FORM A
INFO FOR COURT FILE

Parties:

R & R CONSTRUCTION (PTY) LTD First Appellant

RODNEY RANDALL NO Second Appellant

EUGENE RANDALL NO Third Appellant

and

TANZER TRANSPORT (PTY) LTD **Respondent**

- Case Number: **266/2002**
- High Court: **Bhisho Local Division**

DATE HEARD: **12 November 2007**

DATE DELIVERED: **15 November 2007**

JUDGE(S): **F.KROON; Y.EBRAHIM; F.DAWOOD.**

LEGAL REPRESENTATIVES -
Appearances

- for the Appellant(s): **Adv D Taljaard**
- for the Respondent: **Adv RGN Brooks**

Instructing attorneys:

- for the Appellant(s): **Hutton & Cook**
- for the Respondent: **Smith Tabata**

CASE INFORMATION -
Nature of proceedings

Appeal against order directing that the second and third appellants be joined as the second and third defendants in an action – Appeal dismissed.

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(BHISHO)

CASE NO: 266/2002

IN THE MATTER BETWEEN:

R & R CONSTRUCTION (PTY) LTD	First Appellant
RODNEY RANDALL NO	Second Appellant
EUGENE RANDALL NO	Third Appellant
and	
TANZER TRANSPORT (PTY) LTD	**Respondent**

JUDGMENT

KROON, J:

INTRODUCTION

[1] This is an appeal against an order issued by *Sangoni* J joining two parties as further defendants in a trial action.

[2] The parties to the appeal are the following:

a) R & R Construction (Pty) Ltd, the first appellant (hereinafter referred to as the first defendant);

b) Rodney Randall and Eugene Randall NNO, the second and third appellants (hereinafter referred to as the second and third defendants);

c) Tanzer Transport (Pty) Ltd, the respondent (hereinafter referred to as the plaintiff).

[3] (a) The second defendant is the sole director of the first defendant.

(b) The second and third defendants are the trustees of a trust styled the R & R Construction Trust ("the Trust").

[4] The plaintiff issued summons out of this court for the recovery of damages from the first defendant (then the sole defendant). Its cause of action arose out of a motor vehicle collision on 16 August 1999, the vehicles involved being the plaintiff's vehicle and a vehicle driven by one Webster. The plaintiff's further allegations on the issue of liability were that the collision was due solely to the negligence of Webster and, in effect, that the latter was at all relevant times acting in the course and within the scope of his employment as a servant of the first defendant, or that he drove the vehicle on behalf of the first defendant.

[5] In its plea the first defendant:

a) put the plaintiff to the proof of its allegations concerning Webster's negligence;

b) denied the allegations that at all relevant times Webster was employed by the first defendant or that he was driving the vehicle *qua* servant of the first defendant or that he drove the vehicle on behalf of the first defendant, and pleaded that Webster had been engaged on a frolic of his own, he having stolen the vehicle.

[6] At the trial the issues of liability and the quantum of damages were separated and *Sangoni* J became seized with only the firstmentioned issue.

[7] The plaintiff called two witnesses at the hearing:

a) The first witness was the driver of the plaintiff's vehicle and he testified as to how the collision occurred. He was not subjected to any cross-examination.

b) The second witness was Mr Ellis, a co-employee of Webster, and he testified *inter alia* as to the circumstances under which he and other co-employees came to be passengers in the vehicle driven by Webster. At the time he testified the first defendant was still the sole defendant. During evidence in chief Ellis referred to his and his co-employees' employer as "R & R" or "R & R Construction", and, in response to a leading question by the plaintiff's then counsel, as "R & R Construction (Pty) Ltd". In its dealings with the employees the employer was represented by Mr Rodney Randall (who was present in court during the proceedings, and who, in terms of *Sangoni* J's order, subsequently became the second defendant). During cross-examination by the first defendant's then counsel the

only relevant questions put to him as to the identity of the employer were the following:

> "You said your firm was R & R Construction? Is that how you know them? ---- Yes.
>
> You don't know whether they're a company or a closed corporation or a trust or anything? ---- No."

[8] (a) The first witness called on behalf of the first defendant was Mr Goetsch, who testified that he had contracted with the Trust to carry out renovations at certain premises. The effect of his evidence was that the employees, including Webster, were employed by the Trust and that if, in transporting the employees in the vehicle on the occasion in question Webster was acting in the course and within the scope of his employment, it would have been *qua* servant of the Trust.

(b) The second witness called was the second defendant. In essence, his evidence was to the effect that Webster was employed by the Trust and had never been employed by the first defendant, which had ceased trading during 1995.

[9] The case of the first defendant was then closed. (It may be mentioned that Webster had passed away as a result of injuries

sustained in the collision).

[10] In the light of the evidence referred to in para [8] above the plaintiff moved a substantive application for the joinder of the second and third defendants as further defendants in the action, in their representative capacities as trustees of the Trust. Despite opposition by the three defendants the order sought was granted. That order is the subject of the present appeal.

APPEALABILITY OF THE ORDER

[11] The first issue requiring resolution is whether the order of *Sangoni* J is in fact appealable. In his judgment granting leave to appeal the learned judge answered this question in the affirmative. Mr *Brooks*, who appeared for the plaintiff in the appeal, did not seek to argue to the contrary. Nevertheless, I will deal briefly with the issue.

[12] Section 20(1) of the Supreme Court Act, 59 of 1959 provides for an appeal from "a judgment or order" of a court of a provincial division. If the decision does not constitute "a judgment or order" it is not appealable. *Constantia Insurance Co Ltd v Nohamba* 1986 (3) SA 27 (A) at 42H; *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 531B.

[13] In *Zweni*, at 532F-533B, *Harms* AJA stated *inter alia* as follows:

s 20(1) no longer draws a distinction between "judgments or orders" on the one hand and interlocutory orders on the other; in determining the nature and effect of a judicial pronouncement not merely the form of the order must be considered, but also, and predominantly its effect; a "judgment or order" is a decision which, as a general principle, has three attributes: (i) the decision must be final and not susceptible of alteration by the court of first instance, (ii) it must be definitive of the rights of the parties, (iii) it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings; the second attribute reflects the oft-stated requirement that the decision, in order to qualify as a judgment or order, must grant definite and distinct relief.

[14] *Sangoni* J concluded that the three attributes referred to above were present in the context of the application for joinder, which was a substantive application in its own right separate and distinct from the main case; the parties to be joined were not parties to the main action and an order joining them would be definitive of their rights in respect of the application for joinder. The order was accordingly appealable. In so deciding, he drew a parallel between the present case and *Trakman NO v Livshitz and Others* 1995 (1) SA 282 (A). In that case

the contention that the dismissal of an application for the review of the Registrar's determination of the security to be furnished for the costs of the respondents in the action instituted against them by the appellant (the furnishing of such security having been ordered by the court), was not appealable, was rejected: the Registrar's decision, in the nature of an administrative act, was always susceptible of review; the review application was a substantive one in its own right; the review proceedings were separate and distinct, not merely an extension or ancillary part of the main action; the Registrar, an indispensable party to the review proceedings, was not a party to the main action; the order of the court *a quo* in the review proceedings was intended to be definitive of the rights of all the parties to the review application, and to finally dispose of those proceedings.

[15] In my judgment, *Sangoni* J was correct in applying the reasoning in *Trakman* to the matter before him and, on the basis thereof, reaching the conclusion recorded by him.

MERITS OF THE APPEAL

[16] In his founding affidavit filed in support of the application for joinder Mr Smith, the attorney acting for the plaintiff, recorded *inter alia* the following: Prior to the issue of summons in the matter (which

occurred on 14 June 2002) the plaintiff's attorneys had been favoured with a report compiled by M I Abdulla & Associates, a firm of investigators acting on behalf of the insurer of the plaintiff's vehicle. This report, dated 30 August 2001, reflected *inter alia*: (i) that Goetsch had, during an interview, confirmed that the vehicle driven by Webster had been registered in the name of a firm operated by Goetsch; (ii) that the second defendant, during an interview, had stated that Webster (who had allegedly taken the vehicle without authorisation) had been employed by *a company* styled R & R Construction; (iii) that further investigations had established that the company was in good financial standing and in a position to meet the plaintiff's claim. On the strength of this report the plaintiff's summons was issued against the first defendant.

Smith further stated that the evidence referred to in para [8] above was the first indication to the plaintiff that Webster had been employed by the Trust, and not the first defendant.

[17] In his answering affidavit the second defendant alleged that he had advised the investigator that the Trust had contracted with Goetsch to undertake the work in question (during which Webster had taken the vehicle without authorisation) and that Webster had been employed by the Trust. He denied that he ever referred to "R & R

Construction" as a company or as being owned by a company. He further denied that the investigator had conducted any inquiry into the financial standing of the first defendant in that (as he also testified at the hearing) *inter alia* the first defendant had been dormant since shortly before the close of its financial year as at 29 February 1996. Goetsch also filed a supporting affidavit in which he alleged that he advised the investigator that his dealings had been with the Trust.

[18] The second defendant further contended that the apparent uncertainty which the first respondent's denial, in its plea, that it employed Webster, created for the plaintiff could have been resolved quite simply by the latter in that it could have had recourse to (i) the discovery procedure, (ii) the provisions of Rule 37, (iii) a request for particulars for trial. The first defendant had been under no obligation to offer any explanation in its plea of its denial that Webster had been employed by it. He also stressed that in the rejoinder filed by the first defendant the denial that it had been the employer of Webster was reiterated. (It may be added, however, that the rejoinder went on to state that the first defendant denied that it had permitted Webster to drive the vehicle in question and persisted in its allegation that he stole same).

[19] The second defendant finally disputed that it would be in the

interest of justice for him and the third defendant to be joined in the action. On analysis, it appears that the substantive basis for this stance was three-fold:

(a) The joinder sought would have the result that the plaintiff would have had the benefit of having heard the second defendant's evidence, on behalf of the first defendant, relating to the issue of Webster's employment, and of having cross-examined him thereon, without his or the third defendant's (presumably in their capacities as trustees) having first had the opportunity to seek legal representation and advice;

(b) The plaintiff was attempting to have "a second bite at the proverbial cherry" without the Trust being able to lead evidence on its behalf in refutation of the allegations which would have to be made to sustain a cause of action against it;

(c) The plaintiff, and/or its representatives, having failed correctly to assess the position after receipt of the report of the investigators, were now seeking an opportunity to join the employer of Webster notwithstanding that the claim against the second and third defendants had become prescribed.

[20] As to the replying papers field on behalf of the plaintiff, suffice it to state that Smith and the investigator, Ms Ally, confirmed the allegations that were set out earlier.

[21] In his judgment *Sangoni* J passed severe strictures on the manner in which the first respondent's plea, as filed, was couched, and the second respondent's conduct in the matter. He pointed out that at all material times the second respondent was effectively in control of both entities, the first defendant and the Trust. The evidence of the second respondent, that the Trust was the employer of Webster, was a material piece of evidence on which the first respondent relied. Such evidence was sufficiently material to justify its disclosure in the pleadings – Rule 22 (2) requires a defendant to "state all material facts upon which he relies" – and its omission bordered on misrepresentation in the form of withholding information, and the second respondent could not seek protection against the consequences of such misrepresentation. In similar vein *Sangoni* J found that the terms of the first defendant's rejoinder (ie the portion quoted in brackets at the end of para [18] above) was not compatible with the position of a party alleging that Webster was in the employ of someone else, and the averment was calculated to give a wrong signal to the plaintiff.

In my judgment, the remarks of the learned judge have much to

commend themselves. I would add that if indeed the investigator had been told, as the second defendant and Goetsch now allege, that the Trust was the employer of Webster, one asks why, when the first defendant's plea and rejoinder were subsequently filed, that intelligence was not repeated; instead, the emphasis was placed on the allegation that Webster had stolen the car. Similarly, one questions the coyness of the cross-examiner of Ellis who failed pertinently to put to him the allegation that the Trust was Webster's employer.

[22] It may be true, as suggested by the second defendant (and echoed by *Mr Taljaard* in argument), that the plaintiff could have taken certain steps which might have elicited information to the effect that it was contended that the Trust was Webster's employer. However, in the first place, the plaintiff would not have been bound by such a contention and the result would probably have been an application for joinder at that stage and, in the second place, the suggestion does not meet the comments referred to in the preceding paragraph. In any event, I am not persuaded that any omission on the plaintiff's part required the application to be dismissed.

[23] Mr *Taljaard* sought to stress what he contended was the stance of the plaintiff as reflected by the founding affidavit of Smith in the

application for joinder, viz., that the plaintiff accepted that the Trust was the employer of Webster. The submission, if I understood it correctly, was that in those circumstances *Sangoni* J ought to have refused the application for joinder and left it to the plaintiff to start proceedings afresh against the Trust, if it was so advised. The premise of the argument was mistaken. In the context of the entire application for joinder the relevant paragraph in Smith's affidavit on which counsel fastened was no more than a recording of his view of the position should the allegation that the Trust was the employer of Webster be found to be correct. The stance of the plaintiff was in fact that either the first defendant or the Trust was Webster's employer or, as *Sangoni* J intimated might reflect the true facts, that the first defendant and the Trust were jointly and severally liable to the plaintiff.

[24] Rule 10 (3) provides as follows:

> "Several defendants may be sued in one action either jointly, jointly and severally, separately or in the alternative, whenever the question arising between them or any of them and the plaintiff or any of the plaintiffs depends upon *the determination of substantially the same question of law or fact* which, if such defendant were sued separately, would arise in each separate action."

It need hardly be stated that the requirement reflected by the words that have been emphasised are present in this matter and had the plaintiff *ab initio* joined the second and third defendants, no objection of misjoinder could successfully have been raised thereto.

[25] In my judgment, the order made by *Sangoni* J was the appropriate one to make, Certainly, I am not persuaded that he exercised his discretion in the matter other than in a judicial manner. With reference to certain of the comments appearing in *SA Steel Equipment Co (Pty) Ltd v Lurelk (Pty) Ltd* 1951 (4) SA 167 (T) at 176 the following aspects may be noted:

a) The order made makes no inroads on the rights of any party;

b) It avoids delay and the waste of costs – the alternative would be for the plaintiff to withdraw the present proceedings (with its attendant wasted costs) and commence *de novo* with all the defendants being cited, in the alternative and/or jointly and severally, whereas after joinder the part heard trial would continue subject thereto that the additional defendants would have all the rights of a defendant, including the right to file pleadings, to apply

for the recall of either or both the witnesses who testified on behalf of the plaintiff and to lead such evidence as they may be advised to adduce.

[26] The contentions of the second defendant that the order for joinder runs counter to the interests of justice hold no water.

a) I do not understand the complaint that the second defendant has already given evidence without him or third defendant having had the benefit, in their capacities as trustees, of legal advice and representation. If the suggestion is that his evidence might otherwise have been of a different and contradictory hue, it would be untenable.

b) The second complaint, that the Trust would not be able to adduce evidence on its behalf to refute allegations that the plaintiff must invoke to sustain a cause of action against the Trust, is met by what I have said above relating to the Trust having all the rights of a defendant.

c) The issue whether the plaintiff's claim against the Trust has become prescribed is a matter for pleading and proof in the trial action.

[27] The attack on the order for joinder must accordingly fail.

ORDER

[28] In addition to ordering the joinder sought, *Sangoni* J directed (in paragraph (c) of his order) that: (i) the pleadings as well as the transcript of the proceedings be served on the joined defendants, (ii) within 10 days of such service the joined defendant(s), who wished to defend the action, deliver a notice of intention to defend and thereafter file pleadings in terms of the Rules.

[29] The order was, however, incomplete in that it makes no provision for the plaintiff to file amended particulars of claim such as would be appropriate to reflect the joinder of the two additional defendants and the cause of action invoked against them, a necessary adjunct to the order for joinder. It is proper for this omission to be remedied on appeal. (It is not, however, necessary for any further order giving leave to the first defendant to plead to the amended particulars of claim as Rule 28 (8) already provides therefor).

[30] The following order will accordingly issue:

a) Subject to (b) below, the appeal is dismissed with costs, such costs to be paid by the three appellants, jointly and severally, the one paying the other to be absolved.

b) The order of the court *a quo* is amended by renumbering subparagraphs (i) and (ii) of paragraph (c) thereof as subparagraphs (ii) and (iii), respectively, and the insertion as subparagraph (i) thereof of the following:

> "The applicant is directed to file, within 10 days of this order, amended particulars of claim such as are appropriate to reflect the joinder of the second and third respondents as second and third defendants in the main action and the cause of action invoked by the applicant against them."

F KROON

Judge of the High Court

EBRAHIM J:

I agree

_____
Y EBRAHIM
Judge of the High Court

DAWOOD AJ:

I agree

_____
F DAWOOD
Acting Judge of the High Court

Date of hearing: 12 November 2007

Date of judgment: 15 November 2007

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