

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA,

MAIN DIVISION, WINDHOEK

RULING



PRACTICE DIRECTION 61

<b>Case Title:</b>  Dietrich Jakobus Mouton  and  Roads Authority	Plaintiff    Defendant	<b>Case No:</b> HC-MD-CIV-ACT-DEL-2023/03322
		<b>Division of Court</b>  HIGH COURT (MAIN DIVISION)
<b>Heard before:</b> CLAASEN, J		<b>Heard on:</b> 17 May 2024.
		<b>Delivered on:</b> 13 June 2024
<b>Neutral citation:</b> <i>Mouton v Roads Authority</i> (HC-MD-CIV-ACT-DEL-2023/03322) [2024] 312 NAHCMD (13 June 2024)		
<b>Order:</b>		
<ol style="list-style-type: none"><li>1. The special plea of non-joinder is dismissed.</li><li>2. The defendant is to pay the plaintiff's costs, which cost shall be capped in terms of rule 32(11).</li><li>3. The matter is postponed to 26 June 2024 at 08h30 for a status hearing.</li><li>4. The parties are directed to file a joint status report no later than 21 June 2024.</li></ol>		
<b>Reasons for the order:</b>		
CLAASEN J:		

[1] The plaintiff instituted a claim for damages on account of an alleged failure by the defendant to ensure that a certain temporary road was maintained in a safe and proper condition for road users. The plaintiff avers that whilst he travelled on that road he landed in a large sand pit. He avers that the hole was not visible at night and the sand was not compacted. Consequently his vehicle suffered damages of N\$36 681 64

[2] The defendant is a statutory body established in terms of the Roads Authority Act, Act No 17 of 1999. Apart from raising a plea on the merits the defendant has also raised a special plea of non-joinder.

[3] In its special plea, the defendant pleads that the Road Fund Administration (hereinafter called the 'RFA') is the entity that is legally and statutorily responsible for payment of successful damages claims. The defendant contends that the RFA has a direct and substantial interest in any order which the court might make herein and should have been joined as a party.

[4] The defendant argues that the Roads Authority does not keep and manage its own money but that the RFA performs that function. Counsel for the defendant pointed to certain provisions in the Road Fund Administration Act 18 of 1999 (hereinafter called 'the Act') that provides that the funds in the road fund shall be used:

' (l) for the payment of any compensation due for any damage arising out of the performance of the functions conferred upon or entrusted to the Roads Authority by or under any law, except where such damage is due to a deficiency in any standards referred to in section 16(5) of the Roads Authority Act;

(m) to defray the cost of insurance against any claim for damages referred to in paragraph l'.

[5] Counsel for the defendant argues that the suit is not feasible with the current defendant alone. The current defendant has a statutory duty to maintain the public roads in Namibia and RFA has the statutory duty to manage and allocate funds for the defendant's expenses. The argument is that it is necessary for the RFA to be joined so that it can defend the claim, if it so wishes, because it can potentially affect the entity financially.

[6] In support of the defendant's argument, counsel alluded to *Kleynhans v*

*Chairperson of the Council for the Municipality of Walvis Bay and Others*,<sup>1</sup> wherein the court stated as follows:

[32] 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 from the litigation. 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. '

[7] The plaintiff in its replication denies that there is any merit in the special plea. In short the plaintiff's position in the pleadings is that the cited section in the Act does not make the RFA a necessary party with legal interest in the suit.

[8] The matter had been allocated to this court for trial purposes. Having noted the special plea the court enquired whether the defendant had abandoned it. Counsel for the defendant stated that the joinder remained alive as an issue for adjudication. Counsel for the plaintiff was of the view that the special plea ought not to be entertained as the defendant had not asked that the special plea be determined during the stage of judicial case management. Counsel for the plaintiff also cited *Jin Casings & Tyre Supplies CC v Hambab*<sup>2</sup> to the effect that reports agreed to between the parties forms a binding agreement between them. In looking at the pre-trial report the issue as to whether s 17(l) and 17(m) of the Act makes the RFA a necessary party to the suit appears as one of the issues for determination. As such the court proceeded to hear the special plea.

[9] Counsel for the plaintiff's view is that the RFA has no direct or substantial interest in this damages claim. He argued that the plaintiff cannot claim anything from the RFA unless

<sup>1</sup> *Kleynhans v Chairperson of the Council for the Municipality of Walvis Bay and Others* (A 310/08) [2011] NAHC 90 at 32.

<sup>2</sup> *Jin Casings & Tyre Supplies CC v Hambabi* (I 1522/2008) [2013] NAHCMD 215 (25 July 2013).

all the elements has been proven to sustain a claim in delict. According to him the RFA's role is merely that of a financier and it will not be able to plead to the claim as no delict had been proven against it as an entity.

[10] Counsel for the plaintiff argued that the law in respect of joinder has been crystallised and referred the court to the more recent authority of *Graham v Master of the High Court*<sup>3</sup> wherein it was stated that:

[51] It must be mentioned at this juncture, that the above excerpt, is the standard against which all the contentions relating to non-joinder, raised by the respondents will be gauged. In so saying, the court cannot turn a blind eye to the following dictum by the Supreme Court in *Southline Retail Centre CC v BP Namibia (Pty) Ltd*<sup>4</sup> where the court said in part:

'The Court held that the subtenants did not need to be joined, reasoning that in order for joinder to be necessary, "what is required is a legal interest in the subject-matter of the action which could be prejudicially affected by a judgment of the Court." This crisp encapsulation of the test for a necessary joinder recognises that for joinder to be required the party concerned must have a legal, not merely a financial interest, which will be prejudicially affected by the proceedings. The bar is thus set quite high as the facts of *United Watch* illustrate'. See also *Minister of Trade and Industry and Others v Matador (Pty) Ltd*.<sup>5</sup>

[11] It is trite that the general rule for joinder is that any party is a necessary party and should be joined if that party has a direct and substantial interest in any order the court might make or if such order cannot be sustained or carried into effect without prejudicing such party.

[12] The plaintiff's case herein is for damages caused by an alleged negligent breach of the mandate of the defendant. The plaintiff would thus be required to prove all the elements in delict and any order that the court might make would first and foremost be based on a liability finding against the defendant.

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<sup>3</sup> *Graham v Master of the High Court* (HC-MD-CIV-MOT-REV-2020/00415) [2020] NAHCMD 547 (27 November 2020).

<sup>4</sup> Case No. SA 9/2009.

<sup>5</sup> 2020 (2) NR 362 (SC) para 27.

[13] It is prudent to consider the enabling legislation of the RFA and the specific provisions on which the defendant relies. The RFA was one of three entities established as part of the institutional reforms in the roads sector in Namibia. Firstly, the Roads Contractor Company, fully owned by government, was created with the main objective of undertaking work related to civil engineering and construction and maintenance of roads. Secondly, Roads Authority whose main function is to manage the national road work, which include planning, design, construction and maintenance work. Lastly, the RFA was created with the primary aim of managing the road user charging system and secure and allocate sufficient funding for a safe and efficient road sector in Namibia.<sup>6</sup> The 'road user charging system' is described in the enabling legislation as the 'system providing for the independent regulation of road funding in accordance with economic efficiency criteria and full cost recovery from road users...'

[14] In considering the primary objective of the RFA, it becomes apparent that it was enacted to bring about a road fund which will collect funds from which the expenditure of the Roads Authority will be defrayed. It thus keeps the purse for the activities of the Roads Authority. Section 17 of the Act is entitled 'Utilization of the fund' and the cited provisions on which the defendant pinned its argument forms part of a list of various categories of expenses for which the road fund can be used.

[15] The RFA, as an entity, is not involved in the alleged wrongdoing, although it is clear that it will have to foot the bill if and when negligence by the Roads Authority has been found. At best that can be described as a financial interest.

[16] A mere interest is insufficient to found a basis for joinder. In defining a direct and substantial interest, Hannah J stated in *Ex Parte Sudurhavid (Pty) Ltd: In Re: Namibia Marine Resources (Pty) Ltd v Ferina (Pty) Ltd*<sup>7</sup>:

'... means an interest in the right which is the subject matter of the litigation and is not merely a financial interest which is only an indirect interest in such litigation.'

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<sup>6</sup> Section 3 of Road Fund Administration Act 18 of 1999.

<sup>7</sup> 1992 NR 316 (HC) at 301.

[17] I thus agree with the plaintiff that the RFA is not a necessary party to this claim and the special plea stands to fail. As regards to costs, the general principle is that costs follow the result. The defendant is directed to pay the plaintiff's cost herein.

[18] In the result:

1. The special plea of misjoinder is dismissed.
2. The defendant is to pay the plaintiff's costs, which cost shall be capped in terms of rule 32(11).
3. The matter is postponed to 26 June for a status hearing at 8h30.
4. The parties are directed to file a joint status report no later than 21 June 2024.

<b>Judge's signature:</b>	<b>Note to the parties:</b>
	Not applicable.
<b>Counsel:</b>	
<b>Plaintiff</b>	<b>Defendant</b>
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