

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
RULING IN TERMS OF PRACTICE DIRECTION 61

Case Title: Dr Fred Joshua Mwilima Sipiwe Ruth Mwilima Fred Liswani Mwilima and Minister of Health and Social Services Vicmac Security Services	 1 st Plaintiff 2 nd Plaintiff 3 rd Plaintiff 1 st Defendant 2 nd Defendant	Case No: HC-MD-CIV-ACT-OTH-2021/04434 Division of Court: Main Division Heard on: 14 February 2024 Delivered on: 7 March 2024
Neutral citation: <i>Mwilima v Minister of Health and Social Services</i> (HC-MD-CIV-ACT-OTH-2021/04434) [2024] NAHCMD 85 (7 March 2024)		
Order: 1. A case has been made out for the joinder of Inter Africa Security and the Special plea of Non-joinder should be upheld with costs, capped in terms of rule 32(11). 2. The matter is postponed for a status hearing to 16 April 2024 at 15h30. 3. The parties to file a joint status report on or before 11 April 2024.		
Reasons for order:		
RAKOW J:		

Introduction

[1] The plaintiff's instituted action for delictual damages against the defendants following the killing of the late Sarah Lungowe Mwilima, the wife and mother of the plaintiffs, allegedly at the hands of a certain Mr Simataa Simasiku. Mr Simasiku entered the building where the deceased was employed by the first defendant and took out a fire arm and shot Mrs Mwilima. The second defendant was employed specifically to provide security services on the floors of the building where the first defendant had offices. There was however another security firm, Inter Africa Security which was contracted by the owners of the building to provide security services at the entrance of the building.

[2] The second defendant raised a special plea of non-joinder, being that Mr Simataa Simasiku and Inter Africa Security were not joined as defendants respectively in this matter despite having a direct and substantial interest in the subject matter of these proceedings and the outcome hereof. They in the meantime abandoned their plea regarding Mr Simasiku but wish to proceed with the plea of non-joinder of Inter Africa Security.

Arguments by the parties

[3] The honourable court was invited by the second defendant to scrutinize the claim of the plaintiffs, specifically against the second defendant. The plaintiff lays the basis of its claim at paragraphs 13 to 17 of its Particulars of Claim. Paragraph 15 thereof reads as follows:

'In breach of the above duties towards each of the employees of the first defendant within the City Centre Building, the second defendant and/or its employee(s) on duty unlawfully and negligently failed to prevent that SIMASIKU, who was carrying the firearm referred to above, entered the building and/or accessed the individual office in the building of the deceased, and failed to prevent that SIMASIKU inflicted substantial, material and lethal harm upon the deceased.'

[4] It was further argued that the plaintiffs' at paragraph 19.7.4 claims as follows:

'The first defendant furthermore, generally, unlawfully and negligently failed to: ...take steps to, or arrange that steps would be taken to apprehend SIMASIKU, and/or to stop or prevent SIMASIKU from discharging a firearm within the building.'

[5] The first defendant, in its Plea dated 31 May 2023 at paragraphs 18 to 18.2 pleads that:

'it has installed two types of securities in the building, the first security being the security company employed by the owner of the building and which is situated at the entrance of the building where visitors would sign in a book when they enter the building.'

[6] And further, the second defendant equally in its Plea pleaded at paragraph 17 as follows:

'The 2nd Defendant admits that it was contracted to perform security services at the First Defendant's office premises at City Centre Building. However, this procurement was only in respect of certain floors and not the entire building, specifically floors 2, 6 and 8 only. Inter Africa Security was stationed at the main entrance of the building and other floors.'

[6] It was further argued that upon a proper reading of the plaintiffs claim, it is clear that they take issue with the security of the 'building' as a whole, and not only with certain floors. The plaintiffs' seeks to hold the second defendant liable for allegedly failing to prevent Mr Simasiku from entering the building and entering the individual office of the building. It has been pleaded by both defendants that the second defendant only secured and occupied floors 2, 6 and 8. The second defendant was not stationed or contracted to secure the entrance to the building or the remaining floors. The security company responsible to secure the entrance to the building and the remaining floors is Inter Africa Security.

[7] For the plaintiffs it was argued that these facts are central to addressing the question whether the two parties alleged to have a direct and substantial interest in the proceedings actually have the right alleged by the second defendant. It is alleged that it is common cause that the present matter relates to a claim by the plaintiffs that the first defendant breached its common law obligations and or alternatively its statutory obligations specified in s 39(1)(a) of the Labour Act 11 of 2007 ('the Act'), the underlying obligation that the plaintiffs' allege the first defendant breached, is the obligation to ensure a safe and risk-free work environment for the first defendant's employees. The claim further includes the second defendant, on the basis that by way of a contract, it undertook to assist the first defendant in ensuring a safe and risk-free work environment for the first defendant.

[8] They argue that the claim against the second defendant arises on the basis of a contract between itself and the first defendant. The claim being that to the extent that the first defendant attempted by means of the contract to fulfil its obligations to its employees, the second defendant is liable vicariously as a result of its failure to ensure a safe and risk-free work

environment for the deceased.

Legal principles

[9] A direct and substantial interest has been held to be:¹ ‘an interest in the right which is the subject matter of the litigation and not merely a financial interest which is only an indirect interest in such litigation.’ It is a ‘legal interest in the subject matter of litigation, excluding an indirect and commercial interest only’. The possibility of such an interest is sufficient and it is not necessary for the court to determine that it, in fact exists.

[10] In *Kleynhans v Chairperson of the Council for the Municipality of Walvis Bay and Others*² Damaseb J held that:

‘[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.’

[11] In *Kamwi v the Minister of Lands and Resettlement*³, it was held that:

‘[17] The test for joinder is a direct interest in the outcome of a suit.⁴ The persons to be joined as parties to the proceedings, must have a direct and substantial interest not only in the subject matter of the litigation, but also the outcome of the proceedings.’

[12] In *Ondonga Traditional Authority v Oukwanyama Traditional Authority*⁵, it was held that:

¹ The Civil Practise of the Supreme Court of South Africa, Herbstein & Van Winsen, p 168, Third Edition.

² *Kleynhans v Chairperson of the Council for the Municipality of Walvis Bay and Others* 2011(2) NR 437.

³ *Kamwi v Minister of Lands and Resettlement* (HC-MD-CIV-MOT-GEN-2016/00333) [2022] NAHCMD 282 (8 June 2022) para 17.

⁴ *Maletzky v Zaaluka; Maletzkey v Hope Village* (I 492/2012; I 3274/2011) [2013] NAHCMD 343 (19 November 2013) para 41.

⁵ *Ondonga Traditional Authority v Oukwanyama Traditional Authority* (A 44-2013) [2015] NAHCMD 170 (27 July 2015).

'[15] It is on the strength of these authorities above that it is incumbent upon any court to ensure that all persons, with the requisite interest in the subject matter of the dispute and whose rights may be affected, are before the Court since it is for all intents and purposes in line with the strict requirements of the rules of natural justice, the audi alteram partem rule. The substantial interest factor attracts a lot of judicial importance to an extent that the courts have assumed a right to raise it mero motu where justice so demands⁶'

[13] This Court in *African Stars Sports Club (Pty) Ltd v Collin Benjamin In his capacity as Trustee of BKK Sport Auas Sport Trust and Others*⁷ addressed the approach to pleading a point of non-joinder. The Court directed as follows:

'[48] The law is replete with judgments dealing with the need to join a party to proceedings when that party has a direct and substantial interest in the outcome of the matter, or whose interests would be affected by the carrying out of the order in question. These are allegations that must be stated clearly in the papers, with the interest and the prejudice likely to be visited upon the party alleged not to have been joined. It is not automatic that once one raises non-joinder and no more, that party is an interested party. In this matter, the case was not made out with the necessary clarity and precision.

[49] These are not issues that may be obliquely pleaded with the hope that the flesh will be added to the bare and dry bones in argument. The discipline in motion proceedings requires that all the relevant considerations and allegations of fact are pleaded in order to leave the court and the other party in no doubt as to the nature and basis of the complaint advanced. In the absence of the nature and basis of the interest by the NFA, I am of the view that the point taken by the respondents is not meritorious. The court and the other party must not be left ruminating incessantly, spending sleepless nights in nocturnal surmise as to the nature and basis of the interest of the party alleged to exist.'

Conclusion

[14] It is clearly not disputed that the second defendant had the duty to guard the floors where the first defendant had offices but not the front entrance to the building. This entrance and the remainder of the floors were guarded by the party now seeking to be joined in these proceedings. It is further clear that this party has a direct and substantial interest in the matter as they could clearly be implicated in this matter without them having the opportunity to defend themselves or to submit relevant facts to this case. For this reason, I will grant the joinder

⁶ *Independence Catering (Pty) Ltd and Others v Minister of Defence and Others* 2014 (4) NR 1085 (HC) para (24) and (250).

⁷ *African Stars Sports Club (Pty) Ltd v Collin Benjamin In his capacity as Trustee of BKK Sport Auas Sport Trust and Others* (HC-MD-CIV-MOT-GEN 155 of 2021) [2021] NAHCMD 263 (27 May 2021).

application.

[15] In the result, I make the following order:

1. A case has been made out for the joinder of Inter Africa Security and the Special plea of Non-joinder should be upheld with costs, capped in terms of rule 32(11).
2. The matter is postponed for a status hearing to 16 April 2024 at 15h30.
3. The parties to file a joint status report on or before 11 April 2024.

Judge's signature	Note to the parties:
E RAKOW Judge	Not applicable
Counsel:	
Plaintiff:	Defendants:
T Chibwana (with him L Paulus) Instructed by Dr Weder, Kauta & Hoveka Inc., Windhoek	A Brendell Of Shikongo Law Chambers, Windhoek