REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 11/10614

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED.

…………………….. ………………………..
DATE SIGNATURE

In the matter between:

FLUXMANS INCORPORATED Plaintiff

And

LITHOS CORPORATION OF SA (PTY) LTD First Defendant

ANDRE GYENFIE Second Defendant

J U D G M E N T

VICTOR, J:

[1] The plaintiff sues the first and second defendants for legal fees arising out of legal services rendered to the first defendant in litigation against Kumba Resources Ltd under Case No 35078/2006.

[2] Adv A. Joubert SC, Adv I. Opperman and Adv Clarke were briefed by the plaintiff to appear on behalf of the first defendant in that litigation. The first defendant terminated the plaintiff's mandate and thus parted ways with the advocates. The defendants now wish to join the advocates as second, third and fourth defendants in their counterclaim in this action. The advocates oppose their joinder. The second defendant signed a suretyship agreement in favour of the plaintiff for payment of all the legal fees incurred by the first defendant in that action. The defendants refused to pay the balance of the fees owed to the plaintiff as well as the fees of the advocates and in particular a collapse fee charged by them.

[3] The defendants raise numerous defences and a counterclaim. In this joinder application they raise defamatory allegations against the counsel alleging that they acted fraudulently, immorally and unethically in *inter alia* charging a collapse fee at a time when they knew the action would be postponed. The defendants claim that the advocates have a substantial interest in the outcome of the litigation and therefore need to be joined in this action.

[4] The joinder of defendants is defined in Rule 10(3) of the Uniform Rules of Court:

> *"Several defendants may be sued in one action… 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.*"

[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'

Background History

[6] Upon a proper application of Rule 10, in order to justify the joinder of the advocates to the action by the defendants in their counterclaim, the right to relief must depend upon the determination of substantially the same questions of law or fact which if separate actions were instituted, the same questions of law or fact would arise. In this matter the plaintiff

has specifically and expressly waived its rights to any claim against the advocates. The plaintiff has paid those advocates in full and has on oath stated that it would not seek any relief against them.

[7] According to the defendants, because the advocates have concluded a collapse fee with the plaintiff they, the defendants, ultimately have to pay their fee and it is for this reason that the advocates have a direct and substantial interest in the outcome of the litigation because the same questions of law and fact would be traversed. This submission needs to be analysed in the context of the pleadings and the legal nexus which may exist, if any, between the advocates and the defendants.

[8] The Kumba trial was set down for 8 March 2010 to April 2010. The matter did not proceed and was postponed. Prior to accepting his brief, Adv. Joubert SC recorded his fee terms in writing and in particular incorporated the collapse fee. Despite the written fee letter, the defendants persist that it was unethical for counsel to insist on an onerous collapse fee before accepting the brief. Collapse fees are a perfectly acceptable practice in matters pertaining to the profession of advocates. The defendants have not been able to prove the contrary in this joinder application.

[9] The defendants also contend that upon accepting the brief Adv Joubert SC knew that the matter was not going to proceed and in fact started

drawing the postponement application at the beginning of March 2010. The defendants contend that the advocates acted fraudulently, immorally and unethically in concluding the collapse fee when they knew that the matter was going to be postponed. The answering affidavits demonstrate quite unequivocally that although the postponement application was being prepared the defendants insisted that the legal team be ready to run the trial as they wished a conclusion to the matter. In any event if the postponement was not granted counsel would have had to be ready to run the trial.

[10] When the plaintiff issued summons for non payment of the balance of its fees, the defendants for the first time raised a complaint about the advocates' fees with the Bar Council. Of importance is the fact that the collapse fee was dealt with by the Fees Committee of the Johannesburg Bar Council and they found the collapse fee and counsel's other fees to have been correctly charged. The complaint was dismissed.

[11] In a letter dated 28 January 2010 Adv Joubert SC made it clear that he would only act since he was called in late and that he would accept the instruction regardless of whether the trial proceeded or not. Both Adv Opperman SC and Adv Clarke made the same note in a letter and they all stipulated a maximum fee of 19 days including a collapse fee of 18 days. In dismissing the claim the Fees Committee also raised the question that the defendants only raised their grievance after receipt of

the summons. The matter was referred to the Johannesburg Bar Council some 15 months after the plaintiff had paid the advocates' fees. In a ruling by the Bar Council the reasonableness of the fees was dealt with and the reasonableness of counsel concluding the collapse fee was also considered. The counsel were completely exonerated by the Bar Council.

[12] In a vitriolic response, the defendants in the replying affidavit attacked the recommendation of the Bar Council Fee Panel by stating that it had committed a "*glaring breach of the hallowed principle of natural justice*", that they were condemned without a hearing and that the recommendation flies in the face of the Bar Council's own rulings. It was undisputed that at some stage during the enquiry the defendants refused to participate to the end of the enquiry. The above allegations are puzzling in the light of the defendants' own conduct in that enquiry.

[13] There are also allegations of fraudulent practice on the part of the plaintiff and the allegation is made that there was connivance between the plaintiff and the advocates and this justifies their joinder. There is also an allegation of fraudulent misrepresentation and the defendants contend that the advocates be joined as parties to enable the defendants to prove their allegations against the advocates. The defendants have misconceived the purpose of joinder.

[14] The defendants also aver that the advocates suggested that the claim against Kumba of US $428 million should be reduced to US $2 million. They contend that it was the amendment that caused the trial not to run. Despite the amendment being one of the complaints, the defendants utilised the amendment in further proceedings after the plaintiff's mandate was terminated. The defendants deny this. That dispute of fact is not necessary for me to determine in this application.

[15] The plaintiff points out that the defendants have had various fee disputes not only with it but with their previous attorneys of record which has resulted in this trial not proceeding.

Delay in bringing Joinder Application

[16] The plaintiff contends that these joinder proceedings are a further step on the part of the defendants to delay the conclusion of this trial. The defendants have had ample opportunity to bring these joinder proceedings. The pleadings in this action closed in early 2012. The plaintiff applied for a trial date and the matter was set down for hearing on Friday 19 October 2012 and was to run for several days. With the concurrence of the Deputy Judge President it was agreed that the trial would commence two days later on 22 October 2012.

[17] On 18 October 2012 the defendant's attorneys, C & A Friedlander of Cape Town, withdrew as attorneys of record. The defendants arrived at court represented by new attorneys, Martin Smith Inc, and a new

counsel. On the strength of an unsigned affidavit a postponement was sought based on the fee dispute that had arisen between the defendants and C & A Friedlander. The defendants obtained a postponement. A new trial date was subsequently allocated a year later on 8 October 2013 and again a day or two before the hearing the new attorney of record withdrew based on a fee dispute.

[18] The second defendant without any papers made application for a postponement which was granted and they were ordered to pay the wasted costs. There have been several postponements of this trial and the defendants have not taken any steps to join the advocates. Instead they chose to do so just days before the trial. During extensive case management by this court from 13 June 2014 the defendants have not taken any steps to join any parties.

[19] I also take into account that the claim that the first defendant could have against the advocates has in any event become prescribed if indeed such a claim ever existed. The fee dispute arose in 2010 and it was only on 4 August 2014 that the defendants chose to join the advocates.

Analysis of Pleadings

[20] It is necessary to analyse the cause of action set out in the counterclaim and to see whether that claim justifies the joinder of the advocates to these proceedings. An analysis of the first and second defendants' counterclaim

reveals the following: In claim A the defendants allege that on or about February 2008 the first defendant and the plaintiff concluded an agreement in terms of which the plaintiff was mandated to act as the first defendant's attorney in the action instituted by the defendants against Khumba Pty Ltd. Claim A is clearly a claim against the plaintiff. The defendant alleges that fair and reasonable fees would be rendered and in this case it is the defendant's claim that those fees were not reasonable. In para 7.1 of the counterclaim the defendants make the allegation again that the plaintiff incurred unnecessary disbursements which were not in accordance with the mandate.

[21] Claim B is a claim for damages, again this relates to counsels' fees and the defendants contend that these collapse fees should not have been concluded with counsel on behalf of the first defendant. The allegation is made specifically that the plaintiff was not authorised to conclude such agreements on the defendants' behalf. Clearly, the claim is against the plaintiff for damages from concluding these fees.

[22] In Claim C the defendants submit that the documents pertaining to the suretyship and power of attorney in terms of which the second defendant signed a power of attorney putting up his house as security for the legal fees was executed and concluded under duress, in particular under threat of the postponement of trial as described in their plea and under the influence of a misrepresentation on the part of the plaintiff. Clearly the

party against whom the defendants seek to claim recompense is the plaintiff and not the said advocates.

[23] Claim D is a claim for defamation and again the allegation is that the plaintiffs' director, Mr Collin Strime made defamatory statements against the defendants. This is clearly a claim against the plaintiff.

[24] A new claim E was inserted in the counterclaim of fraudulent misrepresentation where the defendants contend that the plaintiff concealed the material fact that the trial scheduled for 8 March 2010 would never proceed and would not be heard. This again is a claim against the plaintiff.

[25] Clearly each and every claim in the counterclaim is against the plaintiff and not the advocates. The advocates have been paid their fees and also waived their rights to make any claim against the plaintiff. Similarly the plaintiff has waived its right to make any claim against the advocates. The defendants do not have a basis in law to join the advocates as a matter of necessity as set out in the case already referred to.

Joinder of Advocates

[26] It is clear that counsel cannot contract with the members of the public directly. It is a referral profession and it is a professional practice or trade usage that the legal nexus between counsel for their fees is with that of the attorney and not with the members of the public. See *General*

Council of The Bar of South Africa v Geach and Others 2013 (2) SA 52 (SCA)*, Minister of Finance and Another v Law Society, Transvaal* 1991 (4) SA 544 (A) and *Serrurier and Another v Korzia and Another* 2010 (3) SA 166 (W).

[27] The defendants rely on various English authorities. Again these authories are in line with the South African practice; joinder is required if the third party has a direct and substantial interest in the outcome of the proceedings and must of necessity be joined.

Issue Estoppel and Joinder

[28] Advocate Peter SC submitted on behalf of the plaintiff that if there is to be a joinder of necessity the mischief that it seeks to deal with is to prevent a defence of *res judicata* in the form of what has become known as *issue estoppel.* The question of *issue estoppel* must be that the court must determine the identical issue between the identical parties. In the light of an unequivocal waiver by the advocates of the right to be joined they have waived the opportunity to protect their interests by being made parties to the counter claim. That unequivocal waiver is on affidavit and this takes away the need for the advocates to be joined as parties to this litigation.

[29] A further case quoted in support of whether a party has a direct and substantial interest that justifies the joinder is the element of prejudice. In *Amalgamated Engineer Union v Minister Of Labour* 1949 (3) SA 637 (A)

at 661 Fagan AJA stated ‘if I may again adopt words used by the Court in *Bekker v Meyring* – “cannot be sustained and carried into effect without necessarily prejudicing the interest” of the Council’. See also *Ex parte Body Corporate of* Caroline *Court* 2001 (4) SA 1230 (SCA). There is no question of prejudice to the advocates.

[30] In summary, where a party has a direct and substantial interest in litigation and has been given formal notice of such litigation and waives the right to be joined in the circumstances amounting to a consent to be bound by the judgment, such joinder would no longer be necessary as the principle of *res judicata* would operate to permit the judgment to be maintained and carried into execution notwithstanding the prejudice having so been waived.

[31] In the result there is no basis in law based on the principles of joinder where a party seeking to join another party in the face of a clear and unequivocal waiver. There is no necessity for the advocates to be joined in these proceedings.

Costs

[32] On the question of costs, the plaintiff and counsel on behalf of the advocates have asked for costs on the basis of the attorney/client scale by virtue of the defamatory allegations made in the papers against them. It was undisputed by the defendants when the plaintiff and the advocates stated that it was the defendants who were very keen to continue with the

trial and that the advocates had to prepare for a postponement or alternatively if the trial was to run they had to be ready to do so. This is a critical feature in assessing the nature of the scurrilous allegations made by the defendants.

[33] The allegations concerning the advocates refer to fraud and other negative allegations. For example, the defendants say that the plaintiff under the coloured pretext of professional practice connived with counsel with the intent and indeed fraudulently misrepresenting to the defendants that the trial will run. The demand that the advocates be joined to prove this material allegation of fraudulent misrepresentation is bad in law. The alleged fraudulent misrepresentation in the form of concealement of a material fact by the advocates does not justify joining the advocates. Parties are not joined for the purpose of merely obtaining their evidence or for cross examining them. The advocates could have been subpoened by the defendents The further allegation is made that this fraud is really of a criminal nature and that these advocates must be called to answer the case. Joinder is not a process necessary to follow that course.

[34] The allegations against the advocates have been made in a manner which has not been fully explained. The allegations are simply made without a full and detailed exposition as to why their conduct is fraudulent, why there was concealment by omission and why their conduct is of a criminal nature. These are scurrilous allegations and should not be made lightly. The defendants will be aware of the laws of defamation in South

Africa and must be cautioned that they should not lightly make these allegations as there will be consequences. In my view the allegations are of such a scurrilous nature that they do justify an attorney/client cost order.

In the result I make the following order:

The application is dismissed with costs and the defendants are to pay the costs of the joinder application on the attorney and client scale.

JUDGE VICTOR

Counsel for Plaintiff: Adv J Peter SC

Counsel for Advocates: Adv W Van Der Linde

Attorney for Plaintiff and Counsel: Mr C Strime of Fluxmans Attorneys

Appearance for Defendants: Mr A. Gyenfie in person

Date of hearing: 24 July 2014

Judgment handed down: 25 July 2014