

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES
<u>17/7/2015</u> DATE
 SIGNATURE

CASE NO: 36958/12

17/7/2015

In the matter between:

ANDRÉ STEENKAMP

Plaintiff/Applicant

and

NATCORP SPECIALISED LOGISTICS

SOLUTIONS (PTY) LTD t/a NATCORP

Defendant/First Respondent

MIDBANK RETAIL CITY (PTY) LTD

Third Party/Second Respondent

AI EQUIPMENT CC

Third Respondent

JUDGMENT

1. In the main action the applicant, as plaintiff, issued summons against the first respondent, as defendant, claiming an amount of R1 043 580,00 as damages for breach of contract. In a later procedure the first respondent, as defendant, joined the second respondent as co-defendant. The first respondent is thus the first defendant in the main action and the second respondent is the second

defendant. For the sake of clarity I shall refer to the parties as they are cited in the main action.

2. In the present application the plaintiff seeks to join the third respondent as a second plaintiff to the main action. The first defendant opposed the application. The second defendant did not oppose the application and neither did the third respondent.

3. It is necessary to briefly refer to certain of the salient features of the main action. The plaintiff based its cause of action upon an alleged verbal agreement entered into between the plaintiff and the first defendant in terms of which the first defendant would transport a certain excavator from Gauteng to its destination in Swaziland. According to the plaintiff the first defendant breached the terms of the verbal agreement in that it failed to deliver the excavator to Swaziland safely and in a proper working order. What had apparently happened was that *en route* to its destination the excavator was involved in a collision and was damaged beyond repair. The plaintiff's claim was for damages allegedly suffered by the plaintiff as a result of its breach of contract. In its plea the first defendant denied any liability.

4. Subsequent to the close of pleadings the plaintiff launched the present application in terms of rules 6(11) and 10(1). In the founding affidavit, deposed to by the plaintiff's attorney, the reason for the application was, *inter alia*, explained as follows:

"... It appeared that he (a reference to the applicant/plaintiff) may actually have been acting on behalf of the close corporation (a reference to the Third Respondent)".

5. The plaintiff is a member of the third respondent, which is a close corporation.

Apparently the plaintiff negotiated the aforesaid verbal agreement which resulted in him instituting the claim in his personal capacity when the agreement was allegedly breached. If, however, the plaintiff at the time negotiated and concluded the verbal agreement on behalf of the third respondent, the claim might lie for the third respondent and not for the plaintiff. In these circumstances the plaintiff applied for the third respondent to be joined as second plaintiff in the main action.

6. It was, *inter alia*, submitted on behalf of the plaintiff that the plea of the first defendant necessitated the third respondent's joinder as a plaintiff. I do not agree. This is, firstly, not an instance of the obligatory joinder of a plaintiff such as, for example, where joint owners, joint contractors or partners institute action. This is also not an instance where the order of the court may affect the interests of the third respondent. The third respondent does not have 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 any judgement and order the court may make. *In casu* the outcome of the main action would not affect or be binding upon the third respondent and it may sue separately for the same relief.

7. Such a decision, *i.e.*, to sue as plaintiff in an action or not, however, resides with the particular person or entity which is, *in casu*, the third respondent itself. Only in the event of a co-plaintiff being a necessary plaintiff, such as mentioned above,

can one plaintiff join such other as co-plaintiff, if such co-plaintiff is willing, or as defendant or respondent, if unwilling.

8. I accept for present purposes that the plaintiff and the third respondent were entitled but not obliged to join as applicants under rule 10(1) (read with rule 6(14)) at the outset of the litigation. Consequently, if the third respondent wanted to join as co-plaintiff, it's application would have fallen under rule 12. But, as stated before, the third respondent's claim, in such an event, has nothing to do with a legal interest which may be prejudicially affected by the judgment of the court in the main action. It would be an intervention of desire and not of necessity.
9. Counsel could not refer me to any decision which allowed one plaintiff, after close of pleadings, to join another plaintiff in circumstances such as the present. As stated above, it is my view that unless a person or entity is obliged to be a co-plaintiff, as mentioned above, the plaintiff cannot join another as co-plaintiff. After all, there might be very good reason why such a proposed co-plaintiff does not want to be part of the litigation. Furthermore, to join a party as co-plaintiff forces such party to assume the role of *dominus litis*, which brings with it certain obligations and risks. And of course, there is the issue of costs. Any party to litigation runs the risk of an adverse order for costs. No person, *ceteris paribus*, can be forced to institute legal action and thus to run such a risk.
10. During argument it was also submitted on behalf of the plaintiff that it is wrong to say that the third respondent is not a party to this application or has made no application for joinder or intervention. In this regard reference was made to the plaintiff's attorney who stated in the founding affidavit that he was duly authorised to depose to the affidavit "and to act on behalf of the applicant and the third

respondent herein". The attorney also stated that he had instructions from the third respondent "as represented by the applicant" to effect such joinder.

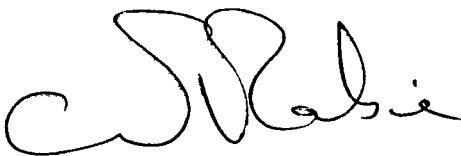
11. There is no merit in the aforesaid submission. The simple fact is that the third respondent did not apply for its own intervention as a party to the litigation. The fact that the third respondent may not have opposed the plaintiff's application or may even have been satisfied therewith, does not change the fact that it was not for the plaintiff to join him, but for himself to do so.

12. On behalf of the first respondent it was submitted that if the third respondent wanted to join or intervene as plaintiff in the existing action, it was for the first respondent itself to apply to the court for permission to do so and that such application would then have to be decided on its own merits -- it was not possible for the plaintiff to do so. It was also pointed out that neither the plaintiff nor the third respondent offered any reason why the third respondent did not itself apply for its intervention. I am in agreement with these submissions.

13. In the circumstances I am satisfied that the application cannot succeed. There is no reason why costs should not follow the event.

14. In the result the following order is made:

1. The application is dismissed with costs.



C.P. RABIE
JUDGE OF THE HIGH COURT