



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 2483/2013

In the matter between:

AUTO TECH TRUCK AND COACH CC

APPLICANT

And

**FANNY'S MOTOR REPAIRS AND
INVESTMENT CC**

FIRST RESPONDENT

**HOLLARD NAMIBIA INSURANCE
COMPANY LIMITED**

SECOND RESPONDENT

Neutral citation: *Auto Tech Truck and Coach CC v Fannys Motor Repairs and Investment CC* (I 2483-2013) [2015] NAHCMD 236 (6 October 2015)

Coram: PARKER AJ

Heard: 22 September 2015

Delivered: 6 October 2015

Flynote: Practice – Parties – Joinder – A party may be joined in a proceeding where the dispute between the parties raises questions of law or fact that would arise in a dispute between the party making the joinder application and another party as contemplated in rule 40 of the rules of court – Besides, the court may evoke its inherent power under the common law to order joinder of a party in order to ensure that the party to be joined is before the court in the proceeding on the basis that the

party to be joined has direct and substantial interest in the outcome of the proceeding.

Summary: Practice – Parties – Joinder – Plaintiff applying to join another person as second defendant the basis that the person to be joined acted as an agent of the defendant in transactions between the plaintiff and the defendant – Court found that no *lis* was established between the plaintiff and the person to be joined (second respondent) as there may be between the plaintiff and the defendant necessitating the calling in aid of rule 40 of rules – Court found further that since agency relationship was not proved between the defendant and the person to be joined the court's inherent power under the common law in order to ensure that that person was before the court in the action and that that person's rights will not be affected by the judgment in due course in the action – Consequently, court dismissed the joinder application with costs.

ORDER

The application is dismissed with costs, including costs of one instructing counsel and one instructed counsel.

JUDGMENT

PARKER AJ:

[1] The plaintiff (applicant in the present proceedings) instituted action against the defendant (the first respondent in the present proceedings). In the instant proceedings I shall refer to the parties as applicant and first respondent, where the context allows.

[2] The applicant laid two claims in the Particulars of Claim. Claim 1 is based on an oral agreement that the applicant and the first respondent entered into on 9 February 2013 whereby -

- '(a) Plaintiff would tow Defendant's accident damaged R144 Scania Truck with registration number N 9028 SH to Tsumeb for and on behalf of the Defendant; and
- (b) Plaintiff would pay an amount of N\$48 900.00, being Plaintiff's recovery fee, plus 15% VAT thereon.'

And Claim 2 is based on an oral agreement that the applicant and the first respondent entered into on 9 February 2013 whereby -

- '(a) Plaintiff would store the Defendant's Scania Truck for and on behalf of the Defendant at an agreed storage fee of N\$200.00 per day plus 15% VAT thereon; and
- (b) The Defendant would collect its Scania Truck within a reasonable time.'

[3] The applicant alleges that in each of the agreements referred to para 2, above, a duly authorized employee entered into the agreement on behalf of the applicant, and a duly authorized agent represented the first respondent. I shall return to this crucial averment in due course.

[4] From the applicant's averments in the Particulars of Claim that a duly authorized agent represented the first respondent, I make the crucial observations that follow in para 5, which are relevant in the determination of the present application in which the applicant prays for an order in the following terms:

- '(a) Joining the Second Respondent as Second Defendant in the main action between First Respondent as Defendant and the Applicant as Plaintiff;
- (b) Ordering that the costs of this Application to be costs in the main action; and

- (c) Such further and/or alternative relief as this Honourable Court deems necessary.'

[5] In the Particulars of Claim the applicant does not identify who the agent in each of the agreements was that represented the first respondent, as the applicant avers, and yet the applicant's Claim 1 and Claim 2 are based on the premise that the first defendant is bound by the acts of its 'duly authorized agent'. Common sense tells me that for the applicant to make such a categorical, unambiguous averment, the applicant has proof of the existence of the agency relationship between the first respondent and the unnamed agent as respects the conclusion of the two agreements. If such proof is not forthcoming, the applicant cannot rely on agency relationship which it also uses in the instant application to drag into the action the second respondent by joining the second respondent as second defendant in the action.

[6] It need hardly saying that one bringing an action upon contract has the burden of showing that the other is a party to it. And the other party can only be such party if it entered into the contract by itself or by an agent. See AJ Kerr, *The Law of Agency*, 4th ed (2006), p 19. In the instant proceeding, the applicant contends that the two agreements were entered into by the applicant and the first respondent, represented by, as the applicant avers, the second respondent as the first respondent's 'duly authorized agent'.

[7] The applicant must as a matter of actual fact establish the authority of second respondent in the conclusion of the aforementioned transactions, unless the applicant is able to rely on ostensible or apparent authority. See LTC Harm, *Amler's Precedents of Pleading*, 7th ed (2009), p 24. I do not see that the applicant has so establish that authority. But that is not the end of the matter. On the papers it seems to me that applicant's case is that the second respondent had apparent authority in the conclusion of the transaction between the applicant and the first respondent.

[8] On the issue of 'apparent authority' it is said in *Chitty on Contracts*, Vol 2, para 31-056 that -

'Where a person by words or conduct represents to a third party that another has authority to act on his behalf, he may be bound by the acts of that other as he had in fact authorized them.'

Lord Denning MR puts it aptly and in words of one syllable thus: 'Ostensible or apparent authority is the authority of an agent as it appears to others'. (*Hely-Hutchinson v Brayhead Ltd and Another* [1968] 1QB 549 (CA) at 583A-G). The Denning proposition was adopted by the South African Supreme Court of Appeal in *South African Broadcasting Corporation v Coop and Others* 2006 (2) SA 217 (SCA) at 234G-H.

[9] As I have said previously, it seems to me that the applicant's case is based on the apparent authority of the second respondent qua 'duly authorized agent' of the first respondent. And what proof has the applicant placed before the court in the applicant's attempt to establish that the second respondent was 'a duly authorized agent' with apparent authority to enter into those agreements on behalf of its principal, the first respondent? It is only this, as Mr Mouton, counsel for the applicant, stated, that is, the contents of annexure 'C' and annexure 'D', attached to the founding affidavit. With the greatest deference to Mr Mouton, I do not find anything remotely resembling proof that the second respondent acted as 'a duly authorized agent' of the first respondent in the aforementioned transactions.

[10] I conclude, therefore, that the applicant has failed to establish that the second respondent was an agent of the first respondent in the aforementioned transactions. Based on these conclusions, I hold as follows:

- (a) It is not established that in the capacity of principal the second respondent was represented by an agent Central Assessing Services CC 'when such agreements were concluded', as Mr Mouton submits.

- (b) I do not see any good reason why, as Mr Mouton argued, it is necessary that for the determination of the plaintiff's (applicant's) rights vis-à-vis the defendant (the first respondent), the second respondent should be joined.
- (c) By a parity of reasoning, I do not see why and in what manner 'an order' made in due course in the action proceeding 'cannot be sustained or carried into effect without prejudicing that party (ie the first respondent)'.
- (d) I do not see in what way and for what reason it can be argued that the second respondent is a person 'interested in the subject matter of the dispute' between the plaintiff (applicant) and the defendant (first respondent) in the action or in what manner and for what reason a judgment in the action would affect the second respondent; and *a priori*, I do not see that it has been established that the second respondent has a direct and substantial interest in the outcome of the action.

[12] In virtue of these holdings, I accept submission by Mr Obbes, counsel for the second respondent, that there is no valid basis in law upon which the second respondent can be joined as a party in the action. There is simply no *lis* established between the applicant and the second respondent, as there may be between the applicant and the first respondent. It follows that there is no such *lis* that can give rise to concurrence of questions of law and fact that should, for that reason, call in aid rule 40 of the rules of court or call in aid the inherent power of the court under the common law in order to ensure that the second respondent is before the court in the action. See H J Erasmus, *et al*, *Superior Court Practice* (1994), p B1-95. I have held already that the second respondent is not a person interested in the subject matter of the dispute between the applicant and the first respondent, and also there are no rights of the second respondent that may be affected by the judgment in due course in the action proceeding.

[13] Based on these reasons, I should reject the application. The applicant has not made out a case for the grant of the relief sought, being joinder of the second respondent as second defendant in the action; whereupon, I order as follows:

The application is dismissed with costs, including costs of one instructing counsel and one instructed counsel.

C Parker
Acting Judge

APPEARANCES

APPLICANT : C J Mouton
Instructed by Mueller Legal Practitioners, Windhoek

FIRST RESPONDENT: No appearance
Sisa Namandje & Co. Inc., Windhoek

SECOND RESPONDENT: D Obbes
Instructed by Francois Erasmus & Partners, Windhoek