

Prinsloo J:

Introduction

[1] This is an application for joinder in terms of rule 40 of the Rules of Court.

[2] The plaintiff, Hydraulic Services CC (the CC), issued a summons on 12 December 2022 against the defendant, Regina Volente Carol Vries, an adult female residing in Walvis Bay.

[3] Ms Vries, the applicant, brought an application to join the second respondent in this application, Mr Petrus Christoffel Potgieter (Mr Potgieter). The CC is the first respondent in the application.

[4] I will refer to the parties as they are in the main action.

Background

[5] The defendant is a minority member of the plaintiff in that she holds a 10 per cent member's interest in the plaintiff. The defendant was also employed by the plaintiff in the position of bookkeeper until 2022.

[6] The managing member of the plaintiff is Mr Potgieter, who also holds a 90 per cent member's interest.

[7] The plaintiff instituted action against the defendant on 12 December 2022, claiming that the defendant failed to make payments to the plaintiff's creditors and suppliers and instead misappropriated the funds by utilising it for her personal use or for other purposes that the plaintiff is not liable for. As a result, the plaintiff is claiming payment in the sum of N\$2 921 657.63 from the defendant, plus interest and costs.

[8] The plaintiff, in its amended particulars of claim, pleads that the defendant was not authorised by the managing member to make the payments she made. However, in her plea, the defendant pleaded that Mr Potgieter gave his oral authorisation.

Relief sought

[9] The defendant filed an application that the managing member be joined as a second plaintiff in the main matter. She seeks the following relief:

'BE PLEASED TO TAKE NOTICE THAT an application will be made to the above Honourable Court on behalf of the above-named applicant on a date to be determined by the Manging Judge on which counsel for the applicant may be heard, for an order in the following terms:

1. That the PETRUS CHRISTOFFEL POTGIETER be joined to the action instituted in the above Honourable Court under case name and number Hydraulics Services CC vs Regina Volente Carol Potgieter, HC-MD-CIV-ACT-OTH-2022/05411.
2. Cost of this application be reserved.
3. Granting the applicant such further or alternative relief as this Court may deem fit.'

[10] The reasons advanced by the defendant in support of the application to join Mr Potgieter in these proceedings can briefly be summarised as follows:

- a) Monies amounting to N\$1 236 889.19 were paid toward Mr Potgieter's friends and for his personal use, which was non-business related activities and for which Mr Potgieter should be held liable.
- b) Mr Potgieter should be joined to these proceedings to enforce a claim against him in his personal capacity. As the papers currently stand, the defendant will not be able to, (in the event that she is successful in her defence), file a counterclaim against Mr Potgieter in his capacity as the managing member of the plaintiff.
- c) The modus operandi with respect to payments made was similar, and thus, Mr Potgieter received monies in a similar fashion as the defendant, in the amount of N\$1 236 889.19.
- d) It is convenient and cost-effective to join Mr Potgieter as the second plaintiff.
- e) If Mr Potgieter is not joined, the plaintiff would not be able to obtain an order for the repayment of unauthorised funds, for which he is liable to the CC, in the event that the court grants the relief sought against the defendant.

[11] The defendant maintains that the conduct alleged to have been carried out by her, as a member of the CC, for the payment of monies is the same conduct carried out by the managing member, Mr Potgieter. The benefits enjoyed by Mr Potgieter as a member were also enjoyed by the defendant. These same benefits are alleged to be regarded as misappropriation of funds from the CC by the defendant, but the same standard is not applied to Mr Potgieter.

[12] The defendant further contends that it would not make sense to finalise the current matter against her and then pursue fresh proceedings against Mr Potgieter for the claim amount that was paid to him under the guise of member benefits.

Opposition

[13] It should be noted that the plaintiff is not opposing the defendant's application, but Mr Potgieter is opposing the application for the following reasons:

- a) Issues of fact need to be determined during the main action, and it does not amount to him having a direct and substantial interest in the main action.
- b) He is a separate entity from the plaintiff, and he did not sue the defendant in the main action as he does not have a claim against the defendant.
- c) Should the defendant wish to bring a claim against him, she should do so by bringing legal action against him.
- d) Any counterclaim that the defendant may have against him in his capacity as managing member is against the plaintiff and not against him in his personal capacity.
- e) Joining him in his capacity as managing member would serve no purpose but would obfuscate the issues and duplicate pleadings unnecessarily.

Arguments advanced

On behalf of the applicant/defendant

[14] It was argued on behalf of the defendant that Mr Potgieter received monies in a similar fashion as the defendant, in the amount of N\$1 236 889.19. According to Ms Christian, this brings about the concept of the fiduciary duties owed to the plaintiff by Mr Potgieter insofar as they relate to the reasonable exercising of care in the management of the plaintiff's business. However, according to the defendant, Mr Potgieter acted contrary to his fiduciary duties as outlined in s 42 of the Close Corporation Act 26 of 1988 (as amended) (the Act), more specifically, s 42(1), s 42 (2)(a) and s 42(2)(b).

[15] Ms Christian submitted that it is, therefore, essential for Mr Potgieter to be joined to these proceedings for the purposes of enforcing a claim against him in his personal capacity.

[16] She further argued that due to the intricate agency and/or working and/or business

relationship between the defendant, the plaintiff and Mr Potgieter, the only conclusion that can be drawn is that all the parties have a substantial interest in the subject matter of the litigation and it will be a miscarriage of justice if Mr Potgieter is not joined to the proceedings.

[17] According to counsel, the defendant is accused of misappropriating some of the company's funds for her own benefit. These benefits are said to be the same as those enjoyed by Mr Potgieter, who similarly paid for them with the company's funds. Mr Potgieter, as a member, has an interest in determining whether the benefits should be considered as misappropriation of company funds only in relation to the defendant or whether it should also be regarded as misappropriation of company funds by Mr Potgieter himself.

[18] She further contended that the defendant could not join Mr Potgieter as a defendant, and her only recourse would be to bring a counterclaim on behalf of the company against Mr Potgieter to return to the company those funds made on his authorisation (for his benefits as a member).

[19] In conclusion, Ms Christian submitted that the plaintiff will suffer substantial prejudice if the application for joinder is not granted, as the order for the repayment of the unauthorised funds for which Mr Potgieter is liable might otherwise not be enforced against Mr Potgieter.

On behalf of Mr Potgieter/respondent

[20] Mr Wylie contended that Mr Potgieter should not be joined in the current proceedings. In support of this contention, he argued that Mr Potgieter has no legal interest in the main action and that no judgment or order that this Court may hand down will have any impact or effect on him.

[21] He submitted that the mere fact that a person is a member of a close corporation, or a shareholder in a company, does not automatically mean that such a person has sufficient interest in proceedings by or against such a close corporation or company.

[22] Counsel submitted that the authorities are clear that a sufficient legal interest only arises when an order may directly affect the rights of the party which seeks to be joined. He stated that, at best, Mr Potgieter may have a mere financial (indirect) interest in the main action.

[23] Mr Wylie argued that the defendant's contention that she has a counterclaim against Mr Potgieter was incorrect because, on the defendant's allegations alone, it is clear that only the

plaintiff, ie the CC, may have a claim against Mr Potgieter and not the defendant.

[24] Therefore, Mr Wylie argued that the defendant does not have the locus standi to claim any monies from Mr Potgieter based on the allegations in her founding papers. Furthermore, in terms of the Act, should the defendant be of the opinion that Mr Potgieter has misappropriated monies belonging to the plaintiff, she can institute proceedings in the name of the plaintiff for the recovery of same.

Discussion

[25] Joinder is governed by Rule 40 of the Rules of the Court, Oosthuizen J stated in *Hochland Park Pharmacy Close Corporation v SME and Medium Enterprises Limited*¹ as follows:

‘The requirement for a successful joinder application is whether the party that is alleged to be a necessary party for purposes of the joinder has a legal interest in the subject matter of the litigation, which may be affected prejudicially by the judgment of the court in the proceedings concerned.

[26] In *Kleynhans v The Chairperson of the Municipality of Walvis Bay and Others*,² where Damaseb JP said:

‘The leading case on joinder in our jurisprudence is *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A). It establishes that it is necessary to join as a party to litigation any person who has a direct and substantial interest in any order, which the court might make in the litigation with which it is seized. If the order which might be made would not be capable of being sustained or carried into effect without prejudicing a party, that party was a necessary party and should be joined except where it consents to its exclusion. Clearly, the ratio, in *Amalgamated Engineering Union* is that a party with a legal interest in the subject matter of the litigation and whose rights might be prejudicially affected by the judgment of the court has a direct and substantial interest in the matter and should be joined as a party.’

¹ *Hochland Park Pharmacy Close Corporation v SME and Medium Enterprises Limited* (HC-MD-CIV-MOT-REV-2021/00214) [2022] NAHCMD 175 (6 April 2022) at para [2].

² *Kleynhans v The Chairperson of the Municipality of Walvis Bay and Others* 2011 (2) NR 437 (HC) at 447 para 32.

[27] The main action was instituted by the CC against the defendant for payment of monies that were allegedly misappropriated. As a legal entity, the plaintiff is capable of instituting and defending legal proceedings in its own name.

[28] If Mr Potgieter is liable to the plaintiff for misappropriated funds, it would be illogical to join him as a second plaintiff in this matter. In addition, thereto, it would not be the defendant that has a claim against Mr Potgieter in his capacity as a majority member. It would be the CC that has the claim against Mr Potgieter.

[29] The Act does provide that members may institute proceedings against fellow members on behalf of the corporation in terms of s 50 of the Act.

[30] Section 50(1) of the Act reads as follows:

'50 Proceedings against fellow-members on behalf of corporation

(1) Where a member or a former member of a corporation is liable to the corporation-

(a) to make an initial contribution or any additional contribution contemplated in subsection (1) and (2)(a), respectively, of section 24; or

(b) on account of-

(i) the breach of a duty arising from his fiduciary relationship to the corporation in terms of section 42; or

(ii) negligence in terms of section 43,

any other member of the corporation may institute proceedings in respect of any such liability on behalf of the corporation against such member or former member after notifying all other members of the corporation of his intention to do so. (my emphasis)

(2) . . .

(3) . . .'

[31] A member who has breached his fiduciary duty is liable to the corporation for any loss suffered by the corporation as a result thereof or for any economic benefit derived by him as a result of the breach. Section 43 of the Act establishes the duty of members of close corporations to act with due care and skill. A member is accordingly liable to the corporation for loss caused by his failure to carry on the business with the degree of care and skill that may reasonably be expected from a person of his knowledge and experience.³

³ Delport P, *The New Companies Act Manual*, Last Updated: 2011 - Second edition at Chapter 16, Meskin PM, Galgut B, Kunst JA, *Henochsberg on the Close Corporations Act*, Last Updated: August 2019 - SI 33 at Part V.

[32] The principle is that a party who has a direct and substantial interest in an order or judgment of the court should be joined as a party as his or her rights will be affected by the order, or if the order cannot be carried into effect without affecting that parties' rights and interests.

[33] According to my assessment of the arguments advanced, Mr Potgieter has no legal interest in the main action, as any judgment or order passed by this court will not have any impact or effect on him. If the defendant believes that Mr Potgieter should be held accountable for the payments made on his behalf, she should institute an action in the plaintiff's name. Once done, the two cases can be consolidated. However, her current approach to join Mr Potgieter as a second plaintiff is not legally sound. Hence, the application for joinder cannot be granted and should be dismissed.

[34] My order is, therefore, as set out above.

Judge's signature:	Note to the parties:
	Not applicable.
Counsel:	
Plaintiff	Defendant
T M WYLIE Of Ellis Shilengudwa Inc Windhoek	P CHRISTIAN On behalf of Rieth Legal Practitioners Windhoek

