

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA
NORTHERN LOCAL DIVISION, OSHAKATI
PRACTICE DIRECTION 61

Case Title: Bonsec Investment Two Five Three CC Plaintiff and Bruce Kudada Defendant	Case No: HC-NLD-CIV-ACT-CON-2021/00343
	Division of Court: High Court, Northern Local Division
	Heard on: 19 March 2024
	Delivered: 12 April 2024

Heard before: Honourable Mr. Justice Munsu

Neutral citation: *Bonsec Investment Two Five Three CC v Bruce Kudada* (HC-NLD-CIV-ACT-CON-2021/00343) [2024] NAHCNLD 36 (12 April 2024)

ORDER

1. The application by the Defendant to join Ms Jacqueline Ying Zhang as second plaintiff and K DEE Investments CC as first defendant is dismissed.
2. The Defendant must pay the Plaintiff's costs of opposing the application, subject to rule 32(11).
3. The Parties are to file a Joint Pre-Trial Report on or before 03 June 2024.
4. The matter is postponed to 06 June 2024 at 08:30 for Pre-Trial Conference.

MUNSU J:Introduction

[1] The plaintiff instituted action against the defendant for payment of a sum of money allegedly owed to the plaintiff by the defendant. The claim is premised on an alleged acknowledgment of debt agreement allegedly entered into by the parties. The matter is defended and is currently at pre-trial stage.

[2] Presently serving before court for determination is an application for joinder brought by the defendant. The defendant seeks to join a natural person, one Jacqueline Ying Zhang as second plaintiff, and a juristic person K DEE Investments CC as first defendant. It is common cause that the defendant is a member of K DEE Investments CC.

The application

[3] In his founding affidavit, the defendant states the reason for his intended joinder of Ms Zhang to be that her rights would likely be affected by the judgment or order of this court due to assertions made in her filed witness statement that the defendant signed the acknowledgment of debt, while the defendant asserts in his witness statement that his signature was forged by Ms Zhang. The defendant claims that the plaintiff approached the court with dirty hands.

[4] In respect of K DEE Investments CC, the defendant claims that joinder should be granted due to the interest it has in the matter since the acknowledgment of debt emanates from a lease agreement between the plaintiff and K DEE Investments CC.

[5] The defendant states that granting joinder would not be prejudicial to any party, but that, it would be unjust if Ms Zhang and K DEE Investments CC are not joined as they would be denied an opportunity to respond to the allegations in the particulars of claim in so far as they relate to the alleged acknowledgment of debt.

[6] The defendant adds that both Ms Zhang and K DEE Investments CC have a direct and

substantial interest in the matter to the extent that it cannot be said that an order or judgement of this court would not be prejudicial to their interests.

The opposition

[7] The plaintiff opposes the application on the following grounds:

- a. Ms Zhang never entered into an agreement with the defendant in her personal capacity;
- b. Ms Zhang is not a member of the plaintiff, thus she does not have any direct and substantial interest in the issue between the plaintiff and the defendant.
- c. The defendant fails to disclose Ms Zhang's alleged interest in the matter to justify her joinder as a plaintiff. Ms Zhang stands to gain nothing as plaintiff in this matter and no order in law can be sought against her personally by the plaintiff and the defendant nor K DEE Investments CC.
- d. Ms Zhang does not intend to pursue any relief for herself, neither does the plaintiff nor the defendant make such averment in their papers.
- e. There is absolutely no order that this court can make that will prejudice Ms Zhang's personal rights as she is not a member of the plaintiff and cannot be held liable for any claims against it.
- f. As regards the joinder of K DEE Investments CC, the plaintiff contends that the defendant is a member of K DEE Investments CC, and only the defendant can answer on behalf of K DEE Investments CC, however, the plaintiff seeks no relief against K DEE Investments CC now or in future. Thus, any allegation K DEE is expected to answer is unknown.
- g. The defendant mentions averments that appear in witness statements and wants the court to deal with same at this stage of the proceedings. Any such attempt from the court would be premature and irregular. The content of the witness statements can only be disposed of by the court at trial stage when evidence would be led and after the witness statements are admitted into the record in accordance with the rules of court. If the defendant has any issues with the content thereof, the legal process allows him to cross examine the author (Ms Zhang) and call any other witness he so wishes with leave of the court or in accordance with the applicable rules of this court.
- h. Should Ms Zhang be joined as plaintiff, that would require her to file further pleadings and the plaintiff and defendant to amend their papers, which would prejudice the plaintiff financially and the interest of justice as further unnecessary delays will occur.
- i. Pleadings in this matter are closed and the defendant does not explain why it suddenly seeks joinder of parties when he did not raise a special plea or an exception at the

opportune stage if he had an issue with the current citation of the parties.

- j. Potential disputes are not a reason in law to apply for joinder. It is apparent that the defendant wants to amend its pleadings and wants to hide behind the process of joinder to do so.
- k. There is no legal basis on which to join the alleged parties as the current suit is based on the acknowledgment of debt which the plaintiff alleges the defendant acceded to in his personal capacity, and not the lease agreement referred to by the defendant.

Discussion

[8] In *Kleynhans v Chairperson of the Council for the Municipality of Walvis Bay and Others*¹ the court had the following to say:

‘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.’²

[9] The present suit is premised on an acknowledgment of debt allegedly entered into by the plaintiff and the defendant. It is not alleged by any of the parties, including the defendant that K DEE Investments CC was party to the said acknowledgment of debt agreement. There is no relief sought against K DEE Investments CC.

[10] According to the defendant, Ms Zhang and K DEE Investments CC should be joined in order to answer to the allegations in the particulars of claim. The particulars of claim merely allege that the plaintiff and the defendant entered into the said acknowledgment of debt and that the defendant failed to fulfill his obligations in terms thereof. It is not clear what allegation Ms Zhang or K DEE Investments CC is expected to answer in terms thereof. It is worth noting that the plaintiff is a juristic person. The plaintiff makes out a case that Ms Zhang is not a member of the plaintiff and never entered into the aforesaid agreement in her personal capacity. The defendant does not

¹ *Kleynhans v Chairperson of the Council for the Municipality of Walvis Bay and Others* 2011 (2) NR 437.

² At 447 para 32.

disclose any interest Ms Zhang or K DEE Investments CC has in the subject matter of the litigation which may be affected or prejudiced by the judgment of the court.

[11] The defendant correctly submits in his heads of argument that, it is settled law that the right of a defendant to demand the joinder of another party and the duty of the court to order such joinder or to ensure that there is waiver of the right to be joined, are limited to cases of joint owners, joint contractors and partners.³ Nevertheless, the defendant does not specify which parties in this case are partners, joint contractors, or joint owners in order to justify their joinder.

[12] It appears from the application that the defendant makes allegations in his filed witness statement, on which basis he seeks to join the mentioned parties. However, the allegations referred to merely restate the defendant's stance in respect of the alleged acknowledgment of debt, namely, that it is not authentic. The dispute regarding the authenticity of the acknowledgment of debt is the subject of a trial, at which the parties who allegedly signed it, including Ms Zhang will testify.

[13] It is worth noting that the defendant did not file a counterclaim. While the plaintiff's case is premised on the alleged acknowledgment of debt, the defendant, in this application, seems to attempt to draw the court's attention to some other agreement between the plaintiff and K DEE Investments CC, upon which the plaintiff's case is not predicated. It is for the plaintiff as *dominis litis*, to prove its case, otherwise, the claim stands to be dismissed. But, it is not for the court to delve on issues unrelated to the case for determination. It is for this reason that the plaintiff contends that the aim of this application is for the defendant to amend its pleadings under the disguise of joinder.

[14] The matter is at an advanced stage of pre-trial, with pleadings having closed and witness statements having been filed. The action was instituted during the year 2021. Thus, the joinder of new parties will not only be prejudicial to the plaintiff but also to the interests of the administration of justice as the matter has been on the court roll for more than two years. Apart from the fact that the application lacks merit, there is no proper explanation why the defendant suddenly seeks joinder when he did not raise a special plea of non-joinder or file an exception at the earliest opportunity.

[15] I therefore make the following order:

1. The application by the Defendant to join Ms Jacqueline Ying Zhang as second plaintiff and K

³ See *United Watch & Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another* 1972 (4) SA 409 (C) at 415E.

DEE Investments CC as first defendant is dismissed.

2. The Defendant must pay the Plaintiff's costs of opposing the application, subject to rule 32(11).
3. The Parties are to file a Joint Pre-Trial Report on or before 03 June 2024.
4. The matter is postponed to 06 June 2024 at 08:30 for Pre-Trial Conference.

	Note to the parties:
D MUNSU Judge	None
Counsel:	
Plaintiff:	Defendant:
M Nyambe Of Mukaya Nyambe Inc. Ongwediva.	A Shapumba Of Shapumba & Associates Inc. Ondangwa.