REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 303/2006

In the matter between:

LUCIAN MARTIN **APPLICANT**

and

DIROYAL MOTORS NAMIBIA (PTY) LTD t/a
NOVEL FORD **FIRST RESPONDENT**

BRADLEY GRAHAM JARMAN **SECOND RESPONDENT**

WILLIAM DAVID LEWIN **THIRD RESPONDENT**

Neutral citation: *Lucian Martin v Diroyal Motors Namibia (Pty) Ltd t/a Novel Ford* (I 303/2006) [2013] NAHCMD 22 (28 January 2013)

Coram: UEITELE J

Heard: **15 August 2012**
Delivered: **28 January 2013**

Flynote: Practice - Parties - Joinder of - defendant applying to join a co-defendant - Court has a discretion to direct that a third party be joined as a defendant purely on the grounds of convenience especially in order to save costs or to avoid multiplicity of actions even if the third respondent is not a necessary party.

Summary: The plaintiff (first respondent in this application) had claimed damages from the first defendant (second respondent) and second defendant (applicant) resulting from a collision between three vehicles, one vehicle was driven by the first defendant, the second vehicle was driven by the second defendant and the third vehicle was driven by an employee (who is sought to be joined as third defendant) of the plaintiff. In his plea the second defendant had pleaded, *inter alia*, that the collision was caused through the negligence of the third respondent, which 'together with that of the second defendant had operated jointly and simultaneously'.

In an application by the second defendant for an order as against the plaintiff and third respondent that the latter be joined as a third defendant, only the third respondents objected to such joinder.

Held, that, in the circumstances, the court had a discretion to permit the joinder, notwithstanding that the third respondent did not have a direct and substantial interest in the proceedings and notwithstanding that his rights would not be affected by the judgment of the court if he were not joined.

Held, further, that it would be eminently convenient, and in accordance with the interests of justice, if the third respondent were to be joined as a third defendant on such terms as would enable and require the Court to decide, *inter alia*, whose negligence caused the collision and, if it was the negligence of both the second and third respondent, their respective degrees of fault.

ORDER

1. (a) That William David Lewin of No 25, Neptune Street, Narraville, Walvis Bay employed by novel Ford, Walvis Bay be and is hereby joined as the third defendant in the action instituted against the second defendant by the plaintiff.

(b) The second defendant is granted leave to amend the pleadings so as to reflect the joinder.

2. The second defendant is ordered to cause a copy of the pleadings to date (with the amendment contemplated in paragraph 1(b)) of this order to be served upon the third respondent not later than ten days from the date of this order.

3. The third respondent is given leave to, not later than ten days from the date that the copy of the pleadings are served on him, request further particulars to the allegations in the plaintiffs particulars of claim or in the second defendant's plea which relate to him and thereafter, not later than seven days after the answer to the request has been filed, file a plea replying to the allegations in the second defendant's plea which relate to him and to any allegation in the plaintiff's particulars of claim which relates to him.

4. Each party is to pay its own wasted costs for 18 July 2012;

5. The costs of this application will be costs in the main action, but subject to Rule 10(3).

JUDGMENT

UEITELE J:

A INTRODUCTION

[1] This is an application in which the applicant seeks the following orders:

"1. That 3rd respondent is joined as a 3rd defendant in the action instituted by the 1st respondent/plaintiff against the applicant/2nd defendant and the 2nd respondent/1st defendant.

2. Granting leave to 3rd respondent to enter an appearance to defend the action within 10 days of his joinder as defendant in the main action;

3. That the costs of the application be costs in the cause of the main action;

4. Further and/or alternative relief."

[2] The applicant in this application is Lucian Martin, who is the second defendant in the main action. I will, in this judgment, refer to the applicant as the second defendant.

[3] The first respondent in this application is Diroyal Motors Namibia (Pty) Ltd t/a Novel Ford, a company with limited liability. The first respondent is the plaintiff in the main action. I will, in this judgment, refer to the first respondent as the plaintiff.

[4] The second respondent (who is the first defendant in the main action) in this application is Bradley Graham Jarman, an unemancipated minor male person (at the time the action was instituted), who is assisted by this mother Sophia Elizabeth Jarman. I will, in this judgment, refer to the second respondent as the first defendant.

[5] The third respondent in this application is William David Lewin, who is employed by Novel Ford, Walvis Bay.

B BACKGROUND TO THE APPLICATION:

[6] On 20 August 2005, a collision occurred at the intersection of Sam Nujoma Drive and Moses Garoeb Streets, in Swakopmund. The collision involved three motor vehicles namely, a Toyota Corolla 1.6 GL motor vehicle with registration number and letters N 16418 WB. (I will, in this judgment, refer to this motor vehicle as the Toyota Corolla), a green Opel Corsa motor vehicle with registration number and letters N 2222 R. (I will, in this judgment, refer to this motor vehicle as the green Opel Corsa), and a grey Opel Corsa with registration number and letters N 5145 S. (I will, in this judgment, refer to this motor vehicle as the grey Opel Corsa).

[7] The Toyota Corolla motor vehicle belonged to the plaintiff and it was driven by the third respondent at the time of the collision. The green Opel Corsa was driven by the first defendant at the time of the collision, while the grey Opel Corsa was driven by the second defendant at the time of the collision.

[8] The plaintiff alleges that the collision was caused by the joint negligence of the first and second defendants. On 15 February 2006, the plaintiff instituted action against the first and second defendants in which action it claimed damages in the amount of N$49 794. Both the first and second defendants defended the action.

[9] On 2 April 2006, the second defendant delivered his plea. In his plea, he among others:

> ‘a) Denied that a collision occurred between the grey Opel Corsa and the Toyota Corolla;
> b) Denied that his (second defendant’s) negligence caused or contributed towards the plaintiff’s damages; and
> c) Pleaded in the alternative that if it is found that the second defendant was jointly negligent with the first defendant and that his (second defendant’s) negligence caused or contributed to the plaintiff’s damages, then the driver of the plaintiff’s vehicle, a certain William David Lewin (the third respondent) was also negligent and that the second defendant’s negligence only caused or contributed to the collision to a lesser degree than the negligence of first defendant and the driver of the plaintiff’s vehicle.’

[10] The plaintiff did not replicate to the second defendant’s plea. After an exchange of some pleadings (request for further particulars to second defendant’s plea and the further particulars supplied by the second defendant) the second defendant launched an application on 12 October 2007 in which application he sought to join the third respondent as a third defendant in the main action. The

second defendant sets out (in his supporting affidavit) the grounds upon which he seeks to join the third respondent as follows:

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> I specifically pleaded that Third Respondent was also negligent and as result Third Respondent having contributed to the collision and First Respondent‘s motor vehicle was damaged in the collision by the motor vehicle driven by Second Respondent and not by the motor vehicle driven by me.
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> I further specifically denied in my Plea that First Respondent’s motor vehicle was damaged as a result of my negligence.
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> On the 27 June 2007 Third Respondent testified as a State witness in the criminal (*sic*) in the Swakopmund Magistrate’s Court which followed as a result of the relevant collision and in which myself (*sic*) and the Second Respondent are charged with culpable homicide and Third Respondent conceded under oath that he did not keep a proper look out when he entered the said intersection and that he did not apply his brakes.
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> Third Respondent further conceded under oath at such trial that if he had kept a proper look out when entering the said intersection and applied his brakes timeously he could have avoided a collision.
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> I therefore submit that Second and Third Respondent’s negligence contributed to the damages caused in the collision and that should the court find that I was negligent in any respect and the First Respondent suffered damages as a result of my negligence as such, then in such an event the Court should be able to make an order for the apportionment of damages in accordance with the respective parties negligence.’

[11] The application to join the third respondent as third defendant was set down for hearing on 23 November 2007. On 14 November 2007, the third respondent gave notice that he will oppose the second defendant's application to join him (third respondent) as third defendant in the main action. The plaintiff and first defendant did not oppose the application.

[12] On 23 November 2007, the application for joinder did not proceed but was postponed to a date to be arranged with the Registrar of this Court. On 4 December 2007, the third respondent gave notice in terms of rule 6 (5) (*d*) (iii) that he intends to raise questions of law only at the hearing of the application to join him (third respondent) as a third defendant.

[13] Between 23 November 2007 (when the matter was postponed) and 21 September 2011 when the file was allocated to a managing judge and when the managing judge called for a case management conference, nothing or little was done to have the application heard. The matter that was placed on the case management roll was the main action between the plaintiff and the first and second defendants. That matter appeared on the case management rolls of 21 September 2011, 05 October 2011, and 14 November 2011. On the 14 November 2011 the managing judge removed the matter from the roll (as the pleadings had not yet closed) and ordered the second defendant 'to urgently file the joinder application'. It appears (I say 'appears' because, there is an allegation in second defendant's legal practitioner's letter of 06 March 2012 of a judicial case management conference held on 22 February 2012, but I have not seen the notice calling for a case management conference or the court order of 22 February 2012 on file) that on 22 February 2012 another case management conference was called and the managing judge ordered that the matter be set down, for hearing the joinder application, on 18 July 2012.

[14] On 06 March 2012, the second defendant's legal practitioners addressed a letter to the third respondent's legal practitioner advising them that the "joinder application" was set down for hearing on 18 July 2012. On 16 March 2012 the third respondent's legal practitioner replied and stated that the "date of 18 July 2012 is

suitable for the hearing of the joinder application". The second defendant's legal practitioner's advances no reasons why she had to write that letter to the third respondent's legal practitioners.

[15] The matter was on the case management roll of 16 May 2012 and on that day, the Court made an order confirming that the application to join the third respondent as third defendant is set down for hearing on 18 July 2012. The Court further ordered that the plaintiff files its heads of argument on or before 25 June 2012 and that the first and second defendants file their heads of argument on or before 02 July 2012. The order of 16 May 2012 does not indicate that the third respondent was cited as a party to the proceedings in court on that day, nor was third respondent in court on that day or the court order served on him.

[16] When the matter was called on 18 July 2012 before me, the third respondent had not filed its heads of argument and he requested that the matter be postponed. The second defendant did not oppose the application for postponement but insisted that he be awarded the wasted costs for the day. I granted the postponement and postponed the matter to 15 August 2012 for hearing the joinder application. When I granted the postponement I also ordered that the question of the wasted costs would also be argued on 15 August 2012.

C THE ISSUE TO BE DECIDED:

[17] The questions which I am called upon to decide in this matter are as follows:

(a) Is the second defendant entitled to join the third respondent as a third defendant in the main action under common law?

(b) Shouldn't the second defendant have followed rule 13 of this court's rules?

(c) Is the second defendant circumventing the provision of the apportionment of Damages Act 34 of 1956, by bringing the joinder application?

(d) Who must bear the costs wasted as a result of postponing the hearing on 18 July 2012?

Is the second defendant entitled to join the third respondent as third defendant in the main action?

[18] It was submitted on behalf of the third respondent that, at common law the second respondent is not entitled to join the third respondent as a third defendant to the main action, and there being no rule of court authorising such joinder, this court does not have the power to order the joining of the third respondent. Mr. Van Zyl who appeared on behalf of the third respondent referred me to the case of *Pepper v Lipschitz and Another*[1] as authority for that proposition. I will return to this case in the cause of this judgment.

[19] I will start off by looking at the general legal principles. Cilliers *et al*[2] argue that: "at common law the courts had a discretion to allow joinder of a party on the basis of convenience". In the matter of *Khumalo v Wilkins and Another*[3] Milne J said*:*

> 'In my view, however, the Court has a discretion to direct that a third party be joined at the instance of a defendant even where the plaintiff and the proposed co-defendant object thereto. It is clearly implicit in the judgment of Van den Heever, J.A., in *Sheshe's* case, *supra*, that the Court has a discretion to direct that a third party be joined. Cf. also *Roberts Construction Co. Ltd. v Verhoef*, 1952 (2) SA 300 (W) at pp. 308G to 309. Cf. also *Anderson v Gordik Organisation*, 1962 (2) SA 68 (D), in which CANEY, J., (a) found, inter alia, that joinder may be justified even if the person joined is not a necessary party, see p. 70D - E, and (b) accepted that the Court could, in a proper case, permit the joinder purely on the grounds of convenience especially in order to save costs or to avoid multiplicity of actions.'

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1 1956 (1) SA 423 (W).

2 Cilliers A C, Loots C & Nel H C *Herbstein and Van Winsen;* The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa: 5th Edition, Juta at page 210.

3 1972 (4) SA 470 at page 475 E-G.

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[20] In the case of *Rabinowitz and Another NNO v Ned-Equity Insurance Co Ltd and Another* [4] Nicholas J said:

> 'Under the common law a number of defendants may be joined whenever convenience so requires subject to the power of the Court to order separation of the actions (see *Van der Lith v Alberts and Others* 1944 TPD 17).' Also see the case of *Ex Parte Sudurhavid (Pty) Ltd: In Re Namibia Marine Resources Pty) Ltd v Ferina (Pty) Ltd*[5].

[21] The decision in the *Pepper's* case[6], created uncertainty as regards the extent of the court's power to order a joinder. The uncertainty was created by the following statement by Bekker J, (and this is the statement relied on by Mr. Van Zyl to argue that this court cannot order the third respondent to be joined as the third defendant in the main action):

> 'Considerations, no matter how appealing, based on convenience, equity, the saving of costs or the avoidance of multiplicity of actions, cannot in my view, create a power to direct a joinder, where it is not necessary for the determination of the plaintiff's rights - and a determination – which will not have any binding effect on the rights and liabilities of the person sought to be joined. Where both these persons object to the proposed joinder, then it seems to me, in the circumstances mentioned, plaintiff's position as *dominus litis*, and his rights as such, should be respected and brook no interference... '

[22] Also see the case of *Marais and Others v Pongola Sugar Milling Co. Ltd and Others*[7] 1961(2) SA 698, where Wessels J said:

> 'I do, however, gather from the various judgments that I have consulted that even in those cases where the Court has a discretion where the matter of joinder of a party is raised, it must at least be shown that that party is a necessary party in the sense that he is directly and substantially interested in the issues raised in the proceedings

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4 1980 (3) SA 415 (W) at page 419.
5 1993 (2) SA 737 (NM).
6 *Supra* footnote 1 at pages 428-429.
7 1961 (2) SA 698 (N) at page 702 F-G.

before the Court and that his rights may be affected by the judgment of the Court. When this is once established the Court will then proceed to determine the matter of joinder in accordance with the requirements of convenience and common sense... '

[23] The cases of Pepper[8] & *Marais*[9]: were considered by Milne J in the case of *Khumalo*[10] where he said (as regards the judgment in the *Marais* case):

'If, however, the passage in the *Marais* case which is set out above[11] is a correct statement of the law, then the Supreme Court would have no power to authorize the joinder of a defendant in these circumstances even where the plaintiff sought such a joinder unless, of course, the persons sought to be joined consented thereto. In *Pepper v Lipschitz*, Bekker J, appears to accept the proposition that in circumstances such as these the Court would have power at the instance of the plaintiff to direct the joinder of a defendant if it appeared that 'considerations based on justice, equity and convenience dictated that joinder should be directed or authorised' at p. 428E. Furthermore, the decision of Caney J, in *British Oak Insurance Co. Ltd. v Gopali and Another*, 1955 (4) SA 344 (D), was, apparently, not brought to the attention of the learned Judge in the *Marais* case. Admittedly in that case neither the plaintiff nor the person sought to be joined opposed the joinder, but the Court did not deal with the matter on the basis of a consent but investigated whether or not the Court had power to grant any of the relief sought. In any event I am, with the greatest respect, constrained to differ from the view of Wessels J, which is set out above. In my view, once it is shown that a party 'is a necessary party in the sense that he is directly and substantially interested in the issues raised in the proceedings before the Court and that his rights may be affected by the judgment of the Court' the Court will not deal with those issues without such a joinder being effected, and no question of discretion nor of convenience arises. In my view, this is what was decided in *Amalgamated Engineering Union v Minister of Labour*, 1949 (3) SA 637 (AD) at p. 659. *See also Sheshe v. Vereeniging Municipality*, 1951 (3) SA 661 (AD) at p. 666… '

[24] With respect to the Pepper case the learned judge said:

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[8] *Supra* footnote 1.
[9] *Supra* footnote 7.
[10] Supra footnote 3 at pages 474 F-H- 475A.
[11] Footnote 7.

> 'I do consider, therefore, that the court has a discretion to permit the joinder of a defendant in circumstances such as the present, notwithstanding that the person sought to be joined does not have a direct and substantial interest in the proceedings and notwithstanding that his rights would not be affected by the judgment of the court if he were not joined. This is contrary to the decision in *Pepper's* case, *supra*. In that case, however, Bekker J, was clearly strongly influenced in coming to the conclusion which he did by the fact that he would have been ordering the joinder of a concurrent as opposed to a joint tort feasor which was, until the introduction of the old Union Rule 12, bad and objectionable and accordingly 'something which ran counter to general principles'. It seems clear that in the circumstances of this case the appellant and the second respondent were acting independently of each other and could only be concurrent and not joint wrongdoers. Nevertheless, as pointed out by Trollip J, in *Windrum v Neunborn*, 1968 (4) SA 286 (T) at p. 288A, sec. 2 (1) of the Act [i.e. the Apportionment of Damages Act,1956 (Act 34 of 1956)] made such persons joint wrongdoers vis-à-vis the first respondent subject to the obligations and rights set out in Chap. II of the Act.'

[25] In the present matter, I fully associate myself with the reasoning of Milne J[12] when he said '*Obviously the appellant could not claim, as of right, that the second respondent be joined. Such a joinder is not necessary for the determination of the plaintiff's rights and if no joinder is effected such a determination would not have any binding effect on the rights and liabilities of the second respondent. In my view, however, the Court has a discretion to direct that a third party be joined at the instance of a defendant even where the plaintiff and the proposed co-defendant object thereto… '* I find a similar situation applicable in this case, the second defendant cannot as of right claim that the third respondent be joined. Such a joinder is not necessary for the determination of the plaintiff's rights and if no joinder is affected such a determination would not have any binding effect on the rights and liabilities of the third respondent.

[26] I am of the view that it will be convenient, and in accordance with the interests of justice, if the third respondent were to be joined as a third defendant on such terms as would enable and require the court to decide, *inter alia*, whose negligence caused

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[12] In *Khumalo's* case supra footnote 3.

the collision and, if it was the negligence of both the second defendant and the third respondent, their respective degrees of fault. I therefore hold, that the Court has a discretion to direct that the third respondent be joined (as a third defendant in the main action), purely on the grounds of convenience especially in order to save costs or to avoid multiplicity of actions even if the third respondent is not a necessary party.

[27] Having come to the conclusion that the court has the discretion to order that the third respondent be joined as a third defendant in the main action, I do not find it necessary to deal with the second and third questions raised by the third respondent. I will thus turn to the fourth question, namely, the question of who should bear the costs of 18 July 2012.

[28] The third respondent's application for postponement of the matter on 18 July 2012 was not opposed. The second defendant's counsel, however, insisted that the wasted costs occasioned by the postponement be paid by the third respondent.

[29] The basic rule is that, except in certain instance where legislation otherwise provides, all awards of costs are in the discretion of the court.[13] It is trite that the discretion must be exercised judiciously with due regard to all relevant considerations. The court's discretion is a wide, unfettered and equitable one.[14] The principal facts and circumstances to which I have regard in the exercise of my discretion are the following:

(a) The second defendant's application to join the third respondent as third defendant was successful.
(b) It is not clear from the record as to whether the setting down of the matter for a case management conference on 26 February 2012 was served on the third respondent, but what is clear is that at all the other case management conferences (ie on 21 September 2011, 05 October 2011 & 14 November 2011) the third respondent was not a party, to those proceedings, nor was it

[13] *Hailulu v Anti-Corruption Commission and Others* 2011 (1) NR 363 (HC) and *China State Construction Engineering Corporation (Southern Africa) (Pty) Ltd v Pro Joinery CC* 2007 (2) NR 674.
[14] *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045.

served with any of the pleadings or the court orders made at those case management conferences;

(c) On 6 March 2012 the second defendant's counsel indicated to the third respondent's counsel that the application for joinder is set down for hearing on 18 July 2012. On 16 March 2012 legal practitioner for the third respondent indicated that the date of 18 July 2012 will suit it for the hearing of the matter.

(d) A further case management conference was called for the 16 May 2012. The court order of 16 May 2012 indicates that the third respondent was not a party to the proceedings of 16 May 2012 and the court order of 16 May 2012 was not served on the third respondent. I interpose here to observe that the second defendant's legal practitioner ought to have picked up these errors and have them corrected, but the second defendant's legal practitioner took no steps to correct the patent errors.

(e) The second defendant's heads of arguments were not served on the third respondent until 11 July 2012 (that is four days) before the date on which the hearing of the application was set down.

[30] All in all, balancing the factors I have set out above in paragraph 29 against the background of the case, I do not see the scale readily descending in favour of one party or the other. Each of them, in his own way, contributed towards the postponement of the matter on 18 July 2012. I am of the view that it would be just and fair that each party should bear his own wasted costs, and so it shall be.

[31] I accordingly make the following order:

1. (a) That William David Lewin of No 25, Neptune Street, Narraville, Walvis Bay employed by novel Ford, Walvis Bay be and is hereby joined as the third defendant in the action instituted against the second defendant by the plaintiff.

(b) The second defendant is granted leave to amend the pleadings so as to reflect the joinder.

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2. The second defendant is ordered to cause a copy of the pleadings to date (with the amendment contemplated in paragraph 1(b)) of this order to be served upon the third respondent not later than ten days from the date of this order.

3. The third respondent is given leave to, not later than ten days from the date that the copy of the pleadings are served on him, request further particulars to the allegations in the plaintiffs particulars of claim or in the second defendant's plea which relate to him and thereafter, not later than seven days after the answer to the request has been filed, file a plea replying to the allegations in the second defendant's plea which relate to him and to any allegation in the plaintiff's particulars of claim which relates to him.

4. Each party is to pay its own wasted costs for 18 July 2012;

5. The costs of this application will be costs in the main action, but subject to Rule 10(3).

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SFI Ueitele
Judge

APPEARANCES

APPLICANT	C J MOUTON Instructed by Koep & Partners, Windhoek.
FIRST RESPONDENT	NO APPEARANCE
SECOND RESPONDENT	NO APPEARANCE
THIRD RESPONDENT	C J VAN ZYL Instructed by Metcalfe Attorneys, Windhoek.