HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: Electronic reporting only.
(2) OF INTEREST TO OTHER JUDGES: No.
(3) REVISED: Yes

06-07-2021 P. A. Meyer

Case No: 3788/2020

In the matter between:

MAPHEPHETHE ELECTRICAL CC Applicant

and

THUSANANG GAST (PTY) LTD First Respondent
EKURHULENI METROPOLITAN MUNICIPALITY Second Respondent

In Re:

THUSANANG GAST (PTY) LTD Plaintiff

and

THUSANANG GAST (PTY) LTD Defendant

***Case Summary*: Practice – Parties - Joinder – Application to be joined as second plaintiff – Requirements for intervention as an applicant in terms of r 12 read with r 10(1) of the Uniform Rules of Court restated.**

JUDGMENT

MEYER J

[1] The applicant, Maphephethe Electrical CC (the sub-contractor), seeks leave to be joined as the second plaintiff in pending action proceedings instituted in this division (case no. 3788/2020) on 6 February 2020, by the first respondent, Thusanang Gast (Pty) Ltd

(the contractor), against the second respondent, Ekurhuleni Metropolitan Council (the employer), relating to a building contract dispute (the action). The employer opposes the application.

[2] It is common cause that following a procurement process, the contractor was the successful bidder to construct an 'Early Childhood Development Centre' for the defendant in Eden Park (the centre) at a total project cost of R21 620 470.83 (the project). Once the contractor's tender had been accepted, the employer and the contractor concluded a written JBCC (Joint Building Contracts Committee) series 2000 5th Ed standard principal agreement on 8 December 2016, as amended by the conditions provided for in the contract data (the principal contract). The employer is entitled to withhold a maximum of 5% of all payments made to the contractor (the retention amount). Repayment of the full retention amount is dependent on achieving practical completion and taking the steps prescribed in the principal contract for the ultimate issuing of a final completion certificate or for a final completion certificate to be deemed to have been issued. However, should the principal contract be breached by the employer, and in that event be validly terminated by the contractor, the security 'shall be returned by the employer to the contractor'.

[3] The contractor and the sub-contractor, in turn, concluded a written sub-contract agreement in terms of which they agreed that the sub-contractor would execute certain works on behalf of the contractor in connection with the project at the tendered amount (the sub-contract). It was agreed that payments to the sub-contractor will be made by the contractor 'within 7 days from the date of the Contractor receiving payment from the Client for work done less retention'. The contractor and the sub-contractor agreed that:
'Retention in the amount of 10% of each claim submitted to the Contractor will be retained by the Contractor as security for the due performance of the Subcontractor to complete the works. No interest will accrue on the retained money and the Contractor will only release the retention money to the Subcontractor within 60 days after the Employer has released the Contractor's relevant retention.'

[4] It must be accepted on the affidavit evidence presented in this application that the sub-contractor performed the work required of it in terms of the sub-contract. During December 2018 it submitted its final invoice for payment in the sum of R311 144.89 to

the contractor. The outstanding amount owing to the sub-contractor is for the release by the contractor of the retention money. The contractor did not pay the sub-contractor's final invoice. It is common cause that the contractor achieved practical completion of the project on 29 June 2018. The employer, however, avers that the contractor has not completed all the works; it provided the contractor with snag lists on 9 November 2018, which the contractor has not fully executed. Only repayment of 50% of the retention money in the amount of R545 253.10 has not been made to the contractor by the employer. The contractor's attorneys advised the sub-contractor's attorneys that the contractor had not been paid by the employer and will release the retention money owing to the sub-contractor in terms of the sub-contract upon receipt by the contractor of the retention money owed to it by the employer.

[5] By letter dated 6 August 2019, the contractor notified the employer that its failure to issue instructions to the contractor was preventing it from achieving finalisation of the project, that the employer flouted its obligations in terms of the principal contract and that its failure to comply with its obligations constituted a repudiation of the principal contract, which repudiation the contractor had accepted. The contractor nevertheless afforded the employer ten days to remedy its breach, failing which it would terminate the principal contract. On 22 August 2019, the contractor notified the employer, *inter alia* that despite the demand dated 6 August 2019, it had failed to remedy its breach and that the principal contract is terminated. The employer was further advised that, in terms of the principal contract, the retention amount is repayable due to the termination of the principal contract by the contractor as a result of the employer's breach. The employer disputes the validity of the contractor's termination of the principal contract and maintains that repayment of the full retention money to the contractor will only be due once final completion is achieved or deemed to have been achieved in terms of the provisions of the principal contract. Hence, the pending action between the contractor and the employer. On 29 June 2020, this court (Moorcroft AJ) dismissed the contractor's application for summary judgment against the employer and ordered costs to be in the cause.

[6] The sub-contractor's grounds for applying to be joined as second plaintiff in the action are that without payment by the employer to the contractor, it cannot in terms of

the sub-contract be paid. It avers that it 'finds itself in a position of not knowing whether all its rights are being protected' and submits that its joinder as plaintiff would place it 'in a position where all the rights accruing to it will be protected and eliminate any prejudice it may suffer'. It submitted 'that there is a possibility that [it] may well find itself prejudiced by any potential agreement or settlement that may be offered by the [employer]', and '[s]imilary, [the contractor] could decide to abandon its claim, thus leaving [it] prejudiced'. It should, so it submitted, be joined to the 'action for reasons of convenience and to avoid a multiplicity of actions against the [municipality]'.

[7] Rule 12 governs the procedure for the intervention of persons as plaintiffs and defendants. It provides that '[a]ny person entitled to join as a plaintiff or liable to be joined as a defendant in any action may, on notice to all parties, at any stage of the proceedings, apply for leave to intervene as a plaintiff or a defendant. The court may upon such application make such order, including any order as to costs, and give such directions as to further procedure in the action as to it may seem meet'. To be able to intervene in proceedings a party must have a direct and substantial interest in the outcome of the litigation: *per* Harms DP in *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 85.

[8] In *Marais & others v Pongola Sugar Milling Co. Ltd. & others* 1961 (2) SA 698 (NPD) at 702A-B, Wessels J said that-

'. . . certain principles seem to have become established which govern the matter of joinder, and different principles would seem to apply to different circumstances, depending on whether the Court is concerned with a plaintiff's right to join parties as defendants, a defendant's right to demand that parties be joined as co-defendants, the rights of third parties to join either as plaintiffs or defendants, or the Court's duty to order the joinder of some or other party (as was done in the case of *Home Sites (Pty.) Ltd. v. Senekal,* 1948 (3) S.A. 514 (A.D.)) or to stay the action until proof is forthcoming that such party has waived his right to be joined as a party, e.g. by filing a consent to be bound by the judgment of the Court (as was done in the case of *Amalgamated Engineering Union v. Minister of Labour,* 1949 (3) S.A. 637 (A.D.)).

[9] In *Vitokaris v Wolf* 1973 (3) SA 928 (W), the entitlement to join as a plaintiff was sought and granted, not on the basis of the criterion of a direct and substantial interest in

the action, but on the basis of the criterion set out in r 10(1) in terms of which any number of plaintiffs may join as plaintiffs against the same defendant or defendants, provided that their right to relief is dependent upon determination of substantially the same question of law or of fact. At 931D-E, Coetzee J said the following:

'In my view, the mere fact that the applicant has not a common cause of action or common ground with the plaintiff is irrelevant. Plaintiffs may join if they have separate claims and may indeed now even claim alternatively. The only pre-requisite to the exercise of this right is that their right to relief is dependent upon the determination of substantially the same question of law or fact. This is undoubtedly so *in casu*.'

[10] In *Shapiro v South African Recordings Rights Association Ltd (Galeta Intervening* 2008 (4) SA 145 (W) para 13, it was held that r 12 covers both criteria and that generally the criterion followed in *Vitokaris* applies to plaintiffs/applicants who wish to intervene whereas the 'direct and substantial interest' criterion applies to the joinder of defendants/respondents. In this regard A Gautschi AJ said the following:

'I am of the view that rule 12 covers both these situations. Generally the first would apply to applicants and the second to respondents. In regard to the first, it is easy to imagine a situation, such as a winding-up or an interdict to stop pollution, where the original applicant's *locus standi* to sue is in issue, and another person who also has *locus standi* seeks leave to intervene as a second applicant in order to ensure that the litigation against the respondent is successful. The present application is such a situation. The original applicant and the intervening applicant were entitled but not obliged to join as applicants under rule 10(1) (read with rule 6(14)) at the outset of the litigation. I agree with Coetzee J that such a situation would fall under rule 12. It has nothing to do with a legal interest which may be prejudicially affected by the judgment of the court. It is an intervention of desire and not of necessity. In the example given, and in the present case, the intervening applicant's rights will not be prejudicially affected by an order granted against the original applicant, since the order is not binding on him and he may sue separately for the same relief. Also an order granted in favour of the original applicant would suit, and not prejudicially affect, the intervening applicant, who may, depending on the type of relief sought, sue for the same relief. Other cases which in my view fall into this category include *Jhatam and Others v Jhatam* [1958 (4) SA 36 (N)], *Flax v Berliner: Houndsditch Warehouse (Pty) Ltd, Intervening* [1950 (2) SA 259 (W)] and *Nelson Mandela Metropolitan Municipality and Others v Greyvenouw CC and Others* [2004 (2) SA 81 (SE)]. The latter case, incorrectly in my respectful view, considered the intervening applicants to have "a direct and substantial interest in the subject-matter of the

dispute" and therefore entitled to intervene as of right [at 89B-C]. Their position was no different from that described above.'

[11] The basic problem with the application is that the sub-contractor has no claim against the employer, which is the only defendant in the action against which relief is claimed, nor for that matter - and I do not suggest that that principle finds application *in casu* because the sub-contractor does not apply to intervene as a defendant in the action - does it have a direct and substantial interest in the subject-matter of the dispute between the employer and the contractor. There is no privity of contract between the sub-contractor and the employer. The sub-contractor has no contractual claim against the employer nor does it place reliance on any other potential claim which it has or may have against the employer, such as a delictual or enrichment claim. The sub-contractor merely has a financial interest which is an undirect interest in the litigation and not a 'direct and substantial interest in the subject matter of the action'. It is trite that a mere financial interest in the outcome of litigation does not give a party the right to be joined in legal proceedings: *per* Lewis JA in *Standard Bank of SA Ltd v Swartland Municipality and others* 2011 (5) SA 257 (SCA) para 9.

[12] In the result the following order is made:
The application is dismissed with costs.

P.A. MEYER
JUDGE OF THE HIGH COURT

Judgment:	06 July 2021
Heard:	28 April 2021
Applicant's Counsel:	Adv S Kelly
Instructed by:	Bernard L du Plessis Inc., Alberton
2nd Respondent's Counsel:	Adv G Badela
Instructed by:	Sibanda Bukhosi Attorneys Inc., Johannesburg