


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1)	REPORTABLE: No
(2)	OF INTEREST TO OTHER JUDGES: No
<div><div>15/5/2023</div><div>DATE</div></div> <div><div></div><div>SIGNATURE</div></div>	

CASE NO: 2022/00966

In the matter between:

VIWE SAMUEL NOTSHE

Applicant

and

THE STATE ATTORNEY, JOHANNESBURG

First Respondent

THE SOLICITOR-GENERAL

Second Respondent

Neutral citation: *Viwe Samuel Notshe v The State Attorney, Johannesburg and The Solicitor-General* (Case No: 00966/2022) [2023] ZAGPJHC 480 (15 May 2023)

JUDGMENT

This judgment is deemed to be handed down upon uploading by the Registrar to the electronic court file.

Gilbert AJ:

1. Mr Viwe Notshe, as the applicant in the main application, initiated motion proceedings against the State Attorney, Johannesburg and the Solicitor-General, as respondents in the main application, for recovery of what he asserts are his fees for legal services rendered. The State Attorney and Solicitor-General, as respondents in the main application, seek to join the Special Investigating Unit ("SIU") as a co-respondent in the main proceedings.
2. For ease of reference, I shall refer to the parties as they are described in the main application.
3. The respondents seek to join the SIU on the basis that, they contend, it has a direct and substantial interest in the matter in that the SIU had and still are investigating whether *inter alia* the State Attorney is indebted to the applicant for legal fees. The applicant opposes the joinder application in a short answering affidavit on the grounds that (i) as there were prior Rule 30 proceedings that had not yet been finalised, the joinder application could not proceed; and (ii) the respondents' reliance upon Rule 10(3) to effect joinder was misplaced as the joinder of a respondent in terms of Rule 10(3) can only be effected at the instance of an applicant and not at the instance of a respondent.
4. The initial ground of opposition fell away as I was informed during the address of counsel that the Rule 30 issues had been resolved and so that no longer presented an obstacle to the joinder application.

5. It is evident from the joinder application that the respondents have sought to effect the joinder of the SIU as a co-respondent in the main application in terms of Rule 10(3). This appears both from the header to the joinder application which unambiguously refers to the application being in terms of Rule 10(3) and also in the body of the founding affidavit itself in paragraph 1.3 where specific reference is made to Rule 10.
6. The respondents have chosen to engage the applicant in seeking joinder on the playing field of Rule 10 and it is upon that field the applicant has engaged the respondents in opposing the joinder application. The applicant does so by asserting that Rule 10(3) in its express terms cannot be used by a defendant (or a respondent, as Rule 10 applies also to motion proceedings, in terms of Rule 6(14)) to join another respondent.
7. Rule 10(3) provides that:

“Several defendants may be sued in one action either jointly, jointly and severally, separately or in the alternative, whenever the question arising between them or any of them and the plaintiff or any of the plaintiffs 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.”

8. I agree with the applicant’s submission that Rule 10(3) cannot be used at the instance of a respondent to join another respondent.
9. The respondents’ counsel’s argument was not directed at persuading me that Rule 10(3) applied, but rather that a more generous approach must

be taken to the respondents' joinder application, more particularly that the application should also be seen as a joinder based upon the common law, and that under the common law the court would have a jurisdiction to join the SIU because, the respondents contend, it has a direct and substantial interest in the main proceedings.

10. The difficulty in adopting this approach is that, as set out above, the respondents have specifically chosen the playing field of Rule 10(3). The applicant confined himself to challenging Rule 10(3) as the applicable playing field, and having succeeded in persuading the court that that was an inappropriate playing field, he would now be prejudiced if the respondents are permitted to change the playing field of joinder under Rule 10(3) to joinder under the common law. Had the respondents asserted in their joinder application that joinder was also sought under the common law, it may have been that the applicant would then have gone further in his opposition and, for example, dealt with the issue as to whether the SIU had a direct and substantial interest that required its joinder. The applicant has not done so, and, in my view, did not need to do so as he has come home on the basis that Rule 10 does not apply. And so the applicant would be prejudiced if the matter is decided on the basis advanced by the respondents' counsel that all that needs to be looked at is whether the SIU has a direct and substantial interest.
11. In the circumstances, I am not in a position to determine the matter of joinder other than on the basis of Rule 10(3), and on that basis the joinder is to fail as that rule does not apply.

12. I therefore need not, and do not, decide whether the SIU has a direct and substantial interest which would require its joinder to the main application. Notably, the respondents have raised in their answering affidavit in the main application what is in effect a plea of non-joinder. The respondents complain that the applicant has done nothing to remedy what they contend is the material non-joinder of the SIU and that motivates their present joinder application. Whether or not a respondents can seek to in effect cure their own plea of non-joinder by bringing a joinder application is something I need not, and do not, decide.
13. Similarly, I need not, and do not, decide whether joinder by one respondent of another respondent on the basis of a direct and substantial interest is permissible under the common law generally, rather than pursuant to one or other of the recognised procedural mechanisms for effecting joinder, such as in terms of the third-party procedure provided for in Rule 13, which too is applicable to motion proceedings of Uniform Rule 6(14).
14. The respondents' counsel implored the court that the difficulties that have been raised above are to be overlooked as "*technicalities*" and that the real issue is whether the SIU has a direct and substantial interest, and that should be determinative of the application. But, as I have explained, this would be prejudicial to the applicant and in the circumstances, I cannot accede to the request.
15. The application for joinder is dismissed, with costs.

A handwritten signature in black ink, appearing to be 'Gilbert AJ', written over a horizontal line.

Gilbert AJ

**ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG**

Date of hearing: 12 May 2023

Date of judgment: 15 May 2023

Counsel for the applicants in the
joinder (respondents in the main
application):

M H Mhambi

Instructed by:

The State Attorney

Counsel for the first respondent
in the joinder (the applicant in
the main application):

Mr S Vobi

Instructed by:

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