

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1)	REPORTABLE: No
(2)	OF INTEREST TO OTHER JUDGES: No
(3)	REVISED: <i>Yes</i>
Date: <i>5/6/25</i> Signature: 	

CASE NO: 2020/0664

In the matter between:

RAEL SEGAL (N.O.)

Applicant

and

LEIGH ANNE LEVICK

First Respondent

MARTIN ASHLEY LEVICK

Second Respondent

In re:

RAEL SEGAL (N.O.)

Plaintiff

and

LEIGH ANNE LEVICK

Defendant

Summary: Application for joinder of insolvent in proceedings where fraud against insolvent is alleged, but no relief sought against insolvent. Finding that insolvent does not have a direct and substantial interest in the outcome of the proceedings, and is therefore not a necessary party.

JUDGMENT

Fourie AJ

Introduction

- 1 This is an opposed interlocutory application for the joinder of Martin Ashley Levick ("Martin") as Second Defendant in an action instituted by the late Frank Segal ("Segal"), now pursued by his executor, Rael Segal N.O. ("the Plaintiff").
- 2 The Defendant in the action, Leigh Anne Levick, opposes the joinder, arguing that Martin is an unrehabilitated insolvent and therefore his trustees, not he personally, should be joined. The Plaintiff contends that Martin can be joined despite his insolvency, particularly since his trustees have waived the right to be joined.

The facts

- 3 During January 2000, Segal issued summons against the Defendant, claiming repayment of USD 7,767,234.00, based on unjustified enrichment. He alleged that in 2007 he entered into an oral agreement with Martin, the Defendant's husband, for them to conduct investment activities together.
- 4 Segal claimed he paid approximately USD 7,767,234.00 into Leigh Anne Levick's Citi Bank account for these investments between July

2007 and January 2009. He further alleged that Martin committed fraud by never investing the funds. Segal pleaded he only discovered the fraud and the Defendant's unjust enrichment during 2019.

- 5 The Defendant filed an exception to Segal's particulars of claim. The first ground of exception was the material non-joinder of Martin, on the basis has a direct and substantial interest in the outcome due to the fraud allegations.
- 6 The Plaintiff brought an application to join Martin as the Second Defendant in the main action. This application also seeks leave to amend the summons and particulars of claim to reflect the joinder.
- 7 The Defendant opposes the joinder application. Her primary ground for opposition is that Martin, as an unrehabilitated insolvent, lacked *locus standi* to be sued in his own name, and that his trustees should be joined instead.
- 8 On 3 February 2023, Segal's attorney wrote to Martin's trustees to ascertain if they wished to be joined, or whether they waived their right to be joined. On 20 February 2023, ENS Attorneys, representing Martin's trustees, confirmed via email that the trustees had no intention of being joined and waived any rights to do so, stating they would abide by the court's decision. Segal filed a replying affidavit in the joinder

application on 23 March 2023, asserting that the trustees' waiver negated the Defendant's objection to Martin's joinder.

- 9 Frank Segal passed away on 19 August 2023. Rael Segal (N.O.) was substituted as the Applicant/Plaintiff in terms of Rule 15 on 26 March 2024.

Analysis:

- 10 The Defendant raised the issue of non-joinder as an exception, and in response to an application aimed at correcting this non-joinder, opposes it. Is there merit in this opposition?
- 11 Two primary questions arise: Does the claim as pleaded require that Martin be joined as a necessary party? If so, can he be joined in his personal capacity (given that the trustees of his insolvent estate had waived their rights to be joined), or must the trustees be joined?
- 12 The Defendant argues that to properly join Martin, his trustees should be joined instead, as his estate has a direct and substantial interest in the litigation. The Defendant submits that a finding of fraud against Martin would have consequences for his estate, including his good name and reputation, prospects of rehabilitation, and potential criminal charges, thus necessitating the involvement of his trustees.
- 13 The Defendant maintains that the trustees' willingness to not be joined is irrelevant, as the insolvent estate is a necessary party, and argues

that joining Martin personally would result in a misjoinder and that the particulars of claim would remain excipiable.

- 14 Lastly, the Defendant contends that the correct procedure is to join the trustees, who would then decide whether to defend the action, and if they decline, Martin could then elect to apply to be joined personally. This ensures costs are borne by the insolvent estate if the trustees defend, or by Martin personally if he defends.

Joinder of necessity

- 15 *Herbstein & van Winsen*¹ describe joinder of necessity as follows:

"A third party who has, or may have, a direct and substantial interest in any order the court might make in proceedings or if such an order cannot be sustained or carried into effect without prejudicing that party, is a necessary party and should be joined in the proceedings, unless the court is satisfied that such person has waived the right to be joined.

...

Joinder can be dispensed with only if the interested party has unequivocally waived the right to be joined and undertaken to be bound by any decision that the court may make.

...

A 'direct and substantial interest' has been held to be 'an interest in the right which is the subject-matter of the litigation and not merely a financial interest which is only an indirect interest in such litigation'. It is 'a legal interest in the subject matter of the litigation, excluding an indirect commercial interest only'...

¹ Cilliers *et al* *Herbstein & van Winsen The Civil Practice of the High Courts of South Africa*, Juta, 5th Ed, p215-217.

- 16 Rule 10 of the Uniform Rules of Court provides for the joinder of parties and causes of action. In *Judicial Services Commission and another v Cape Bar Council and another*², the SCA held that:

"[12] It has by now become settled law that the joinder of a party is only required as a matter of necessity – as opposed to a matter of convenience – if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned (see eg *Bowring NO v Vrededorp Properties CC* 2007 (5) SA 391 (SCA) para [21]. The mere fact that a party may have an interest in the outcome of the litigation does not warrant a joinder plea. The right of a party to validly raise the objection that other parties should have been joined to the proceedings, has thus been held to be a limited one."

Claims against insolvent persons:

- 17 Section 20 of the Insolvency Act 24 of 1936 provides that, upon sequestration, an insolvent's estate vests in the Master and then in the trustee/s, stripping the insolvent of the ability to sue and be sued. But the insolvent is not completely deprived of *locus standi*. For example, section 23(6) of the Insolvency Act 24 of 1936 states:

"The insolvent may sue or may be sued in his own name without reference to the trustee of his estate in any matter relating to status or any right in so far as it does not affect his estate or in respect of any claim due to or against him under this section..."

- 18 The insolvent may also, with the leave of the court, intervene to defend an action or claim which the trustee refuses to contest.³

² *Judicial Service Commission and another v Cape Bar Council (Centre for Constitutional Rights as amicus curiae)* 2012 (11) BCLR 1239 (SCA)

³ *Herbstein & van Winsen supra* p228, citing *Kuper v Stern & Hewitt NO* 1941 WLD 1.

19 The claim as pleaded does not seek any relief against the insolvent. In the circumstances, in my view the claim does not affect the insolvent estate. In any event, the trustees have waived any rights to participate in the litigation, and abide the outcome. Even if the insolvent estate was a necessary party, an unequivocal waiver by the trustees resolves the issue.

20 Does Martin have a direct and substantial interest in the proceedings, which affect his status or rights? Allegations of fraud are made against him in the particulars of claim, although no consequent relief is sought against him.

21 *Herbstein* mentions the following examples of joinder being refused, which in my view are relevant here:

"Where in an action the defendant pleaded fraud and collusion between the plaintiff and a third person, not a party to the proceedings, it was held that the latter was not entitled to leave to appear at the trial merely for the purpose of cross-examining the defendant's witnesses on the allegations. So, too, in a matter in which an applicant made serious allegations against the integrity and probity of a third party, the third party was refused leave to intervene simply to clear his name where it was not necessary for the court to consider the correctness of the defamatory allegations in determining the issues between the parties."⁴

22 The cause of action as pleaded is based on alleged unjust enrichment of the Defendant, at the Plaintiff's expense, *sine causa*. The allegation that Martin committed fraud on the Plaintiff is pleaded as part of factual

⁴ *Herbstein & van Winsen supra* p228, citing *Vawda v Budrea* (1908) 29 NLR 539 and *Wynne v Divisional Commissioner of Police* 1973 (2) SA 770 (E).

background as to how the Defendant came to be in possession of the Plaintiff's money, and why the Defendant has been enriched *sine causa*. The trial court may or may not need to deal with the allegation of fraud against Martin, but the mere fact that allegations of fraud are made against him, in circumstances where no relief is sought against him, do not create a direct and substantial interest in the outcome of the proceedings for either Martin personally, or his insolvent estate.

- 23 The decisions of the Constitutional Court in *SA Riding*⁵ and *Lebea*⁶ confirm the principle that in order to create a direct and substantial legal interest, sufficient to create a right to intervene (or, by analogy, to give rise to a claim of misjoinder), it is not sufficient that a party's interests are affected by the court's reasoning – the order is what counts. In *SA Riding*, the Court held:

"It is now settled that an applicant for intervention must meet the direct and substantial interest test in order to succeed. What constitutes a direct and substantial interest is the legal interest in the subject matter of the case which could be prejudicially affected by the order of the court. This means that the applicant must show that it has a right adversely affected or likely to be affected by the order sought".⁷ (Underlining added)

- 24 In my view, Martin is not a necessary party to the proceedings.

Costs

- 25 In the exercise of my discretion on costs, I decline to grant either party costs. The Plaintiff did not need to respond to the exception by bringing

⁵ *SA Riding for the Disabled Association v Regional Land Claims Commissioner* 2017 (5) SA 1 (CC).

⁶ *Lebea v Menye and another* 2022 JDR 3647 (CC).

⁷ At para 9.

this application, and the Defendant has engaged in tactical messing around, which does not deserve to be rewarded with costs.

Order:

26 The application for the joinder of Martin Ashley Levick as Second Defendant is dismissed.

27 No order as to costs.

GA Fourie

**Acting Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg**

HEARD ON: 14 April 2025

DATE OF JUDGMENT: 5 June 2025

FOR THE APPLICANT: Adv C Denichaud

INSTRUCTED BY: Edelstein Farber Grobler Inc

FOR THE RESPONDENT: Adv A Myers

INSTRUCTED BY: Ndobe Inc.
