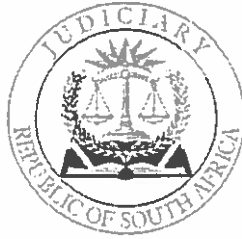


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 71375/18

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

7/10/19

DATE

A handwritten signature in black ink, appearing to be "CJ", is written over a dotted line.

SIGNATURE

In the matter between:

BODY CORPORATE OF AMINIE

APPLICANT

and

NCEBA ELLIOT KONDILE

FIRST RESPONDENT

KENEILWE REGINAH KONDILE

SECOND RESPONDENT

NKOSINATHI GOODWILL KHATHAMZI

THIRD RESPONDENT

JUDGEMENT

COLLIS J:

1. This is an opposed application brought by the applicant seeking to declare three immovable properties belonging to the first respondent specially executable.¹
2. The properties are described as Unit No 53, Unit 40 and Unit 67 shown and more fully described on the Sectional Title Plan No. SS 147/1985, in the scheme known as Aminie in respect of the land and building or buildings situated at PROCLAMATION HILL EXT 1, 566 all held by deed of transfer ST 9075/2010, ST 85842/2012 and ST 49386/2004 respectively.
3. The cause of this application is the first respondent's inability to pay and continue to make payments towards his pro rata share of the levies and contributions. The applicant is a body corporate established in terms of section 3 of the Sectional Title Schemes Management Act No 8 of 2011. Section 3 (1)(c) read together with (e) and (f) provides that owners are required to, whenever necessary to make contributions to the administrative fund, which fund will be utilised for the repair, maintenance and administration of the common property; payment of rates and taxes to municipalities; payment of insurance premiums in respect of the land or building and the discharge of any duty or fulfilment of any obligation of the body corporate.
4. It is common cause between the parties that the first respondent is the sole registered owner of units 40, 53 and 67 and the joint registered owner of unit 70 together with the third respondent.²
5. In present application it is only the first respondent who opposes same. In opposition, the first respondent had raised two points in limine. I will proceed to deal with these points first.

MISJOINDER

6. In this regard the first respondent asserts that he is the sole owner of the units sought to be declared specially executable and in support of this assertion he annexed to his opposing affidavit annexures NEK 1, NEK 2 and NEK 3. It is on

¹ Index Bundle Part 1 p 1-3

² Index Bundle Part 2 p 104 paragraphs 1.3 to 1.5

this basis that he asserts that there has been a misjoinder of the second and third respondents and that the application ought to be dismissed for misjoinder.³

7. The issues of misjoinder are regulated in Rule 10(3) and the common law specifically. The test of misjoinder of a defendant was coined in Rule 10(3):

"(3) Several defendants may be sued in one action either jointly, jointly and severally 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. The test to determine whether there is a misjoinder is whether or not a party has a direct and substantial interest in the subject-matter of the action, that is, a legal interest in the subject-matter of the litigation which may be affected prejudicially by the judgment of the Court.⁴
9. Harms⁵ dealt with the law in detail and with reference to case law. I align myself with the findings. The term direct and substantial interest, means an interest in the subject-matter of the litigation, and not merely an indirect interest in the litigation. Likewise, if a parties have a liability, which is joined and several, the plaintiff is not obliged to join them as co-defendants in the same action but is entitled to choose his target. A mere interest is also insufficient. A litigation funder may be directly liable for costs and may be joined as a co-litigant in the funded litigation. This would be the case where the funder exercises a level of control over the litigation or stands to benefit from the litigation.

THE DISPUTE

10. As mentioned the relief sought in the notice of motion is for an order against the first respondent only. There is no relief sought against the second and third respondents.

³ Opposing affidavit paragraph 2

⁴ Henri Viljoen (Pty) Ltd v Awerbuch Brothers 1953 (2) SA 151 (O) at 168-170.

⁵ Civil Procedure in the Superior Courts, Last Updated: February 2019-SI 64 at B10.2 Direct and Substantial Interest

11. As per the founding affidavit it is alleged that the indebtedness in this matter pertains to the units owned by the first, second and third respondents and that the applicant is utilizing the debt that is owed by the first, second and third respondents in support of the relief as per the notice of motion.⁶
12. Mr. Prinsloo, appearing on behalf of the applicant submitted that the point of misjoinder has no merit. The second and third respondents are registered joint owners of some of the units with the first respondent and that liability in this matter extends to the second and third respondents. It is on this basis that they have been joined to ascertain as to whether the second and third respondents are going to object to this liability.
13. I have given careful consideration to the argument presented by Mr. Prinsloo. However, I cannot agree with his submissions. The judgment⁷ forming the subject-matter for the relief sought pertains to the indebtedness of the applicant and it is based on this judgment and in the process of executability of this judgment, that the relief in the present application is sought. The second and third respondents were not cited in the proceedings conducted by the Ombud in terms of the Community Schemes Ombud Services Act 9 of 2011.
14. As an executability order is sought against immovable properties solely owned by the first respondent there simply is no logic to contend that the second and third respondents has a direct, legal or substantial interest in the subject-matter, not will they be affected by its outcome.
15. In my view the joinder of the second and third respondents therefore, indeed constitutes misjoinder and as such the *first point in limine* should be upheld.
16. The first respondent having been substantially successful with this point, I can find no reason why costs should not follow the success.

⁶ Founding affidavit paragraph 7-9 and Replying affidavit paragraph 6

⁷ Founding affidavit paragraph 11 p 9

17. Prior to finalizing the adjudication of the remainder of the merits of the application effect should first be given to the point of misjoinder having been upheld.

ORDER

18. Consequently, the following order is made:

- 18.1 The *first point in limine* of the misjoinder of the first and second respondents is upheld.
- 18.2 All references in the notice of motion to the second and third respondents as a party to the application are struck out.
- 18.3 The applicant is ordered to amend its notice of motion accordingly within 15 days from date of this order.
- 18.4 The applicant is ordered to pay the first respondents costs for the adjudication of the *first point in limine*.



COLLIS J
JUDGE OF THE HIGH COURT OF
SOUTH AFRICA

Appearances as follows:

Counsel for the Applicant	: Adv. J. Prinsloo
Attorney for the Applicant	: Jukes Malekjess and Associates
Attorney for the First Respondent	: Mr/s L Mbanjwa
Attorney for the First Respondent	: L Mbanjwa Incorporated
Date of Hearing	: 12 March 2019
Date of Judgment	: 07 October 2019