IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

Case No.: 896/2019

Date Heard: 11 November 2021

Date Delivered: 30 November 2021

In the matter between:

JANSSEN PRODUCTS CC Applicant

and

JOUBERT GALPIN & SEARLE INCORPORATED First Respondent

NEVILLE DU PLESSIS Second Respondent

JUDGMENT

EKSTEEN J:

[1] There is currently litigation pending between the applicant, Janssen Products CC (the plaintiff in the action), and the first respondent, Joubert Galpin and Searle Incorporated (Joubert Galpin) (the defendant in the action). In this application Janssen Products sought to join the second respondent, Mr Neville du Plessis, as a defendant in the action, either as a necessary party, alternatively, as a matter of convenience in terms of Rule 10 of the Uniform Rules of Court (the rules). Whilst the second respondent did not enter an appearance to defendant Joubert Galpin opposed the application.

[2] Mr Bruce Percival Williams previously traded as East Cape Lighting in Gqeberha. In the course of the business he incurred debt in respect of goods sold and delivered to him by Janssen Products. On 29 June 2012 he signed an acknowledgement of debt (the acknowledgement) in favour of Janssen Products in the amount of R2 170 798.81. In terms of the acknowledgement Mr Williams undertook to pay the said amount together with interest thereon upon demand.

[3] On the same day Mr du Plessis bound himself, in writing, as the surety and co-principle debtor, *in solidum,* in favour of Janssen Products, for the due fulfilment by Mr Williams of his obligations set out in the acknowledgement.

[4] During October 2012 Janssen Products instructed Joubert Galpin, an established firm of attorneys in Gqeberha, to assist it to recover the amounts owed by Mr Williams. Thus, in September 2014 Joubert Galpin, acting in accordance with the mandate of Janssen Products, demanded payment from Mr Williams of the amount due under the acknowledgement. When payment was not forthcoming Joubert Galpin issued summons, against Mr Williams only, in the Port Elizabeth Magistrate's Court on 16 September 2014.

[5] By April 2016 Janssen Products had become disillusioned with the progress in the matter and terminated Joubert Galpin's mandate. New legal advisors were appointed and they obtained judgment against Mr Williams on 22 January 2018 for payment of the amount of R2 170 796.81 together with interest and costs of the action.

[6] However, execution on the judgment proved problematic. After various appearances in terms of section 65 of the Magistrate's Court Act[1] Mr Williams deposed to an affidavit confirming that he has no money or disposal property available to satisfy the judgment. This led to the issue of summons in the action on 8 April 2019, wherein Janssen Products alleged that Joubert Galpin had been negligent in the performance of their mandate in various respects. In particular it alleged that they had failed to commence proceedings against Mr du Plessis, either as a co-defendant in the Magistrate's Court, alternatively, by means of separate legal action. They said that they had obtained advice that their right of action against Mr du Plessis arising from the suretyship had become prescribed on 29 June 2015, three years after the signature of the suretyship. Had it not been for the alleged negligent conduct of Joubert Galpin, they contended, they would have been successful in their claim against Mr du Plessis and, accordingly, they sought payment from Joubert Galpin in the amount of R2 170 796.81 together with interest and legal costs.

[7] Joubert Galpin disputed their claim and filed an exception. The exception is not before me, however, it is apparent that Joubert Galpin contended that, in law, the claim against Mr du Plessis, as surety, did not become prescribed on 29 June 2015 because the running of prescription had been interrupted by the service of summons upon Mr Williams, as the principle debtor, in September 2014. The merit of the exception appears

[1] Magistrate's Court Act 32 of 1944

to be unassailable[2] and Mr *Nel,* who appeared on behalf of Janssen Products,[3] did not suggest the contrary.

[8] The filing of the exception led to a demand being made upon Mr du Plessis. He insisted that the claim against him had indeed become prescribed. Janssen Products accordingly resolved to hold the exception in abeyance pending the application to join Mr du Plessis as a defendant in the action. Hence these proceedings.

[9] In these proceedings Janssen Products said that they intended to amend their existing particulars of claim to include Mr du Plessis as a defendant in the action and they annexed to their founding affidavit a draft "Amended Particulars of Claim". No notice of intention to amend has been delivered and Janssen Products did not ask in these proceedings for leave to amend. The draft Amended Particulars of Claim reflected a claim against Mr du Plessis, as first defendant, for the same amount that had been claimed from Joubert Galpin in the action. It reflected, too, a different cause of action against Joubert Galpin, in which it sought payment from Joubert Galpin, in the event of Mr du Plessis being unable to pay the amount claimed. I revert to this issue below.

[10] As I have explained, the joinder was sought primarily on the grounds that Mr du Plessis is an essential, or necessary, party to the action. Where a third party has, or may have, a direct and substantial interest in any order which a court might make in

[2] *Jans v Nedcor Bank Ltd* 2003 (6) SA 646 (SCA) para [32]

proceedings, or, where such an order cannot be sustained or carried into effect without prejudicing that party, it is a necessary party and should be joined in such proceedings.[4] A "direct and substantial interest" is "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.[5] In *South African Riding for the Disabled Association*[6] the Constitutional Court confirmed that what was required was a "legal interest" in the subject matter of the case which could be prejudicially affected by the order of the court[7]. In *Amalgamated Engineering* the Supreme Court of Appeal[8] employed two tests in order to decide whether a third party had a direct and substantial interest. The first was to consider whether the party would have *locus standi* to claim relief concerning the same subject matter.[9] 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 subject matter and possibly obtain an order irreconcilable with the order made in the first instance.[10]

[11] Janssen Products' case against Joubert Galpin in the action is for damages arising from the alleged negligent breach of their mandate. It is an implied term of a mandate given to an attorney that they will exercise the skill, adequate knowledge and diligence

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[4] *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A); *Henri Viljoen (Pty) Limited v Awerbuch Brothers* 1953 (2) SA 151 (O) at 165-171; *Ex Parte Pearson and Hutton* NNO 1967 (1) SA 103 (E) at 107C; and *South African History Archive Trust v South African Reserve Bank* 2020 (6) SA 127 (SCA) at para [30].
[5] *Henri Viljoen* 169, 170; and *Aquatur (Pty) Limited v Sacks and Others* 1989 (1) SA 56 (A) at 61J-62G.
[6] *South African Riding for the Disabled Association v Regional Land Claims Commission and Others* 2017 (5) SA 1 (CC)
[7] Para [9]
[8] Then the Appellate Division of the Supreme Court
[9] *Amalgamated Engineering* at 661
[10] *Amalgamated Engineering* at 660-661. See also *Herbstein and Van Winsen: The Civil Practice of the High Court of South Africa* (5th ed) at 218

expected of an average practicing attorney. Janssen Products would be required in the action to prove that Joubert Galpin had been negligent, in the sense that they had failed to exercise such skill, knowledge and diligence as is to be expected of an average practicing attorney, and that it had suffered damages as a consequence of such negligence. I do not consider that Mr du Plessis can have any legal interest in the subject matter of such litigation. If the action were to succeed, and Joubert Galpin ordered to pay damages, it could have no impact on any right or interest which Mr du Plessis holds. Similarly, if the action were to be dismissed Mr du Plessis's interests remain unscathed. Mr du Plessis is not an essential party to the action.

[12] The thrust of the argument on behalf of Janssen Products was, as I have said, based on the alleged intention at some future stage to seek an amendment to the Particulars of Claim. As adumbrated earlier, Janssen Products said that they intend to amend their pleadings so as to introduce a new claim, as the main claim, against Mr du Plessis for payment of the aforestated amounts in terms of the Deed of Suretyship concluded in 2012. The amendment, it said, would seek, as an alternative, to recover such money from Joubert Galpin in the event that Mr du Plessis is found not to be liable or being unable to pay. If such an amendment were to be granted, then, in that event, so the argument went, the issue of prescription of the claim against Mr du Plessis would be material both for their cause of action against him and against Joubert Galpin.

[13] It seems to me that there are two fundamental difficulties with this approach. First, as I have said, Janssen Products have not delivered a notice in terms of Rule 28 of their

intention to amend their Particulars of Claim and they have not sought leave to amend in these proceedings. The consequence thereof is that Joubert Galpin have not had the opportunity, to which they are entitled in terms of Rule 28, to object to the proposed amendment. On the existing cause of action, Mr du Plessis has no direct or substantial interest in the action.

[14] Second, in these proceedings Mr *Shapiro*, on behalf of Joubert Galpin, argued that the proposed claim against Joubert Galpin would be excipiable because it is premature as it is speculative, being based upon allegations of harm which have not yet arisen. It can therefore safely be accepted that an application for the proposed amendment will be opposed. The application for amendment, as I have said, is not before me and it would be inappropriate to consider it on its merits in these proceedings. Suffice it to say that it seems to me, *prima facie*, that there is a reasonable prospect that the application for an amendment, as contained in the draft Amended Particulars of Claim, would not be granted.

[15] I turn to the joinder of convenience. Rule 10(3) provides for the joinder of defendants in one action whenever the question arising between them and the plaintiff 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. At common law, too, a defendant could be joined to an action on the grounds of convenience, equity, the interests of justice, saving of costs and the avoidance of a

multiplicity of actions.[11] The principle is not contentious. The common law joinder would ordinarily occur to ensure that persons who have an interest in the subject matter of an existing dispute, or have rights which may be affected by the judgment of the court in such a dispute, are before court.[12] The question of joinder arises when there is an issue in dispute in the action which requires such a joinder. As demonstrated earlier, Mr du Plessis has no interest in the subject matter of the existing litigation. Thus, the question of joinder cannot arise in this matter unless the proposed amendment were adjudicated upon and granted simultaneously with the joinder application. Janssen Products have chosen not to seek an amendment in these proceedings.

[16] In the result, the application for the joinder is dismissed with costs.

J W EKSTEEN
JUDGE OF THE HIGH COURT

Appearances:

For Applicant: Adv G Nel SC instructed by R G Robinson Attorney c/o Friedman Scheckter, Gqeberha

For 1St Respondent: Adv W N Shapiro SC instructed by Joubert Galpin & Searle Inc, Gqeberha

[11] *Sheshe v Vereeniging Muncipaliaty* 1951 (3) SA 661 (A) at 666H; *Rabinowitz and Another NNO v Ned-Equity Insurance Co Limited and Another* 1980 (3) SA 415 (W) at 419E
[12] *Ploughmann NO v Pauw and Another* 2006 (6) SA 334 (C) at 341