

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 38204/22

(1) REPORTABLE: YES/NO  
(2) OF INTEREST TO OTHER JUDGES: NO  
(3) REVISED: NO

Date: 30 August 2023 E van der  
Schvff

In the matter between:

JOSE LUIS RODRIGUES BAPTISTA N.O.

FIRST APPLICANT

JACO VAN ROOYEN N.O.

SECOND APPLICANT

JORGE MENDONCA VELOS N.O. OF THE  
BEST TRUST COMPANY (JHB) (PTY) LTD

THIRD APPLICANT

and

QUICKSTEP 684 (PTY) LTD

FIRST RESPONDENT

EDWARD EDUMAN MILNE

SECOND RESPONDENT

PAUL HESSOP

THIRD RESPONDENT

ADRIAAN COMBRINK

FOURTH RESPONDENT

CHRISTOPHER RILEY

FIFTH RESPONDENT

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JUDGMENT

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Van der Schvff J

## Introduction

- [1] On 1 March 2023, I granted an order upholding a point *in limine* regarding non-joinder, raised by the respondents. I simultaneously ordered that all the shareholders and purported shareholders of the first respondent and the directors purportedly elected at the meeting of 24 May 2022 must be joined as respondents to the application. The order provided for all the papers filed of record to be served on the said shareholders and purported shareholders and directors and set a timeline for the further filing of, amongst others, notices of intention to oppose, answering affidavits, and the like.
- [2] The applicants subsequently filed a 'Filing Notice' citing forty-five respondents. That is forty respondents in addition to the five respondents initially cited in this application. The filing notice was accompanied by an affidavit titled 'Affidavit of Service – Joinder'.
- [3] The deponent to the affidavit, the applicants' attorney of record, explains in this affidavit how the list of shareholders and purported shareholders and directors to be joined was established, and how the court papers were served on them. The affidavit also indicates that the time period for filing a notice of opposition in terms of the court order expired on 18 April 2023.
- [4] The second to fifth respondents (the respondents) subsequently caused a notice in terms of Rule 30(2)(b) to be served on the applicants' attorney. The irregularity complained of is said to be that:
- 'The Plaintiff's (*sic.*) Filing and Notice and Affidavit of Service – Joinder as served on the Defendants via e-mail on 19 May 2023, constitutes an irregular step.'

The respondents demanded that the applicants withdraw the Filing Notice and Affidavit of Service – Joinder.

[5] The applicants did not withdraw the Filing Notice and Affidavit. The respondents subsequently delivered an application in terms of Rule 30(1).

[6] The parties are referred to as in the main application.

### **The Rule 30(1) application**

[7] The respondents are of the view that the applicants failed to comply with the court order dated 1 March 2023 in that they did not serve the shareholders, purported shareholders, and directors (the identified parties) with a joinder application but served them with the court papers. As a result, they contend, the filing of the Affidavit of Service – Joinder, constitutes an irregular step.

[8] The respondents' contention is that it was incumbent on the applicants to bring a separate, formal application in terms of the Uniform Rules of Court for leave to join the identified parties.

### **The parties' respective submissions**

#### *The respondents' submissions*

[9] The respondents submit that Rule 10 of the Uniform Rules of Court, read with Rule 6, provides for the procedure. The applicants have not followed the proper procedure (the procedural issue) and failed to serve the purported joinder application per Rule 4 (the service issue).

- [10] The respondents referred to *Hofmann N.O. and Another v Livewell Devco 1 (Pty) Ltd*,<sup>1</sup> and *Bayer Intellectual Property GMBH and Others v New Clicks South Africa (Pty) Ltd and Others*,<sup>2</sup> in support of its view that it is incumbent upon a party to bring a substantive application supported by an affidavit if it seeks to join another party to the proceedings. The party to be joined should be given due notice of the application, and the basis for the joinder should be set out fully to enable the party to be joined to answer thereto and, if need be, oppose the joinder application.
- [11] The respondents aver that the court 'would not have granted an order joining parties to the main application' where those parties have not been given notice of the joinder or an opportunity to oppose the joinder application. The respondents also take issue with how the applicant determined the respective identities of the identified parties and how the court papers were served.

*The applicants' submissions*

- [12] The applicants submit that on reading the order, it is 'patently evident' that the court did not contemplate or direct that a separate, substantive joinder application be brought before the identified parties are joined to the proceedings. This is evident from the fact that after paragraph 2 of the order, where it is ordered that the identified parties be joined, directory orders followed, explaining how the joinder was to take place. Paragraph 3 of the order refers to 'joined respondents', and submits counsel, it 'is obvious to any reasonable reader' that the joinder directed was affected by the service of the papers filed of record. The order would have been phrased differently if it was required to bring a separate substantive application for joinder.
- [13] The applicants additionally contend that the Rule 30(2)(b) notice was out of time, and that prejudice is a requirement for a successful application in terms of Rule 30(1). In the unique context of the facts, I am not of the view that the application is out of time. As for the submission regarding the lack of prejudice, the court was

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<sup>1</sup> (20317/2017) [2022] ZAWCHC 209 (28 October 2022).

<sup>2</sup> (2099/2022; 06238/2009) [2023] ZAGPPHC 411 (7 June 2023)

referred to *Afrisun Mpumalanga (Pty) Ltd v Kunene N.O. and Others*,<sup>3</sup> where Southwood J said:

'With regard to the Rule 30 application Mr. Van der Linde pointed out that such an application will be granted only where the irregular step would cause prejudice to the applicant seeking to set it aside. In support of this argument he referred to (authorities omitted). The prejudice that is referred to is prejudice which will be experienced in the further conduct of the case if the irregular step is not set aside. There is no prejudice if the further conduct of the case is not affected by the irregular step and the irregular step can simply be ignored.'

- [14] The applicants contend that the respondents failed to make out a case that they are prejudiced in how the applicants complied with the court order. The applicants submit that the Rule 30(1) application is an abuse of process and should be dismissed with a punitive costs order.

## Discussion

- [15] It is trite that each case and application must be decided on its own peculiar facts and circumstances. This, the Supreme Court of Appeal confirmed in *Motladile v Minister of Police*,<sup>4</sup> cannot be emphasised enough.
- [16] The facts and context within which the 1 March 2023 order was granted are distinguishable from those in both *Hofmann N.O.* and *Bayer Intellectual Property GMBH*. *In casu*, the respondents had already acknowledged and promoted the direct and substantial interest of the first defendant's shareholders, purported shareholders, and directors when the non-joinder issue was raised as a point *in limine*.

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<sup>3</sup> 1999 (2) SA 599 (T) at 611C-F.

<sup>4</sup> (414/2022) [203] ZASCA 94 (12 June 2023).

[17] This court has already considered the issue of non-joinder and found that the first respondent's shareholders, purported shareholders, and directors have a direct and substantial interest in the litigation that requires them to be parties to the application and provided for an appropriate timeline for the serving of papers on them, and for facilitating their participation in the proceedings. A precedent substantiating the approach followed when the order was granted in consequence of the point *in limine* raised by the respondents is the order granted by a Full Court of this Division in *Minerals Council South Africa v Minister of Mineral Resources and Another*.<sup>5</sup>

[18] The identified parties do not constitute an unidentifiable group of stakeholders. If challenged, it is up to the applicants to prove at the hearing that the order was adequately complied with in that all relevant *personae* comprising the identified parties were served with the court papers effectively and in accordance with the Uniform Rules of Court and provided an opportunity to oppose the application.

[19] I agree with the applicants that the second to fifth respondents failed to make out a case that they are prejudiced in any manner in the conduct of the case by the joinder of the forty respondents by serving them with the court papers in accordance with the provisions of the court order.

[20] Even though this is an interlocutory application, I am of the view that costs must follow success. I am, however, not of the view that a punitive costs order is warranted.

## **ORDER**

**In the result, the following order is granted:**

- 1. The application is dismissed with costs.**

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<sup>5</sup> (20341/19) [2020] ZAGPJHC 171 (30 June 2020).

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E van der Schyff

Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. It will be emailed to the parties/their legal representatives as a courtesy gesture.

For the applicants:	Adv. A.R.G. Mundell SC
Instructed by:	AC Schmidt Inc.
For the second to fifth respondents:	Adv. A. N. Kruger
Instructed by:	Frese Gurovich Attorneys
Date of the hearing:	25 August 2023
Date of judgment:	30 August 2023