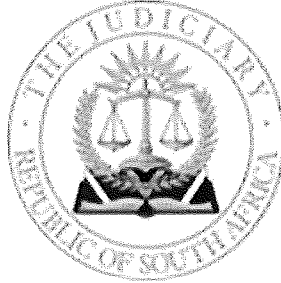


REPUBLIC OF SOUTH AFRICA**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED:

15/5/2023
DATE


SIGNATURE

CASE NO: 2022/5427

In the matter between:

CBZ SOLUTIONS (PTY) LTD**Applicant**

And

ESKOM HOLDING SOC LTD**Respondent****(Registration Number: 2005/013558/07)**

In Re:

ESKOM HOLDING SOC LTD

Plaintiff

And

ZURICH INSURANCE plc

First Defendant

ZURICH INSURANCE plc, FRENCH BRANCH

Second Defendant

**ZURICH INSURANCE plc, NIEDERLASSUNG
FÜR DEUTSCHLAND, KAUTIONS-UND
KREDITVERSICHERUNG**

Third Defendant

CYLDE BERGEMANN MANAGEMENT GmbH

Fourth Defendant

CYLDE BERGEMANN POWER GROUP INC

Fifth Defendant

CBZ SOLUTIONS (PTY) LTD

Sixth Defendant

Neutral citation: *Eskom Holding Soc Ltd Vs Zurich Insurance plc And Five Others* (Case No: 2022/5427) [2023] ZAGPJHC 470 (15 May 2023)

JUDGMENT

DREYER AJ:

- [1] The Applicant (the Sixth Defendant in the action instituted under the abovementioned case number) seeks an order that it be removed as Defendant in the matter.
- [2] The Applicant asserts that its joinder to the action by the Respondent (the Plaintiff in the action) was irregular and amounts to a misjoinder.
- [3] A brief chronology is as follows:
- 3.1 On or about 22 February 2022 the Respondent served a Citation and Intendit on the Applicant.
- 3.2 The Applicant proceeded on 5 April 2022 to serve a Notice of Intention to Defend as well as a Notice in terms of Rule 30 ("the Rule 30 notice") on the Respondent's attorneys of record.
- 3.3 The present application was served on the Respondent's attorneys of record on 16 May 2022.
- [4] Rule 10(3) of the Rules states that:
- "(3) 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."*

[5] Misjoinder is the joining of several plaintiffs or defendants in one action in circumstances which in law does not sanction; i.e. the objection is that the wrong plaintiffs are suing or the wrong defendants are being sued.

[6] It is evident from the Intendit that the Respondent is not seeking any relief against the Applicant in the action.

[7] The Applicant's reasons for asserting that its inclusion in the action amounts to misjoinder, as set out in its Rule 30 notice and paragraphs 20 to 25 of the Founding Affidavit, are as follows:

7.1 The Respondent seeks relief against the First to Fifth Defendants only.

7.2 The Respondent does not seek any relief nor make any prejudicial claims against the Applicant.

7.3 The Respondent has joined the Applicant in proceedings where there is no *lis* or other question of law or fact to be determined between it and the Respondent.

7.4 The Respondent failed to plead a clear and concise statement of material facts upon which it relies for a claim against the Applicant as is required by Rule 18(4) of the Uniform Rules ("the Rules") of Court and the Citation constitutes an irregular step as contemplated in Rule 30 of the Rules insofar as it refers to the Applicant.

7.5 The joining of a party as a Defendant in a matter is determined in terms of Rule 10(3) of the Rules.

7.6 Rule 10(3) of the Rules determines that a party may only be sued as a co-Defendant whenever the question arising between it and the Plaintiff (or Plaintiffs) depends upon the determination of substantially the same question of law or fact which, if such co-Defendants were sued separately, would arise in each separate action.

7.7 Accordingly the Applicant ought not to have been joined as a Defendant in these proceedings and the Citation constitutes an irregular step as contemplated in Rule 30 insofar as it refers to the Applicant.

[8] The Respondent in paragraphs 18 to 37 of its Answering Affidavit summarised the essential allegations in the Intendit as follows:

8.1 The action arises out of a contract concluded in November 2009 between the Respondent and the Applicant in terms of which the Applicant (then known as Clyde Bergemann Africa) would construct and complete certain works at the Medupi Power Station.

8.2 The Applicant was entitled to interim payments for work undertaken. The Respondent was entitled to retain specified portions of these interim payments to create a fund which could be called on if the Applicant failed to meet any of its contractual obligations to the Respondent or its work proved defective ("the Retention Money"). In lieu of the Respondent retaining the Retention Money, the Applicant could elect, at its own costs, to provide the Respondent with a guarantee being a Retention Money Guarantee. The Retention Money Guarantee would stand in stead of a fund comprising the Retention Money.

8.3 The Applicant was obliged to ensure that the Retention Money Guarantee remained valid and enforceable until all works had been completed and the defects period had elapsed.

- 8.4 The Applicant was also obligated to obtain an irrevocable demand bank guarantee as security for the proper performance of its obligations to the Respondent being a Performance Security.
- 8.5 The Applicant was obligated to ensure that the Performance Guarantee remained enforceable and valid until the date of the issue of the Taking Over Certificate of the Last Section.
- 8.6 On 16 December, and on the instructions of the Applicant, Zurich Insurance plc, French Branch ("ZI France"), the Second Defendant in the action, issued a Performance Bond – Demand Guarantee ("the Performance Guarantee") to the Respondent. The said guarantee had an original expiration date of 2 February 2014.
- 8.7 On 26 June 2012, and on the instructions of the Applicant, Zurich Insurance plc, Niederlassung für Deutschland Kautions-Und Kreditversicherung ("ZI Germany"), the Third Defendant in the action, issued a Retention Money Guarantee – Demand Guarantee ("the Retention Money Guarantee") to the Respondent. The said guarantee had an original expiration date of 30 January 2016.
- 8.8 ZI France and ZI Germany are branch offices of Zurich Insurance plc ("ZI"), the First Defendant in the action.
- 8.9 The Performance Guarantee and the Retention Money Guarantee were extended by ZI from time-to-time, on the instructions of the Applicant. On 28 January 2019 ZI extended the said guarantees until 28 February 2019.

8.10 At no stage after 28 February 2019 had the Applicant completed the works at the Medupi Power Station. In the circumstances the Applicant remained obligated to ensure that the Performance Guarantee and the Retention Money Guarantee were extended after 28 February 2019. The Applicant's failure to do so triggered the Respondent's rights to demand payment of the full amounts still guaranteed under the said guarantees.

8.11 In light of the Applicant's failure to have the Performance Guarantee and the Retention Money Guarantee extended beyond 28 February 2019, the Respondent on 27 and 28 February 2019 respectively demanded the amounts held by ZI under the said guarantees.

8.12 ZI however refused to pay out the guaranteed amounts and the Respondent proceeded to institute action on or about 22 February 2022. The Respondent therefore seeks payment from ZI of the guaranteed amounts (Claims 1 and 2 in the Intendit).

8.13 The Respondent further seeks relief in the action directing Clyde Bergemann Power Group Inc (the Fifth Defendant in the action) ("CB USA"), being the Applicant's parent company, take all necessary steps to ensure that documents issued by ZI which extended the said guarantees to 28 February 2019 being the Additional Declarations, are handed to the Respondent. The basis for the relief is that the extension documents were sent by ZI to the Applicant. The Applicant was obliged to hand these original documents to the Respondent, but instead handed same to CB USA and which are now being held by the attorneys of record of the First to Fifth Defendants in the action.

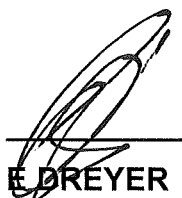
[9] In paragraphs 43.1 to 43.5 of its Answering Affidavit the Respondent that in light of the content of the Intendit the Applicant will be centrally involved in several factual determinations in the action, and the legal consequences which flow from such findings, in particular:

- 9.1 The Performance Guarantee and the Retention Money Guarantee were issued by ZI on the Applicant's instructions for obligations owed by Applicant to the Respondent.
- 9.2 The said guarantees reflect that ZI held the guaranteed sum at the disposal of the Respondent as security for CBZ's obligations. If ZI is compelled to pay out the guaranteed sums to the Respondent, the Applicant will lose the amounts held by ZI, or be indebted to ZI to pay such amounts back to ZI.
- 9.3 The Applicant will be best placed to indicate any reason why the Respondent's to demand payment under the said guarantees were not triggered.
- 9.4 The said guarantees contained formalities for the Respondent to meet before demanding payment from ZI, including notification to the Applicant, and the Applicant will be centrally placed to determine whether these formalities were met.
- 9.5 The Applicant will be centrally involved in any determination whether it instructed ZI to extend the said guarantees to 28 February 2019.
- 9.6 The Applicant will be centrally involved in explaining why it failed to hand the original Additional Declarations issued by ZI over to the Respondent, and instead handed it to CB USA.
- [10] The response of the Applicant to the abovementioned, as set out in paragraphs 35.1 to 35.6 of its Replying Affidavit, is either a denial or to state that it is irrelevant to the Respondent's claims.

- [11] Fagan J.A. held in *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) that the Court has consistently refrained from dealing with issues in which a third party may have a direct and substantial interest without either having that party joined in the suit or, if the circumstances of the case admit of such a course, taking other adequate steps to ensure that its judgment will not prejudicially affect that party's interests.
- [12] In *Abrahamse and Others v Cape Town City Council* 1953 (3) SA 855 (C) the Court held the use by Fagan J.A. of the word "may" indicates that it suffices if there exists the possibility of such interest. It is not necessary for the Court to determine that it, in fact, exists; in many cases, such a decision could not be made until the party had been heard.
- [13] In *Bowring NO v Vrededorp Properties CC and Another* 2007 (5) SA 391 the Court held that the substantial test is whether the party that is alleged to be a necessary party for the purposes 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.
- [14] In *SA Riding for the Disabled Association v Regional Land Claims Commissioner and Others* 2017 (5) SA 1 (CC) the Constitutional Court held that is now settled that an applicant for intervention must meet the direct and substantial interest test in order to succeed. What constitutes a direct and substantial interest is the legal interest in the subject-matter of the case which could be prejudicially affected by the order of court. This means that the applicant must show that it has a right adversely affected or likely to be affected by the order sought. But the applicant does not have to satisfy the court at the stage of intervention that it will succeed. It is sufficient for such applicant to make allegations which, if proved, would entitle it to relief. The Constitutional Court further held that it is a basic principle of our law that no order should be granted against a party without affording such a party a predecision hearing. This is so fundamental that an order is generally taken to be binding only on parties to the litigation.

- [15] In *Knoesen and Another v Huijink-Maritz and Others* (5001/2028) [2019} ZAFSHC 92 (31 May 2019) it was held that it is imperative to emphasise that there is a difference between the “relief” sought, the “cause of action” and the judgment of the court”. The “subject matter” of the litigation referred to in the misjoinder-test is not necessarily the “relief”. The “judgment” is not only the relief ordered.
- [16] In *Hlophe v Freedom Under Law, and Other Matters* 2022 (2) SA 523 (GJ) the Court held that a ‘legal interest’ must be put forward. The possibility of such an interest is sufficient.
- [17] In *Selborne Furniture Store (Pty) Ltd v Steyn* NO 1970 (3) SA 774 (A) and *Pretorius v Slabbert* 2000 (4) SA 935 (SCA) the Court recognised that it would not be proper to proceed to draw an inference as to the rights of a party, without giving them an opportunity of being heard in regard thereto.
- [18] The Applicant acknowledges that the Intendit refer to and make numerous references and allegations in respect of the Applicant, all of which stand as admitted, should the Applicant not plead in full thereto (See Annexure “JAB2” to the Answering Affidavit).
- [19] The facts as set out in the Intendit show that the Applicant has a possible legal interest in the subject matter of the litigation.
- [20] The Applicant has failed to set out why its legal interests would not be affected in the event that the Respondent is successful in the action.
- [21] The facts set out in the Intendit further show that the Applicant is centrally involved in issues that the Court adjudicating upon the action would be called upon to determine.

- [22] In the circumstances I am of the view that this Court ought to err on the side of caution and not remove the Applicant as a party to the action.
- [23] The Applicant contends that it would be severally prejudiced should it not be removed as a party to the action in that it will have to prepare a Plea and possibly participate in a trial and any appeals in circumstances where no relief is claimed against it.
- [24] I am not in agreement with this. It is always open to the Applicant to deliver a Notice of Intention to Abide.
- [25] I therefore make the following order: The application is dismissed with costs.



E. DREYER

**ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG**

This judgment was handed down electronically by circulation to the parties' legal representatives by email and by being uploaded to CaseLines. The date and time for hand down is deemed to be 15 May 2023.

Appearances:

Appearance for Applicant:

Adv. DP de Villiers SC

Instructed by:

Daly Maqubela Oliphant Inc.

C/O Memela Jones Inc.

Appearance for Respondent:	Adv. D Borgström SC
	Adv G Rüther
Instructed by	Edward Nathan Sonnenbergs Inc.
	C/O Makau Phefadu Inc.

Date of hearing:	25 April 2023
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Date of Judgment:	15 May 2023
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