



IN THE FREE STATE HIGH COURT BLOEMFONTEIN

Not reportable

Case No. : 1272/2015

In the matter between:-

M BUYS

Applicant

and

DR PA MINNAAR & ASSOCIATE 99 ING

1st Respondent

LEON VAN ASWEGEN

2nd Respondent

GEORGINA MARY-ANN

3rd Respondent

ELIZABETH HALLIDAY

4th Respondent

WILLIAM NTHONY ORROC

5th Respondent

ELANA VAN DER MERWE

6th Respondent

GEORGINA MARY-ANN ELIZABETH HALLIDAY N.O. 7th Respondent

WILLIAM ANTHONY ORROCK N.O.

8th Respondent

ELANA VAN DER MERWE N.O.

9th Respondent

HEARD:

28 JULY 2016

DELIVERED: 11 AUGUST 2016

CORAM: CJ MUSI

MUSI J

- [1] This is an application to join the first respondent as a defendant in case number 1272/2015 of this court.
- [2] The first respondent is a company with limited liability incorporated in terms of the laws of South Africa, trading as Quintamed at 2 Wag 'n Bietjebos street, Pellissier, Bloemfontein (the company).
- [3] The second to the fifth respondents are all medical practitioners who practise at Quintamed Building 2 Wag 'n Bietjebos street Pellissier Bloemfontein.
- [4] The sixth to the ninth respondents are the second to fifth respondents in their capacities as trustees of the Quinta Trust (IT 1392/99).
- [5] The second to fifth respondents are the sole directors of the company.
- [6] On 22 July 2013 the applicant visited the Quintamed building to consult with her physiotherapist, Ms Amanda Delpont, who practiced at the Quintamed Building.

- [7] She slipped and fell at the foyer of the Quintamed Building after stepping on a wet mat that was left or put on the tiles. She sustained serious injuries.
- [8] On 13 March 2015 she sued the second to the ninth respondents in their personal and representative capacities for damages. She alleges that the second to the ninth respondents employed a person or people to clean and maintain the Quintamed Building and that they are vicariously liable for the negligence of their employee/s.
- [9] On 10 July 2015 the first to the fourth and the 5th to the ninth respondents filed their pleas. They all:
- 9.1 denied that they were negligent.
 - 9.2 pleaded that in the event that the court finds that there was negligence that such negligence is not casually linked or did not contribute to the fall of the applicant.
 - 9.3 pleaded that the applicant was contributory negligent.
- They did not mention the first respondent at all.
- [10] On 3 May 2016 the sixth to the ninth respondent delivered a notice of amendment of their plea. In the amended plea the sixth to the ninth respondents allege that the Quinta Trust leased the Quinta Building to the first respondent at all relevant times and that the first respondent indemnified the Quinta Trust against any claims arising out of injuries sustained by anyone at the

Quintamed Building. They further allege that the occupier of the building (first respondent) had a legal duty of care and not them. The amendment has not yet been effected.

- [11] On 17 June 2016 the sixth to the ninth respondents' insurers filed an application for leave to serve a Third Party notice on the first respondent, in terms of Rule 13(3)(b) of the Uniform Rules.
- [12] The applicant alleges that it would not be possible to get an order against the first respondent for the payment of any damages and that a separate claim would have to be instituted against the first respondent. This is so because Rule 13 only makes provision for the third party to contribute or indemnify the sixth to the ninth respondents whereas the applicant wants an order of full liability against the first respondent.¹
- [13] The applicant is correct in her contention that the third party procedure would assist the sixth to the ninth respondents in that the third party would either have to indemnify them against or assist them by contributing towards the claim of the plaintiff, if successful. All that the sixth to the ninth respondents have to prove is that they have a right against the third party arising from contract or by statute or from the law to an indemnity in respect of or a contribution towards the claim of the plaintiff.²

¹ Rule 13(1)(a) (1) Where a party in any action claims - (a) as against any other person not a party to the action (in this rule called a 'third party') that such party is entitled, in respect of any relief claimed against him, to a contribution or indemnification from such third party, or

² See *Eimco (SA) (Pty) (T) v P Mattoida's Construction Co* 1967 (1) SA 326 (N) at 332F to 333A.

[14] The parties were *ad idem* that joinder at this stage of the proceedings is not governed by Rule 10(3).³ They both requested me to decide the matter on common principles.⁴ In **Rabomwitz and Another NND v Wed-Equity Insurance**⁵ it was said:

“I do not think, however, that the question whether the joinder was competent in terms of Rule 10 (3) is decisive in regard to the proper order as to costs. The Rule is not and was not intended to be exhaustive of the cases in which a plaintiff may join separate defendants in one action.”⁶

[15] In **Lewis N.O. v Schoeman, N.O. and Others**⁷ it was said:

“In many cases, claims are advanced against defendants jointly and severally and these claims necessarily import claims against the defendants in the alternative, although based upon the same cause of action.

In this Court, therefore, there does not seem to be any ground for taking the view suggested by Mr Fannin that in no case other than those indicated by Rule 12(1) ... is the joinder of defendants in the alternative permitted. The matter seems to me to be one entirely in the discretion of the Court and to be determined in accordance with convenience and common sense ...”

³ Rule 10(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.

⁴ See *Ex Parte Sudurhavid & In Re Namibia Marine Resources v Ferina* 1993 (2) SA 737 (NMHC)

⁵ 1980 (3) SA 415 (WLD)

⁶ At 419 D - E

⁷ 1951 (4) SA 133 (NPD) at 136 H- 137A

- [16] It is therefore clear that the court has a discretion on whether to allow a party to join another party. In **Marais & Others v Pangola Sugar Milling Co & Others**⁸:

“It is also clear from the above-mentioned cases that a plaintiff has a wider right than a defendant in regard to the joinder of parties as defendants and may join a third party as defendant notwithstanding the fact that a plea of non-joinder could not have succeeded if the plaintiff had elected not to join such third party in the action.

I do, however, gather from the various judgments that I have consulted that even in those cases where the Court has a discretion where the matter of joinder of a party is raised, it must at least be shown that that party is a necessary party in the sense that he is directly and substantially interested in the issues raised in the proceedings before the Court and that his rights may be affected by the judgment of the Court. When this is once established the Court will then proceed to determine the matter of joinder in accordance with the requirements of common sense and common sense.”⁹

- [17] The applicant has set out why it did not sue the company in the first place. She did not know about the lease agreement between the Trust and the company. It is only when the amended plea was filed that the existence of such contract and the fact that the company undertook to indemnify the Trust in the event that

⁸ 1961 (2) SA 698 (N.P.D)

⁹ At 702 E to G.

someone sustains injuries on the premises and institutes a claim against the Trust.

- [18] The applicant is of the view that she may recover all her damages from the company in light of the lease agreement. The insurers of the Trust were also of the view that the company should be joined as a third party to the proceedings. The application to join the company as a third party has not yet been granted. In my view the company is indeed a necessary party in these proceedings. In my judgment the company is directly and substantially interested in the issues raised during the trial because it has taken it upon itself to indemnify the owners of the building against an eventuality such as the one under consideration.
- [19] It goes without saying that it could be an unnecessary duplication of resources – human and financial – to proceed to trial against the present defendants and at a later stage to deal with the same issues in a trial between the applicant and the company. It seems to me that convenience and common sense favours the granting of this application.
- [20] Should the joinder ultimately be shown to have been unnecessary; the company would in any event be entitled to its costs. Therefore any prejudice suffered by it can still be cured by an appropriate costs order.
- [21] The applicant has requested that I order the costs to be costs in the action. The respondents did not put up an argument against

such request. I find it a sensible and suitable manner of dealing with the costs of this application.

[22] In the result I make the following order.

Paragraphs 1 and 2 of the notice of motion are granted.

C J MUSI, J

APPEARANCES

For the applicant:	Adv. Hefer
Instructed by:	McIntyre and Van der Post BLOEMFONTEIN
First to the fifth respondents:	Adv. Benade
Instructed by:	Symington & De Kok BLOEMFONTEIN