


REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case Numbers: 17095/2020;
42437/2021

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
	
DATE 24 May 2024	SIGNATURE

In the matter between:

SABELO MACINGWANE

First Plaintiff

TURQUOISE MOON PROPRIETARY LIMITED

Second Plaintiff

And

**BOSASA YOUTH DEVELOPMENT CENTRES
PROPRIETARY LIMITED (in liquidation)**

First Defendant

RALPH FARREL LUTCHMAN N.O.

Second Defendant

CLOETE MURRAY N.O.

Third Defendant

TANIA OOSTHUIZEN N.O.

Fourth Defendant

JARED MICHAEL WATSON

Fifth Defendant

(in his capacity as the Executor for the Estate Late Gavin Joseph Watson)

NTSIMBINTLE HOLDINGS PTY LTD

Sixth Defendant

TSHEPO HARRY NONYANE N.O.

Seventh Defendant

OFENTSE ANDREW NONG N.O.

Eighth Defendant

[the second to fourth, seventh and eighth defendants are cited in their capacity as the duly appointed provisional liquidators of the first defendant]

**AFRICAN GLOBAL OPERATIONS PROPRIETARY
LIMITED (in liquidation)**

Ninth Defendant

CLOETE MURRAY N.O.

Tenth Defendant

RALPH FARREL LUTCHMAN N.O.

Eleventh Defendant

TANIA OOSTHUIZEN N.O.

Twelfth Defendant

MILANI BECKER N.O.

Thirteenth Defendant

[the tenth to thirteenth defendants are cited in their capacity as the duly appointed provisional liquidators of the ninth defendant]

**AFRICAN GLOBAL HOLDINGS
PROPRIETARY LIMITED**

Fourteenth Defendant

MELA WOMENS INVESTMENT

Fifteenth Defendant

PROPRIETARY LIMITED

NZUZO INVESTMENTS PROPRIETARY LIMITED

Sixteenth Defendant

MPAKO INVESTMENTS PROPRIETARY LIMITED

Seventeenth Defendant

JOHANNES GUMEDE N.O.

Eighteenth Defendant

THEMBA ISHMAEL MNCWABA N.O.

Nineteenth Defendant

CAROL FELICITY MKELE N.O.

Twentieth Defendant

TERENCE ANTHONY PERRY N.O.

Twenty-first Defendant

[the eighteenth to twenty-first defendants are cited in their capacity as trustees of the Bosasa Employees Trust (IT3305/02)]

LULAMA SMUTS NGONYAMA

Twenty-second Defendant

**THUNDERCATS INVESTMENTS 92
PROPRIETARY LIMITED**

Twenty-third Defendant

JUDGMENT

FISHER J

Introduction

- [1] These two associated actions instituted under case numbers 17095/2020 and 42437/2021 were consolidated by consent between the parties. They remain

under their original case numbers but on are consolidated on the basis that they will be considered together¹.

- [2] The plaintiffs in each instance are Messrs Ngonyama and Macingwane and a company in each instance conducted by each of them. I will refer to them respectively as the Ngonyama action and the Macingwane action.
- [3] This judgment is in respect of an exception purportedly brought under rule 23 to the amended particulars of claim in the Macingwane action (by the ninth and eleventh to thirteenth defendants.

Factual background to the actions

- [4] Both actions are founded on similar causes of action and seek substantially the same relief against the same set of defendants, the Liquidators of Bosasa Youth Development Centres (Pty) Ltd (BYDC). The relief sought in both actions is the return of shares in the seventh respondent, Ntsimbintle Holdings (Pty) Ltd on the basis that they were fraudulently obtained.
- [5] This judgment is in respect of a purported exception brought to the amended particulars of claim in the Macingwane action by the ninth and the eleventh to thirteenth defendants.
- [6] The ninth defendant is African Global Operations(Pty)(Ltd)(AGO) in liquidation and the other excipient defendants are its liquidators. AGO was previously known as Bosasa Operations (Pty) Ltd. AGO. The excipient defendants are referred to as the AGO parties.
- [7] The procedural history which led to the AGO parties becoming defendants is relevant.

¹ The heading references both cases but cites details of the case being considered -ie 17095/2020.

Procedural history

- [8] The plaintiffs in the Macingwane action brought an application to join the AGO parties as defendants in that action.
- [9] The application for joinder was brought pursuant to a Supreme Court of Appeal judgment in a matter related to the now consolidated actions in issue in these proceedings, *Watson NO v Ngonyama* [2021] 3 All SA 412 (SCA) (the SCA case).
- [10] In the SCA judgment certain remarks or findings were made in relation to the factual complex which overlaps with the facts in the two actions and specifically the possible interest of the AGO parties in relation thereto.
- [11] In the joinder application, it was alleged by the plaintiffs in the Macingwane action that these overlaps as mentioned in the SCA judgment were such that it was necessary to cite the AGO parties for a possible interest which may exist or emerge in due course in the actions (now consolidated by agreement).
- [12] The joinder application was not opposed by the AGO parties and the joinder was granted.
- [13] Pursuant to the joinder, the particulars of claim in the Macingwane action were duly amended to include the citation of the AGO parties as defendants. The amendment was effected without objection on the part of the AGO parties.

The exception

- [14] The joined AGO parties now seek to except to the particulars of claim as amended on the basis that they disclose no cause of action against them.
- [15] This approach taken by the AGO defendants seeks to confuse the principles of joinder and the rules pertaining to pleading.

[16] It is trite that a party may be cited in proceedings for the sake of convenience or on the basis that they are cited for possible interest although no case is pleaded against them.² That this is the case in the relation to the AGO parties is not seriously in contention.

[17] Axiomatically, this type of joinder is one in which there is no pleading of a cause of action.

[18] The AGO parties argue that when a person is joined for convenience or interest there must, notwithstanding this type of joinder still be an indication in the pleading of the basis of the convenience or interest.

[19] There may be circumstances where this would be required, but I make no determination of this point in that it is not a matter before me and neither is it a matter of pleading.

[20] In the normal course of procedural rights, if someone is joined and they object to their joinder, their remedy would be to bring an application on the basis that they have been mis-joined.

[21] In the same vein if an application is made to join a party and such party objects to being part of the proceedings, that party has the right to oppose the joinder on whatever grounds it sees fit.

[22] The AGO parties did not avail themselves of this procedure. The application to join the AGO parties as defendants was deliberately not opposed.

Costs

[23] The plaintiffs seek costs on a punitive scale on the basis that these proceedings constitute an abuse of this courts process.

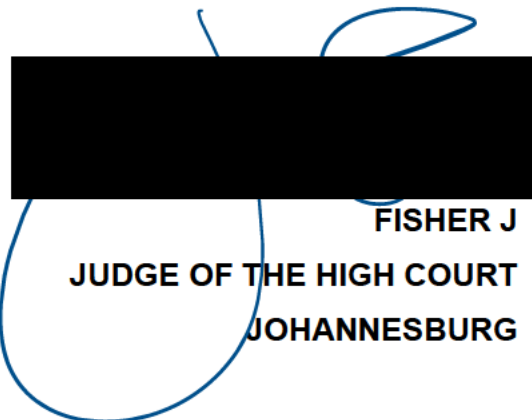
² See *JUDICIAL SERVICE COMMISSION AND ANOTHER V CAPE BAR COUNCIL AND ANOTHER* 2013 (1) SA 170 (SCA) at Para 12.

[24] I am inclined to agree. The approach taken is patently anomalous with reference to the requirements of section 23 and the trite common law right to join for interest or convenience as opposed to cause of action.

Order

[25] I thus make the following order:

The exception is dismissed with costs such costs to be on the scale as between attorney and client and to include the costs of two counsel where employed.



FISHER J
JUDGE OF THE HIGH COURT
JOHANNESBURG

This Judgment was handed down electronically by circulation to the parties/their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be .

Heard: 29 April 2024

Delivered: 24 May 2024

APPEARANCES:

Plaintiff's (Respondent's) counsel: Adv. N Maenetje S.C
Adv. N Luthuli

Instructing Attorneys:

Edward Nathan Sonnenbergs Inc.

Defendant's (Excipients) Counsel:

Adv. D M Leathern S.C

Adv A A R Marques

Instructing Attorneys:

VFV Attorneys