THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JS205/19

In the matter between:

SOLIDARITY obo SB PRETORIUS	**Applicant/Plaintiff**
and	
SIZWE SECHABA HOLDINGS (PTY) LTD	**First Respondent/Defendant**
SIZWE SECHABA PROPERTIES (PTY) LTD	**Second Respondent/Defendant**
SIZWE SECHABA CONSTRUCTION (PTY) LTD	**Third Respondent/Defendant**

Heard: 6 March 2025

Delivered: 7 May 2025 (This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing-down is deemed to be 10h00 on 7 May 2025.)

JUDGMENT

PHEHANE, J

Introduction

[1] This is an application by Solidarity on behalf of its member, the plaintiff, to join the second and third defendants to proceedings that it instituted against the first defendant for unpaid salaries over the period February 2017 to December 2018 in the amount of R592 000.00, and in terms of the provisions of section 77(3) read with section 77A(e) of the Basic Conditions of Employment Act[1] (BCEA).

Background

[2] The plaintiff claims that he was employed by the first defendant in April 2014 in the position of Property Development Manager until his services were terminated in December 2018 for what he terms to be unknown reasons.

[3] The plaintiff subsequently launched a referral against the first defendant in this Court on 19 March 2019. The first defendant opposed the referral essentially on the basis that the plaintiff was at no stage employed by it; rather, the plaintiff was appointed as an independent contractor. This raises a question of this Court's jurisdiction to adjudicate the plaintiff's referral. This jurisdictional point is referenced in paragraph 6 of the pretrial minute that was concluded between the parties on 6 August 2019. The plaintiff avers that his employment status is a matter for evidence at the trial proceedings.

[4] Pursuant to discovery procedures, the plaintiff avers that he discovered that his salary was paid to him by the first, second and third defendants. The plaintiff contends that in e-mail correspondence by the first defendant's attorneys on 21 August 2023,[2] the first defendant stated that the discovered documents revealed that the plaintiff was paid by the second defendant, which had not been cited as a party

[1] Act 75 of 1997.
[2] Pleadings, annexure "P3" on pp 27 to 28.

in the referral. Consequently, this application was launched by the plaintiff on 4 September 2023 to join the second and third defendants in the main action.

[5] This joinder appliation is opposed by the first, second and third defendants on the basis that firstly, the plaintiff has failed to make out a case for joinder, and secondly, should this Court agree that the second and third defendants be joined to the main action, the defendants submit that the plaintiff's claim against the second and third defendants has prescribed, as the plaintiff failed to insitute proceedings within a period of three years from the date its claim arose as contemplated in the Prescription Act.[3]

[6] In reply to the second challenge, the plaintiff relies on section 12 of the Prescription Act, which provides that prescription shall not commence to run until the creditor becomes aware of the debt in circumstances where the debtor wilfully prevents the creditor from coming to know of the existence of the debt. As I understand this contention, the plaintiff's version is that he only became aware at discovery stage that he was paid by the second and third defendants. I deal with this version below.

[7] In reply to the first challenge, the plaintiff alleges that it has made out a case for joinder.

Legal framework

[8] When this joinder application was launched, it was brought in terms of the now-repealed Rule 22 of the Rules of this Court[4], which reads essentially the same as Rule 52 of the new Rules of this Court.[5] Rule 52(1) and (2) read:

> '(1) At any time before judgment is delivered, the court may join any number of persons, whether jointly, jointly and severally, separately, or in the

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[3] Act 68 of 1969.
[4] GN1665 of 1996, repealed effective 17 July 2024.
[5] Rules Regulating the Conduct of the Proceedings of the Labour Court published under GN4775a in GG 50608 of 3 May 2024.

alternative, as parties in proceedings, if the right to relief depends on the determination of substantially the same question of law or facts.

(2)(a) The court may, of its own motion or on application and on notice to every other party, make an order joining any person as a party in the proceedings if the party to be joined has a substantial interest in the subject matter of the proceedings.

(b) When making an order in terms of paragraph (a), the court may give such directions as to the further procedure in the proceedings as it deems fit and may make an order as to costs.' (Own emphasis).

[9] It is now well established that a party that is to be joined to proceedings must have a direct and substantial interest in the matter. Further, only parties that would be directly affected by the court order or whose rights would be prejudiced by the court order and, therefore, are required to be heard before such order is made to sustain it or given effect thereto, are necessary parties to the proceedings.

[10] The learned authors, van Niekerk JA and Prinsloo J[6] quote this principle from the decision of the Labour Appeal Court in *Murray and Roberts (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration*[7] which held as follows:

'[24] It is a trite proposition of law that a person must be joined as a party to court proceedings if that person has an interest which is of such a nature that she (or he, or it) may be prejudicially affected by the judgment in the proceedings. The true test for a joinder has also been said to be whether the person has a "direct and substantial interest" in the proceedings. It is generally accepted that "direct and substantial interest" means a legal interest in the subject matter of the proceedings (ie litigation) which could be prejudicially affected by the judgment of the court.

[25] In *Cape Bar Council*, the Supreme Court of Appeal reiterated those basic tenets of the law. The joinder of a party is only required if it is a matter of necessity, and not for convenience. The mere fact that the party has an interest in the outcome of litigation does not warrant its joinder, and the

[6] C Prinsloo, A van Niekerk, Labour Court Manual at p 86.
[7] [2019] 11 BLLR 1224 (LAC) at paras 24 to 25.

interest must be "direct and substantial" in the sense mentioned earlier. Similarly, in *Makwela*, this Court confirmed those principles. <u>This Court specifically held that in court proceedings regarding a claim founded on a contract, a person that was not a party to the contract and had no rights or obligations in respect of it, did not have to be joined as a party.</u>' (Own emphasis)

<u>Submissions and analysis</u>

Direct and substantial interest

[11] Has the plaintiff demonstrated that the second and third respondents have a direct and substantial interest in the main proceedings? The answer is a resounding '*no*' for the reasons that appear below.

[12] The plaintiff submits that the defendants operate from the same premises and are controlled by the same individual, namely, Mr. Brian Eustance Wille Bestenbier (Mr Bestenbier). This is not disputed. The plaintiff alleges that during the course of his employment, he was instructed by Mr. Bestenbier to perform services for the second and third defendants, such that he was paid by all three defendants during the period of his employment.

[13] As stated above, the plaintiff relies to a large extent on the email by the first defendant's attorneys discussed above as the catalyst for the joinder application. This email was misconstrued by the applicant. The first defendant simply states that the documents discovered reveal that the plaintiff was paid by the second respondent who is not cited as a party to the proceedings and the first defendant further reiterates the content of its plea that no contract of employment was concluded between it and the plaintiff and therefore, the plaintiff had instituted the action against the wrong party and he is urged to withdraw the action and tender costs. This email is not a basis for joining the second and third respondents to the main action, as it does not demonstrate that the second and third respondents have a direct and substantial interest in the main action. Further, the defendants operating from the same business premises is not sufficient to demonstrate that the second and third defendants have a direct and substantial interest in the main action. More

than a financial interest is required to join a party to proceedings. Thus, the contentions of the plaintiff on which its case is premised do not make out a case for joinder – at best, these contentions point a joinder for convenience, which does not constitute the legal basis for joinder. Put differently, convenience does not constitute a legal direct and substantial interest that necessitates a party to be joined to litigation.

Jurisdiction

[14] Before joinder can arise, the Court must have jurisdiction to adjudicate the main action.

[15] As stated above, the parties identified the preliminary point on jurisdiction in their pre-trial minute, premised on the first defendant's challenge that the plaintiff was not its employee. This jurisdictional challenge is persisted with by the defendants in opposing the joinder application – the defendants deny that the plaintiff was an employee and allege that the plaintiff was contracted as an independent contractor to render services to the defendants, who operate in different industries.

[16] The plaintiff has not pleaded any contract of employment between him and the second and third defendants that could establish their obligations towards him in relation to the litigation he has instituted against the first defendant that could demonstrate that the second and third defendants have a direct and substantial interest in the main proceedings.

[17] The defendants contend that the plaintiff's own documents in the form of bank statements reflect differing amounts of monies he received from the second and third defendants, some comprised of loans to the plaintiff and none of these payments constitute a salary.

[18] Therefore, an issue that is yet to be determined between the plaintiff and the first defendant before joinder can be adjudicated is whether this Court has jurisdiction to adjudicate the referral in instances where the defendants allege that

the plaintiff was not their employee but an independent contractor. The plaintiff insists that this is a matter for evidence at trial.

[19] In view of the decision of the Labour Appeal Court (LAC) in *Intervalve (Pty) Ltd and Another v National Union of Metalworkers of SA obo Members*[8], where the LAC stated that in the absence of jurisdiction, joinder does not arise. Therefore, until such time that jurisdiction is determined, this joinder application is ill-conceived.

Prescription

[20] On the *Plascon Evans*[9] rule, the plaintiff's version that he became aware that he was paid by the second and third defendants in August 2023 is improbable.

[21] It is improbable that an employee who had not received a salary for 23 months would remain mum over such an extended period of time and only demand payment from the first respondent for unpaid salaries close to two years later.

[22] The bank statements are those of the plaintiff. He was well aware from inception which entities were depositing funds into his bank account, but he took no steps against those entities.

[23] This raises the question of prescription in relation to his claim against the second and third defendants, which he seeks to join to the main action – the claim against the second and third respondents has prescribed.

[24] In the circumstances of the claim against the second and third defendants having prescribed, it would be inappropriate to join parties to litigation where there are no proceedings in which the party sought to be joined can participate.[10]

<u>Costs</u>

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[8] (2014) 35 ILJ 3048 (LAC) at para [11].

[9] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

[10] See: *Du Preez v LS Pressings CC & Another* (2013) 34 ILJ 634 (LC) at para [17] discussed in *Labour Court Manual, supra* at p 87.

[25] The plaintiff was aware on its own version that from 2017 to 2018, it was paid by the defendants. When he did not receive his salary for 23 consecutive months, he did nothing. Four years later, with the knowledge that he received monies in his bank account from the second and third defendants, he launched this joinder application. He brings this application, insisting that jurisdiction be determined after evidence is led on whether or not he was an employee of the defendants. The plaintiff is legally represented and ought to have known that there can be no joinder without jurisdiction and no joinder when there is no live litigation.

[26] This joinder application is ill-conceived. I do not see why, in such circumstances, the defendants should be out of pocket, as they have incurred costs defending a hopeless application that ought not to have seen the light of day.

[27] In the premises, the order is as follows:

<u>Order</u>

1. The joinder application is dismissed with costs.

M.T.M. Phehane

Judge of the Labour Court of South Africa

<u>Appearances:</u>

For the plaintiff: Mr Hanekom of Solidarity.

For the defendants: Adv Mbhalati (Ms)

Instructed by: Hajibey Bhyat Inc.