

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 2021/25745

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED: YES / NO
29/05/2023 <i>[Signature]</i> DATE SIGNATURE	

In the matter between:

Kufuma (Pty) Ltd

Applicant

and

Bidvest Facilities Management (Pty) Ltd

First Respondent

Sishen Iron Ore Company (Pty) Ltd

Second Respondent

*In re***Kufuma (Pty) Ltd**

Plaintiff

and

Bidvest Facilities Management (Pty) Ltd

Defendant

Neutral citation: Kufuma (Pty) Ltd vs Bidvest Facilities Management (Pty) Ltd and Sishen Iron Ore Company (Pty) Ltd (Case no: 2021/25745) [2023] ZAGPJHC 591 (29 MAY 2023)

JUDGMENT

MAHALELO, J:

Introduction

- [1] This is an application for the joinder of the second respondent in terms of Rule 10(3) of the Uniform Rules of Court. The joinder application is accompanied by an application for condonation in respect of the delivery of the applicant's further supplementary affidavit. The applicant seeks to have the second respondent joined as the second defendant in the main action wherein it claims damages in the action instituted on 20 May 2021 against the first respondent for breach of contract. The applicant, if granted joinder of the second respondent seeks to amend its claim to plead that the first and second respondents are liable to it jointly and severally, the one paying the other to be absolved. The second respondent opposes this application to be joined as a party in the main action. However, does not oppose the filing of the supplementary affidavit. The second respondent has not delivered any answering affidavit and has sought to raise a single point of law against the joinder application.
- [2] The first respondent concluded an oral agreement with Fresh Camp Management Service (FCMS) for the provision of, inter alia, catering, laundry and housekeeping services at the Sishen mine. The first respondent was the party liable to FCMS for payment of the services and allegedly contracted with FCMS as principal. The applicant was subsequently incorporated and was assigned the catering and housekeeping agreement. The catering and housekeeping agreement was varied in a number of respects.
- [3] The applicant alleges that it performed properly in terms of the catering and housekeeping agreement as amended and that the first respondent materially breached, alternatively, repudiated the catering and housekeeping agreement by giving notice of termination of the agreement. The applicant alleges that it suffered contractual damages as a consequence thereof.
- [4] On 20 May 2021, the applicant instituted the main action against the first respondent. The first respondent defended and delivered a notice to remove course of complaint on 1 July 2021. In response to receiving the notice to remove cause of complaint, the applicant delivered a notice of intention to amend its particulars of claim on 12 August 2021. The proposed amendment

was not opposed by the first respondent and the applicant delivered its amended pages on 31 August 2021. Thereafter, the first respondent delivered a substantive plea on 29 September 2021. On 20 October 2021 the applicant delivered an exception to the first respondent's plea.

- [5] Pursuant to the delivery of the exception, the first respondent delivered a notice of intention to amend its plea. The applicant delivered a notice of objection to the proposed amended plea. The first respondent then delivered a substantive application for leave to amend its plea. After considering the contents of the application for leave to amend and explanation provided, the applicant decided that it would not persist with its objection to the application for leave to amend. Accordingly, it consented to the proposed amendment. Thereafter, the first respondent delivered its amended plea.
- [6] The applicant's basis for the joinder application is that the first respondent, in the course of advancing its various defenses, admitted and or conceded that it had always contracted with FCMS and subsequently with the applicant *qua principal*. The applicant submits that at no point in its original plea, did the first respondent contend that it had merely acted as an agent or in a representative capacity on behalf of anyone else. However, in the amended plea, the first respondent's defense hinges, inter alia, on the contention that it never concluded the catering and housekeeping agreement with FCMS originally or subsequently with the applicant *qua principal*. The applicant says that the first respondent now appears to be saying that it merely managed and oversaw the conclusion of the catering and housekeeping agreement as well as the performance in terms thereof in a representative capacity on behalf of the second respondent.
- [7] The applicant contended that the first respondent now purports for the first time to distance itself from any contractual liability in terms of the catering and housekeeping agreement by contending that it was not the other party contracting the catering and housekeeping agreement. In other words, all its actions, including the original appointment of FCMC as well as termination of the catering and housekeeping agreement by notice, were simply carried out in a representative capacity acting for and on behalf of the second respondent. Further, the services originally provided by FCMC in terms of the catering and housekeeping agreement provided to the second respondent were provided to the second respondent who was the contracting party who paid FCMS and the applicants invoices.

- [8] The applicant argued that a necessary implication of the first respondent's contentions is that the first respondent maintains that the catering and housekeeping agreement was actually concluded with the second respondent as principal. Consequently, it has become necessary for the applicant to join the second respondent as the second defendant to the main action so that it may amend its pleadings and plead a contractual cause of action against the second respondent in the alternative.
- [9] The second respondent contended that the applicant maintains that it has a cause of action against the first respondent as pleaded in its amended particulars of claim therefore as a matter of fact and law, it always contracted with the first respondent *qua principal* with respect to the catering and housekeeping agreement as well as the terms thereof. Further, because the applicant persists with its case that it contracted with the first respondent it cannot succeed in a case against the second respondent. The second respondent argued that the trial court will not make a finding that a contract was concluded with the second respondent if the case advanced by the applicant is that the contracting party was the first respondent and any joinder of the second respondent would be at best an academic exercise and or have no practical effect.

Legal position

- [10] In terms of Uniform Rule 10 (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.”

- [11] The test in a joinder application is whether or not the party has a “*direct and substantial interest*” in the subject matter of the action, i.e. a legal interest in the subject matter of litigation, which may be affected prejudicially by the judgment of the court.¹ If such interest is shown this will amount to a joinder out of necessity. Apart from a joinder out of necessity a court can join a party

¹ *Old Mutual Life Assurance Co SS Ltd v Swemmer* 2004 (5) SA 373 (SCA) at 381 C-D.

under the common law on grounds of convenience, equity, the saving of costs and the avoidance of multiplicity of actions.

[12] Rule 10(3) requires that the question of law and fact upon which the right to relief depends must be substantially the same. It means that the question of law and fact must in the main or in their principal essentials be essentially the same.

[13] Under the common law the court has the inherent power to order the joinder of further parties in an action which has already begun in order to ensure that that person's interest in the subject matter of the dispute and whose rights may be affected by the judgment are before court.²

[14] The legal principles regarding applications for a joinder were confirmed by Nkabinde J in a dissenting judgment in *National Union of Metal Workers of South Africa v Intervolve (Pty) Ltd and others*³ as follows:

“The test at common law is governed by the following principles:

(a) there must be a legal interest in the proceedings and not merely a financial interest.

(b) a party has a right to ask that someone be joined as a party ‘if such a person has a joint propriety interest with one or either of the existing parties to the proceedings or has a direct and substantial interest in the court's order’ and ‘to avoid a multiplicity of actions and a waste of costs’.”

Evaluation

[15] The original plea delivered by the first respondent contained a plethora of defenses to the applicant's claim. What is relevant from the original plea is that the first respondent never once denied having contracted with either FCMS and or the applicant *qua principal*. The first respondent admitted throughout its original plea that it had acted as a principal with both FCMS and with the applicant. The defenses originally pleaded presupposes that it had dealt with and appointed the applicant as principal. In the amended plea the first respondent now contended that it had only acted in a representative capacity for and on behalf of the second respondent and had only ever acted on the second respondent's instructions.

² *Ploughman NO v Pauw* 2006 (SA) 334 (C) at 341 E-F.

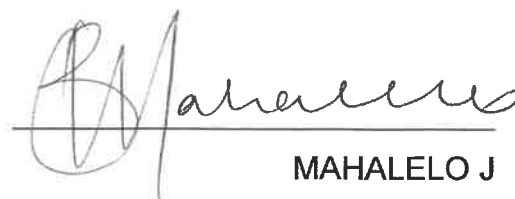
[16] As a result of the amended plea and what had been asserted by the first respondent in its application for leave to amend it becomes clear that the applicant would have to join the second respondent to the main action in order to plead an alternative contractual cause of action against it. There is a substantially similar question of law or fact that exists between the applicant and the first and second respondents which would arise if a separate action was instituted by the applicant against the second respondent therefore, joinder of the second respondent as second defendant in the main action would be convenient and equitable. The joinder of the second respondent would prevent a multiplicity of actions and prevent the inevitable increase in costs that would be attendant upon the institution of a separate action against the second respondent. It would again prevent the applicant's witnesses from testifying twice in two separate trials against two separate juristic entities and the contractual liability if any of the respective parties could be determined and dispositive in a single trial. The second respondent would not be prejudiced at all by being joined as a second defendant to the main action.

[17] As far as costs are concerned, the applicant argued that the second respondent should bear the costs of the joinder application because it opposed the joinder application and has not abandoned its point of law even after being expressly invited to do so. I find myself in agreement with the applicant. The second respondent's opposition to be joined as the second defendant to the main action was not necessary.

Order

[18] In the result I make the following order:

1. The second respondent is hereby joined as the second defendant to the main action, under case number 25745/ 2021.
2. All pleadings filed of record to date in the main action are to be served on the second respondent within 10(ten) days of the granting of this order.
3. The second respondent to bear the costs of the joinder application.



MAHALELO J
JUDGE OF THE HIGH COURT
JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' legal representatives and uploading on caselines. The date for hand down is deemed to be 29 May 2023.

Appearances.

For the Applicant: Adv E Fraser

For the Second Respondent: Adv M Smit