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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: **9978/2019**

In the matter between:

KTRPT INVESTMENTS (PTY) LTD

Applicant

and

EDGE INVESTMENTS (PTY) LTD

First Respondent

HERMAN JOHAN VILJOEN

Second Respondent

EDGE HOLDING COMPANY (PTY) LTD

Third Respondent

In re:

KTRPT INVESTMENTS (PTY) LTD

Plaintiff

and

EDGE INVESTMENTS (PTY) LTD

First Defendant

HERMAN JOHAN VILJOEN

Second Defendant

Coram: Justice J Cloete

Heard: 24 October 2023

Delivered electronically: 27 November 2023

JUDGMENT

CLOETE J:

Introduction

- [1] This is an application for the joinder of the third respondent (“Holdings”) as third defendant in the pending action between the parties under the above case number. The application is opposed by all three respondents. For convenience I refer to the first respondent as “Investments” and the second respondent as “Viljoen”.
- [2] As currently pleaded the action concerns the validity of a purported transfer of shares held by the Ropet Trust (IT1[...]) (“the Trust”) to Investments during 2004 and/or 2005. The applicant is the cessionary of the Trust’s claim, and an order is sought declaring that share transfer to be void.
- [3] Holdings is a company which is associated with Investments although the precise nature of that association is one of the issues which will need to be determined at trial should Holdings be joined. The applicant seeks to join Holdings to advance its claim in the alternative in the event it is found that Investments does not hold the shares. Clearly therefore the main issue at trial will depend upon the determination of substantially the same question of law or fact and falls squarely within uniform rule 10(3).

- [4] The respondents oppose the application on the following principal grounds:
- (a) the applicant has failed to show that joinder would be convenient; (b) it is an abuse of the court process; (c) the claim the applicant seeks to enforce against Holdings ‘as currently pleaded’ arose after the issue of summons; (d) the proposed amended particulars of claim contain averments contrary to the version in the founding affidavit and which are unsustainable ‘on the evidence’; and (e) in the circumstances the proposed amendment is excipiable. Grounds (d) to (e) overlap to a degree. On that basis I deal with each of the grounds in turn.

Joinder of convenience versus joinder of necessity

- [5] The applicant’s case for joinder is founded on necessity, not convenience as the respondents misinterpret it. The distinction is succinctly summarised in Erasmus: Superior Court Practice¹ as follows:

‘It is, however, important to distinguish between necessary joinder, where the failure to join a party amounted to a non-joinder, on the one hand, and joinder as a matter of convenience, where the joinder of the party was permissible and would not give rise to misjoinder, on the other hand. In cases of joinder of necessity a court could, even on appeal, mero motu raise the question of joinder to safeguard the interests of third parties and decline to hear a matter until such joinder had been effected or the court was satisfied that the third parties had consented to be bound by the judgment or waived their right to be joined.’² A court of appeal has held³ in circumstances where a party had not been joined and it would be inappropriate to make inferences as to its rights without giving such party an opportunity of being heard, that the appeal should

¹ 2ed, vol 2 at D1-126 to 127.

² *Rosebank Mall (Pty) Ltd v Cradock Heights (Pty) Ltd* 2004 (2) SA 353 (W) at 366B-D.

³ *Pretorius v Slabbert* 2000 (4) SA 935 (SCA) at 939E.

be postponed in order to afford such party the opportunity of stating its position.

*The fact that the two parties before court desire the case to proceed in the absence of a third party cannot relieve the court from inquiring into the question whether the order it is asked to make may affect the third party.*⁴

- [6] As pointed out by counsel for the applicant the respondents have conflated the two. In the present matter the joinder sought is indeed one of necessity since a third party (Holdings) may have a direct and substantial interest in any order the trial court might make. Accordingly failure by the applicant to join Holdings would amount to a non-joinder. There is thus no merit in the respondents' submission in the answering affidavit that *'the joinder application proposes to inflict a material inconvenience, both procedural and substantive, on the respondents individually and collectively'*.

Abuse of the court process

- [7] The respondents contend that the explanation proffered in the founding affidavit for the joinder sought, namely that *'...it appears... the Applicant may have erroneously instituted proceedings against the incorrect party, as annexure FA5 indicates the Trust in fact held shares in the Third Respondent'* is an abuse of process since the annexure referred to was discovered by the applicant itself. The crux of the complaint is that *'a simple, albeit diligent and responsible, perusal of the documents concluded (sic) in its own discovery would have revealed that the applicant had no claim whatsoever against*

⁴ *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 649; *Klep Valves (Pty) Ltd v Saunders Valve Co Ltd*. 1987 (2) SA 1 (A) at 39I-40A.

[Investments], *even on its own pleaded case*'. The applicant is accused of inattentiveness, lack of diligence, recklessness and of trying to conceal this "fact".

[8] Annexure FA5 is one of the items in Investments' discovery. It is the company register of Holdings. If one has regard to it along with other documents discovered by Investments it is evident that: (a) on 1 October 1999 Investments transferred some of its shares to Holdings; (b) during 2003 Holdings held certain shares in the Trust; and (c) on 28 February 2006 Holdings reacquired some shares from Investments under a return of allotment of shares issued by the Registrar of Companies.

[9] The deponent to the founding affidavit, Mr H, who is a trustee of the Trust, stated that Investments and Holdings '*...are closely associated with one another and have been for several years since I was actively involved in these companies*'. The deponent to the answering affidavit, Mr K, did not deny this and simply noted the averment made. From the company records annexed to the papers it is clear that Viljoen was appointed a director of Investments on 1 March 2003 and was still a director on 11 April 2007. In the existing particulars of claim annexed to the founding affidavit the applicant alleges that it was Viljoen who procured H's signature on the share transfer form during 2004 at a time when the latter had suffered a mental breakdown and the transfer was not authorised by the Trust. That it was Viljoen who did so is denied in the plea. However Viljoen did not depose to a confirmatory affidavit in this application.

[10] It might be so that the applicant was not diligent enough when scrutinising Investments' discovery. It might similarly be the case in regard to the applicant's own discovery which the respondents maintain included the share register for Holdings, but to my mind this is not the point. There is enough prima facie extraneous evidence to indicate that various share transfers occurred between Investments and Holdings both preceding and subsequent to the purported share transfer which the applicant in the action seeks to have declared void.

[11] It is not for this court in an application of this nature to delve into evidence and draw conclusions. That is a matter for the trial court in due course. The respondents will no doubt have a full opportunity to cross-examine the applicant's witnesses. In the circumstances the contention that the joinder application is an abuse of process is premature.

The claim against Holdings arose after the issue of summons

[12] Summons was issued during the first half of 2019. Prior thereto on 20 August 2018 the applicant took cession of the Trust's claim in the action. After the information concerning Holdings came to light the Trust ceded its (potential) claim to the applicant on 28 June 2021. The joinder application was launched on 29 October 2021. The second cession, so the respondents contend, has the effect that any claim against Holdings arose after summons was issued.

[13] Again, as pointed out by counsel for the applicant, the respondents misconstrue the position. The potential quasi-vindictory claim against Holdings is not a new cause of action arising after summons but one which, if proven, existed before the applicant instituted action, i.e. it was a potentially existing one subsequently discovered. The cession concluded on 28 June 2021 pertains to locus standi and nothing more.

[14] To this it should be added that in their current plea Investments and Viljoen do not assert what they (and Holdings) do now, namely that the applicant has no locus standi vis-à-vis Holdings since *'...the right to claim a declarator of shareholding vests only in the shareholder. Until the underlying shareholding has been transferred, the [applicant] simply does not hold any shareholding... and it cannot advance a claim which vests only in the shareholder'*.

[15] The respondents lose sight of the fact that the abstract theory of ownership applies in our law. As stated in *Legator McKenna*:⁵

'In accordance with the abstract theory the requirements for the passing of ownership are twofold, namely delivery... coupled with a so-called real agreement... The essential elements of the real agreement are an intention on the part of the transferor to transfer ownership and the intention of the transferee to become the owner of the property... Although the abstract theory does not require a valid underlying contract, e.g. sale, ownership will not pass – despite registration of transfer – if there is a defect in the real agreement...'

⁵ *Legator McKenna Inc and Another v Shea and Others* 2010 (1) SA 35 (SCA) at para [22].

The proposed amended particulars of claim contradict the evidence in the founding affidavit and renders that proposed amendment excipiable

[16] The respondents' contention that a proposed amendment of the applicant's particulars of claim, if the joinder is granted, is not consistent with H's evidence in the founding affidavit overlooks two fundamental points. First, courts do not consider whether a pleading is excipiable against evidence. It is trite that an exception is a legal objection to an opponent's pleading. No facts outside those stated in the pleading can be brought into issue, except in the case of an inconsistency or contradiction in the pleading itself,⁶ and no reference can be made to any other document.⁷

[17] Second, the parties are nowhere near the exception stage at present. As is clear from its notice of motion all the applicant seeks at this point is the joinder of Holdings and an order directing it to deliver '*...a notice of intention to amend its particulars of claim to include the formulation of its claim*' against Holdings within 10 days of the court's order. The respondents will thus not be deprived of their opportunity to object to the applicant's rule 28(1) notice on the ground that whatever amendment is sought therein will render the pleading excipiable. In adopting their stance they have put the proverbial cart before the horse.

Concluding remarks

⁶ *Soma v Morulane* NO 1975 (3) SA 53 (T).

⁷ See the long line of cases at fn 5 of Erasmus: Superior Court Practice 2ed, vol 2 at D1-295 to 296.

[18] It follows that the joinder application must succeed. The applicant sought costs in the cause of the action in the event of there being no opposition. However, given the opposition, they seek costs against the respondents. There is no reason why costs should not follow the result.

[19] **The following order is made:**

- 1. The third respondent is joined as the third defendant in the action instituted by the applicant against the first and second respondents under case number 9978/2019;**
- 2. The applicant is to deliver a notice of its intention to amend its particulars of claim to include the formulation of its claim against the third defendant within 10 (ten) days of date of this order; and**
- 3. The respondents shall pay the costs of this application on the party and party scale, jointly and severally, the one paying the other to be absolved, and including the costs of one senior counsel.**

J I CLOETE

On behalf of applicant: Adv A G South SC

Instructed by: Y Ebrahim Attorneys (Mr Mamahlodi-Sofe)

For respondents: Adv G Walters and Adv J Van Aswegen

Instructed by: Webber Wentzel (Ms K Rew)