



**HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION, OSHAKATI**

**RULING**

Case no: INT-HC-JOIN-2021/00014

In the matter between:

**ROSALIA SHIVUTE**

**APPLICANT**

and

**KAI-BROWN SURGICAL CENTRE CC**

**FIRST RESPONDENT**

**DR E D KALANGULA t/a DR E D KALANGULA  
GENERAL PRACTICE**

**SECOND RESPONDENT**

**ONGWEDIVA MEDIPARK LTD**

**THIRD RESPONDENT/FIRST DEFENDANT**

**DR BROWN NDOFOR**

**FOURTH RESPONDENT/SECOND DEFENDANT**

**DR DESIRE KIBERITI**

**FIFTH RESPONDENT/THIRD DEFENDANT**

**DR KAI KAI-KAI**

**SIXTH RESPONDENT/FOURTH DEFENDANT**

**Neutral citation:** *Shivute v Kai-Brown Surgical Centre CC* (INT-HC-JOIN-2021/00014) [2022] NAHCNLD 2 (21 January 2022)

**Coram:** ANGULA DJP

**Heard:** 26 March 2021

**Delivered:** 21 January 2022

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**ORDER**

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1. The respondents' points *in limine* are dismissed.
2. Kai-Brown Surgical Centre CC be and is hereby joined as the fifth defendant in main action.
3. Dr Erastus Dossy Kalangula be and is hereby joined as the sixth defendant in the main action.
4. The applicant is hereby granted leave, to serve this order together with copies of the pleadings and notice(s) already filed of record on the fifth and sixth defendants. Such services to be effected on the fifth and sixth defendants by the Deputy-Sheriff.
5. Costs of this application shall be costs in the cause.
6. The matter is postponed to **7 February 2022** at **10h00** for a status hearing. (Reason: To determine whether the fifth and sixth defendants have been served as contemplated in order 3 above and to afford the fifth and sixth defendants to file the notices to defend if so advised).
7. The parties are to file a joint status wherein they set out, whether the fifth and sixth defendants have been served as well as how they wish to proceed with this matter, on or before **2 February 2022**.

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## RULING

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ANGULA DJP:

### Introduction

[1] Serving before court is an application for joinder brought by the applicant (plaintiff in the main action) to join the first respondent being Kai-Brown Surgical Centre CC, a close corporation duly established in terms of the close corporation

laws of the Republic of Namibia, as fifth defendant and Dr Erastus Dossy Kalangula as sixth defendant to the main action.

[2] The parties in this matter waived their rights to present oral arguments and requested the court to decide the matter on their papers as filed on record.

[3] For ease of reference, I will refer to the parties as cited in the joinder application and not the main action.

#### Brief background of the cause of action

[3] The applicant alleges that she was misdiagnosed by the fifth respondent who was in the employment of the second respondent as a *locum* doctor – (a doctor who works in the place of a regular doctor while the latter is on leave or absent) – at the facilities of the third respondent. The applicant further alleges that the said misdiagnosis resulted in her requiring an emergency surgery which was performed by the fourth respondent and/or the sixth respondent practicing in the name of the first respondent and at the facilities of the third respondent.

[4] According to the applicant, she received negligent post-operative care at the hands of fourth and/or sixth respondents, which negligence was followed by a second surgery and the applicant alleges that she received the same negligent post-operative care after her second surgery as well.

[5] First and second respondents use the facilities of the third respondent to conduct surgeries. Second respondent employed fifth respondent as a locum doctor. The applicant further alleges that the fifth respondent who was employed by the second respondent as a locum doctor, misdiagnosed her which resulted in the above mentioned operations. Applicant further alleges that, there exists a legal relationship amongst the respondents which has direct bearing on her cause of action and that such relationship can only be crystallised once the first and second respondents have been joined. The applicant contends that it is for these reasons that the first and second respondents should be joined as parties in the main action.

[6] The first and second respondents opposed the application. Their opposing affidavits read the same. In short, they contend that the applicant failed to allege the facts which create a legal relationship which imposes an obligation on them to be liable to the applicant.

### The law

[7] It is now well settled principle of our law that, if a third party has or may have a direct and substantial interest in any order the court might make in proceedings or if such order could not be sustained or carried into effect without prejudicing that party, he is a necessary party and should be joined to the proceedings. Where such third party is a necessary party, the court will not deal with the matter unless and until such necessary parties have been joined and no question of discretion or convenience arises.<sup>1</sup>

[8] In *Kleynhans v The Chairperson of the Municipality Walvis Bay and Others*<sup>2</sup>, Damaseb JP held as follows:

‘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 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 right 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.’

### Determination

[9] Applying the above principles to present case, the court is of the view that given an intricate, intertwined and opaque working relationship and/or employment

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<sup>1</sup> Herbststein and Van Winsen: *The Civil Practice of the Superior Courts in South Africa*, 3<sup>rd</sup> ed, p 167.

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

and/or agency relationship amongst the respondents, the first and second respondents are necessary parties to the proceedings. A further reason, in my view, is that, it appears to be impossible for an outsider, like the applicant, to dissect the relationship amongst the respondents without joining all of them and then call for discovery of documents which set out their inter-relationship. Furthermore, any order this court might ultimately make might not be able to be carried out should the first and second respondents not be joined as parties to the proceedings in the main action should it turn out in the end that they should have been joined in the first place.

[10] In the light of the foregoing reasons the respondents' points in *limine*, which are identical, stand to be dismissed.

[11] As regards the merits, there appears to be no serious dispute between the applicant and the two respondents. The two respondents either noted, or have no knowledge of the allegations or the allegations are admitted. Applying the well-known *Plascon-Evans* rule, the version of the respondents consists of bold and uncreditworthy denials that the court is justified in rejecting them merely on papers. Accordingly, the court is satisfied that a case has been made for the relief sought.

#### Order

[12] As a result of the above, I make the following order:

1. The respondents' points *in limine* are dismissed.
2. Kai-Brown Surgical Centre CC be and is hereby joined as the fifth defendant in main action.
3. Dr Erastus Dossy Kalangula be and is hereby joined as the sixth defendant in the main action.
4. The applicant is hereby granted leave, to serve this order together with copies of the pleadings and notice(s) already filed of record on the fifth

and sixth defendants. Such services to be effected on the fifth and sixth defendants by the Deputy-Sheriff.

5. Costs of this application shall be costs in the cause.
6. The matter is postponed to **7 February 2022** at **10h00** for a status hearing. (Reason: To determine whether the fifth and sixth defendants have been served as contemplated in order 3 above and to afford the fifth and sixth defendants to file the notices to defend if so advised).
7. The parties are to file a joint status wherein they set out, whether the fifth and sixth defendants have been served as well as how they wish to proceed with this matter, on or before **2 February 2022**.

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H Angula  
Deputy-Judge President

