

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA  
MAIN DIVISION, WINDHOEK



PRACTICE DIRECTION 61

<b>Case Title:</b>  McNel Investment CC  and  PC Centre (Pty)Ltd	  Plaintiff    Defendant	<b>Case No:</b> HC-MD-CIV-ACT-OTH-2023/01135
		<b>Division of Court</b>  HIGH COURT (MAIN DIVISION)
<b>Heard before:</b> CLAASEN, J		<b>Heard on:</b> 8 November 2023, 04 December 2023
		<b>Delivered on:</b> 8 February 2024
<b>Neutral citation:</b> <i>McNel Investment CC v PC Centre (Pty) Ltd</i> (HC-MD-CIV-ACT-OTH-2023/01135) [2024] 36 NAHCMD (8 February 2024)		
<b>Order:</b>		
<ol style="list-style-type: none"><li>1. The special plea of misjoinder is dismissed.</li><li>2. The defendant is to pay the plaintiff's costs, which costs shall be capped in terms of rule 32(11).</li><li>3. The matter is postponed to 13 March 2024 at 08h30 for status hearing.</li><li>4. The parties are directed to file a joint status report on or before 7 March 2024.</li></ol>		
<b>Reasons for order:</b>		
CLAASEN J:		

[1] The plaintiff is a close corporation trading as McNel Freight, with its principal place of business located in Nickel street, Windhoek. The defendant is a private company duly registered in terms of the laws of Namibia with its principal place of business located in Hosea Kutako Drive, Windhoek.-

[2] The plaintiff instituted summons claiming that the defendant has failed to pay an outstanding invoice of N\$40 400. The defendant raised a special plea and pleaded on the merits. After the plaintiff replicated thereon the matter was set down for evidence and hearing of the special plea.

[3] The plaintiff's claim is predicated on an oral agreement concluded during November 2021 for the shipment, freight, importation, storage, and incidental expenses in respect of carriage and delivery of goods from China. The plaintiff pleaded that it was represented by its member and authorized representative, Mr Charlton Hwende, and the defendant was represented by Mr Alexander Zacharia.

[4] The plaintiff contends that the material terms of the agreement were that upon arrival of the goods at the ports in Namibia, the plaintiff would attend to the customary clearance where-after it would invoice the defendant. Such invoice would be payable on demand. The plaintiff contends that having rendered the services, it delivered invoices to the defendant. One of the invoices was delivered on 24 November 2021 for freight and importation in the amount of N\$35 900 and another invoice was delivered on 13 January 2023 for storage fees. The defendant has up to date not paid the outstanding amount.

[5] The defendant raised a special plea of misjoinder to the claim. In the special plea, the defendant contends that no agreement was concluded between the parties and denies that it received any services from the plaintiff. The defendant pleads that a certain Mr Zacharia, who is the Managing Director of the defendant, concluded a purported agreement with the plaintiff. The defendant admits that communication was done between the parties 'on Mr Zacharia's work e-mail' but that all further communication and payment was done by him personally. The defendant denies that Mr Zacharia had acted on behalf it and pleaded that the defendant has no interest in the purported agreement between the plaintiff and Mr Zacharia.

[6] The plaintiff replicated and asserted that the defendant has through its conduct represented that the agreement was between them, and that it was a reasonable belief on the part of the plaintiff. The plaintiff contends that it sent invoices and a letter of demand to the defendant and it was received. The defendant knew for a substantial period that the plaintiff acted under the reasonable belief that the contract was concluded between them and has, throughout, omitted to inform the plaintiff that it billed the wrong entity.

[7] Counsel for the defendant cited several authorities on misjoinder and the test for that. She referred to the evidence by the defense witness, Mr Alexander Zaharia, who is the managing director of the defendant. The court has to restrict itself to the evidence relevant for the misjoinder allegations as that is all that the court is seized with at this juncture. Mr Zacharia contacted the plaintiff via Whatsapp Messenger in response to an advertisement on Facebook. He registered on the plaintiff's online system and did so under 'his name'. On 21 December 2021, he received invoice no. 1108 for N\$13 075 delivered to him at his work email address and it contained details such as his name and the physical address of PC Centre. He says that the instruction on the invoice was to 'Use Your Name on the Invoice'. He paid the invoice from his personal bank account and referenced his name and surname as requested.

[8] Counsel for the defendant emphasised that the witness testified that, at no material time has he conveyed that the goods were for the business and that, in any event, he communicated to a certain Leonor and denies ever making any representation to Charlton Hwende. Furthermore, that the witness also explained what would have to happen if the business places orders, namely that the activities must be authorized by the board of the defendant and all activities must relate to the business of the defendant. Additionally, that the company would use its company letterhead and would pay from its business account, which is not the case herein.

[9] Counsel for the defense accepted, correctly so, that the defendant has the burden of proving it has been mis-joined. She argued that the defendant has done so whereas, the plaintiff failed to prove the existence of an alleged oral contract between itself and the defendant. Thus the defendant has no interest in the matter.

[10] As far as the estoppel is concerned, she submitted that the plaintiff has not even met the first requirement, namely that a representation by words or conduct has taken place. She argued that the mere using of a work e-mail address could not possibly constitute a representation that the

defendant was the party that contracted with the plaintiff.

[11] Counsel for the plaintiff, Mr Rukambe argued contrariwise. Having heard the defendant's evidence, counsel elected not to call the witness to the stand for these proceedings. He submitted that the nub of plaintiff's case is that the defendant has, by way of its conduct, represented to the plaintiff that the person with whom it contracted was an authorised agent of the company. In this regard, he cited *Monzali v Smith*<sup>1</sup> wherein it was stated that where any person, by words or conduct, represents to anyone or permits it to be represented that another person has authority to act on his behalf, he is bound by the acts of such other person with respect to any dealing with him as an agent on the faith of any such representation, to the same extent as if such other person had the authority which he was so represented to have.

[12] He implored the court to consider the following common cause facts:

- a) The defendant gave instructions and specifications to the plaintiff, using the work's email address;
- b) The defendant received and accepted the invoices from the plaintiff made out to the defendant;
- c) The defendant caused payment ( partial) to the invoices to be made out to the defendant;
- d) The defendant received a letter of demand issued in its name.

[13] Counsel for the plaintiff argued that these common cause facts illustrate that at no point has the defendant informed the plaintiff about the defence of alleged lack of authority or that it has cited the wrong party. He urged that the court should to reject the explanation that the email address was used merely because Mr Zacharia 'frequently checks his work email address' as one of convenience and without merit. He argued that the defendant would have had to disclose to the plaintiff and is now estopped from relying on this excuse to avoid liability. As for the defendant's evidence about its internal procedures and transactions to bind the company he referred to the Turquand rule and that the effect thereof is that a person dealing with a company or association is entitled to assume that due compliance has taken place.

[14] The law on misjoinder is settled and the parties are in agreement about the applicable test. The court gave a concise explanation in *Tobias v Nguvauva*<sup>2</sup> at para 9:

<sup>1</sup> *Monzali v Smith* 1929 AD 382 at 385

<sup>2</sup> *Tobias v Nguvauva* (HC-MD-CIV-ACT-DEL-2019/05249)[2020] NAHCMD 343 (31 July 2020).

'With respect to misjoinders, the test to determine whether there is a misjoinder is whether or not the party (cited) has a direct interest in the subject matter of the action, i.e. a legal interest in the subject matter of the litigation which might be affected prejudicially by the judgment of the court'.

[15] Stripped from its frills, the defendant's objection in the special plea is that the plaintiff cited the wrong party. The contention is postulated that the Managing Director, in his personal capacity, has purportedly entered into an agreement with the plaintiff to transport goods from China and deliver it in Namibia.

[16] The facts leave no doubt that the plaintiff received an instruction and procurement to transport and deliver goods. The issue in contention in this special plea is who concluded the contract? The plaintiff says it is the company, and it relies on certain representations ostensibly made by the defendant that led it to that impression. It is common cause that the engagement commenced by communication on 'WhatsApp' between the witness, Mr Alexander, and a certain person Leonor at McNel Freight.

[17] It is not in dispute that there was e-mail correspondence regarding the matter, shortly after the text messages on 'WhatsApp'. From the plaintiff's side there is an e-mail on 23 December 2021 from a person called Leonor Hwende, whose e-mail signature indicates her title as the Logistic Manager. It informs the recipient that the plaintiff has updated the status on their system and he should receive e-mails from the e-mail that he registered with. The professional e-mail address of the recipient bears the name of the witness, his position as Managing Director, the company's name and the company's address. It is also indicative thereof that that was the witness who provided these details in his registration when he placed the order. The rhetorical question is therefore what impression did that create as to who or what entity placed the order?

[18] Further indicators were that the company received certain invoices in respect of this transaction. One of these invoices in the paper trail was paid, without any objection or denial of liability that the recipient of these invoices was the wrong party.

[19] In view of that, the court is not persuaded by the defendant's arguments in support of the special plea. The defendant has had several opportunities, spanning over more than a year to divest itself from the 'agreement' and inform the plaintiff that it was pursuing the wrong entity. It has

not done so. According to the e-mail signature, it emanated from the Managing Director, who has certain functions in the company. He provided that information, at the outset, when he registered and logged on to the plaintiff's system. It is a lukewarm explanation that the professional e-mail was used merely because he checks it more frequently. Furthermore, if the matter goes on trial and the plaintiff's assertions about its case are found to be correct, the company might be affected by the order. This court will refrain from saying anything about the main claim as that is a battle for another day.

[20] The court was presented with no reason to depart from the principle that costs follow the result. However, I received no compelling reason why the costs to be awarded should not be capped as provided for in rule 32(11). As a result, costs to be awarded shall be subject to rule 32(11).

[21] In the result:

1. The special plea of misjoinder is dismissed.
2. The defendant is to pay the plaintiff's costs, which costs shall be capped in terms of rule 32(11).
3. The matter is postponed to 13 March 2024 at 08h30 for status hearing.
4. The parties are directed to file a joint status report on or before 7 March 2024.

<b>Judge's signature:</b>	<b>Note to the parties:</b>
	Not applicable.
<b>Counsel:</b>	
<b>Plaintiff</b>	<b>Defendant</b>
U Rukambe Of Fisher, Quarmby & Pfeiffer Windhoek.	E Shifotoka Instructed by Kloppers Legal Practitioners Windhoek

