

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)**

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES /NO.	
(2) OF INTEREST TO OTHER JUDGES: YES /NO.	
(3) REVISED.	
DATE: 06.05.2010	 SIGNATURE

CASE NO: 4145/2009

DATE: 7 May 2010

In the matter between:

CENTURY CIVILS CC

First Applicant

**TIENIE VAN DER WESTHUIZEN CIVIL
ENGINEERING CONSULTANTS CC**

Second Applicant

And

CALSIKRETE BRICKWORKS (PTY) LTD

Respondent

In re:

CENTURY CIVILS CC

Plaintiff

And

CALSIBRICK (PTY) LTD

Defendant

JUDGMENT

MATOJANE J

[1] The applicant seeks an order to join the second applicant as second plaintiff in the action under the abovementioned case number. Secondly, to amend the particulars of claim dated the 27th of January 2009.

[2] Simultaneously with the issue of the application for "joinder", first applicant as plaintiff issued a second action against respondent as defendant and attached the Particulars of Claim dated the 27th of January 2009. The respondent excepted to the Particulars of Claim in the second action. The exception has not yet been enrolled. The plaintiff attempted to effect an amendment to its Particulars and the defendant objected to the proposed amendment.

[3] In the main application, first applicant as plaintiff, instituted an action against Calsibrick (Pty) Ltd for damages allegedly suffered as a result of defective paving bricks that they purchased from the defendant that were used in the construction of roads and an intersection for the Lesedi Municipality. It is alleged that the defects in the manufacturing of the paving bricks only manifested itself after the project was completed, and that the plaintiff / first applicant had

to replace the defective pavers at its own expense, which resulted in the damages now being claimed.

[4] The defendant was cited as Calsibrick (Pty) Ltd in the main action, the applicant now applies for an amendment in terms whereof it seeks, *inter alia*, to amend the citation of the defendant to Calsicrete Brickworks (Pty) Ltd, trading as Calsibrick (Pty) Ltd.

[5] The respondent in its Answering Affidavit and Heads of Argument contend that the interlocutory application is defective and fails to sustain a cause of action for the relief sought in that applicant attempt, through an amendment and joinder, to effect a substitution of the parties. It is submitted that Calsibrick (Pty) Ltd is a non party to the main action and can only be introduced into the main action by way of substantive application. Counsel for the respondent did not take this point further during argument and correctly abandoned it. It is obvious that the respondent knew that it was the instance intended to be sued in this action as it was cited in the particulars of claim under its trading name Calsibrick (Pty) Ltd and not as Calsicrete Brickworks (Pty) Ltd. It is clear that the amendment, as far as the citation of the respondent as defendant is concerned, is only aimed at correctly citing the correct defendant as Calsicrete Brickworks (Pty) Ltd t/a Calsibrick. I am accordingly satisfied that the initial citation of

the defendant was an apparent misnomer and not an endeavour to substitute a non-existing defendant as alleged by respondent.

[6] It was submitted further by the respondent in the Opposing Affidavit that the institution of the second action by the applicant simultaneously with the interlocutory application was indicative thereof that applicant had elected to abandon the main action. This point was also abandoned during argument. Counsel for the applicant correctly argued that the issue of abandonment is a factual issue on which evidence will be necessary as it requires unequivocal conduct. In any event, it is open to the respondent to raise *lis pendens*.

[7] The Respondent claims *lis alibi pendens* to object to the joinder. It is argued that this court should in its discretion, dismiss this application to join by virtue of the said pending second action and, in particular, because of failure of the applicants to have shown good cause to litigate through identical actions. Respondent submitted that applicant must be put to an election as to which action it intended proceedings with and until it has done so, the court should not allow the present application to proceed.

[8] In **Loader v Durst Bros (Pty) Ltd** 1948 (3) SA 136 (T) at 138 Roper J held that a plea of *lis alibi pendens* does not have the effect of an absolute bar to the proceedings in which the defence is raised. The court intervenes to stay one or other of the proceedings, because it is *prima facie* vexatious to bring two actions in respect of the same subject matter. It follows that a plea of *lis pendens* merely stays one or other of the proceedings brought in respect of the same matter and does not require the other action to be dismissed. In my view, the balance of convenience and of equity requires that the question of *lis pendens* be dealt within the main action. It will be convenient for the respondent to plead *lis pendens* either in the main action or the second action.

[9] The Respondent raises the alleged excepiability of the Particulars of Claim as a ground of objection to the joinder of the second applicant. The exception has not been enrolled and is a separate matter that should be dealt with separately at an appropriate time.

[10] In an application for leave to intervene , the intervening party must show that he has a legal interest, not merely a financial intererst in the right which is a subject matter of the litigation and that his legal interest could be prejudicially affected by the judgment of the

court. It is sufficient for the applicant to make such allegations as would show that he has a *prima facie* case and that his application is made seriously and is not frivolous. In this regard see **Ex Parte Moosa: In Re: Hassim v Harrop - Allin** 1974 (4) SA 408 (TPD) at 416 E – H. See Erasmus, Superior Court Practice pB1/103.

[11] The basis of applicant's application that second applicant be joined as second plaintiff in the action is that first and second applicants constituted the Tienie van Der Westhuizen joint venture that was awarded the project for the construction of the Denne and Akasia Roads. The Tienie van Der Westhuizen joint venture allegedly suffered damages as a result of sub-standard interlocking bricks that were supplied by the respondent. As the joint venture had suffered damages, it is necessary that the second applicant be joined as second plaintiff as it is a necessary party to the action.

[12] In my view, the allegations made by the applicants are such that if they can be proved in the main action, they will be entitled to succeed. See **Moosa In Re: Hassim v Harrop - Allin** 1974 (4) SA 408 (TPD) at 416G. I am convinced that the application to join second applicant as second plaintiff is seriously and not frivolously made and a proper case for joinder has accordingly been made out.

[13] There remains the matter of costs to be considered. Rule 69 of the Rules of this court provides that:-

"Save where the court authorises fees consequent upon the employment of more than one advocate to be included in a party and party bill of costs, only such fees as are consequent upon the employment one advocate shall be allowed as between party and party".

[14] Mr P J Venter SC has asked, in the event of the amendment being allowed, applicants must pay the opposed costs of the matter to date hereof. Mr Louw SC on the other hand tendered the unopposed costs of the amendment. He argued that the opposition was unreasonable and vexatious and respondent must accordingly be ordered to pay the opposed costs of the application for amendment, including the costs of two counsel.

[15] The basic rule is that all costs are in the discretion of the court. The court must consider whether it was proper or wise and reasonable to brief two counsel. See **Law v Kin** 1966 (3) SA 7 (E). The relevant factors to the granting of the costs of the second advocate includes, *inter alia*, the volume of evidence, the complexity of the facts or the law relevant to the case, the importance of the matter in issue, any

difficulties or obscurities in the relevant legal principles etc. See **Motaung v Mothiba**, N.O 1975 (1) 618 (O) at 631.

[16] In my view, the issues of fact and law in this matter were of not such complexity as to warrant the employment of two counsel and the point which was argued is a crisp one. The issues in the main trial appear simple and straightforward, involving as they do, alleged defects in the manufacture of paving bricks. I do not consider that two counsel were necessary to argue an opposed application to amend and joinder.

I consequently make the following order:

1. Second applicant is joined as the second plaintiff under case number 4145/2009.
2. Leave is granted to applicants to amend the Pleadings under case number 4145/2009 to give effect to the joinder of the second applicant as the second plaintiff.
3. Leave is granted to applicants to amend the Particulars of Claim dated the 27th of January 2009 by substituting same with the Particulars of Claim attached to the replying affidavit as Annexure "AB3B".

4. The respondent is ordered to pay the opposed costs of the application.



4. The respondent is ordered to pay the opposed costs of the application.



MATOJANE, J