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

CASE NO: 10029/2020

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

17.08.23

In the matter between:

IAN CRAIG ROSS

First Plaintiff

ANNELIE ROSS

Second Plaintiff

and

NEDBANK LIMITED

Defendant

J U D G M E N T

MAIER-FRAWLEY J:

1. The plaintiffs instituted action against the defendant in which they advanced a delictual claim for damages on account of the defendant's alleged negligent breach of a duty of care owed to the plaintiffs - to not allow withdrawals from an account into which monies obtained by a third party 'fraudster' (the account holder) through interception fraud were deposited -

after the defendant, Nedbank Limited ('the bank') became aware of fraudulent transactions pertaining to the account.

2. The defendant raised a special plea of non-joinder to the plaintiffs claim. By agreement between the parties, the special plea was to be adjudicated separately from the merits of the claim at the hearing of the matter.
3. The relevant background facts appear from the particulars of claim and are largely common cause. For purposes of judgment, a broad overview of the plaintiffs' case is provided. The plaintiffs had entered into an agreement of sale in terms of which they had purchased an immovable property from a third party seller. Ross and Jacobs attorneys (RJ attorneys) were appointed as the conveyancers to attend to the transfer of the property into the names of the plaintiffs. On 8 February 2019 the plaintiffs received an email purporting to originate from RJ attorneys, in which the plaintiffs were instructed to make payment of the purchase price into the bank account bearing the account number reflected in the email, being an account held with the bank.
4. Unbeknown to the plaintiffs, the email was fraudulent in that it did not originate from RJ attorneys and the account reflected in the email (fraudulent account) did not belong to and was not operated by RJ Attorneys. On 11 and 12 February 2019, the plaintiffs paid R2,800,000.00 and R140 000.00 respectively into the fraudulent account.
5. The fraud was discovered on 12 February 2019. The payments that were electronically made into the fraudulent account were reported to the bank on the same day. The bank informed the Plaintiffs that the fraudulent account would be suspended (frozen) and that no transaction from or against the account would be allowed. Despite the aforesaid, the bank allowed amounts to the total value of R2,940,000.00 to be withdrawn

against, alternatively, debited from the fraudulent account, thereby allegedly causing the Plaintiffs to suffer damages

6. In its special plea, the defendant alleges as follows:

- “1. *In paragraphs 5, 6 and 8 of the particulars of claim, the plaintiffs allege that Ross & Jacobs Attorneys (RJ Attorneys) were appointed as conveyancers to transfer registration of the immovable property into the plaintiffs’ names;*

On 8 February 2019 the plaintiffs received an email purporting to originate from RJ Attorneys, instructing the plaintiffs to make payment of the purchase price in respect of the immovable property into an account held with the defendant, with account number [...] (a fraudulent account); and that;

Unaware of the fraudulent email, the plaintiffs on 11 and 12 February 2019 paid in aggregate R2 940 000.00 into the alleged fraud account.

2. *The appointment of RJ Attorneys as conveyancers gave rise to a legal duty between RJ Attorneys and the plaintiffs in terms of which RJ Attorneys had to take all reasonable steps to ensure that email and other communication between itself and the plaintiffs was secure, in that the integrity thereof was not compromised.*
3. *It is apparent from the plaintiffs’ allegations that the alleged fraudster may have somehow gained knowledge of the communication between the plaintiffs and RJ Attorneys and thereby generated the alleged fraudulent email that purported to be from RJ Attorneys.*
4. *The alleged fraudster would have gained knowledge of the communication between the plaintiffs and RJ Attorneys due to the negligence on the part of either the plaintiffs or RJ Attorneys. Consequently, by virtue of their appointment as conveyancers and the legal duty flowing therefrom, RJ Attorneys have a legal interest in the action and should accordingly be joined as second defendant in the action.*

5. *In the circumstances, the defendant intends to plead contributory negligence on the part of either the plaintiffs and/or RJ Attorneys, in the event the defendant is found to have been negligent and caused the plaintiffs loss.” (emphasis added)*

Relevant Legal Principles

7. The relevant principles pertaining to non-joinder were conveniently summarised by Tolmay J in *Myeni*,¹ as follows:

“[63] ...In the common law a defendant’s right to join other parties are narrowly confined.²

[64] Non-joinder arises where another party has a direct and substantial interest in the matter, which is determined by the relief that is sought. A party can only be said to have a direct and substantial interest in the matter if the relief cannot be sustained and carried into effect without prejudicing their interests.³

[65] In *Amalgamated Engineering Union*,⁴ the Appellate Division explained further that “[t]he question of joinder should ... not depend on the nature of the subject-matter of the suit ... but... on the manner in which, and the extent to which, the Court’s order may affect the interests of third parties.”

[66] This means that the relief is decisive, not the facts or issues in dispute. Even where a Court may be called on to make findings that are adverse to another

¹ *Myeni v Organisation Undoing Tax Abuse NPC and Others* (15996/2017) [2019] ZAGPPHC 565 (2 December 2019), paras 63-70.

² *Burger v Rand Water Board & Another* 2007 (1) SA 30 SCA par 7 where the following was said: “The right to demand joinder is limited to specified categories of parties such as joint owners, joint contractors and partners and where the other party(s) has a direct and substantial interest in the issues involved and the order which the court might make...Kock & Schmidt v Alma Modehuis (Edms) Bpk 1959 (3) SA 308 (A)... at 318E-F...”.

³ *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 653 (‘Amalgamated Engineering’); *Gordon v Department of Health, Kwazulu-Natal* [2008] ZASCA 99; 2008 (6) SA 522 (SCA) at para 9; *Absa Bank Ltd v Naude* NO 2016 (6) SA 540 (SCA) at para 10.

⁴ *Amalgamated Engineering* at 657.

party this does not establish grounds for non-joinder if the relief sought does not adversely impact on that party's interests.⁵

[67] In this instance the Respondents seek relief only against the Applicant and not against the other Board Members.⁶ The relief claimed therefore does not impact on the other director[s]...at all and as a result they do not have a direct and substantial interest in this matter.

[68] That does not mean that they may not be called as witnesses and that their evidence may be determinative of the success of the Respondents claims against the Applicant.

[69] The other directors do not have a direct and substantial interest in the relief sought even if the evidence ultimately reveals that they were complicit in any unlawful conduct that may be proved.

[70] In any event a Plaintiff is entitled to choose their defendant from a group of wrongdoers.⁷ (footnotes included) (emphasis added)

8. More recently, in *South African History Archive Trust v South African Reserve Bank and another* 2020 (6) SA 127 (SCA) para 30, Gorven AJA (writing for a unanimous bench) recognised and applied the test for joinder of necessity as it was restated by Brand JA in *Bowring NO v Vrededorp Properties CC and Another* 2007 (5) SA 391 (SCA) ([2007] ZASCA 80) para 21, namely, that 'The substantial test is whether the party that is alleged to be a necessary party for 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....'. Gorven AJA went on to clarify that 'The question is therefore

⁵ *Gordon v Department of Health, Kwazulu-Natal* [2008] ZASCA 99; 2008 (6) SA 522 (SCA) at para 10; *Judicial Service Commission and Another V Cape Bar Council And Another* 2013 (1) SA 170 (SCA) at paras 15 – 17.

⁶ *Amalgamated Engineering* at 653; *Gordon v Department of Health, Kwazulu-Natal* [2008] ZASCA 99; 2008 (6) SA 522 (SCA) at para 9, where, inter alia, the following was said: "if the order or 'judgment sought cannot be sustained and carried into effect without necessarily prejudicing the interests' of a party or parties not joined in the proceedings, then that party or parties have a legal interest in the matter and must be joined."; *Absa Bank Ltd v Naude NO* 2016 (6) SA 540 (SCA) at para 10.

⁷ I align myself with Tolmay J's accurate depiction of the legal principles that have been enunciated or endorsed by Superior Courts over the decades.

whether Messrs Hill and Palazzolo might be prejudicially affected by a judgment on the application. As has been clarified, the application does not reach the point where any relief granted could have a prejudicial effect on them...⁸ (emphasis added)

9. The learned author Harms,⁹ summarised the legal position thus:

“a) If a party has a direct and substantial interest in any order the court might make in proceedings, or if such order cannot be sustained or carried into effect without prejudicing that party, he is a necessary party and should be joined in the proceedings unless the court is satisfied that he has waived his right to be joined.

b) The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder objection.

c) The term "direct and substantial interest" means an interest in the right, which is the subject-matter of the litigation, and not merely an indirect financial interest in the litigation.

d) An academic interest is not sufficient. On the other hand, the joinder of joint wrongdoers as defendants is not necessary, although advisable.

e) Likewise, if parties have a liability, which is joint and several, the plaintiff is not obliged to join them as co-defendants in the same action but is entitled to choose his target.

f) A mere interest is also insufficient. A litigation funder may be directly liable for costs and may be joined as a co-litigant in the funded litigation. This would be the case where the funder exercises a level of control over the litigation or stands to benefit from the litigation.” (emphasis added)

Discussion

⁸ *South African History Archive Trust*, paras 30 -31

⁹ As quoted in *Knoesen and Another v Huijink-Maritz and others* (50001/2018) ZAFSHC 92 (31 May 2019), para 8 ('Knoesen).

10. The plaintiffs claim is premised upon an alleged negligent breach by the bank of a legal duty owed to the plaintiffs, which caused the plaintiff's to suffer damages.
11. Accepting that, as suggested by the defendant, the plaintiffs could also have preferred a claim for damages against RJ attorneys on the basis of a negligent breach by RJ attorneys of a legal duty arising by virtue of their appointment as conveyancers in the sale transaction, the fact remains that the plaintiff's sought relief only against the bank, as they were entitled in law to do. Whilst a claim may lie against RJ attorneys in law, which, if pursued against RJ attorneys, could possibly render such party a joint wrongdoer, this does not oblige the plaintiffs to have joined RJ attorneys as a party to the action, regard being had to the authorities cited above.¹⁰
12. The question that arises is whether any relief that may be granted against the defendant could have a prejudicial effect on RJ Attorneys. In this matter, the Plaintiff seeks relief only against the bank and not against another possible joint wrongdoer such as RJ attorneys. The relief claimed therefore does not impact on RJ attorneys at all and can in no way prejudicially affect their legal interests. This is because any order granted in favour of the plaintiff would per force be based on a liability finding as against only the bank at trial.¹¹ As a result, RJ attorneys do not have a direct and substantial interest in any order that the trial court may make in this matter.
13. In as much as the defendant indicates in its special plea that it *intends* to plead contributory negligence on the part of RJ attorneys (whom the

¹⁰ See too:

¹¹ Any liability finding would be based on proof of all the elements of the delict, namely, wrongfulness, negligence and causation. No liability finding could be made against RJ attorneys in favour of the plaintiff in *casu* for the obvious reason that the plaintiff has not alleged in the particulars of claim that RJ attorneys are liable for their loss.

plaintiffs have elected not to sue), this too is not a basis for asserting that RJ attorneys are a necessary party. Even were RJ attorneys to be joined as a defendant in this action, in the absence of a claim having been preferred by the plaintiff against RJ attorneys, the defendant would not be able to pursue a claim for a contribution from RJ attorneys by the use of its plea. In any event, as pointed out above, even where a Court may be called on to make findings that are adverse to another party (RJ attorneys) this does not establish grounds for non-joinder if the relief sought does not adversely impact on that party's interests.¹²

14. In so far as the bank seeks to rely on the *Knoesen* case¹³ for the submission that RJ attorneys are a necessary party (and not just an incidental secondary party) 'because they participated in the events that caused the basis and subject matter of the action and litigation', as 'they were the contracted agent for the conveyancing of the property the plaintiffs were purchasing and for which they had to pay the purchase price', the *Knoesen* case does not assist it.
15. In *Knoesen*, the plaintiff did not seek any relief against the second defendant, who was already a party to the action. The second defendant raised the issue of (his) mis-joinder by way of exception. The relevant facts appear from the judgment.¹⁴ Opperman J held as follows:

¹² See authorities cited in fn 5 and para 8 above.

¹³ Cited above, fn 9, a decision of the Free State Division of the High Court.

¹⁴ Relevant facts were pleaded in the plaintiffs' particulars of claim which directly implicated the second defendant as a participant in collusion and misrepresentation, which ultimately led the first defendant to repudiate an oral agreement concluded with the plaintiffs. Relevant facts outlined in the judgment included:

"[25] During September 2011 **the plaintiffs and the first and second defendants allegedly entered into an oral agreement** that succinctly entailed that the first defendant would buy the property at the auction on behalf of the plaintiffs. The plaintiffs would repay the first and second defendants in instalments of R5000-00 per month. Once the full amount contracted to were paid, the property would be transferred back to the plaintiffs. The plaintiffs will remain in occupation of the property and

“Connection between the defendant’s actions and the relief claimed to prove interest and consequent prejudice to the party joined, is not the only test and factor to be regarded. It may be situated in the cause for the litigation. His legal interest, *in casu* for instance, lies in the serious allegations of misrepresentations and fraudulent transactions. He, amongst others, allegedly partook in the funding of the purchase and there is the alleged commission payable by him to the employee of the third defendant. If the trial court judges in favour of the plaintiffs and accepts the version of the plaintiffs, he will suffer severe prejudice. Financially he could lose the monies he invested in the transactions. His integrity; personally and professionally is at stake.

[42] According to the particulars of claim the facts show that the second defendant has a direct and substantial interest in that he actively partook in the events that caused the basis and subject matter of the action and litigation. He was, accordingly, not an incidental secondary party and participant to the acts. He might be prejudiced by a judgement in favour of the plaintiffs. His legal interest in the outcome is material.”¹⁵

16. Knoesen’s case is distinguishable on its facts. First, the court’s findings were fact specific, having been determined on the merits of that specific case. Second, the second defendant was already a party to the proceedings. Third, serious allegations of collusion, fraudulent transactions and misrepresentations were made against the second defendant in the

continue to run the school. It was implied, alternatively tacitly agreed, that the first defendant would not be entitled to sell or otherwise alienate the property.

[27] First defendant bought the property. **First defendant, and or second defendant on behalf of first defendant, alternatively both the first and second defendants paid the purchase price** to the transferring attorneys on behalf of the plaintiffs.

[29] On 4 October 2011 the first defendant entered into a lease agreement with the Academy School of Development represented by the plaintiffs. **The lease agreement was facilitated by the second defendant.**

[30] The lease was a simulated agreement which was proposed by the second defendant on behalf of the first defendant to create the impression that the property was leased to the Academy School for Development to justify the payment of “rental” to the first defendant.

[32] **The plaintiffs were allegedly induced by the first and second defendants** to enter into the lease agreement in the honest belief that the payments toward the “rental” was in fact repayment towards the settlement of the outstanding balance of the purchase price and peripheral costs of the property.

[39](f) **the plaintiffs were deceptively induced by the second defendant to belie[ve] that the lease agreement was for the settlement of the outstanding balance of the purchase price and ancillary costs of the property.**” (emphasis added to highlight second defendant’s involvement)

¹⁵ Knoesen, at paras 40 & 42.

particulars of claim, which directly implicated him in acts of wrongdoing. Fourth, the second defendant was a direct participant in the acts in question. For these reasons, the court held that the serious allegations that were made against the second defendant could be prejudicial to him by a judgment in favour of the plaintiffs. In the present case, however, no direct adverse allegations have been made against RJ attorneys, nor have they been implicated in acts of wrongdoing in the particulars of claim. In any event, when regard is had to the triable issues on the pleadings apropos the plaintiff's claim against the defendant, amongst others, the existence of a legal duty on the part of the bank and its negligent and causal breach thereof, an award in favour of the plaintiffs would not conceivably give rise to a situation wherein any adverse finding could be made against RJ attorneys that might be prejudicial to them.

17. The defendant also relies on the case of *Watson No*¹⁶ in support of what constitutes a direct and substantial interest. The court In *Watson No* held as follows:

“In *Transvaal Agricultural Union*, this Court set out the two tests to determine whether a party has a direct and substantial interest in the outcome of the litigation:

‘The first was to consider whether the third party would have *locus standi* to claim relief concerning the same subject matter. The second was to examine whether a situation could arise in which, because the third party had not been joined, any order the court might make would not be *res judicata* against him, entitling him to approach the courts again concerning the same subject matter and possibly obtain an order irreconcilable with the order made in the first instance.’ (footnote excluded)

18. The defendant submits that RJ attorneys would have locus standi to claim relief (for instance contributory negligence) in respect of the same delictual

¹⁶ *Watson No v Ngonyama and Another* 2021 (5) SA 559 (SCA) at para 53.

claim as before court. Furthermore, so it was submitted, it is conceivable that a judgment in the dispute as currently framed, would entitle RJ attorneys to approach the courts again on the same subject matter as any order the court might make would not be *res judicata* against RJ attorneys, which would potentially result in a conflicting judgment with the judgment the trial court may deliver. I do not agree.

19. In the particulars of claim, the plaintiffs refer to a fraudulent email emanating from a person unknown but who was the account holder who thus had access to the account mentioned in the fraudulent email, being the account held at the bank. At the risk of repetition, the plaintiffs do not allege that RJ attorneys were under a legal duty to prevent them from suffering economic loss, which duty was negligently breached by RJ attorneys. Assuming the plaintiff succeeds at trial, a judgment will be granted against the bank based on a finding of liability on the part of the bank for the amount claimed. Since no liability finding could be made against RJ attorneys in favour of the Plaintiff on the dispute as framed, it is inconceivable that RJ attorneys would be able to institute an action against the bank for payment of a contribution in relation to payment of the plaintiffs' claim, precisely because RJ attorneys could not be found liable for the plaintiffs' loss in these proceedings. This is because the issue pertaining to liability on the part of RJ attorneys -based on a negligent and causal breach of a legal duty owed by them to the plaintiff - is not part of the particulars of claim and is therefore not before court.
20. For all the reasons given, the special plea falls to be dismissed.
21. The plaintiffs submit that the defendant was *mala fide* in introducing its special plea some three years after the delivery of its initial plea in the matter. They further submit that the late introduction thereof was designed

to deliberately delay the hearing of the matter, given that the special plea had to be adjudicated before the merits of the matter. The plaintiffs therefore seek a punitive costs order be granted against the bank.

22. I agree with counsel for the bank that there is no evidence to substantiate the plaintiffs' bald allegation that the special plea was belatedly filed for *mala fide* purposes, which allegation is speculative at its best. The bank submitted that the costs of the hearing of the special plea ought to be costs in the trial. I do not agree. The special plea has been argued and adjudicated before me and this court is thus best suited to determine the issue of costs. The general rule is that the successful party should be granted her or his costs. I see no reason why costs should not follow the result in this case.

23. Accordingly the following order is granted:

ORDER:

26.1 The special plea is dismissed with costs.

AVRILLE MAIER-FRAWLEY
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, JOHANNESBURG

Date of hearing: 24 July 2023

Judgment delivered 17 August 2023

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on Caselines and release to SAFLII. The date and time for hand-down is deemed to be have been at 10h00 on 17 August 2023.

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