



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 20317/2017

In the matter between:

ROGER COENRAAD HOFFMAN N.O.

First Plaintiff

DIANNE LIESA HOFFMAN N.O.

Second Plaintiff

and

LIVEWELL DEVCO 1 (PTY) LTD

Defendant

Coram: Justice J Cloete

Heard: 31 August 2022

Delivered electronically: 28 October 2022

JUDGMENT

CLOETE J:

Introduction

[1] The plaintiffs, in their capacities as the trustees for the time being of the Rocon Trust ("the trust") instituted action against the defendant during November 2017 for payment of R7 275 121.56, being the alleged balance due in terms of an

oral agreement to execute various building projects for and on behalf of the defendant.

[2] Initially, the dispute centred mainly around whether the work reflected on the invoices was indeed executed and whether the total invoiced amount of R60 519 802.56 represents the contract price payable to the trust in terms of its agreement with the defendant.

[3] In December 2020, the defendant amended its plea and raised certain new defences. Briefly, these new defences relate to the following:

3.1 An allegation that the plaintiffs had no authority to act *qua* trustees of the trust because its trust deed is invalid for the reasons set out in the amended plea; alternatively

3.2 If the trust deed is valid, a denial that the plaintiffs had the necessary authority in terms of the trust deed to enter into the agreement with the defendant to perform the building and related work.

[4] On 10 May 2021 the plaintiffs delivered '*Notices in terms of rule 10 and rule 28*'¹ in which they gave notice of their intention:

¹ Of the uniform rules of court.

4.1 To join the first plaintiff in his personal capacity as third plaintiff and to introduce a second, alternative claim against the defendant by him in his personal capacity, based on unjust enrichment; and

4.2 To amend the particulars of claim to deal with the allegations by the defendant regarding the trust deed and to add an alternative claim by the trust, based on unjust enrichment, in the event of the trial court finding in favour of the defendant on the issue of authority of the plaintiffs to have concluded the oral agreement with the defendant.

[5] On 21 May 2021 the defendant served a notice of objection in which it raised 6 grounds. Although the parties agreed that the proposed joinder and amendments should be decided separately, they were unable to reach agreement regarding which should be dealt with first. By that stage the matter was already under judicial case management in terms of rule 37A before Binns-Ward J. On 18 August 2021 the parties filed a pre-trial minute in which they set out their areas of disagreement. On 7 September 2021 the learned Judge made the following directions in terms of rule 37A(12):

- '1. The parties are directed to proceed with an application for:-
 - 1.1 The joinder of "the third plaintiff";
 - 1.2 The amendment of the particulars of claim;
 as described in paragraphs 3.4.1.3 and 3.5.2 of the pre-trial minute.
- 2. The matter is removed from the pre-trial roll until after the determination of the aforementioned application(s).'

- [6] The paragraphs of the pre-trial minute referred to in the case management Judge's directions read as follows:

'3.4.1.3 Are the plaintiffs precluded:

3.4.1.3.1 from joining the third plaintiff and or

3.4.1.3.2 from amending their Particulars of Claim;

as more fully set out in their Notice in terms of Rules 10 and 28, dated 6 May 2021,² for one or more of the objections raised by the defendant in its objection, dated 20 May 2021?

The plaintiffs maintain that it is imperative that the Court is asked to determine the last mentioned aspects separately as well...

3.5.2 With reference to the issues regarding procedure followed in the process during the future conduct of the proceedings:

3.5.2.1 whether there is any reason for the Honourable Court to adjudicate the objections regarding the notices... in light of the dies in terms of Rule 28(4) having lapsed subsequent to the Defendant's objection;

3.5.2.2 whether the Honourable Court would be able to adjudicate the questions regarding the joinder... or the consequential amendments to enable this... without the Plaintiffs following the provisions of [the rules] by launching an application as required by the Rules (i.e. in a vacuum);

3.5.2.3 whether the procedure envisaged by the plaintiffs is appropriate; i.e. an application only having to be done by Plaintiffs pursuant to the Honourable Court having adjudicated the objections raised by the Defendant in light of...' [6 grounds followed]

² Although dated 6 May 2021, it was delivered on 10 May 2021.

[7] On 22 November 2021 the Judge President granted an order by agreement between the parties in the following terms:

- ‘1. That the matter is postponed to the opposed motion roll in the Fourth Division for the application, as directed by the Honourable Judge Binns-Ward, to be heard on **10 May 2022**;
2. The parties agree that First Plaintiff and Second Plaintiff will file their application referred to in paragraph 1.1 above by no later than 18 February 2022 and that Defendant will file its opposing affidavit by no later than 18 March 2022 and that First Plaintiff and Second Plaintiff may reply by no later than 25 March 2022.’ [my emphasis]

[On 10 May 2022 the matter was postponed to 31 August 2022 when it came before me.]

[8] In the joint practice note filed by the parties’ legal representatives, they agreed that the issues for determination are:

- 8.1 whether the procedure adopted by the plaintiff to join a party is irregular;
- 8.2 whether the first plaintiff should be joined in his personal capacity as third plaintiff; and
- 8.3 whether the plaintiffs should be permitted to amend their particulars of claim to introduce two new alternative claims based on enrichment.

The parties’ respective positions

[9] The “application” contemplated in the order of 22 November 2021 comprised of two affidavits by the plaintiffs (the second plaintiff’s simply confirmed the

contents of the first plaintiff's). It was submitted that since the intended joinder was only interlocutory in nature, it was unnecessary for the plaintiffs to also file a notice of motion.

- [10] They also alleged that although they disputed the validity of the new defences raised, joinder was sought on the basis that, if the defendant succeeds with these defences, then the first plaintiff in his personal capacity ("RCH") wishes to pursue an alternative claim for unjust enrichment. The first plaintiff stated that:

- '24. *The plaintiffs' case to join me as third plaintiff is therefore a simple one: if Rocon Trust is found to effectively be a non-entity for one or more of the reasons set out in the defendant's amended Plea, I, in my personal capacity will be entitled to claim from defendant for payment of the building and related work.*
25. *It should therefore be patently obvious that my right to intervene is dependent upon the determination of substantially the same questions of law or fact: whether the work reflected on the invoices was actually executed and if so, whether the defendant is liable for payment to Rocon Trust, alternatively to me in my personal capacity, for payment of the amount claimed.*
26. *I furthermore respectfully submit that I have a prima facie case against the defendant: if I prove the averments contained in the plaintiffs' Notice, I will succeed with the alternative claim...*

- [11] In the opposing affidavit the deponent took the stance that the procedure adopted by the plaintiffs is irregular for the reasons that: (a) the notice in terms of rule 10 (included in the initial 'Notices' of 10 May 2021) was unsupported by any affidavit; (b) the contemplated joinder of a party without a supporting

affidavit is a '*substantial irregularity*' since '*the party whose joinder is sought*' must at least establish a direct interest in the subject matter of the litigation; and (c) the purported rectification of the '*defective notice*' by filing affidavits almost a year later is therefore not only procedurally irregular but fails to comply with the express terms of the order of 22 November 2021.

- [12] The defendant also contends that the intended amendment would render the particulars of claim excipiable (in respect of both the trust's alternative claim for unjust enrichment as well as that which RCH seeks to introduce), and any such claim, if successfully introduced by RCH, would also long since have prescribed. The defendant's procedural objection is thus inextricably linked to its substantive objection, both in relation to the joinder sought and the proposed amendment to the plaintiffs' particulars of claim.

Whether procedure adopted irregular

- [13] The first point is that in the '*Notices*' of 10 May 2021 it is clearly stated at the outset that the plaintiffs '*hereby give notice of their intention*' to: (a) apply for the joinder of the first plaintiff (in his personal capacity); and (b) to amend their particulars of claim. It ends with the notification to the defendant that unless written objection to '*the proposed joinder of the third plaintiff and the amendments is delivered within 10 days of delivery hereof, the aforementioned joinder and amendments will be effected*'.

[14] On its plain wording therefore it is nothing more than a notice of the intention to do something unless objection is timeously received, and is not a self-standing application. Given that the defendant indeed objected within the prescribed period, that was the end of the notice unless and until the plaintiffs took a further step or steps in compliance with the uniform rules of court.

[15] The second point is that, after considering the contents of the pre-trial minute of 18 August 2021, Binns-Ward J specifically directed '*the parties*' (clearly meaning the plaintiffs) to proceed with an application both for the joinder of the third plaintiff and the amendment of the particulars of claim. Quite obviously the learned Judge would not have made these directions if he was satisfied there was already an application pending.

[16] The third point is that the parties agreed in the order of 22 November 2021 that the plaintiffs would '*file*' (presumably, deliver) their application by no later than 18 February 2022. If the plaintiffs believed that such an application was already pending, there would have been no need to include this provision in the order.

[17] The fourth point is that in the notice of objection itself (i.e. preceding the filing of the pre-trial minute, the directions made by Binns-Ward J and the agreed order of 22 November 2021) the following grounds were advanced by the defendant:

17.1 The plaintiffs had failed to comply with rule 10(1), alternatively rule 12, by failing to launch a formal application;

17.2 No basis was set out in the '*Notices*' to indicate that RCH's intended claim is founded upon determination of substantially the same question of law or fact (as indicated above, this was set out, for the first time, in the affidavits filed by the plaintiffs subsequent to the order of 22 November 2021);

17.3 Rule 6(1) provides that, save where proceedings by way of petition are prescribed by law, every application must be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief, but the plaintiffs had failed to attach such affidavit to the purported notice of joinder;

17.4 RCH could not be joined by way of an amendment in terms of rule 28;

17.5 Amendment of the particulars of claim *prior* to joinder of RCH would render them excipiable; and

17.6 In any event, the intended amendments (apart from the purported joinder) would render the pleading excipiable.

[18] Accordingly, the plaintiffs could have been under no illusion about what was required of them for purposes of placing the relief which they seek properly before the court. In heads of argument filed on behalf of the plaintiffs, it was submitted that after the directions made by Binns-Ward J, the parties agreed to a timetable for the exchange of affidavits for purposes of the application to join

the third plaintiff and amendment of the particulars of claim, which agreement was made an order of court on 22 November 2021. However there is not a shred of evidence to support this submission, and in its heads of argument the defendant disputed the existence of any such agreement.

[19] It was also submitted in the plaintiffs' heads of argument that they did follow the correct procedure: due and proper notice was given of their intention to apply for an order to join the first plaintiff in his personal capacity as third plaintiff, and for the amendment of the particulars of claim. But as I have pointed out, this is plainly incorrect; and is indeed contrary to a later submission, in the same heads of argument, that the reason why the plaintiffs did not initially file affidavits in support of their "application", was because the defendant objected to the intended amendment and joinder, and the parties were attempting to reach an agreement about the way the objection should be dealt with.

[20] It was also submitted on behalf of the plaintiffs that, properly considered, most of the defendant's objections in its notice of objection amount to '*an insistence on formalism*' in the application of the rules, rather than a complaint about the merits of that "application". Reliance was placed on the well-established authorities that insistence on compliance with the rules which amounts to undue formalism is to be discouraged. But, again, the plaintiffs have missed the point.

[21] The plaintiffs also rely on *Swartz v Van der Walt t/a Sentraten*³ in which the court concluded that the reference in rule 28(4) to '*lodge an application for leave*

³ 1998 (1) SA 53 (W).

to amend’ pursuant to a notice of objection, cannot ‘*denote an intention on the part of the legislator that the formal notice of motion procedure supported by an affidavit contemplated in rule 6 should be adopted*’.⁴ I accept that an application for leave to amend a pleading is an interlocutory one, and that applications of this nature are often moved only on notice (as opposed to notice of motion) or, indeed at times, orally from the Bar. The defendant also accepts that for purposes of the rule 28 amendment no affidavit was required.

[22] However the fact of the matter is that, in the present case, all that was before the court at the time of granting the agreed order on 22 November 2021 were a notice of intention to apply for the joinder of RCH, a notice of intention to amend the particulars of claim, and a formal notice of objection to the relief sought on the grounds set out therein (as previously stated, this is also only what was before Binns-Ward J when he made his directions. I do not accept that, in these circumstances, it was open to the plaintiff to blithely file affidavits without more.

[23] The issue in *Swartz* pertained only to the amendment of a pleading in terms of rule 28, and not to the joinder of a party under rule 10. The latter is silent on the procedure to be followed, and accordingly rule 6(1) applies, namely that every application must be brought on *notice of motion* supported by an affidavit as to the facts upon which the applicant relies for relief. Although rule 6(11) makes provision for interlocutory and other applications ‘*incidental to pending*

⁴ At 56I-J for the reasons set out at 57A-58B.

proceedings’ to be brought on notice supported by such affidavits as the case may require, the plaintiffs cannot get around the facts that: (a) their ‘*Notices in terms of rule 10 and rule 28*’ were not accompanied by any affidavit at the time of delivery; and (b) the affidavits subsequently delivered after the order of 22 November 2021 were unaccompanied by any notice. There is also considerable merit in the defendant’s standpoint that, before any amendment to introduce an alternative claim by RCH can properly be considered, a court must be persuaded that he should be joined.

[24] For all these reasons it is my conclusion that the plaintiffs adopted an irregular procedure and accordingly the relief they seek is not properly before the court. In these circumstances, it would be most unwise for me to delve into the merits of that “relief”.

[25] **The following order is made:**

The matter is struck from the roll with costs, including any reserved costs orders.

J I CLOETE

For plaintiffs: Adv P A **Botha SC**

Instructed by: Laubscher & Hattingh Attorneys (H Ehrich)

For defendant: Adv J **Whitaker**

Instructed by: Cluver Markotter Inc. (J M Geyser)