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**IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA**

CASE NO: 1066/2023

REPORTABLE: YES / NO

OF INTEREST TO OTHER JUDGES: YES/NO

REVISED: YES/NO

DATE

SIGNATURE

In the matter between:

JACQUELINE LANGENHOVEN

PLAINTIFF

and

**GERHARD POTGIETER MAINTENANCE CLEANING
SERVICES (WITBANK) LTD**

DEFENDANT

SHOPRITE HOLDINGS LTD

THIRD PARTY

JUDGMENT

MONTSHO-MOLOISANE AJ

- [1.] Before this Court is an application lodged by the Plaintiff for the joinder of the Third party as the Second Defendant in the main action she instituted against the Defendant in this Court.
- [2.] The Plaintiff is an adult female who, at the time of the institution of the main action, was residing in Middelburg, Mpumalanga province.

- [3.] The Defendant is a private company with limited liability, trading as Mr Clean, duly incorporated and registered in terms of the company laws of the Republic of South Africa, with its registered address at Secure Office Park, B[...] B[...], S[...] Street, Witbank, Mpumalanga province.
- [4.] The Third party, Shoprite Holdings Ltd, is a company duly incorporated and registered in terms of the company laws of the Republic of South Africa, with its registered address at Corner William Street and Old Paarl Road, Brackenfell, Western Cape province.
- [5.] The Third party opposes the joinder application, which opposition culminated in the current proceedings.
- [6.] The Defendant filed a Notice of intention to abide by the decision of the Court in this application.

SALIENT FACTS

The Pleadings

- [7.] It is common cause that the Plaintiff instituted an action against the Defendant in this Court, on 07 March 2023. The claim is for payment of damages that the Plaintiff alleges to have suffered when she slipped and fell in a pool of water that had accumulated in front of a fridge inside Shoprite store, Crown Centre, Barberton, Mpumalanga (“the premises”), on 11 April 2020, causing her to suffer serious injuries and sequelae thereto.
- [8.] In her Particulars of claim, the Plaintiff avers that the fall was as a result of the breach of the legal duty that the Defendant owed to her to keep the floor dry and safe, alternatively that the Defendant acted negligently in failing to do.

- [9.] It is further averred that at the time of the incident, the Defendant was represented by its employees, acting within the course and scope of their employment with the Defendant.
- [10.] The Defendant raised a Special Plea of Non-joinder of Shoprite Holdings Ltd (“Shoprite” or “Third party”), and pleaded that at the time of the incident, the Defendant was an independent contractor appointed by Shoprite, which controls the premises, to perform general cleaning duties on its premises. It is pleaded that the failure to join Shoprite amounts to a non-joinder of a party who has a direct and substantial interest in the action.
- [11.] In the Plea on the merits, the Defendant denied liability and pleaded that the breach did not cause nor contribute to the incident, alternatively that the Plaintiff failed to keep a proper lookout and was therefore solely negligent in causing the incident, further alternatively, it is her contributory negligence that caused her to slip and fall. The Plaintiff’s claim should on that basis be apportioned in accordance with the Apportionment of Damages Act, 34 of 1956.
- [12.] On or about 12 October 2023, the Plaintiff filed her Replication wherein she pleaded that the Defendant was an independent contractor and was therefore solely liable for the spillages on the floor of the premises. On 31 October 2023, the Defendant’s attorney provided the Plaintiff’s attorney with a copy of a witness’ statement, on a without prejudice basis, advising that the pool of water was caused by a blocked fridge drain.

The Joinder application

- [13.] Subsequent to obtaining the aforementioned witness’ statement on 31 October 2023, the Plaintiff lodged the current application for joinder of Shoprite, the Third party herein, as the second Defendant in the main action.
- [14.] In the Founding affidavit, the Plaintiff’s attorney of record, Christian Petrus Smit, duly authorised by her to depose to the affidavit, avers that the

Defendant was an independent contractor employed by the Third party to keep the floor of the premises clean and dry, and that at the time of issue of Summons, the Plaintiff was not aware of the origin of the pool of water that caused her to fall. She later learnt that the water accumulation was due to the blocked fridge drain inside the Shoprite store. It is further averred that the Third party has a direct and substantial interest in the action, notwithstanding that the Defendant was appointed as an independent contractor.

[15.] Furthermore, it is pleaded, that the determination of the dispute between the Plaintiff and the Third party involves substantially the same issues of law and facts as against the Defendant.

[16.] In its opposition to the Joinder application, the Third party filed an affidavit, deposed to by its attorney of record, Lekwalo Jones Ditsela. The essence of the said affidavit is that:

16.1. the Plaintiff's claim in the main action constitutes a "*debt*" as envisaged in the Prescription Act, 68 of 1969 (as amended) ("the Prescription Act"), which is subject to the 3(three) years period of prescription;

16.2. the Plaintiff acquired knowledge of the identity of the debtor (Third party), when the debt arose, being the date of the alleged slip and fall on 11 April 2020;

16.3. in the premises, the Plaintiff's claim prescribed on 10 April 2023;

16.4. consequently, there would be no purpose to join the Third party to the main action, under circumstances where the claim of the Plaintiff has, in terms of Sections 10,11 and 12 of the Prescription Act, already become prescribed.

[17.] The essence of the facts pleaded in the Replying affidavit is that:

- 17.1. she was not aware that the pool of water was caused by a blocked fridge drain until 31 October 2023;
- 17.2. the Defendant's Special Plea and Plea on the merits did not specify that the pool of water was caused by a blocked fridge drain;
- 17.3. it was further pleaded in the Special Plea that Shoprite has a direct and substantial interest in the action as it was in control of the premises at the time, and had appointed the Defendant as an independent contractor to perform general cleaning services at the premises;
- 17.4. that considering the knowledge that the Plaintiff had at the time of issue of Summons, and after service of the Defendant's Special Plea and Plea on the merits, no grounds existed for the Third party to have been cited as the Second Defendant in the action;
- 17.5. furthermore, without being advised that the pool of water had been caused by a blocked fridge drain, the Plaintiff would have had no reason to issue summons against the Third party; and
- 17.6. the period of prescription against the Third party commenced on 31 October 2023 after the Plaintiff became aware of the minimum facts which establish an action against the Third party.

Submissions of the parties

- [18.] It is important to highlight the submissions made by the parties, in addition to the averments made in the affidavits of the Plaintiff and the Third party in order to consider whether the Plaintiff has made out a case as envisaged in the provisions of Rule 10(3) of the Uniform Rules of Court.

The Plaintiff

- [19.] Counsel for the Plaintiff, Mr A.J. du Toit, limited his submissions to the legal principles applicable in determining the liability of a principal in instances where the former had appointed an independent contractor to execute duties on behalf of the principal, on his premises, and the circumstances which would render the principal, in this case the Third party, liable. In this regard, he relied on the case of *Chartaprops 16 (Pty) Ltd and Another v Silberman*¹, where Nugent JA held that a Defendant is liable for harm that arises from the negligent conduct on the part of an independent contractor from the breach of the Defendant's own duty, in circumstances where a reasonable possibility of harm occurring ought to be foreseen in accordance with the classic test for negligence.
- [20.] It was further contended on behalf of the Plaintiff that the Plaintiff's claim against the Third party has not prescribed as she only became aware that she had a claim against the Third party on 31 October 2023, when the Defendant's attorney provided her attorney with a copy of a witness' statement, on a without prejudice basis, advising that the pool of water in which the Plaintiff slipped and fell, was actually caused by a blocked fridge drain, which caused the water to flow onto the floor of the premises.
- [21.] Furthermore, Mr du Toit contended that the Plaintiff was not aware that the pool of water had been caused by the said blocked fridge drain, for which the Third party would have been responsible. On this basis, he relied on the provisions of Section 12(3) of the Prescription Act, which stipulates that:
- “a debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care”.*
- [22.] On this basis, he further contended that at no point in time before 31 October 2023, was the Plaintiff advised that it was the blocked fridge drain, for which

¹ *Chartaprops 16 (Pty) Ltd and Another v Silberman* 2009 (1) SA 265 (SCA) at para [7]

the Third party was responsible, that had caused the water to accumulate and pool on the floor of the premises.

The Third party

[23.] It was contended on behalf of the Third party by Mr L.I. Ditsela that the notice of joinder issued by the Plaintiff in terms of Rule 10(3) is not a process as intended in Section 15(1) of the Prescription Act, which provides that:

“15. Judicial interruption of prescription

(1) *The running of prescription shall, subject to the provisions of subsection (2), be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt”.*

[24.] In the premises, Mr Ditsela contended, the Joinder application does not, and has not interrupted the running of prescription. The numerous judgments the Court was referred to, focused on whether the service of the Joinder application interrupted prescription or not, and do not deal with the provisions of Rule 10(3).

[25.] It was further contended on behalf of the Third party that as the service of the Joinder application on the Third party did not interrupt prescription, the Plaintiff's claim prescribed on 10 April 2023.

[26.] Consequently, the joinder of the Third party as the second Defendant in the main action would serve no purpose.

The issues

[27.] The key issues that arise herein regarding the joinder sought, are the following:

27.1. does the determination of the dispute between the Plaintiff and the Defendant, involve the same questions of law and fact that

would arise in the dispute between the Plaintiff and the Third party and?; if so

- 27.2. does the Third party have a direct and substantial interest that is a legal interest which may be affected prejudicially by the judgment of the Court?.

Applicable legal principles

- [28.] In the *locus classicus* case of **Amalgamated Engineering Union v Minister of Labour**², the Appellate Division (as it then was), emphasised the importance of joinder of parties in promoting efficiency and fairness in legal proceedings, while also recognising the need to balance this with considerations of practicality and prejudice. It was held that:

“... the Court has consistently refrained from dealing with issues in which a third party may have a direct and substantial interest, without either having that party joined in the suit or, if the circumstances of the case admit of such course, taking other adequate steps to ensure that its judgment will not prejudicially affect that party’s interests”.

- [29.] In Herbstein and Van Winsen’s *The Civil Practice of the High Courts the Supreme Court of Appeal South Africa*, by Van Winsen, Cilliers and Loots, the learned authors supply a useful summary of the approach of the court in the **Amalgamated Engineering** case *supra*, in determining, by way of two tests, whether a third party has a direct and substantial interest in the outcome of litigation. The learned authors stated as follows³:

“The first was to consider whether the third party would have locus standi to claim relief concerning the same subject matter. The second was to examine whether a situation could arise in which, because the third party had not been joined, any order the Court might make would not be res judicata against him, entitling him to approach the court again concerning the same

² *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 7 (A) at 659

³ Cilliers et al Herbstein and Van Winsen : *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5th ed (2009) at 218

subject matter and possibly obtain an order irreconcilable with the order made in the first instance”.

[30.] Navsa JA, in a unanimous judgment of the Supreme Court of Appeal, in the case of *Transvaal Agricultural Union v Minister of Agriculture and Land Affairs and Others*⁴, reaffirmed the legal exposition regarding joinder of parties enunciated in the **Amalgamated Engineering** case *supra*, and the elaboration thereof by the aforementioned learned authors.

[31.] This Common law principle has been codified in Rule 10(3), which provides that:

“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”.

[32.] In the case of *Matjhabeng Local Municipality v Eskom Holdings Ltd*⁵, the Constitutional Court confirmed the correctness of the aforestated legal position as follows:

“The law on joinder is well settled. No Court can make findings adverse to any person’s interests, without that person first being a party to the proceedings before it”

[33.] The case of **Watson NO v Ngonyama and Another**⁶, echoed the legal principle enunciated in the **Amalgamated Engineering** and **Matjhabeng** judgments *supra* as follows:

⁴ *Transvaal Agricultural Union v Minister of Agriculture and Land Affairs and Others* 2005 (4) SA 212 (SCA) at paras 64 to 67

⁵ 2018 (1) SA 1 (CC) at para [92]

⁶ *Watson NO v Ngonyama and Another* 2021 (5) SA 559 (SCA) at [51] to [53]

“This Court has consistently insisted from as far back as 1949, that it would not deal with matters where a third party that may have a direct and substantial interest in the litigation was not joined in the suit, or where adequate steps could not be taken to ensure that its judgment will not prejudicially affect that party’s interests. It is clear that an order without the involvement of such a party will not be res judicata against it”⁷.

Evaluation

[34.] It is important to point out that the Plaintiff’s affidavit in support of the Joinder application does aver that the Third party does have a direct and substantial interest in the pending litigation between the Plaintiff and the Defendant. Submissions were further made in relation to the following:

- 34.1. the determination of the liability of the principal, being the Third party, particularly where the principal appears to be at fault; and
- 34.2. the provisions of Section 12(3) of the Prescription Act as to whether the Plaintiff’s claim against the Third party has prescribed or not.

[35.] The Third party’s Opposing affidavit and submissions made, on the other hand, focused on the issue of prescription, particularly the following:

- 35.1. when did the prescription period start running in respect of the Plaintiff’s claim against the Third party, and whether it was ever interrupted;
- 35.2. did the Plaintiff’s knowledge that the incident occurred at the Shoprite store, Crown Centre, Barberton, constitute minimum facts of the identity of the Third party, and knowledge as contemplated in Section 12(3) of the Prescription Act.

[36.] The submissions made by the parties no doubt dealt with substantive issues which are relevant for the determination of the dispute in the main action.

⁷ See also: *Old Mutual Assurance Company (SA) Ltd and Another v Swemmer* 2004 (5) SA 373 at para [12]

[37.] It is apposite to state that this Court has the inherent power to *mero motu* consider, on the totality of the facts before it, whether the Third party has a direct and substantial interest, that is a legal interest in the subject matter of the litigation, or not, for the relief sought by the Plaintiff to be granted. The pertinent facts considered are:

- 37.1. the Defendant was appointed by the Third party as an independent contractor, to keep the floors of the premises clean and safe;
- 37.2. the pool of water that accumulated in front of the fridge, that the Plaintiff alleges, caused her to slip and fall, resulting in injuries, was as a result of a blocked fridge drain, for which the Third party was allegedly responsible; and
- 37.3. the Plaintiff lodged the application for joinder of the Third party in the main action, after she acquired knowledge regarding the cause of the pool of water, when her attorney was provided with the witness' statement by the Defendant's attorney.

[38.] It is appropriate to state that the argument advanced on behalf of the Third party regarding the issue of prescription of the Plaintiff's claim is clearly indicative that, the former does have a direct and substantial interest in the subject matter of the litigation between the Plaintiff and the Defendant.

[39.] The first issue for consideration by the Court should therefore be, whether the dispute between the Plaintiff and the Defendant, and that between the Plaintiff and the Third party, involves the determination of the same questions of law; and secondly, whether a situation could arise in which, because the Third party had not been joined, any order the Court might make would not be *res judicata* against him/her, entitling him/her to approach the Court concerning the same subject matter.

[40.] I therefore have no reason to depart from the legal principle applied in the *Amalgamated Engineering* case *supra*, as it is now trite that the law regarding joinder of parties is settled.

[41.] This Court further finds that the argument of prescription of the Plaintiff's claim against the Third party, presented on the latter's behalf, constitutes a defence which may be raised by way of a Special Plea or otherwise, in the pending litigation, and is not a factor to be considered in an application contemplated in Rule 10(3).

[42.] In light of the foregoing facts and the authorities cited, I am satisfied that the Plaintiff has succeeded in satisfying the requirements for joinder as set out in Rule 10(3).

[43.] In the result, the following order is made:

1. the Third party is hereby joined as the second Defendant in the main action;
2. the complete set of Pleadings and amended Particulars of claim in the main action are to be served on the Third party within 10(ten) days of the date of this order;
3. the Third party is hereby directed to serve its Notice of intention to defend, within 10 (ten) days of service upon it, of the set of Pleadings and Particulars of claim, on the Plaintiff's attorneys of record;
4. thereafter, and within 20 (twenty) days after filing and serving its Notice of intention to defend as aforesaid, the Third party is directed to file with the Registrar of this Court, and serve upon the Plaintiff's attorney a Plea or Exception, with or without a Counterclaim;
5. the costs of this application be paid by the Third party on a party and party scale.

L.M. MONTSHO-MOLOISANE
ACTING JUDGE OF THE HIGH COURT

MPUMALANGA DIVISION, MBOMBELA

Date heard: 13 February 2025

Judgment delivered: 11 March 2025

Appearances

For the Applicant: Adv A.J. du Toit
instructed by: DSC Attorneys
CAPE TOWN
C/O Pieter Swanepoel Attorneys
NELSPRUIT

For the Third party: L.J. Ditsela
instructed by: Ditsela Inc. Attorneys
CENTURION PRETORIA
C/O Marule Attorneys
NELSPRUIT