



THE HIGH COURT OF SOUTH AFRICA
FREE STATE PROVINCIAL DIVISION

Case No: 5001/2018

In the matter between:

WILLEM DANIEL KNOESEN

1st Plaintiff

JOHANNA CORNELIA KNOESEN

2nd Plaintiff¹

and

IZETTE HUIJINK-MARITZ

1st Defendant

JAN GYSBERT MARITZ²

2nd

Defendant

MATJABENG MUNICIPALITY

3rd

Defendant

NUMISCENE (PTY) LTD

4th

Defendant

ALITE GUESTHOUSE (PTY) LTD

5th Defendant

CORAM:

OPPERMAN, J

HEARD ON:

26 APRIL 2019

DELIVERED ON:

31 MAY 2019

JUDGEMENT BY:

OPPERMAN, J

¹ Hereafter referred to as "plaintiffs".

² Excipient hereafter referred to as "second defendant".

Summary: *Civil Procedure – Misjoinder – Misjoinder raised by way of exception – Procedure is to raise issue by way of plea in abatement.*

Civil procedure – Misjoinder – Each case adjudicated on its own merits – Joinder of second defendant permitted - Second Defendant alleged to be cause of contract that is subject of claim for specific performance – Direct and substantial interest and prejudice to second defendant

JUDGEMENT

I INTRODUCTION

[1] First and second defendants motioned³ an exception to the plaintiffs' particulars of claim on the basis that it is vague and embarrassing, alternatively do not contain sufficient allegations to sustain a cause of action against the second defendant, alternatively there has been misjoinder of second defendant.⁴ In paragraph 6 of the Notices of Exception the claim is that the plaintiffs have not pleaded, specifically: "...a basis disclosing that the second defendant has any substantial interest in the subject matter of the action in the form of a legal interest in the subject matter of litigation which may be affected prejudicially by granting of the relief⁵ claimed."

[2] Although the first and second defendants lodged the exception, the matter was not taken any further on behalf of the first defendant during the hearing.⁶ The claims of vague and embarrassing and

³ Notice in terms of Rule 23(1), (2) & (3) dated 15 November 2018 and served on 16 November 2018 & Notice in terms of Rule 23(1), (2) & (3) dated 13 December 2018 and served on 14 December 2018.

⁴ Excipient/Second Defendant's Heads of Argument at paragraph 1 and Notices in terms of Rule 23(1), (2) & (3).

⁵ Note that there is a difference between the "relief" sought and the "judgement of the court" for purposes of the adjudication of this case. In paragraph 12 of the Excipient/Second Defendant's Heads of Argument the word "judgement" was correctly used.

⁶ Excipient/Second Defendant's Heads of Argument.

insufficient allegations to sustain a cause of action against the second defendant, was also not maintained; suitably so.⁷

[3] Second defendant, in the end, only averred misjoinder by way of exception. The application stands opposed to be dismissed with costs. The prayer of second defendant is for the following order:⁸

- “1. The exception is upheld on the basis of misjoinder of the second defendant.
2. All references in the combined summons, which include the particulars of claim, to the second defendant as a party to the action, are struck out.
3. The plaintiffs are ordered to amend their combined summons, including their particulars of claim, accordingly within 15 days from the date of this order.
4. The plaintiffs are ordered to pay the costs of the exception.”

II EXCEPTION AND MISJOINDER

[4] The vehicle used to bring the application, being exception in terms of Rules 23(1), 23(2) and 23(3)⁹ was defended by the second defendant to be apt. He maintained that although the usual procedure to be adopted where the question of non-joinder or misjoinder arises, is to raise the question by way of plea in

⁷ Excipient/Second Defendant's Heads of Argument paragraphs 7 to 12.

⁸ Notice in terms of Rule 23(1), (2) & (3) dated 13 December 2018.

⁹ Rule 23(1): Where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto and may set it down for hearing in terms of paragraph (f) of sub-rule (5) of rule 6: Provided that where a party intends to take an exception that a pleading is vague and embarrassing he shall within the period allowed as aforesaid by notice afford his opponent an opportunity of removing the cause of complaint within 15 days: Provided further that the party excepting shall within 10 days from the date on which a reply to such notice is received or from the date on which such reply is due, deliver his exception. Rule 23(2): Where any pleading contains averments which are scandalous, vexatious, or irrelevant, the opposite party may, within the period allowed for filing any subsequent pleading, apply for the striking out of the matter aforesaid, and may set such application down for hearing in terms of paragraph (f) of sub-rule (5) of rule 6, but the court shall not grant the same unless it is satisfied that the applicant will be prejudiced in the conduct of his claim or defence if it be not granted.

Rule 23(3): Wherever an exception is taken to any pleading the grounds upon which the exception is founded shall be clearly and concisely stated.

abatement and it is *fairly*¹⁰ well settled that non-joinder and misjoinder can be raised by way of exception. The rationale in *McIndoe and Others (in their capacities as joint liquidators of G&D Shoes (Pvt) Ltd and Belmont Leather (Pvt) Ltd v Royce Shoes (Pty) Ltd* [2000] 3 All SA 19 (W) was cited in support.

- [5] Misjoinder or non-joinder may be raised by way of exception where the alleged defect appears *ex facie* the pleadings and no additional evidence is required to substantiate the defence.¹¹ Where additional facts need to be placed before the court to show that there has been a misjoinder or non-joinder, a special plea is generally used.¹²

- [6] The dilemma in the choice of either Rule 23-exception or Rule 10(3)-misjoinder lies in, amongst others, the tests to be applied in adjudication. It is dissimilar.

- [7] The issues of misjoinder are regulated in Rule 10¹³ and the common law specifically. The test for misjoinder of a defendant was coined in Rule 10(3):

¹⁰ Accentuation added.

¹¹ *McIndoe and Others (in their capacities as joint liquidators of G&D Shoes (Pvt) Ltd and Belmont Leather (Pvt) Ltd v Royce Shoes (Pty) Ltd* [2000] 3 All SA 19 (W), *Sanan v Eskom Holdings Ltd* 2010 (6) SA 638 (GSJ) paragraph 20.

¹² Herbstein and Van Winsen, *Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa*, (5th Edition), Internet: ISSN 2224-7319, Jutastat e-publications at V Procedure for raising the objection of non-joinder or misjoinder at 5th Ed, 2009 ch6-p238 to p241 with reference to *Skyline Hotel v Nickloes* 1973 (4) SA 170 (W) at 171F–172A.

¹³ **10 Joinder of parties and causes of action**

(1) Any number of persons, each of whom has a claim, whether jointly, jointly and severally, separately or in the alternative, may join as plaintiffs in one action against the same defendant or defendants against whom any one or more of such persons proposing to join as plaintiffs would, if he brought a separate action, be entitled to bring such action, provided that the right to relief of the persons proposing to join as plaintiffs depends upon the determination of substantially the same question of law or fact which, if separate actions were instituted, would arise on such action, and provided that there may be a joinder conditionally upon the claim of any other plaintiff failing.

(2) A plaintiff may join several causes of action in the same action.

(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

“(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.*” (Accentuation added)

[8] Harms¹⁴ dealt with the law in detail and with reference to case law. I align myself with the findings.

“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.

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.

(4) In any action in which any causes of action or parties have been joined in accordance with this rule, the court at the conclusion of the trial shall give such judgment in favour of such of the parties as shall be entitled to relief or grant absolution from the instance, and shall make such order as to costs as shall to it seem to be just, provided that without limiting the discretion of the court in any way—

(a) the court may order that any plaintiff who is unsuccessful shall be liable to any other party, whether plaintiff or defendant, for any costs occasioned by his joining in the action as plaintiff;

(b) if judgment is given in favour of any defendant or if any defendant is absolved from the instance, the court may order:

(i) the plaintiff to pay such defendant's costs, or

(ii) the unsuccessful defendants to pay the costs of the successful defendant jointly and severally, the one paying the other to be absolved, and that if one of the unsuccessful defendants pays more than his *pro rata* share of the costs of the successful defendant, he shall be entitled to recover from the other unsuccessful defendants their *pro rata* share of such excess, and the court may further order that, if the successful defendant is unable to recover the whole or any part of his costs from the unsuccessful defendants, he shall be entitled to recover from the plaintiff such part of his costs as he cannot recover from the unsuccessful defendants;

c) if judgment is given in favour of the plaintiff against more than one of the defendants, the court may order those defendants against whom it gives judgment to pay the plaintiff's costs jointly and severally, the one paying the other to be absolved, and that if one of the unsuccessful defendants pays more than his *pro rata* share of the costs of the plaintiff he shall be entitled to recover from the other unsuccessful defendants their *pro rata* share of such excess.

(5) Where there has been a joinder of causes of action or of parties, the court may on the application of any party at any time order that separate trials be held either in respect of some or all of the causes of action or some or all of the parties; and the court may on such application make such order as to it seems meet.

¹⁴ *Civil Procedure in the Superior Courts*, Last Updated: February 2019 - SI 64 at B10.2 Direct and Substantial Interest.

- 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."

[9] Erasmus¹⁵ elaborated:

- g) Subrule (3): Several defendants may be sued in one action.
 "Under the common law a number of defendants may be joined on grounds of convenience, equity, the saving of costs and the avoidance of multiplicity of actions. In *Rabinowitz and Another NNO v Ned-Equity Insurance Co Ltd* it was held that as regards the joinder of defendants, the common law has been preserved notwithstanding the provisions of this subrule. The subrule permits the joinder of parties in the same proceedings but it does not direct the hearing of evidence as between all defendants, so that the extent of liability is determined between the parties."
- h) Substantially the same question of law or fact.
 "This means that the questions of law and fact must 'in the main' or in their 'principal essentials' be 'essentially' the same."

[10] Again, Harms:¹⁶

¹⁵ *Superior Court Practice*, CD-Rom & Intranet: ISSN 1561-7467, Internet: ISSN 1561-7475, Jutastat e-publications at RS 5, 2017, D1-124 to D1-129.

- “i) The rule is not intended to be exhaustive of the cases in which a plaintiff may join different defendants in one action.
- j) Under the common law, a number of defendants may be joined whenever convenience so requires, subject to the power of the court to order separation of the actions.
- k) Where a plaintiff sues two or more defendants in the alternative and, in the further alternative, jointly and severally for damages suffered, and the defendants deny liability and reciprocally point to one another as the party responsible for the plaintiff’s loss, a court should not grant absolution from the instance at the end of the plaintiff’s case if there is evidence which establishes that one or the other (or both) is liable even if it is uncertain which alternative is the correct one.
- l) That does not mean that the defendants must be put on their defence where there is no evidence of negligence.”

[11] An exception is a legal objection to the opponent’s pleading. It complains of a defect inherent in the pleading; admitting for the moment that all the allegations in a summons or plea are true, it asserts that even with such admission the pleading does not disclose either a cause of action or a defence, as the case may be.¹⁷

[12] The formal requirements for an exception to succeed are either to prove that a pleading is vague and embarrassing¹⁸ or a pleading lacks the averments necessary to sustain a cause of action or a defence (i.e. when it is bad in law).¹⁹

¹⁶ At B10.8 Joinder as Defendants.

¹⁷ Erasmus at Exceptions and applications to strike out, <https://jutastat.juta.co.za/nxt/gateway.dll?f=templates&fn=default.htm&vid=Publish:10.1048/Enu> on 17 May 2019.

¹⁸ *Nasionale Aartappel Koöperasie Bpk v Price Waterhouse Coopers Ing* [2001] 2 All SA 319 (T), 2001 (2) SA 790 (T).

¹⁹ *Trope v SA Reserve Bank* [1993] 2 All SA 278 (A), 1993 (3) SA 264 (A).

- [13] I will allow misjoinder to be challenged by way of exception in this instance because the parties received adequate notification of the misjoinder-objection. The excipient did not step outside the particulars of claim. The adjudication, in fact and law, to turn on:
- a) Direct and substantial interest and legal interest,
 - b) in the subject matter of the action and litigation,
 - c) which may cause the second defendant to be affected prejudicially by the judgement of the court.

III THE DISPUTE

- [14] The relief claimed in the main action is for an order against the first defendant only. It is the following:

“Ordering the first defendant to take all necessary steps and sign all documents to effect transfer of the property known as Erf 4187, Welkom, into the names of the plaintiffs against payment by plaintiffs of the full purchase price and ancillary costs, on demand, to the first defendant’s transferring attorneys by the plaintiffs.”²⁰

- [15] There lies no claim for any relief against second, third, fourth and fifth defendants but the facts alleged by the plaintiffs show that they are implicated and may be prejudiced by the judgement of the court in the main action.
- [16] The relief is for specific performance in terms of the subject matter which is an alleged oral contract that allegedly came about as result of misrepresentation and underhanded conduct²¹ by the first and second defendants and the terms of which were not complied with by the first defendant in collusion with the second

²⁰ Amended Index: Pleadings at page 14.

²¹ Amended Index: Pleadings page 18 at paragraphs 20, 21 and 26.2.

defendant. The alleged oral contract was between the first defendant and the plaintiffs to buy their property on an auction but to transfer it back into their names after they reimbursed the purchase sum paid at the auction to the first defendant. The first defendant, so was the understanding of the plaintiffs, would be reimbursed under the guise of a lease agreement. The first defendant, with the assistance of the second defendant, sold the property without their knowledge to a third party in alleged contravention of the contract and the situation snowballed into a sale to the fourth and fifth defendants.

- [17] The argument of the plaintiffs is that although there is not a claim for relief against the second defendant, he dynamically and substantially so, partook in the actions that lead to the contract and the breach thereof. His collusion with the first defendant caused the contract and subsequent breach thereof.
- [18] The main contention on behalf of the second defendant is that the reference to the second defendant is primarily “part of the facts as background to the conclusion”²² of the agreement between the plaintiffs and the first defendant to the extent that the second defendant from time to time acted as agent or representative of the first defendant. The contract was not with the second defendant and there cannot be and is not any relief claimed against him. This basis, according to second defendant, for joining the second defendant is not sufficient to show that he has “a direct and substantial interest in the subject matter of the

²² *Nyumba Mobile Homes and Offices (Pty) Ltd v Member of the Executive Council: Department of Health, Free State Province and Another* (1719/2015) [2016] ZAFSHC 79 (6 May 2016) at paragraph 7.

action, that is, a legal interest in the subject matter of the litigation which may be affected prejudicially by the judgement of the Court.” He relied on the matter of *Nyumba Mobile Homes and Offices (Pty) Ltd v Member of the Executive Council: Department of Health, Free State Province and Another* (1719/2015) [2016] ZAFSHC 79 (6 May 2016).²³

[19] Many terms/words are used in the assessments to be applied for misjoinder; both in the legislation and common law. It is imperative to emphasise that there is a difference between the “relief” sought, the “cause of action” and “the judgement of the court”. The “subject matter” of the litigation referred to in the misjoinder-test is not necessarily the “relief”. The “judgement” is not only the relief ordered. Joint wrongdoers are also not necessarily at the receiving end of the relief claimed.

[20] Detailed depiction of the facts is imperative to the judgement. I am bound by the facts as alleged in the particulars of claim in this instance. Each case must be adjudicated on its own merits. The facts of this case differ from the facts in the *Nyumba Mobile Homes and Offices (Pty) Ltd*-case referred to above.

IV THE FACTS

[21] The first defendant is an attorney at Legal Aid South Africa and married out of community of property to the second defendant. At the time of the alleged oral contract between herself and the plaintiffs, depicted hereunder, first and second defendant were engaged to be married. The second defendant is also an attorney

²³ *Henri Viljoen (PTY) LTD v Awerbuch Brothers* [1953] 2 ALL SA 40 (O).

and in private practise; the second defendant from time to time acted as agent or representative of the first defendant and served as attorney of record for the plaintiffs during the contract and events that caused the dilemma that has now culminated into the litigation *in casu*.

- [22] The plaintiffs were the registered owners of the Erf 4187, Welkom which they utilised as a pre-primary school for 30 years before the events material to the case, ensued. The school was known as the Academy School of Development.
- [23] The case got underway during 2011 when the property was attached by First Rand Bank Limited t/a First National Bank under case number 6257/2009 in respect of the outstanding balance and arrears due to First National Bank by plaintiffs. An auction was scheduled for 28 September 2011 by the Sheriff, Welkom.
- [24] The plaintiffs were in financial distress and they approached the second defendant, “their attorney of record at the time”²⁴ for assistance to prevent them from losing the property by way of public auction.
- [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

²⁴ Amended Index; Pleadings at paragraph 10.

would be transferred back to the plaintiffs. The plaintiffs will remain in occupation of the property and 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.

- [26] No interest was payable and accordingly was the National Credit Act, Act 34 of 2005, not applicable.
- [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.
- [28] The first defendant took transfer of the property during February 2012.
- [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. The material terms were that the property be rented for the purposes of conducting a school. The period of rental to be 9 years and 11 months and the rent payable was R5000-00 per month payable into the account of the first 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. Another purpose of the lease agreement was to allegedly assist the first defendant to obtain a loan from a financial institution to pay the purchase price of the property.

- [31] According to the particulars of claim this representation was false in that the first defendant did not use the said lease agreement to obtain a loan from a financial institution and never obtained finance from a financial institution to purchase property.
- [32] The plaintiffs were allegedly induced by the first and second defendants to enter into the lease agreement in the honest believe 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.
- [33] The plaintiffs performed in terms of the oral agreement but during February 2012 the first defendant required the plaintiffs to enter into an addendum to the lease agreement wherein the term of repayment was changed to 1 year. All payments were now to be made to the second defendant in cash and the second defendant accepted the payments on behalf of the first defendant.
- [34] During June 2012 an employee of the third defendant informed that the property was sold to it in May 2012. The first defendant sold the property to the third defendant and transferred simultaneously into the name of the third defendant when first defendant took transfer of the property from the plaintiffs.

- [35] Third defendant sold the property to the fourth defendant and fourth defendant received transfer of the property on 15 August 2012. As mentioned, fourth defendant sold to fifth defendant in 2018.
- [36] It is alleged that the first defendant's conduct to immediately sell the property to the third defendant constitutes repudiation of an oral agreement between the parties in that the first defendant could no longer effect transfer of the property to the plaintiffs once the plaintiffs have made payment of the full purchase price of the property.
- [37] Third defendant is the Matjhabeng Municipality, a local municipality doing business in Welkom. Fourth defendant, is a company with limited liability and with registered business address in Gauteng. The fifth defendant is a company with limited liability with registered business address in Welkom.
- [38] The plaintiffs do not accept the first defendant's repudiation of the oral agreement and tenders the full outstanding balance of the purchase price and costs due to the first defendant in respect of the property against transfer of the property into the names of the plaintiffs. Plaintiffs demand specific performance.

V THE INVOLVEMENT OF THE SECOND DEFENDANT

- [39] The involvement of the second defendant, in specific summary, is stated in the particulars of claim to be as follows:
- a) Paragraph 10: "Due to the fact that the plaintiffs were in financial distress, the plaintiffs approached the second defendant, as their

attorney of record at the time, for assistance to prevent the plaintiffs from losing the property by way of public auction.”

- b) Paragraph 11: “During September 2011 and at Welkom, the plaintiffs personally, and the first defendant, duly represented by the second defendant, entered into an oral agreement...”
- c) Paragraph 12: “On 28 September 2011, on the day of the auction, the second defendant requested plaintiffs to make payment of the required cash registration fee to the auctioneer in the amount of R10 000.00 on behalf of first defendant, to enable the first defendant to take part in the auction on behalf of the plaintiffs.”
- d) Paragraph 16: “The first defendant, and or the second defendant on behalf of the first defendant, alternatively both the first and second defendants, paid the balance of the purchase price to the transferring attorneys on behalf of the plaintiffs.”
- e) Paragraph 20.1: “The lease agreement 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 of Development to justify the payment of “rental” to the first defendant and allegedly to assist the first defendant to obtain a loan from a financial institution to pay the purchase price of the property.”
- f) Paragraph 20.2 read with paragraph 21 states “that the representation was false in that the first defendant did not use the lease agreement to obtain a loan and never obtained a loan and that the plaintiffs were deceptively induced by the second defendant to belief that the lease agreement was for the settlement of the outstanding balance of the purchase price and ancillary costs of the property.”
- g) Paragraph 25: Although the contract demanded that the instalments be paid into the account of the first defendant: “During February 2012 the second defendant requested the plaintiff to make payment of the instalment in respect of the oral agreement in cash at his office...”

h) Paragraph 26: “In June 2012 an employee of the third defendant claimed that he/she is entitled to commission in the amount of R50 000.00 in respect of the sale of the property from second defendant which second defendant refuses to pay.”

[40] 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.

[41] The actions of the second defendant that caused the litigation and “cause of action” is synthesised in the following definitions:

“Cause of action: “was defined²⁵ by Lord ESHER, MR in *Read v Brown* 22 QBD 131 to be “every fact which it would be necessary for the plaintiff to prove if traversed, in order to support his right to the judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved”. See also *Cooke v Gill*, LR 8 CP 116. S 64(1) of Act 22 of 1916: means “every fact which is material to be proved to entitle a plaintiff to succeed in his claim” (*Lyon v SAR&H* 1930 CPD 276); but it can mean “that particular act on the part of

²⁵ Cause of action, <https://www.mylexisnexus.co.za/Index.aspx> on 26 May 2019.

the defendant which gives the plaintiff his cause of complaint". "A *cause of action* accrues, when there is in existence a person who can sue and another who can be sued, and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed" (per GARDINER, JP, adopting s 64 of *Halsbury*, xix, in *Coetzee v SAR&H* 1933 CPD 570). See *G North & Son v Brewer & Son* 1941 NPD 74; *Beaven v Carelse* 1939 CPD 323; *Abrahamse & Sons v SAR&H* 1933 CPD 626; *McKenzie v Farmers' Co-op Meat Industries Ltd* 1922 AD 16; *Huletts v SAR&H* 1945 NPD 413."

VI CONCLUSION

[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.

[43] The case revolves around the same question of law and fact. One trial should serve convenience, equity, the saving of costs and the avoidance of multiplicity of actions.

[44] The joinder of the second defendant is appropriate in law.

VII ORDER

The exception is dismissed with costs.

M. OPPERMAN, J

On behalf of the second defendant/excipient: Adv. M.C. Louw
Instructed by:
Hill, McHardy & Herbst
Inc
BLOEMFONTEIN

On behalf of the plaintiffs: Adv. F.G. Janse van Rensburg
Instructed by:
Bezuidenhouts Inc
BLOEMFONTEIN