



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No. 1719/2015

In the matter between:

NYUMBA MOBILE HOMES & OFFICE (PTY) LTD

Plaintiff

and

**MEC OF THE DEPARTMENT OF HEALTH,
FREE STATE PROVINCE
FEZILE DABI DISTRICT MUNICIPALITY
MAZIBUKO WESSELS ARCHITECTS
RAMALEPHATSO INDUSTRIES CC
SIZAMPILO PROJECTS CC
GRAHAM TAKATSO LEHETLA
CARLTON PULE SHAKWANE**

1st Defendant
2nd Defendant
3rd Defendant
4th Defendant
5th Defendant
6th Defendant
7th Defendant

JUDGMENT BY: VAN ZYL, J

DELIVERED ON: 6 MAY 2016

- [1] This is an exception raised by the first defendant to the plaintiff's particulars of claim, which is being opposed by the plaintiff. The exception is founded on the following grounds:

- “1. Rule 20(2)...requires a declaration to set forth the nature of claim and the conclusions of law which the Plaintiff shall be entitled from the facts stated therein. (*sic*)
2. The declaration of the Plaintiff does not comply with the above provision as stated in paragraph 1 above and therefore lacks averments to sustain a cause of action against the First Defendant.
3. The First Defendant has been joined in the action as a party having an interest in the action as alleged in paragraph 1.2 of the Plaintiff's particulars of claim. The First Defendant does not have any interests in the action and should not have been a party to the action.” (*sic*)

[2] Paragraph 1.2 of the plaintiff's particulars of claim reads as follows:

“The first defendant is the MEC of the FREE STATE DEPARTMENT OF HEALTH.... No relief is sought against the first defendant and same is merely cited for any interest it might have in the proceedings.”

[3] In this matter the plaintiff issued a combined summons together with its particulars of claim. No declaration was filed. The reference by the first defendant to the provisions of Rule 20(2) and to a declaration in paragraphs 1 and 2 of the grounds of the exception as recorded above, is therefore completely misplaced. As a party is bound by the way in which its case is made out in an exception, the exception cannot be upheld on those grounds. See

Jowell v Bramwell-Jones and Others 1998 (1) SA 836 (W) at 898 E – F.

- [4] With regards to the alleged misjoinder of the first defendant as relied upon by the first defendant in paragraph 3 of the grounds of the exception, Mr Mene, appearing on behalf of the first defendant, correctly submitted that such an objection may be taken by way of an exception where the misjoinder is apparent *ex facie* the pleadings. See **Herbstein and Van Winsen: The Civil Practice of the High Courts of South Africa**, 5th Edition, p. 633.
- [5] The test to determine whether there is a misjoinder is whether or not a party has a direct and substantial interest in the subject matter of the action, that is, a legal interest in the subject-matter of the litigation which may be affected prejudicially by the judgment of the Court. See **Henri Viljoen (Pty) LTD v Awerbuch Brothers** 1953 (2) SA 151 (O) at 168 – 170.
- [6] Mr Bruwer, appearing on behalf of the first defendant, submitted that the first defendant indeed has a substantial interest in this matter. In this regard he relied on the following:
1. He referred to paragraph 2.1 of the particulars of claim and contended that the first defendant was the initiator of the entire project from which the cause of action ensues.
 2. He also referred to paragraph 2.2.4 of the particulars of claim and submitted that the fact that the plaintiff reserved ownership of the materials supplied, is another reason why the first

defendant has a substantial interest in the outcome of this action.

3. Mr Bruwer also pointed out that in paragraph 4.3 of the particulars of claim it is alleged that when the cession agreement was made an order of Court, the first defendant was also a party to the proceedings and in terms of paragraph 6.1.3 of the particulars of claim an interdict against payment was obtained also against the first defendant.

[7] I have given careful consideration to the arguments presented by Mr Bruwer. However, I cannot agree with his submissions. The actual cause of action in this matter is the cession agreement concluded between the fourth and fifth defendants, on the one hand, and the plaintiff, on the other hand, pertaining to "rights, title and interest" against the second defendant. As correctly contended by Mr Mene, the first defendant was not a party to this cession agreement. The mentioning of the first defendant in the particulars of claim merely forms part of facts pleaded as background to the conclusion of the cession agreement.

[8] In my view the joinder of the first defendant therefore indeed constitutes misjoinder and the exception should be upheld on this basis.

[9] The first defendant was substantially successful with his exception and therefore I can find no reason why costs should not follow the success.

[10] The following orders are consequently made:

1. The exception is upheld only on the basis of the misjoinder of the first defendant.
2. All references in the combined summons, which includes the particulars of claim, to the first defendant as a party to the action, are struck out.
3. The plaintiff is ordered to amend its combined summons, including its particulars of claim, accordingly within 15 days from the date of this order.
4. The plaintiff is ordered to pay the costs of the exception.


C. VAN ZYL, J

On behalf of the plaintiff: Mr M. Bruwer
Instructed by:
Hugo & Bruwer Attorneys
BLOEMFONTEIN

On behalf of the first
defendant: Adv. B.S. Mene
Assisted by:
Adv. D. Thompson
Instructed by:
State Attorney
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