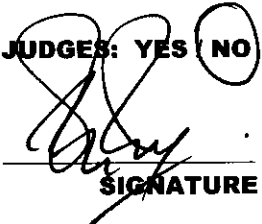




IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED
DATE	9/12/2014
	 SIGNATURE

CASE NUMBER: 10136/14

DATE: 19 ^{Dec} November 2014

RONNIE DENNISON AGENCIES (PTY) LTD
T/A WATER AFRICA SA

APPLICANT

V

SABS COMMERCIAL SOC LTD

RESPONDENT

JUDGMENT

STRYDOM AJ:

Introductory remarks

[1] This is an interlocutory application brought by the applicant on 25 March 2014, wherein it seeks the following relief:

- 1.1 Joinder of the respondent as an *"interested"* party to a pending insolvency application, by *DPI Plastics (Pty) Ltd, t/a DPI Plastics* (hereafter *"DPI Plastics"*), against the applicant;

1.2 Staying of the winding up proceedings pending the finalisation of the joinder application.

- [2] The basis of the application for joinder of the respondent appears from the defence the applicant raised against the claim of DPI Plastics in the winding-up proceeding, as set out hereunder.

Background facts

- [3] On 7 February 2014, DPI Plastics (the applicant in the winding-up proceedings) brought an application for the liquidation of the applicant.
- [4] The cause of action of DPI Plastics in the liquidation application was based on the deeming provision contained in section 345 of the Companies Act 1973¹ that the applicant is, upon 21 days demand, not able to pay its debts. The debt DPI Plastics relied upon amounted to R6, 848, 337. 35, allegedly owed by the applicant to DPI Plastics, in respect of trade debts that arose pursuant to the purchase of industrial piping by the applicant from DPI Plastics.
- [5] The applicant denied liability for payment of the aforesaid amount. More in particular the applicant denied that the amount claimed by DPI Plastics, was due and payable on the basis that:

5.1 It entered into a contract with DPI Plastics from which the trade debt in respect of the industrial piping arose. The said contract was concluded on the basis that all industrial

¹ Act No. 61 of 1973.

piping supplied by DPI Plastics to the applicant, was ISO certified,² and as such complied with the SANS standards,³ and;

5.2 The piping supplied by DPI Plastics to the applicant was gravely defective, and neither met the ISO certification, nor did it comply with the SANS standards.

[6] The applicant commissioned the services of an expert witness, which report was filed in support of the applicant's contentions in respect of the defective industrial piping. The applicant raised the dispute in respect of the payment for the defective piping prior to the institution of the liquidation application by DPI Plastics. Accordingly the applicant denied that it is unable to pay its debts within the meaning of section 345 of the Companies Act, 1973.

[7] On 5 May 2014 DPI Plastics filed replying papers in which they joint issues with the applicant. They specifically alleged that the industrial piping supplied to the applicant was a so-called "*econo-pipe*" and as such did not carry the SANS mark and was not required to adhere to the SANS standard. DPI Plastics further denied that it contracted with the applicant that the piping it was required to supply to the applicant, should have been SANS standard compliant.

² I was informed by counsel for the Respondent that the International Organization for Standardization known as ISO, is an international standard-setting body composed of representatives from various national standards organizations too which standards the Republic of South Africa prescribes. The respondent is responsible for maintaining the ISO standards in South Africa. This was not disputed by the Applicant's Counsel.

³ I was informed by counsel for the Respondent that the respondent sets the standards for production of products, known as South African National Standards, abbreviated as "*SANS*". This was also not disputed by the Applicant's Counsel. In this regard, which was also not challenged by the applicant, the respondent submitted that it might certify that a specific manufacturers' production plant comply with the ISO standards. However, that does not in itself mean that all the products manufactured at the plant by the manufacturer comply with the SABS or the SANS standards, nor is a manufacturer compelled to only produce SABS or SANS certified products. Only in the event that as specific product has been certified to be in accordance with the SABS or the SANS standards, may such product carry the SABS or SANS endorsement certificate.

[8] In summarising of the background facts, I make no finding in respect of the merits of the pending liquidation application against the applicant. It is solely referred in order to indicate the subject matter of the dispute between the parties in the pending liquidation proceedings, being:

- 8.1 A dispute between DPI Plastics and the applicant relating to whether the trade debts of the applicant with DPI Plastics is due and payable; and
- 8.2 The defence of the applicant that DPI Plastics acted in breach and contravention of the agreement between the parties by failing to deliver the agreed product and that any amount claimed by DPI Plastics is not due and payable;
- 8.3 The particulars of the applicant defence is secondary to the aforesaid dispute between the parties, being that DPI Plastics supplied substandard piping to the applicant, which was contrary to the alleged agreement between the parties, being not ISO certified and as such did not comply with SANS standards.

[9] The above facts form the background for the basis upon which the applicant relies for the joinder of the respondent to the winding-up proceedings between DPI Plastics and it.

The relevant legal principles

[10] The South African Law do not recognise a broad category for the joinder of parties to pending litigation, known as "*a general interest in a matter*". Our law recognises three distinct categories for joinder of parties, being (1) joinder of necessity in terms of the common law; (2) joinder of convenience in terms of Rule 10,⁴ and the applicable common law rules and (3) Third-party joinder in terms of Rule 13 of the Uniform Rules.

⁴ As read with Rule 6(14)) of the Uniform Rules of Court.

- [11] At the outset of the hearing, I enquired from the counsel for the applicant on which basis the applicant brought its joinder application, upon which he indicated that the applicant's case is based on *"joinder of necessity and/or joinder of convenience"*.

Joinder of necessity

- [12] In order for the applicant to succeed with an application to join the respondent in necessity it should prove that the respondent has a direct and substantial interest in the subject matter of the pending litigation.⁵ The nature of such interest must go beyond a mere personal or financial interest. It must be of such a nature that the party sought to be joined, has a legal interest in the pending subject matter of the litigation, which interest may be affected prejudicially by the judgment of the Court.⁶

- [13] In the joinder of a party in necessity, the presence of such party to be joined, is required in the proceedings, because the subject matter cannot be decided in such party's absence, nor can an order be sustained, or carried out without negatively interfering on such party's rights. In *Amalgamated Engineering Union v Minister of Labour*⁷ the Court formulated this principal as follows:

"Once it is shown that a party is a necessary party in the sense that he is directly and substantially interested in the issues raised in the proceedings before the Court and that his rights may be affected by the judgment of the Court, the Court will not deal with those issues without such joinder being affected."

⁵ See: *CC SHE v Vereeniging Municipality* 1951(3) SA 661 (A) at 666 H.

⁶ Compare: *Hartland (ETMS) BPK v Emal Eiendomme* BK 2002(3) SA 653 NC at 663 E-H.

⁷ 1949(3) SA 637 (A) at 659; see also *Khumalo vs Wilkins and Others* 1972(4) SA 470 (N) at 475 A.

Joinder of Convenience

[14] A joinder of convenience is normally brought under Rule 10(3) of the Rules of the High Court which reads as follows:

“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 on the determination of substantially the same question of law or fact, if such defendants are sued separately, would arise in each separate action.”

[15] A party is joined of convenience because there is a *lis*⁸ between the party to be joined and the applicant, which on the ground of equity, the saving of costs, or the avoidance of multiplicity of actions, the Court will deem it in the interest of justice that the matters should be heard together.⁹

Grounds relied upon for joinder of the respondent

[16] The applicant based the grounds for joinder of the respondent on the following arguments raised in its papers and in argument by its counsel:

16.1 The contract entered into between the applicant and DPI Plastics from which the trade debt for the industrial piping arose, was concluded on the basis that all industrial piping supplied to the applicant by DPI Plastics was ISO certified, and as such complied with SANS standards;

16.2 The industrial piping supplied by DPI Plastics to the applicant was gravely defective and neither met the ISO certification nor complied with SANS standards;

⁸ A legal tie or legal chain.

⁹ See: *Rabinovich and Others NNO v Med: Equity Insurance Co. Ltd* 1980(3) SA 415 (W) at 419 E.

- 16.3 The discovery of the standards of accreditation processes and certification, as well as the testing of manufactured goods and services, will play a central role in the adjudication of the dispute between the applicant and DPI Plastics, and as such the respondent allegedly has a *substantial interest in the matter*;
- 16.4 The respondent should be made aware, that its mark has been utilised on products for export from South Africa, in respect of which the SANS standards may, or may not, have been complied with;
- 16.5 The respondent should be joined so that it could protect its good name and standards;
- 16.6 The respondent should be joined so that it can take note that DPI Plastics failed to comply to the SANS standards set by it in respect of the products DPI Plastics supplied to the applicant;
- 16.7 The respondent will be able to institute an action of damages against DPI plastics, which will curtail duplication of legal proceedings and ultimately lead to the saving of costs, or the avoiding of multiplicity of actions;
- 16.8 In the event that the respondent is joined to the pending proceedings between the applicant and DPI Plastics the applicant will be able to seek discovery from the respondent without having to follow the provisos of the *Promotion of Access to Information Act, 2000*.¹⁰

[17] In my view the applicant failed to proof on a balance of probabilities that the respondent have a *direct, substantial and material interest in the proceedings* (the winding-up of the applicant) which is of *such a nature that the proceedings could not reasonably be continued*

¹⁰ Act No. 2 of 2000.

*to finalisation in the absence of the respondent.*¹¹ In my view, the Honourable Court hearing the winding-up application, would be able to adjudicate that application, without any interference with the interests of the respondent being its rights, duties and responsibilities in terms of the Standards Act, 2008,¹² being so affected. I will return to my latter finding hereunder.

[18] I am further of view that none of the above arguments demonstrates on a preponderance of probabilities that there is *any lis between the applicant and the respondent, or between DPI Plastics and the respondent, which, on the grounds of equity, the saving of costs, or the avoiding of multiplicity of actions*, that requires that the Court should, in the interest of justice, hear all of those disputes together with the dispute between the applicant and DPI Plastics. The legal effect of the aforesaid is that, in order to sustain a joinder of convenience, the applicant is required to demonstrate that the question of law or fact raised between the applicant and the respondent, as set out in the joinder application, or at the very least between the respondent and DPI Plastics, are in principle essentially the same as the questions of law and fact to be decided between the applicant and DPI Plastics in the winding-up application.¹³ This valley the applicant cannot bridge with its application for joinder of the respondent, due to the following reasons:

18.1 The rights, duties and responsibilities of the respondent is contained in Section 27 of the Standards Act, 2008 which provides the circumstances under which the

¹¹ Compare: *Khumalo v Wilkins and Others*, supra.

¹² Act No. 8 of 2008.

¹³ Compare: *Denny v University of Witwatersrand* 2005(5) SA 357 (W) at 386 D-E.

respondent may institute proceedings to restrain a party or claim for damages against a party in respect of the use of the SANS or SABS marks and standards.¹⁴

18.2 The respondent has made no finding that DPI Plastics contravened the ISO standards or failed to adhere to SANS or SABS marks and standards on its products. *Abudandum cautella*, the respondent has not made any decision; neither formulated any action or claim that it might be willing to institute against DPI Plastics as a result of its alleged aforesaid contraventions.¹⁵

18.3 In argument of counsel for the applicant, it appeared that the major reason for joinder of the respondent was that the Court in hearing the application for the winding-up of the applicant should order the respondent to exercise its rights, duties and responsibilities in accordance with the aforesaid provisions of the standards Act, 2008. The manner in which an administrative organ, as the respondent, decides to exercises its rights, duties and responsibilities is subsequent to it having made a finding that a person (natural or legal) acted in contravention with legally set standards. This can in normal event only be done subsequent to at least an investigation which is normally instigated by a complaint of an injured or legally interest party.

18.4 No court will, in my view, be willing to compel the respondent to exercise its rights, duties and responsibilities, unless the applicant would be able to at least show that

¹⁴ In this regard section 27(1) of the Standards Act, 2008, provides that no person may conduct his/her/it's business in such a manner as to create a false impression that any product or service complies with the standards set by SANS. Section 27(2) of the Standards Act further provides that no person may falsely claim that a product or service complies with the SANS standards.

¹⁵ At best the evidence of the applicant in respect of the alleged contraventions of DPI Plastics of ISO and SABS or SANS standards is denied by DPI Plastics. Normally a court will be hesitant to make a credibility finding on affidavits. It is highly uncertain that DPI Plastics, who was compelled to follow application procedure for the liquidation of the applicant, will apply that the dispute of the applicant should be referred to trial. There is no indication on the papers that the applicant will seek to refer a dispute to trial. Counsel for the applicant however indicated that he will attempt to seek referral of the applicant's defence to trial. I doubt whether he will be successful with such an application.

it lodged a proper complaint with the respondent, and the respondent to date of the hearing of that matter failed to reply to the complaint or refused to exercise its rights duties and responsibilities on arbitrary or capricious grounds. Accordingly I specifically enquired from the counsel for the applicant whether the applicant lodged a complaint with the respondent in respect of the alleged contravention of DPI Plastics of the standards set by the respondent, after DPI Plastics supplied the industrial piping to the applicant. Counsel for the applicant indicated that *the present application for joinder of the respondent was the applicant's complaint with the respondent* in respect of the alleged contravention of DPI Plastics, as set out above. I find this answer to be unusual. It firstly negates the normal practise expected of administrative organs like the respondent. Section 33 of the Standards Act, 2008, provides for regulations. In normal event the regulations will set out a procedure for lodging a complaint with the respondent in respect of contravention, upon which the respondent will then be required to properly answer to such complaint. The parties were not able to direct me to any regulations that provide for such complaint to be lodged. In any event, the application for joinder, in my view, cannot be said to be a complaint that was properly lodged with the respondent, in respect of the alleged contravening conduct of DPI Plastics of the standards set by the respondent for the production of material by DPI Plastics. In any event, court can hardly at this time usurp the decision of the respondent to take any action against DPI Plastics, as it might or might not be entitled to do. Such will be the case if the argument of the applicant for avoidance of multiplication of actions will be sustained.

18.4 It is clear from the above considerations that the respondent cannot be said to have a direct and substantial interest in the subject matter (the liquidation application between the applicant and DPI Plastics) or that on grounds of equity, the saving of costs and the avoidance of multiplicity of actions deem it necessary in the interest of justice that the respondent should be joint at its own legal expense to a private commercial dispute between the applicant and DPI Plastics, for the following reasons:

18.4.1 In my view the winding-up application of the applicant by DPI Plastics has no relation to the rights, duties and obligations granted to the respondent in terms of Section 27 of the Standards Act, 2008;

18.4.2 It is at this stage highly speculative whether the respondent will institute any claim, action or application against DPI Plastics, *ultimately* because the contractual dispute between the applicant and DPI Plastics has not been adjudicated upon and because the applicant has not to date lodge a proper complaint to the respondent in respect of the alleged contravention, indicated above;

18.4.3 The Honourable Court hearing the liquidation application will, in my view, not be able to order, in the absence of a proper complaint having been lodged by the applicant to it, in respect of the alleged contravening act of DPI Plastics, not be able to order the respondent to exercise its rights, duties and responsibilities in terms of the Standards Act, 2008.

18.4.4 Lastly the subject matter of the dispute between the applicant and DPI Plastics has no direct influence on the rights, duties and responsibilities of the respondent; save that, the respondent may (or may not) decide to


invoke its rights in terms of section 27 of the Standards Act, 2008, in the event the applicant is not *only successful in resisting the pending liquidation application*, but the court hearing the winding-up application entertains the full defence raised by the applicant in that proceedings. I doubt that any of the latter possibilities¹⁶ will come to pass.

[20] It follows that the application for joinder of the respondent was, in my view, ill founded and must accordingly fail.

ORDER

After having read the papers, hearing counsel for the parties and with reference to the above considerations and findings, the following order is made:

1. The application for joinder of the respondent, to the winding-up application between the applicant and DPI Plastics, is refused.
2. The applicant is ordered to pay the costs of the respondent, in the application for its joinder.


J.S. STRYDOM

ACTING JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicant:

Adv. CD Roux

Instructed by:

RC Christie Incorporated

Counsel for the respondents:

Adv. SM Tisani

Instructed by:

Gildenhuys Malatji Incorporated

Date Heard:

20 November 2014

Date of Judgment:

19 December 2014

¹⁶ In contradiction to probabilities.