
SOUTH AFRICA / JUDGMENT

Smith v Schoeman and Another (1802/2017) [2017] ZAFSHC 136 (25 August 2017) [2017] ZAFSHC 136

COURT

Free State High Court, Bloemfontein

BEFORE

Mhlambi

CASE / FILE NUMBER

1802/2017

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IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Case number: 1802/2017

In the matter between:

MATTHYS ABRAHAM SMITH

Applicant

and

HERMAN HECTOR SCHOEMAN

First Respondent

ROAD ACCIDENT FUND

Second Respondent

HEARD ON: 22 June 2017

DELIVERED ON: 25 August 2017

MHLAMBI, J

[1] The applicant seeks the joinder of the second respondent as the second defendant to the main action instituted under case number

1802/2015 between the applicant (as Plaintiff) and the first respondent (as first defendant). The claim stems from the under-settlement of the applicant's (Lehlohonolo Le-Roy Mashoba) claim against the Road Accident Fund (or its predecessor, the Multilateral Motor Vehicle Accidents Fund) for injuries sustained in a collision that occurred on 27 February 1995 at or near Wolmaransstad.

- [2] The second respondent, the Road Accident Fund opposed the application for joinder.
- [3] The applicant's counsel submitted that it is trite law that the only test to be applied in joinder applications is whether the claim against the party sought to be joined depended on the determination of substantially the same questions of law or fact. Relying on *Dreyer v Tuckers Land & Development Corporation (Pty)Ltd* 1981 (1) SA 1219 (T), she contended that any special defences raised by the second respondent to the plaintiff's claim are not a bar to the granting of the order for the joinder. The purported defences raised are not relevant to the current application and can be raised by the

second respondent in its plea, once it has been joined as a party.

- [4] It was submitted on behalf of the second respondent that reliance on *Dreyer* above was misplaced as the said case was distinguishable from the present matter and it was certainly not authority for the proposition that defences raised by a respondent in an application for joinder, should be left over to the main proceedings to which the joinder is aimed. I was urged to follow the dictum by Gautschi, AJ in *Mercantile Bank Ltd v Carlisle and Another* 2002 (4) SA 886 (W) at 889C-F and 889 E-H which reads as follows:

"It is difficult to see why it should not be a sine qua non to the success of such an application that the applicant should make out a prima facie case on the merits, in the sense of alleging facts which, if established at the trial, would entitle it to succeed. An applicant in this situation ought normally (I am prepared to say always) to attach a draft third party notice and annexure in which his cause of action against the third party is set out, and to confirm or adopt those allegations under oath. If no prima facie case is made out in those allegations (ie the claim as set out in the notice and annexure is excipiable in that it does not disclose a cause of action), it is inconceivable that a court would permit the third party joinder. Accordingly, I would, at the very least, expect an applicant to set out a prima facie case in the sense described above, whether in his founding affidavit or in the draft third party notice and annexure.

The prima facie case, or absence of excipiability, must of course be weighed in the light of the totality of the available facts."

- [5] It was contended that the applicant's claim against the first respondent was based on the allegations that the latter breached the duty of care that he owed the claimant, alternatively the agreement of mandate, and that the claim was not pursued in a proper and professional manner, with the required skill, knowledge and diligence and without negligence. The claim was therefore one in delict, with an alternative basis of misrepresentation and breach of the agreement of mandate. It was submitted that no duty of care existed which could support delictual liability against the second respondent or its predecessor in title in the light of the

mandate given to the first respondent. Any claim the applicant may have in law which had not prescribed, lay against the first respondent on the grounds as pleaded in the existing particulars of claim.

- [6] Rule 10(3) of the Uniform Rules of Court stipulates 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." The Rule requires that the questions of law and fact upon which the applicants' right to relief depend must be substantially the same. The word "substantial" was equivalent to words or phrases such as "in the main", "in its principal essentials", "essentially" and "intrinsically": Dreyer, *supra* 1224G-H.
- [7] In the *Mercantile Bank Ltd* case, *supra*, G-H, it was stated that the purpose of the Rule is to prevent a multiplicity of actions. The court is given a wide discretion and a lenient approach is called for. If a case against the third party is totally unfounded, the joinder would be refused. It must be a clear case, for it is the function of the trial court to decide disputes, and joinders should not be refused save in the clearest cases.
- [8] In the light of the above, it is clear that the test to be applied is whether the claim against the party sought to be joined depended on the determination of substantially the same questions of law or fact; which, in my view, is the case in the given circumstances.

Consequently, I make the following order:

ORDER

Prayers 1,2,3,4 and 5 of the notice of motion are granted with costs which shall include all reserved costs.

JJ MHLAMBI, J

Counsel for Applicant:

A Viljoen

Instructed by:

ES Els

McIntyre Van Der Post

12 Barnes Street

BLOEMFONTEIN

Counsel for second respondent: LW De Beer

Instructed by:

Maduba Attorneys

2nd Floor, 77 Kellner Street,

Westdene

BLOEMFONTIEN

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