

SOUTH AFRICA / JUDGMENT

Shake's Multi-Save Supermarket CC v Haffejee and Another; In re: Shake's Multi-Save Supermarket CC v Haffejee (413/12) [2015] ZANWHC 48 (21 August 2015)

[2015] ZANWHC 48

COURT

North West High Court, Mafikeng

BEFORE

A A Landman

CASE / FILE NUMBER

413/12

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST PROVINCIAL DIVISION, MAHIKENG

CASE NO: 413/12

In

the matter between:

SHAKE'S
MULTI-SAVE SUPERMARKET CC
APPLICANT
and
HAFFEJEE, AHMED ABDUL
HAY 1ST
RESPONDENT
A I
HAMPERS
2ND RESPONDENT

In re:

SHAKE MULTI-SAVE SUPERMARKET
CC
PLAINTIFF
HAFFEJEE, AHMED ABDUL
HAY
DEFENDANT

JUDGMENT

Landman J:

- [1] Shake's Multi-save Supermarket, the plaintiff, seeks to join A I Hampers CC (the 'Close Corporation'), on the basis of convenience, as the second defendant in an action instituted under case number 413/2012 against Ahmed Abdul Hay Haffejee, the defendant.

The law re joinder

- [2] Rule 10(3) of the Uniform Rules of Court provide that:

'Several defendants may be sued in one action either jointly, jointly and severally, separately or in the alternative, whenever the question arising between them or any of them and the plaintiff or any of the plaintiffs depends upon the determination of substantially the same question of law or fact which, if such defendants were sued separately, would arise in each separate action.'

And in *Rabinowitz and Another NNO v Ned-Equity Insurance Co Ltd and Another* 1980 (3) SA 415 (W) at 419 D-F Nicholas J said:

'I do not think, however, that the question whether joinder was competent in terms of Rule 10 (3) is decisive in regard to the proper

order as to costs. The Rule is not and was not intended to be exhaustive of the cases in which a plaintiff may join separate defendants in one action (cf *Lewis NO v Schoeman NO and Others* 1951 (4) SA 133 (N)). Under the common law a number of defendants may be joined whenever convenience so requires subject to the power of the Court to order separation of the actions (see *Van der Lith v Alberts and Others* 1944 TPD 17).'

- [3] The Close Corporation opposes the application for joinder. Mr Jagga, who appeared on its behalf, submitted that the common law joinder of parties on the basis of convenience is no longer possible. He relies on a judgment by Victor J in *Fluxmans Incorporated v Lithos Corporation of SA* (No 2) 2015 (2) SA 322 (GJ) who says at para 5:

'Parties may only be joined as a matter of necessity and not convenience. It is only necessary if the parties sought to be joined would be prejudicially affected by the judgment of the court in the proceedings. See *Judicial Service Commission and Another v Cape Bar Council and another* 2013 (1) SA 170 (SCA) at par [12] where the court held that:

"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 and Another 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.”
- [4] In my view, the grammatical construction of the dictum of the Supreme Court of Appeal in the Judicial Service Commission judgment does not support the proposition. The court also made it clear that it was not concerned with joinder as a matter of convenience and that a plea of non-joinder can only be sustained if a person, who is not party to the action, has a direct and substantial interest which may be prejudicially affected by the judgment of the court in the proceedings in question. If the court in Fluxman Incorporated meant to say that parties may only be joined as a matter of necessity I would respectfully disagree.
- [5] It is competent for the plaintiff to seek to join the Close Corporation on the grounds of convenience.

The

facts

- [6] The plaintiff claims, in the action, payment of R 4 297 211.19 in respect of procured goods as well as goods directly purchased from the plaintiff by the defendant for the period 2010 to July 2011 in terms of an oral agreement between the plaintiff and the defendant.
- [7] The defendant pleads that since 2004 he no longer conducted business as a sole proprietor. He pleads that he has never conducted business as A I Wholesalers or as A I Hampers and points out that there is a Close Corporation in existence registered as A I Hampers CC. It is common cause that the defendant is the sole member of this Close Corporation. The defendant denies that the plaintiff entered into any agreement or procured goods for the defendant. In particular he pleads that:

“4.2 It is specifically denied that any agreement existed as averred by the plaintiff and further that any goods were procured by the plaintiff and delivered to the defendant...”

- [8] A reading of the plea shows that the defendant denies the existence of any agreement between himself and the plaintiff. And, although the defendant says that he has not conducted business as a sole proprietor since 2004 and that there is in existence a Close Corporation (A I Hampers CC), he does not go so far as to allege that he entered into any agreement on behalf of that Close Corporation with the plaintiff. He is content simply to deny the existence of the agreement as averred by the plaintiff.
- [9] The plaintiff, as cessionary of certain cheques that have been dishonoured, in another matter issued summons for provisional

sentence against the defendant personally. The defendant filed an opposing affidavit complaining that he was sued in his personal

capacity while to the knowledge of the plaintiff, it had numerous business dealings with A I Hampers CC and that he had signed the cheques as a signatory of that legal entity.

- [10] The plaintiff avers in its affidavit for joinder, that it infers that the defendant will at the trial simply deny the agreement between the plaintiff and the defendant and say that any agreement that may have been concluded was between the plaintiff and the Close Corporation. As a consequence, the plaintiff intends to amend its declaration to hold the defendant and the Close Corporation either in the alternative, or jointly and severally, liable for the goods sold and delivered in terms of an oral agreement.
- [11] Mr Van der Vyever, who appeared for the plaintiff, submitted that joinder ought to be granted on the basis of convenience in that it would avoid a multiplicity of actions on substantially the same questions of law and fact. The plaintiff submits that the joinder of the Close Corporation is necessary as:
- (a) It is the alter ego of the defendant and it has (or will have I should say) a direct and substantial interest in the action;
 - (b) the defendant's version in regard to the litigation between the parties warrants the joinder of the Close Corporation and
 - (c) the proposed amendment warrants that it would be convenient to the Close Corporation.

Evaluation

- [12] It would be perfectly competent for the plaintiff to issue summons against the Close Corporation and then seek a consolidation of the actions. But it would be mere convenient to simply join the Close Corporation in the same action. It would be convenient because the cause of action and the evidence required would be substantially the same. The applicable law would be the same. In addition joinder on the basis of convenience is likely to advance the course of justice than hinder it. The Close Corporation will suffer no prejudice. It will be in the same position that it would have been had it been sued separately except that a multiplicity of actions and inconvenience would have been avoided.
- [13] Mr Jagga has advanced various arguments in opposition to the joinder on the basis of the facts. I have accepted that the plaintiff has erred when it submitted that the defendant admitted the existence of an agreement in his plea. But I also accept Mr Van der Vyever's submission that should the plaintiff amend the pleadings as it intends to do, the Close Corporation would have a direct and substantial interest in the outcome of the action. Although Mr Jagga submits that the claim against the Close Corporation has prescribed the plaintiff has made out a prima facie case that the prescription only arose when the defendant filed its opposing affidavit, albeit in another matter. In my view it would be prudent for the plaintiff and convenient should it join the Close Corporation in its action against the defendant. The plaintiff's fear that the defendant may testify that he acted on behalf of the Close Corporation is not an exaggerated one.

[14] Mr Jagga submits that I ought to exercise my discretion against joinder on account of the plaintiff's delay in bringing the application. It is true that the plaintiff has delayed in launching this application for joinder. It should have launched this application at much earlier stage. This is a factor to take into considered in relation, but it is not a decisive factor when there will be no prejudice to the defendant and the Close Corporation.

[15] I am satisfied that the application to join the Close Corporation on the basis of convenience should be granted and that the costs should be costs in the cause. An award of costs at this stage may be prejudicial to the Close Corporation.

Order

[16] In the premises, I grant the following order:

1. The second respondent is joined in the main action under case number 413/2012, as the second defendant.
2. The applicant, as plaintiff, in case number 413/2012, is ordered to deliver its proposed amendment of the declaration to the first and second defendants within 10 days of granting this order.
3. Costs are to be costs in the cause.
4. Should the applicant fail to comply with paragraph 2 above, paragraph 1, 2 and 3 of this order shall lapse, and the applicant shall pay the respondents costs.

A A Landman

Judge of the High Court

Appearances

Date of hearing:

20 August 2015

Date of

Judgment:

21 August 2015

For the Applicant:

Adv Van der Vyever instructed by Minchin & Kelly Inc

For the Respondents: Adv Jagga instructed by Smit Stanton Inc

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