

IN THE SUPREME COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 161/2004

In the matter between:

RAND WATER BOARD

Excipient

and

BURGER IZAK JOHANNES

Respondent

INRE:

RAND WATER BOARD

Plaintiff

and

BURGER IZAK JOHANNES

First Defendant

CLUB TWELVE

Second Defendant

(also known as KLUB 12)

CORAM:

KRUGER J

JUDGMENT:

KRUGER J

HEARD ON:

26 NOVEMBER 2004

DELIVERED ON:

3 MARCH 2005

[1] The plaintiff excepts to the first defendant's special plea of non-joinder.

[2] In the action by the plaintiff against the first defendant, the plaintiff seeks an order directing the first defendant to demolish certain buildings and structures erected on his farm, Erfenis, because they were erected illegally below the 1975 floodline next to the Vaal River. The buildings and structures form part of a recreational resort operated by a tenant of the first defendant, an association by the name "Klub 12". Klub 12 has been joined as second defendant, but no relief is sought against it and it is joined solely for any interest it may have in the matter.

BACKGROUND

[3] In his plea dated 11 March 200, the first defendant raised a special plea of non-joinder on the basis that all the members of Klub 12 (the second defendant) had, in their capacity as members, a direct and material interest in the outcome of the action and that they had not been joined.

[4] The plaintiff excepted to the special plea of non-joinder as being bad in law on the basis that there is no requirement in law that, where an association is cited as a party, the individual members also have to be cited. Furthermore, Rule 14(2) of the Uniform Rules sanctions the suing of an association, without the need to sue individual members thereof.

[5] The exception was argued before Van der Merwe J on 7 November 2003. The exception was upheld with costs. The

First Defendant was granted leave to amend his plea within 15 days after date of judgment.

[6] The First Defendant delivered a notice of amendment on 28 November 2003 to which the Plaintiff delivered a notice of objection in terms of Rule 28(3) on 12 December 2003.

[7] The objection to the amendment was argued before Hattingh J on 22 April 2004. The Court held that the First Defendant could amend his special plea as of right and simply had to deliver the amendment, and that the Plaintiff was not entitled to use the procedures of Rule 28, but should have acted in terms of Rule 23.

[8] First Defendant says that on dates before 6 August 1982 it and the then members of the second defendant's club (Klub 12) entered into oral agreements. The first defendant gives the names of the persons with whom he entered into the agreements.

[9] The most important terms of the oral agreements were the following:

(1) The persons would be entitled to erect habitable and

other structures on that portion of first defendant's property leased from him by second defendant.

- (2) The first defendant would only give the right to erection to persons who are or become members of Klub 12.
 - (3) Such persons with whom first defendant entered into agreements would be entitled to transfer all rights and obligations (including ownership) which they acquire by virtue of the agreement with the first defendant to other persons who are or become members of Klub 12.
 - (4) Such member or successor in title is and remains owner of the structures erected by it and is entitled to live in, possess and occupy the said structures for as long as the lease between first and second defendant endures.
 - (5) At completion of the period (or any extension thereof) such persons will be entitled to remove the structures.
- [9] In terms of the said agreements the said persons (members

of second defendant) erected habitable and other structures.

[10] In the premises, first defendant says, the said persons or their successors in title are owners of the structures and entitled to live in them, possess and occupy them.

[11] First defendant says only two of the twelve initial contracting parties are still in occupation. He says he is unaware of the identity of all the successors in title of the initial parties.

[12] First defendant pleads that all those persons, the two initial ones and the other successors in title, are at present owners of some of the structures mentioned in paragraph 14 and prayer 1 of the particulars of claim and that they have a direct and substantial interest in the adjudication of this action. None of them have been joined and, says the first defendant, in the premises the relief sought in the prayers cannot be granted.

[13] The plaintiff excepted to the special plea on the basis that it lacks averments which are necessary to sustain a defence on the following grounds:

“1. 1.1 Save for the names of Messrs Bill Phillips and Brian David Kay, the First Defendant demands the joinder of persons that he is unable to identify, whom the Plaintiff cannot identify and whom the First Defendant does not allege the Plaintiff can identify. The Plaintiff is unable to give effect to this demand of joinder, even if it wanted to do so, and accordingly the special plea of non-joinder amounts to a demand which is impossible of performance by the Plaintiff.

1.2 It is not competent in law to defeat a Plaintiff's

claim with a plea of non-joinder where the person required to be joined cannot be identified and therefore cannot be effectively joined by the Plaintiff.

2. 2.1 Furthermore, the First Defendant pleads that the oral agreements were concluded with members of the Second Defendant only and that such members could only transfer their rights to other members of the Second Defendant for the duration of the lease agreement between the First Defendant and the Second Defendant.

2.2 The rights that the individuals acquired as pleaded by the First Defendant are therefore wholly dependant on their membership of the Second Defendant, and such individuals are by definition the current members of the Second Defendant.

2.3 There is no requirement in law that, where an association is cited as a party, the individual members also have to be cited. Indeed, Rule 14(2) sanctions the suing of an association without the need to sue individual members thereof.

3. The special plea of non-joinder is therefore bad in law and should be struck out.”

CONDONATION

[14] The exception was filed out of time and the excipient had to apply for condonation. That application was opposed. I do not intend to go into detail of the delays. The crux of Mr. Gautschi’s submissions in argument was that the reason for

the late noting of the exception was that it was precipitated by the filing of the second defendant's exception to the plaintiff's particulars of claim. Plaintiff deemed it expedient to have both exceptions dealt with at this stage. That argument appears sound to me and I believe that the plaintiff's exception to first defendant's special plea should be decided now. There is no reason to delay that until the hearing of the matter or have it specially set down at a later stage if the plaintiff wishes to have it dealt with by means of an exception. That, in my view, is an expedient manner of dealing with it. Mr. Danzfuss, for excipient, said that if condonation is granted, plaintiff should be ordered to pay the costs thereof. In my view, taking the exception was an expeditious decision, which could result in a saving of costs. No costs order should be made in respect of the condonation application.

MERITS OF EXCEPTION

[15] Plaintiff says that the special plea of non-joinder amounts to

a demand which is impossible of performance by the plaintiff.

Plaintiff's counsel says that it is not competent in law to defeat a plaintiff's claim with a plea of non-joinder where the person required to be joined cannot be identified and therefore cannot be effectively joined by the plaintiff.

[16] It is highly improbable that the First Defendant is not aware of the full list of the members of Klub 12 in that he is the owner of the farm and he stays on the farm. Even if he is not aware of the identity of the members, it cannot be expected of the Plaintiff to join persons that it is not able to identify.

[17] Furthermore, Mr. Gautschi says, the first defendant pleads that the oral agreements were concluded with members of Klub 12 only and that such members could only transfer their rights to other members of Klub 12 for the duration of the lease agreement between the first defendant and Klub 12.

[18] The rights that the individuals acquired as pleaded by the first defendant are therefore wholly dependent on their membership of Klub 12, and such individuals are by definition the current members of the second defendant. Therefore, Mr. Gautschi says the joinder of Klub 12 is

sufficient to protect all its members and its own interests.

- [19] In opposing the exception, Mnr. Danzfuss pointed out that for purposes of the exception plaintiff cannot rely on allegations or circumstances which do not appear *ex facie* the plea. Plaintiff is limited to the allegations within the four corners of the plea – **VILJOEN v FEDERATED TRUST LTD** 1971 (1) SA 750 (O) at 754 F – G. For purposes of an exception the facts stated in the pleadings must be accepted – **EDWARDS v WOODNUTT N.O.** 1968 (4) SA 184 (R,S) at 186 E – F.

- [20] The excipient for purpose of the exception is bound by the pleading to which it excepts and is taken to admit those facts – **Beck’s Theory and Practice of Pleading in Civil Actions** 6th edition (2002) 129. The exception may not introduce fresh matter (**VILJOEN, *supra*, loc.cit**). As stated in Beck p. 152:

“It will be remembered that the test of a valid exception is that the truth of the pleading excepted to is assumed and that no fresh

matter of any sort is introduced. Pleas in bar, dilatory pleas and pleas in abatement differ from exceptions precisely in this, that they do always introduce fresh matter which must be proven by evidence.”

[21] No fresh matter of any sort may be introduced. For purposes of the exception the facts pleaded must be accepted as correct - **MARNEY v WATSON AND ANOTHER** 1978 (4) SA 140 (C) at 144 F – G.

[22] The rule is that for purposes of interpretation the pleading must be taken as it stands. No evidence can be introduced - that is done via a special plea, not an exception. The pleading must be assessed in the light of all the pleadings. The exception is restricted to pure matters of law – **Beck** p. 129.

[23] Two main issues arise for determination:

- i) Can a party compel another to join persons he does not identify?
- ii) Is the interest of a member of the second defendant

sufficient to qualify for joinder in the light of the fact that the second defendant is before the court?

(i) IDENTITY OF PARTIES

[24] Mr. Gautschi says the first defendant does not name the parties he says should be joined. First defendant does not say that plaintiff knows who they are. Mr. Gautschi says it is asking too much to demand that people that he cannot identify, be joined. He says if anyone is likely to know their identity it is the first defendant.

[25] It is of course possible that parties can be joined without being named. Especially in eviction cases one often sees that persons are cited as “occupiers” of certain premises. That is what Mr. Danzfuss says should be done in this case. The occupiers of the various houses should simply be cited as “occupiers”. However that creates several problems in this case. We know from the special plea that a member of the second defendant who is then also an occupier of a

particular house is entitled to transfer the ownership which he or she has in the structures in question to any other person by simply transferring membership. That is done without any formalities and it appears without informing the first defendant about it. Apparently the first defendant does not know who they are, and there have been several transfers since the second defendant's club came into existence. Therefore it is possible that during the course of this litigation such property may also change hands. A person who was for instance the occupier of house no. 3 as at today would no longer be the owner or occupier of house no. 3 within a year or two when the trial is heard and judgment is given. That appears to me to create a serious hurdle and apart from the fact that one does not know who would be bound by whatever is ordered in the judgment it could also have a bearing on costs. If such party would be ordered to pay costs it would not be possible to determine who was intended. Was it the person who occupied for the first six months, as from today (before the judgment), or was it the person who occupied at the date of judgment who did

not even know that he had been joined? That creates a serious problem in this matter. This problem becomes clearer in dealing with the second point.

(ii) IS THE INTEREST OF A MEMBER OF THE SECOND DEFENDANT SUFFICIENT TO QUALIFY FOR JOINDER?

[26] Mr. Gautschi says there is a complete identity of interest between the second defendant and its members. With reference to WHOLESALE PROVISION SUPPLIES CC v EXIM INTERNATIONAL CC AND ANOTHER 1995 (1) SA 150 (T) at 158 D – E he says that the rule which seeks to avoid orders which might affect third parties in proceedings between other parties is not simply a mechanical or technical rule which must ritualistically be applied, regardless of the circumstances of the case. He says that there is no suggestion that the members have an interest adverse to the interest of the first and second defendants (158H-I). In this case it is clear that both defendants are opposing the order sought by the plaintiff which is a demolition order. It seems

to me obvious that if the members of the club also had a demand that would simply also be to oppose the demolition orders. I cannot see that they would have any other interest adverse to that if they wished to oppose this litigation. If they did not wish to oppose they can stay away and not be involved at all.

[27] Mr. Gautschi says the demand for joinder is just a ritualistic demand for joinder of people whose interests are entirely overlapping with those of the second defendant. He says the rights of the club members are to take away the structures. He says the plaintiff will be only too pleased if those members take away their structures. That right need not be protected separately from Klub 12, the second defendant. Secondly he says they have the right to use and occupation of the property. That right arises from the lease between the first defendant and the second defendant. Sub-lessees do not need to be joined. That is settled law. The members of Klub 12 are in the position of sub-lessees and have no right to be joined. See **NTAI AND OTHERS v VEREENIGING**

TOWN COUNCIL AND ANOTHER 1953 (4) SA 579 (A) at 591 – 592; **SHE SHE v VEREENIGING MUNICIPALITY** 1951 (3) SA 661 (A) at 666F – 667C referred to in a judgment which I gave in the matter of **RAND WATER BOARD AND ANOTHER v BURGER**, OPD Case No.: 2805/2001 on 5 September 2002, par. 16 thereof.

[28] Mr. Danzfuss says that the **WHOLESALE PROVISIONS SUPPLIES**-case is to be distinguished from the present case. There the person in question took part in the proceedings and signed on behalf of the legal person and was actually before the Court. Here, Mr. Danzfuss says, the order sought is that the first defendant abolishes the structures of which other persons are the owners. Thus they have to be before Court. Mr. Danzfuss says that the new members of the second defendant are owners of the structures and entitled to be cited in their own right. Mr. Danzfuss also says that this being an exception the question is whether the defence raised can be a good defence. He says that is the point of law which I have to decide. See

MINISTER OF LAW AND ORDER v KADIR 1995 (1) SA

303 (A) at 318 D – E. He says the test is whether the conclusion for which the plaintiff contends cannot be supported upon every interpretation which the particulars of claim can reasonably bear. See **LEWIS v ONEANATE**

(PTY) LTD AND ANOTHER 1992 (4) SA 811 (A) at 817 F – G.

[30] The facts pleaded represent the high water mark of the factual basis on which the Court will be required to decide the question. Therefore if those facts do not *prima facie* support the defence of non joinder contented for there is no reason why the exception should not succeed (**KADIR**-case at 318 I - J). The fact that the persons sought to be joined are owners of the structures does not put them in a better category than sub-lessees. They derive their rights from being members of the second defendant. The right to ownership which they have is simply a right in the structures erected which they are entitled to remove when they depart. That they are entitled to do and I cannot see how this court

order would adversely affect that right.

[31] An important aspect of this case, not applying the test for joinder ritualistically, is to assess whether the parties to be joined have an interest adverse to that of the second defendant. By virtue of the membership of the second defendant they have ownership of those structures. The members of the second defendant must be funding this litigation. At least, they must be aware thereof. If not, the management of second defendant would be acting in a grossly irresponsible manner. No one prevents them from intervening if they believe their interests are not being protected. It would in no way advance the interests of justice to allow the special plea to stand. It is simply a delaying tactic contrived by the defendants.

[32] Novel points of law were raised in the exception and the special plea, and it was a wise precaution of excipient to employ two counsel.

[33] The following orders are made:

- (i) The condonation application is granted but no order for costs is made in respect thereof .
- (ii) The exception is upheld and the special plea is struck out with costs such costs to include the costs consequent upon the employment of two counsel.

A. KRUGER, J

On behalf of Excipient/Plaintiff:

Adv. A. Gautschi and
Adv. I. Lindeque
Instructed by

Hill McHardy & Herbst
BLOEMFONTEIN

On behalf of Respondent/First Defendant: Adv. F.W.A. Danzfuss S.C.

Instructed by
Honey Attorneys
BLOEMFONTEIN

On behalf on Second Defendant:

No appearance

/ec /sp