IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, EAST LONDON CIRCUIT)

Not reportable

Case no. EL279/2022

In the matter between:

A[...] J[...] obo

B[...] J[...] Plaintiff

and

MEMBER OF THE EXECUTIVE COUNCIL,

DEPARTMENT OF EDUCATION, EASTERN CAPE Defendant

JUDGMENT

LAING J

[1] This matter concerns a special plea within the context of an action for damages. The plaintiff has sued in her own capacity and as the mother of her son, B,

who was previously a learner at Southernwood Primary School, KuGompo City (East London). On 15 May 2019, an employee of MFP Office Automation was installing a CCTV camera in one of the classrooms. He fell through the ceiling and landed on top of B, who had been seated at his desk. The accident caused B to bite off his tongue. The child is disfigured and has sustained severe psychological damage. The plaintiff alleged that the educators at the school were responsible for the care and safety of learners. They had been negligent in failing to prevent the incident.

[2] The defendant raised a special plea of non-joinder, asserting that MFP Office Automation has a direct and substantial interest in the outcome of the matter. The plaintiff replicated, alleging that it was unnecessary to have joined the entity; alternatively, MFP Office Automation had been acting as the defendant's agent at the time.

[3] The parties requested that the special plea be determined at the outset. In this regard, the defendant called the principal of the school to testify about the appointment of MFP Office Automation. For immediate purposes, it suffices merely to remark that the witness confirmed that the school had appointed the entity as an independent service provider to supply and install the CCTV cameras required.

[4] Van Loggerenberg observes that non-joinder is the failure of a plaintiff to join a defendant with another, being sued, in circumstances where the law requires that both be sued together.[1] The learned writer summarises the relevant principles as follows:

'The test is whether or not a party has 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 the judgment of the court. A mere financial interest is an indirect interest and may not require joinder of a person having such interest. The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea. The rule is that any person is a necessary party and should be joined if such person has a direct and substantial interest in any order that the court might make, or if such an

[1] D E van Loggerenberg *Erasmus: Superior Court Practice* RS 25 (2024) D1 Rule 10–2.

order cannot be sustained or carried into effect without prejudicing that party, unless the court is satisfied that he has waived his right to be joined.'[2]

[5] In *Matjhabeng Local Municipality v Eskom Holdings Ltd and Others*,[3] the Constitutional Court dealt with the subject within the context of contempt of court proceedings. Nkabinde ADCJ, emphasized that:

'At common law courts have an inherent power to order joinder of parties where it is necessary to do so even when there is no substantive application for joinder. A court could, *mero motu*, raise a question of joinder to safeguard the interest of a necessary party and decline to hear a matter until joinder has been effected. This is consistent with the Constitution.

. . . 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. The purpose of this requirement is to ensure that the person in question knows of the complaint so that they can enlist counsel, gather evidence in support of their position, and prepare themselves adequately in the knowledge that there are personal consequences — including a penalty of committal — for their non-compliance. All of these entitlements are fundamental to ensuring that potential contemnors' rights to freedom and security of the person are, in the end, not arbitrarily deprived.'[4]

[6] Returning to the present matter, counsel for the defendant contended that the special plea should be determined with reference to the possible delictual liability on the part of MFP Office Automation. In other words, argued counsel, the entity was required to account for the conduct of its employees so that the court could decide whether it was the sole cause of the damages incurred or whether liability should be apportioned. If MFP Office Automation was not joined, then such conduct could go unquestioned in circumstances where it was the *fons et origo*, as counsel put it, of these proceedings.

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[2] Op cit, RS 27 (2025) D1 Rule 10–3 to 10–4. Footnotes omitted.
[3] 2018 (1) SA 1 (CC).
[4] Paras 91 and 92.

[7] The court disagrees. In *Myeni v Organization Undoing Tax Abuse NPC*,[5] Tolmay J reiterated that a plaintiff is entitled to choose the defendant from a group of wrongdoers.[6] In the present matter, the plaintiff has framed her case in terms of the pleadings, directing her claim at the defendant, no-one else. Nothing prevents her from doing so. There is a risk that the claim proves unsuccessful, but this is a risk that the plaintiff appears to have accepted by the time that pleadings were closed. She was not obliged to have joined MFP Office Automation or any other possible joint wrongdoer.

[8] In the oft-quoted authority of *Amalgamated Engineering Union v Minister of Labour*,[7] the erstwhile Appellate Division held, per Fagan AJA, that the question of joinder should not depend on the nature of the subject matter of the claim. Instead, it depends on the manner in and extent to which an order may affect the interests of third parties.[8] More recently, in *Bowring NO v Vrededorp Properties CC and Another*,[9] the Supreme Court of Appeal, per Brand JA, restated the position as follows:

> 'The substantial test is whether the party that is alleged to be a necessary party for purposes of joinder has a legal interest in the subject matter of the litigation, which may be affected prejudicially by the judgment of the Court in the proceedings concerned.'[10]

[9] The court in the present matter is simply enjoined to determine whether the plaintiff can demonstrate that the defendant is liable in delict for the accident that occurred during the installation of CCTV cameras. An order for the defendant to pay damages will have no impact whatsoever on MFP Office Automation. The order will have no adverse consequences for the entity in question, requiring that it first be joined before the court can decide the case. Likewise, there will be no prejudice to the defendant if the special plea is not upheld. It may still be open to the defendant to apply for leave to seek a contribution from MFP Office Automation, as envisaged under section 2 of the Apportionment of Damages Act 34 of 1956. Similar provisions

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[5] 2019 JDR 2599 (GP).
[6] Para 70. See, too, *Ross and Another v Nedbank Limited* 2023 JDR 3265 (GJ), paras 7–9.
[7] 1949 (3) SA 637 (A).
[8] At 657.
[9] 2007 (5) SA 391 (SCA).
[10] Para 21.

are available in terms of the third-party procedure contained under rule 13 of the Uniform Rules of Court.

[10] Consequently, the court is not persuaded that MFP Office Automation has a direct and substantial interest in the subject matter of the case, which would be adversely affected by the court's decision. Regarding costs, the general rule must be applied. Scale B is appropriate.

[11] In the circumstances, the following order is made:

(a) the special plea of non-joinder is dismissed; and

(b) the defendant is ordered to pay the plaintiff's party-and-party costs, at scale B.

JGA LAING

JUDGE OF THE HIGH COURT

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Dates heard: 30 July 2025 and 17 March 2026.

Date delivered: 5 May 2026.