Republic of South Africa

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

Case No. 5399 / 2012

Before: The Hon. Mr Justice Binns-Ward
Date of hearing: 8 May 2023
Date of judgment: 9 May 2023

In the matter between:

AUBREY SAMUEL JULIUS Plaintiff / Applicant

and

NAMAQUA WINES (PTY) LTD First Defendant

NAMAQUA WINES LTD Second Defendant / Respondent

JUDGMENT

BINNS-WARD J:

[1] In this matter the plaintiff, in an action in which he claims compensation for bodily injuries allegedly sustained when he was run down by a forklift, cited Namaqua Wines Ltd as the second defendant. He alleged that the second defendant, as the employer of the forklift driver, was vicariously liable for the consequences of the negligence of its employee. It is

common ground that the forklift driver's employer was Vredendal Wynkelders (Pty) Ltd, not Namaqua Wines Ltd (which has since changed its name to Namaqua Wines (RF) (Pty) Ltd).

[2] Vredendal Wynkelders (Pty) Ltd is a subsidiary of Namaqua Wines Ltd. Service of the summons was effected by the deputy sheriff on a certain Mr Arniel du Toit at 17 Sirkel Road, Vredendal, which is the registered address of both Namaqua Wines Ltd and Vredendal Wynkelders (Pty) Ltd. Mr du Toit is employed by Namaqua Wines Ltd in the capacity of group financial manager.

[3] Namaqua Wines Ltd entered appearance to defendant the action, and in due course delivered a plea, dated 6 June 2012. The plea raised the special defence of misjoinder on the grounds that the company was not the employer of the forklift driver. It also pleaded over, however, in regard to the plaintiff's allegations of negligence on the part of the forklift driver. The plea did not state who the driver's employer was.

[4] At the time of the exchange of the aforementioned pleadings, the plaintiff was represented by a different attorney. His then legal representative appears to have overlooked, or done nothing about, the indication in the plea that Namaqua Wines was not the forklift driver's employer. It would appear that the issue only enjoyed attention several years later (in 2021) when the plaintiff's current legal representatives were pointed to it at a pretrial meeting with the legal representatives of Namaqua Wines Ltd. Namaqua Wines Ltd also made discovery, in terms of Uniform Rule 35, of a payslip that identified Vredendal Wynkelders (Pty) Ltd as the driver's employer.

[5] The plaintiff contends that notwithstanding that Namaqua Wines Ltd was named in the summons as the second defendant, it was evident *ex facie* the content of the pleading that the debtor was the forklift driver's employer, and that the citation of a related company that was not the employer was an obvious misdescription. He sought to amend the summons by the

deletion therein of the name of Namaqua Wines Ltd as the second defendant and its replacement with the name Vredendal Wynkelders (Pty) Ltd.

[6] Notice of the plaintiff's intention to amend was given, in terms of Uniform Rule 28, to the attorneys of record of Namaqua Wines Ltd. There was no notice to Vredendal Wynkelders (Pty) Ltd. Namaqua Wines Ltd objected to the proposed amendment. The plaintiff consequently applied to court, in terms of rule 28(4), for leave to amend the summons in the respect mentioned. Notice of the application was served on the attorneys of record for Namaqua Wines Ltd. Notice was not given to Vredendal Wynkelders (Pty) Ltd.

[7] The application was predicated, as it had to be in the circumstances, on the assertion by the plaintiff that notwithstanding the incorrect naming of Namaqua Wines Ltd as the second defendant, the summons had in fact been served on a person entitled to accept service on behalf of the actual debtor, Vredendal Wynkelders, who, so it was alleged, must have appreciated from the content thereof that the process was intended for the latter company, not Namaqua Wines Ltd.

[8] When the application was called, Mr *MacWilliam* SC appeared as counsel for Namaqua Wines Ltd. He made it plain that he held no instructions from Vredendal Wynkelders (Pty) Ltd.

[9] I raised with counsel at the commencement whether the application could validly be adjudicated in the absence of notice to Vredendal Wynkelders (Pty) Ltd. I pointed out that there was nothing before the court to indicate that Vredendal Wynkelders was aware of the application. It seemed to me that that company had a vital legal interest in the proceedings. This was because if the relief sought by the plaintiff were granted, its inherent effect would be tantamount to a declaration that, notwithstanding appearances to the contrary, that company, not Namaqua Wines Ltd, had been joined from the outset as the second defendant in the action.

It appeared to me that the failure to join Vredendal Wynkelders (Pty) Ltd as a respondent in the application exemplified a classic case of non-joinder.

[10] Counsel on both sides appeared to be initially resistant to the proposition. Mr *van der Merwe* SC, who appeared, together with Ms *van Wyk*, for the plaintiff-applicant, on mature consideration changed his mind, and cited the comparable matter of *Mutsi v Santam Versekeringsmaatskappy Bpk en 'n Ander* 1963 (3) SA 11 (O), on which he also relied to support his submissions on the merits of the application, as an illustration of a case in which both the allegedly erroneously cited party and the actual debtor were joined as respondents in the application to amend the summons by correcting the alleged misdescription.

[11] Mr *MacWilliam*, however, persisted in his stance that joinder of Vredendal Wynkelders (Pty) Ltd was unnecessary. As I understood his argument, it was that the application to amend was lacking in merit because it failed to establish that the summons had been served on Vredendal Wynkelders (Pty) Ltd, and that in the circumstances no purpose would be served by the delay entailed in the postponement that would be necessary in order for that company to be given notice of the application. The argument was misplaced, in my judgment.

[12] The test for joinder has nothing to do with the eventual result of the case. It is determined rather by the potential effect of the relief that is sought in the case. Joinder of a party is necessary (not optional) if judgment in the matter could, not would, bear prejudicially on an issue in which that party has a direct legal interest.

[13] There is no doubting that were the application to amend granted, the result would give rise to a situation in which Vredendal Wynkelders (Pty) Ltd has a direct legal interest. It would imply that the company has been from the outset a party to the action, notwithstanding the lack of any indication thus far by the company that it is, or has ever been, cognisant of the fact. The potentially prejudicial effect of such an outcome is obvious. It would imply that the running

of prescription in respect of the plaintiff's claim against Vredendal Wynkelders had been interrupted on 26 March 2012 when Mr du Toit accepted service of a summons made out in the name of a different company.

[14] It is clear from the judgment of the late Appellate Division in *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) that non-joinder can be raised at any stage, even on appeal, and that the court has a duty to do so *mero motu* where the parties themselves have failed to recognise it as a pertinent issue. In *Amalgamated Engineering*, where the court itself raised the issue when that matter reached it on appeal, and where, the matter having been fully argued, the court found itself in a similar situation to that in which this court finds itself in the current matter, Fagan AJA, writing for a unanimous bench, dealt with it as follows (at p.663):

> '*It is clear to me that the Council should have been cited as a party in the first instance. The difficulty is to know what to do now that the matter has reached the appeal stage. One wishes to avoid, as far as it may be at all possible, the necessity of causing the parties unnecessary trouble, expense and delay. The furthest, however. that I think we are able to go to meet the parties is to let the final judgment in this matter stand over so as to give them an opportunity of ascertaining from the Council whether it is prepared to file with this Court, through its own attorneys, a consent to be bound by our judgment notwithstanding the fact that it has not been cited as a party. If such consent is filed, we shall give final judgment without hearing further argument, as the merits of the matter have been fully argued before us by counsel for the two parties who are appearing. If, however, no such consent is filed within two months of the delivery of this interim judgment, or if at any time before the expiry of the two months the appellant's attorneys intimate to the Registrar of the Court that no such consent can be obtained, we shall give directions as to the course the proceedings will then have to take*.'

[15] It seems to me that equivalent instructions are called for in the current matter. An order will therefore issue in the following terms:

1. Judgment in the plaintiff's application to amend the summons shall stand over, subject to, and pending execution of, the further provisions of this order.
2. The plaintiff is directed through the offices of the Sheriff of the Court to serve a copy of the papers in the application, including the heads of argument, together with a copy of this order, on the registered office of Vredendal Wynkelders (Pty) Ltd within 10 days of the date of this order.
3. Vredendal Wynkelders (Pty) Ltd is afforded an opportunity to deliver notice that it consents to be bound by the judgment of this court in the plaintiff's application to amend the summons in case no. 5399/2012 notwithstanding that it has not yet formally been joined as a party in that application.
4. Vredendal Wynkelders (Pty) Ltd is called upon, if so advised, within 10 days of the service upon it of this order, to deliver such notice of consent by filing the original with the registrar of this Court (per Ms Ely-Hanslo, registrar to Mr Justice Binns-Ward) and serving a copy thereof on the plaintiff's attorneys of record, Scheibert & Associates Incorporated, Suite 401, 4th Floor, 42 Keerom Street, Cape Town and the attorneys acting for Namaqua Wines (RF) (Pty) Ltd, Spamer Triebel Incorporated c/o Norman Wink & Stephens, 2nd Floor, The Chambers, 50 Keerom Street, Cape Town.
5. Leave is granted for the notice of consent to be delivered by email, in lieu of physical delivery, to the following email addresses:

   ***@judiciary.org.za (registrar to Mr Justice Binns-Ward)

   ***@scheibert.com (plaintiff's attorney)

   ***@spamertriebel.co.za (Namaqua Wines (RF) (Pty) Ltd's attorney).
6. If no such notice of consent is delivered by Vredendal Wynkelders (Pty) Ltd within the period stated in paragraph 4 of this order, the plaintiff and/or Namaqua Wines

(RF) (Pty) Ltd are granted leave to request the presiding judge, in writing, within 5 days of the expiry of the period stated in paragraph 4, for directions as to the course the proceedings will then have to take.

7. If no notice of consent is delivered by Vredendal Wynkelders (Pty) Ltd and no approach for directions, as contemplated in terms of paragraph 6 of this order, is made, the application for leave to amend the summons will thereupon be deemed to be struck from the roll.

A.G. BINNS-WARD
Judge of the High Court