REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

[WESTERN CAPE DIVISION, CAPE TOWN]

Case No.: **5417/2014**

PIERRE DU PLESSIS KRIEL N.O. Applicant

and

WENTZEL LINDSAY OAKER First Respondent

ROCKLAND GROUP HOLDINGS (PTY) LIMITED Second Respondent

JUDGMENT: 3 JUNE 2016

MEER J

[1] The Applicant, in his capacity as curator of Rockland Asset Management and Consulting (Pty) Ltd ("RAM"), has instituted action against the Second Respondent, Rockland Group Holdings (Pty) Ltd ("Holdings") for repayment of a loan of R31 282 886,46. The Applicant seeks to join the First Respondent Wentzel Lindsay Oaker ("Oaker") as Second Defendant in the action. In so doing, the Applicant seeks also to amend his particulars of claim by introducing

a claim against Oaker in the alternative for the same amount. Such claim is conditional upon the existing claim against Holdings as First Defendant, failing.

[2] The joinder application is brought under the common law on grounds of convenience, equity, the saving of costs and the avoidance of a multiplicity of actions. It is also brought in terms of Uniform Rule 10 (3) on the basis that both the existing claim and the claim in the alternative, which is sought to be introduced, depend upon the determination of substantially the same question of law or fact which, if the Respondents were sued separately, would arise in each separate action.

[3] The Applicant's cause of action in the existing claim against Holdings arises from a loan agreement between RAM and Holdings. The terms of the loan agreement are disputed. According to the particulars of claim the terms are that the loan is repayable on demand and owed. Holdings, in its plea, has denied this to be the case. Instead, the plea avers that in terms of the loan agreement, the loan was only payable when RAM was possessed of sufficient retained income and it was tax efficient to do so. Furthermore, RAM would declare dividends, which dividends would be due to Holdings as a sole shareholder of RAM, and that such dividends would be paid, not by way of a cash distribution, but by crediting Holding's loan account with RAM, and setting off the amount of the dividends against Holding's indebtedness to RAM. The

plea avers also that Oaker as the sole director of both RAM and Holdings, concluded the agreement of loan between them.

[4] Accordingly, the issue for determination in the action, as presently pleaded, is a determination of the terms of the loan agreement between RAM and Holdings.

[5] The claim in the alternative, which the Applicant seeks to introduce and which has led to this joinder application, is against Oaker for payment of the loan amount on the basis of the breach of Oaker's fiduciary duties as director, an alleged delict. The claim in the alternative and the joinder application arose in response to the aforementioned averments in the plea pertaining to the terms of the agreement. It is the Applicant's contention that if those averments are correct, Oaker, would have breached the fiduciary duties owed by him, as a director of RAM to act in good faith and in the best interests of RAM, and not to place himself in a position in which his personal interests conflict with his duties to RAM. In regard to this latter duty, it is pointed out that Oaker was a trustee of the Johnny Bravo Trust, which was the sole shareholder in Holdings, and of which Oaker's wife and children are beneficiaries.

[6] The Applicant contends that if the averments in the plea regarding the terms of the loan agreement are correct, and the Applicant cannot succeed with a claim in contract against Holdings by virtue of those terms having been

agreed, then the Applicant has a claim for the same amount against Oaker on the basis of his breach of fiduciary duties.

[7] It is in my view apparent that whilst the existing claim and the claim in the alternative which is sought to be introduced, both arise from a common loan, they are inherently different. The one concerns the determination of the terms of the loan agreement, no more no less. The other derives from sections 76 and 77 of the Companies Act, No 71 of 2008, ("the Companies Act"), and raises issues of fact and law pertaining, *inter alia,* to whether Oaker as a director of a company performed his functions in good faith, for a proper purpose and in the best interests of the company.

[8] I agree with the submission on behalf of the Respondents that the proposed amendment to the particulars of claim to accommodate the alternative claim and the joinder, introduce an entirely new cause of action against Oaker to that pleaded in respect of Holdings. It would, as Respondents contend, call for evidence not required in relation to the existing claim and argument on matters of law, that do not arise from the present pleadings, concerned as they are solely with evidence of a loan agreement, and whether it is due and payable.

[9] Oaker, in his answering affidavit, states that the cause of action pleaded against him in the alternative claim, is entirely different to that pleaded in respect of Holdings. He says he has a number of defences to the claim against him, defences which do not impinge upon the main claim against Holdings. These include, *inter alia,* his entitlement to rely on advice furnished to him in his capacity as a director of RAM as set out in section 76 (5) of the Companies Act. It follows, he avers, that his conduct as a director of RAM will constitute a discrete issue to be enquired into by the Court and which has nothing to do with the issues in the existing claim.

Uniform Rule 10 (3)

[10] A joinder of defendants under Uniform Rule 10 (3) is permitted 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. That is not the case in the present matter. Substantially the same questions of fact or law do not arise in the existing claim against Holdings and the claim in the alternative against Oaker. The two claims are inherently different, notwithstanding that the alleged breach of fiduciary duties arises from the terms of the loan agreement that has been pleaded by Holdings. It follows therefore that the Applicant does not meet the threshold test in Uniform Rule

10 (3) that the two claims involve determination of "substantially the same question of law or fact". The application therefore cannot succeed under Uniform Rule 10 (3).

The Common Law

[11] Arguing for the application to succeed under the common law, Mr Fagan for the Applicant submitted that Oaker, if not joined in the existing action, would not be bound by the Court's judgment, if the Court were to find in favour of Holdings, that the terms of the loan agreement were as contained in the latter's plea. Such a judgment, so the argument went, would not be *res judicata* against Oaker. In these circumstances, if the alternative claim were brought as a separate action, there is the possibility, he contended, that Oaker could challenge the terms of the agreement as contained in the judgment. This could give rise to evidence having to be lead afresh on the terms of the agreement and potentially to conflicting judgments. Two trials would moreover increase costs, he submitted. The application should succeed under the common law on grounds of convenience, the saving of costs and the avoidance of multiplicity of actions and conflicting judgments.

[12] Mr Manca for the Respondents countered that it was far-fetched to suggest that Oaker would challenge a judgment which found the terms of the agreement were as contained in the plea. Oaker, he suggested, in annexing the

plea to his answering affidavit, has confirmed that the terms of the contract are as contained in the plea and had pinned his colours to the mast as to what these terms were. If needs be, he submitted, Oaker could sign an agreement to the effect that he was bound by the terms of the agreement as contained in the plea. It was, he submitted, unlikely in the extreme that there would be two conflicting judgments on the terms of the agreement.

[13] I am inclined to agree. For, even though Oaker has not sworn in an affidavit that the terms of the agreement are as contained in the plea, Oaker, it must be borne in mind is the sole director of the company from whom the plea emanates. The plea moreover states that Oaker concluded the agreement of loan between RAM and Holdings. It would, I believe, be far-fetched for a litigant in his position, ably represented, to aver different terms. It cannot in the circumstances be said that there is a reasonable prospect of an overlap on this aspect or of conflicting judgments, were the two claims to be brought separately. In *Dendy v University of the Witwatersrand and Others* 2005 (5) SA 357 (W) at paragraph 73 Boruchowitz J said,

"At common law a number of defendants may be joined whenever convenience so requires. There is a reasonable prospect of an overlap of factual issues. Convenience dictates that it would be inappropriate to run the risk of conflicting judgments by different Judges in different trials on issues that are common to all three actions."

That is not the scenario at hand.

[14] As to the saving of costs, given that the case against Oaker is entirely conditional upon the failure of the existing claim against Holdings, there is, as is contended on behalf of the Respondents, no reason why Oaker should be drawn into the existing litigation between the Applicant and Holdings in circumstances where no claim may ever eventuate against Oaker. He will be obliged to incur costs in the existing proceedings, which as the Respondents contend, may be wasted if the claim against Holdings is successful. I agree also that there is no reason why Holdings should be drawn into litigation against Oaker, at further cost to itself.

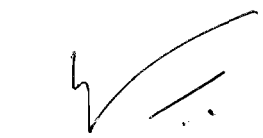
[15] If the claim in the alternative does not arise there will certainly be no saving of costs. Given that it is unknown whether such claim will arise, the question concerning saving of costs can at this stage only be speculative.

[16] I am in the circumstances also unable to find that the joinder application is supported by the common law on the grounds, *inter alia,* of convenience. The fact that Oaker might be the common witness in both contemplated claims or that both claims emanate from the loan agreement, does not detract from this.

[17] In the light of all of the above, the application cannot, in my view, succeed.

[18] I accordingly grant the following order:

The application is dismissed with costs such to include the costs of two counsel.



Y S MEER

Judge of the High Court