



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

CASE NO: 2020/11949

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

9/10/2023

DATE

SIGNATURE

In the matter between:

MIDCO ENGINEERING CC

Applicant

and

**RONDEBULT DOBSON (PTY) LTD (in liquidation)
AURUM METALS (PTY) LTD
LE ROUX, JOHANNES JACOBUS**

First Respondent
Second Respondent
Third Respondent

in re

MIDCO ENGINEERING CC

Plaintiff

and

**RONDEBULT DOBSON (PTY) LTD (in liquidation)
AURUM METALS (PTY) LTD**

First Defendant
Second Defendant

JUDGMENT

MOORCROFT AJ:

Summary

Service – rule 4 - no service on third respondent as required in terms of rule and no application for condonation in terms of rule 27

Service – on liquidators – no factual basis for service on liquidators in terms of rule 4A

Rule 10 – joinder of party – no case made out on the facts

Companies Act, 71 of 2008 – sections 22, 214, and 218(2)

Companies Act, 61 of 1973 – section 424

Apportionment of Damages Act, 58 of 1971 – does not apply to contractual claims – director not a joint wrongdoer with defendants in a contractual claim

Order

[1] In this matter I make the following order:

1. *The application is dismissed;*
2. *The applicant is ordered to pay the costs of the application.*

[2] The reasons for the order follow below.

Introduction: Service

[3] The first respondent is a company in liquidation represented by its liquidators¹ and service of the application on the first respondent took place by email. I could not find any indication on the electronic Caselines court file that this was an email address provided by the liquidators in terms of rule 4A.

[4] It is alleged in the compliance affidavit in the joinder application that all the parties are legally represented and that service took place on the legal representatives. There is however no indication on the Caselines record that the first defendant's liquidators are indeed legally represented.

[5] The application was not served in terms of rule 4 on the third respondent. Service took place by email and the third respondent opposed the application.

[6] No application was made for condonation in terms of rule 27 in respect of service other than in terms of rule 4 and no such order is made. Good cause must be shown in an application for condonation and no such grounds can be derived from the founding affidavit.

[7] The application was therefore not properly served on the first and third respondents but this is of no moment because of the conclusion reached by me on the merits.

Joinder

[8] Joinder of a party is intended to avoid a multiplicity of actions.² The party sought to

¹ Provisional liquidators were appointed on 28 March 2022. The special resolution was registered on 9 November 2021.

² *Gross v Commercial Union Assurance Co Ltd* 1974 (1) SA 630 (A) 634E. See the discussion of rule 10 of the uniform rules by van Loggerenberg *Erasmus: Superior Court Practice* D1-123.

be joined must have a direct and substantial interest, i.e. a legal interest,³ in the litigation to justify joinder of necessity. Such an interest is not⁴ required for an application for joinder of convenience as relied upon by Midco – the test is whether substantially the same question of law or fact is to be determined.⁵

[9] The applicant (“Midco”) seeks an order that the third respondent (“Le Roux”) be joined as the third defendant in the action between Midco as plaintiff and the first and second respondents (“Rondebult” and “Aurum”) as first and second defendants.

[10] Midco now states that when the agreement that gave rise to the action was instituted -

- 10.1 Rondebult was represented by Le Roux, a director of Rondebult, and they convinced Midco that Rondebult was Aurum’s agent;
- 10.2 Rondebult induced Midco to conclude an agreement with Rondebult and Aurum in terms of which Rondebult would manufacture equipment (namely eight tanks and two stands) for the benefit of both Rondebult and Aurum;
- 10.3 Midco manufactured the equipment, and Rondebult arranged for delivery to Aurum’s premises;
- 10.4 Rondebult and Aurum failed to pay the debt and Midco applicant in full, and the Midco sued for payment of the outstanding balance or return of the equipment;

[11] In its plea Rondebult raised the defence that a third party, African Dynamics (Pty)

³ *United Watch & Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another* 1972 (4) SA 409 (C) 415E – 416A. See also *Judicial Service Commission v Cape Bar Council* 2013 (1) SA 170 (SCA) 176 I – 177A.

⁴ *Dendy & Loots Herbstein and Van Winsen: The Civil Practice of the Superior Courts of South Africa* 6th ed. 2022 para 2.4.1.

⁵ Rule 10(1) and (3). See *Ex parte Sudurhavid (Pty) Ltd: In re Namibia Marine Resources (Pty) Ltd v Ferina (Pty) Ltd* 1993 (2) SA 737 (Nm) 740C to 741F.

Ltd (“Dynamics”) was involved in a joint venture with Aurum;

- 11.1 African Dynamics required the equipment for the joint venture;
- 11.2 Rondebult introduced Midco to African Dynamics and concluded an agreement between Midco and African Dynamics as an agent of the latter firm in terms of which the equipment was supplied;
- 11.3 Midco circumvented Rondebult and provided engineering services to Dynamics, Aurum, and the joint venture;
- 11.4 As a result Rondebult suffered damages;
- 11.5 The equipment delivered by Midco was defective and of poor quality;
- 11.6 Rondebult counterclaimed for damages claiming that Midco interfered with the joint venture, delivered defective equipment, and damaged Rondebult’s reputation;

[12] Aurum opposed the action on the basis that it only ordered two tanks and stands, and paid for what it ordered. It denied that Rondebult was its agent and pled that it contracted directly with Midco.

[13] Midco seeks to join Le Roux and then to amend the particulars of claim to hold Le Roux personally liable for Rondebult’s debts on grounds of reckless or fraudulent conduct. Midco relies⁶ on section 214 of the Companies Act, 71 of 2008 and section 424⁷ of the Companies Act, 61 of 1973.

⁶ See *Grancy Property Limited and Another v Gihwala and Others; In Re: Grancy Property Limited and Another v Gihwala and Others* [2014] ZAWCHC 97 para 104, Delpont et al *Henochsberg on the Companies Act 71 of 2008* 118(1), 303, 309, 641 to 645, and sections 22 and 218(2) and (3) of the 2008 Act.

⁷ Chapter 14 of the 1973 Act still applies to the winding up of companies by virtue of item 9 of schedule 5 to the 2008 Act. See Delpont et al *Henochsberg on the Companies Act 71 of 2008* Sch-17, and in respect of the 1973 Act Meskin et al *Henochsberg on the Companies Act* 915. See also *Philotex (Pty) Ltd and Others v Snyman and Others; Braitex (Pty) Ltd and Others v Snyman and Others* 1998 (2) SA 138 (SCA).

The application does not expressly refer to section 218(2) nor is such express reference required, but it must be made clear on the facts that the subsection is applicable.⁸

[14] The intention to join Le Roux and amend the particulars of claim is based on the following averments set out in heads of argument:

- 14.1 Le Roux introduced himself as the owner and only director of Rondebult;
- 14.2 He misrepresented his status and induced Midco plaintiff to enter into the contract;
- 14.3 He represented himself as Aurum's agent, an allegation denied by Aurum;
- 14.4 As soon as legal action was instituted, he alleged the existence of African Holdings (Pty) Ltd (but, confusingly, not Dynamics as alleged elsewhere), as a party to the agreement for the first time and instituted a baseless and flagrantly inflated counterclaim, which was not premised on any prior demand to remedy positive malperformance;
- 14.5 He caused Rondebult to be liquidated.

[15] Turning to the founding affidavit one finds that the applicant's case consists of bald allegations that are not substantiated by factual evidence of reckless or fraudulent conduct. The mere fact that Le Roux caused Rondebult to be liquidated is not *per se* evidence of fraud or reckless conduct. To the contrary, would be reckless to continue trading in insolvent circumstances.

[16] The counterclaim by Rondebult will of course now be dealt with by the liquidators and one does not know what its fate will be.

[17] Midco did not put up a replying affidavit. The main purpose of a replying affidavit is to put up evidence to refute the case made out by a respondent in its answering affidavit.⁹ The averments made by Le Roux are therefore uncontroverted and the Plascon-Evans

⁸ Delport et al *Henochsberg on the Companies Act 71 of 2008* 642. See also *Blue Farm Fashion Limited v Rapitrade 6 (Pty) Ltd and Others* [2016] ZAWCHC 35 para 21 (*obiter*), *Fundstrust (Pty) Ltd (in liquidation) v Van Deventer* 1997 (1) SA710 (A), and *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC)

⁹ See Rule 6(5)(e) of the uniform rules and *Standard Bank of SA Ltd v Sewpersadh and Another* 2005 (4) SA 148 (C) para 21.

test¹⁰ applies.

[18] Rondebult's liquidators did not put up an answering affidavit and no inference can be made from this failure. There is some doubt as to whether they know of the joinder application as they were not properly served, and the application in any event deals with events that took place before they became involved.

[19] No case is made out to join Le Roux on the basis of convenience on the evidence in the founding affidavit read with the answering affidavit by Le Roux.

Apportionment of Damages Act

[20] The Apportionment of Damages Act, 58 of 1971 does not apply to a claim for damages for a breach of contract.¹¹ Midco's claim against Rondebult and Aurum is a contractual claim. Its claim against Le Roux is based on provisions of the companies legislation. Section 218(2) of the Companies Act establishes a *sui generis* liability.¹²

[21] Le Roux is not a joint wrongdoer vis à vis Rondebult and Aurum and Le Roux's reliance on the Apportionment of Damages Act must fail.

Conclusion

[22] I therefore make the order as set out in paragraph 1 above.

¹⁰ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) 634C to 635C.

¹¹ *OK Bazaars (1929) Ltd and Others v Stern and Ekermans* 1976 (2) SA 521 (C).

¹² *Delport et al Henochsberg on the Companies Act 71 of 2008* 641.



J MOORCROFT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **9 OCTOBER 2023**.

COUNSEL FOR THE APPLICANT:	D M POOL
INSTRUCTED BY:	FRIEDRICH INC
COUNSEL FOR THE THIRD RESPONDENT:	B D STEVENS
INSTRUCTED BY:	VOGEL INC
DATE OF HEARING:	2 OCTOBER 2023
DATE OF JUDGMENT:	9 OCTOBER 2023