to the proceedings and in the possession of third parties. Both witnesses and documents in their possession may be brought before the court by way of subpoenas. That is not the only mechanisms available to a party seeking such evidence. The directives of this court provide specific practical mechanisms to deal in a cost effective and efficient way with disputes between parties.
68. Among the arsenal of procedural mechanisms available to parties, above and beyond the most obvious tools found in the Rules of Court, to facilitate a fair and expeditious trial includes the option for a party to seek the Case Management of proceedings or that a matter may be referred to the Commercial Court. The Applicant's

primary complaint appears to revolve around the need for timeous discovery of documents. It is understandable that a party may need documents in advance of the commencement of a trial to prepare for that trial.

69. The Applicant's difficulty in this regard may be alleviated by seeking the case management of the consolidated trial actions. This would provide that a party may seek directives, as and when needed,

in respect of, inter alia, targeted discovery, the issuing of subpoenas within specific time frames and the management of the consolidated actions to ensure that justice is done. Considering the serious allegations made against the Second Respondent, an officer of the court, and his firm it may be well in the interest of justice that case management be facilitated in this matter.

The condonation application:

70. The Applicant initially failed to file a replying affidavit, and only belatedly filed a Replying Affidavit on 4 March 2024. This where the matter was set down to be heard on 11 March 2024. The Replying Affidavit was subsequently followed by an application for condonation. The Replying Affidavit does not take the matter further and it cannot remedy the defects or lack of primary evidence which is absent in the Founding Affidavit.
71. In so far as the Replying Affidavit contains legal argument, the Applicant's attorney could and did advance that argument in court. Mr Bester conceded that the Applicant would have to make its case in the Founding Affidavit and that nothing much turned on the Replying Affidavit.
72. The condonation application suffers from the same lack of primary facts as is the case in respect of the Founding Affidavit. There are long delays without a proper explanation. No dates are given in respect of the events which ostensibly triggered the need for the filing of the Replying Affidavit. Condonation is not simply for the asking.
73. In *Uitenhage Transitional Local Council v South African Revenue Service* 2004 (1) SA 292 (SCA) the Court held at paragraph 6:

“One would have hoped that the many admonitions concerning what is required of an applicant in a condonation application would be trite knowledge among practitioners who are entrusted with the preparation of appeals to this Court: condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out.”

74. The time periods set in the Rules are not simply salutary and there are good reasons why parties should respect those Rules and comply with them. The interest of justice dictates that disputes should be properly ventilated, but that does not provide a license to ignore the Rules of court. Where there is a delay or non-compliance, good cause must be shown to justify condonation being granted. If the well-established principles relating to condonation are not applied and if mere lip-service to the Rules is allowed to proliferate, the very real risk arises that the orderly functioning of the courts may ultimately be comprised to the detriment of all involved.
75. Mindful of the principles relating to condonation and where there is clearly a patent failure to provide a proper explanation in respect of the delay in filing the Replying Affidavit, the condonation application stands to be dismissed.

Conclusion

and cost:

76. The Applicant's Founding Affidavit has been prepared in such a manner that there are very few primary facts presented to justify the relief being sought in respect of the joinder. It does not

appear that it would be in the interests of justice for the Respondents to be joined to the action proceedings. The Applicant has failed to make out a case which would justify such an order. Rather than reducing costs a joinder is likely to lead to: an escalation of the costs, that the trial be protracted, and an inefficient use of judicial resources.

77. Joinder is not a mechanism to facilitate a fishing expedition for a party to build its case. The court should be astute to avoid the unintentional consequences, which may very well arise, where parties are simply joined merely as a matter of course and without properly applying the principles applicable to joinder.
78. In the result, it follows that the application for joinder cannot succeed. In light of the above findings the ancillary relief contained in prayers 3 and 4 of the notice of motion is no longer relevant and it is not necessary to make any findings in respect thereof.

79. The only remaining issue is that of cost. In respect of the joinder application, I see no reason why the general rule that cost should follow the event should not be applied in the present matter. The conduct of the Applicant is not such that a punitive cost order is warranted and there would be no true merit in the contention that the Applicant has acted in a mala fide way. In so far as the consolidation application is concerned that was not opposed and the relief succeeded.

80. It would be just and equitable that the unopposed cost of the drafting of the application, which deals with both the consolidation and joinder, be cost in the consolidated actions. The cost of opposition to the joinder application (including the cost relating to the opposed argument) should be borne by the Applicant.

81. Accordingly, the following order is made:

79.1 The condonation application in respect of the admission of the Applicant's replying affidavit is dismissed with cost;

79.2 Prayer 1 of the notice of motion seeking the joinder of the Respondents is dismissed;

79.3 The unopposed cost of the drafting of the consolidation application shall be cost in the consolidated actions under the above case number; and

79.4 The cost of occasioned by the opposition to the joinder application (including the cost relating to the opposed argument) is to be paid by the Applicant.

RJ GROENEWALD (AJ)

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 19 March 2024.

For the Applicant: Mr S Bester Instructed by: Steve Bester Attorneys For the Respondents: Adv E Prophy Instructed by: Johan Nysschens Attorneys Matter heard on: 11 March 2024 – Court 8F

Judgment

date: 19 March 2024

[1] Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa 1999 (2) SA 279 (T) at 324D–F; Die Dros (Pty) Ltd v Telefon Beverages CC 2003 (4) SA 207 (C) at 217B–D; Rees v Harris 2012

(1) SA 583 (GSJ) at 595H–596A.

- [2] Bates & Lloyd Aviation (Pty) Ltd and Another v Aviation Insurance Co; Bates & Lloyd Aviation (Pty) Ltd v Aviation Insurance Co, 1985
- (3) SA 916 (A) at 939F – 940A.
- [3] Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others, 1999 (2) SA 279 (T).
- [4] See Willcox and Others v Commissioner for Inland Revenue 1960 (4) SA 599 (A) at 602A.
- [5] Reynolds NO v Mecklenberg (Pty) Ltd 1996 (1) SA 75 (W) at 78I; “Superior Court Practice” Vol 2, D6-10.
- [6] My Vote Counts NPC v Speaker of The National Assembly 2016 (1) SA 132 (CC) at paragraph [177].
- [7] Caselines AAA56.
- [8] Judicial Service Commission v Cape Bar Council 2013 (1) SA 170 (SCA) at 176I–177A; Lawrence v Magistrates Commission 2020 (2) SA 526 (FB) at paragraph [27];.
- [9] Marais v Pongola Sugar Milling Co Ltd 1961 (2) SA 698 (N) at 702D; Gemeenskapontwikkelingsraad v Williams (2) 1977 (3) SA 955 (W) at 971H; Rabinowitz and Another NNO v Ned-Equity Insurance Co Ltd 1980
- (3) SA 415 (W) at 419E; Ploughman NO v Pauw 2006 (6) SA 334 (C) at 341E–F.
- [10] Followed in Minerals Council of South Africa v Minister of Mineral Resources and Energy and Others - 2022 (1) SA 535 (GP) at par 65.

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