

Reportable:	YES/NO
Circulate to Judges:	YES/NO
Circulate to Magistrate:	YES/NO
Circulate to Regional Magistrate	YES/NO



THE NORTH WEST DIVISION, MAHIKENG

CASE NO: 1072/2019

In the matter between:

**THE MEMBER OF THE EXECUTIVE COUNCIL
FOR THE DEPARTMENT OF FINANCE,
ECONOMY AND ENTERPRISE DEVELOPMENT:
NORTH WEST PROVINCE**

Applicant

and

SEHUDI TERENCE SELETEDI
Respondent

1st

ANTHONY CLIFF GLUSTON
Respondent

2nd

MULALO MEMOTANZHELA

3rd Respondent

NOKUZOLA MNTUNGWA

4th Respondent

KEBONEILWE NELLIE GASENGAKE

5th Respondent

LESEGO CONSTANCE TISANE

6th Respondent

LESEGO PATIENCE LEPODISE

7th Respondent

GADIBOTSILE PATIENCE RIET

8th Respondent

ELISA OUSINYANA ROBIANE

9th

Respondent

IDAH TSHIKA SELEKA
Respondent

10th

Date of hearing: 21 May 2024
Date of judgement: 31 May 2024

Delivered : This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses. The date for the hand-down is deemed to be 31 May 2024.

JUDGEMENT

M E MAHLANGU AJ

INTRODCUTION

[1] The plaintiff's instituted action against the defendant in which, insofar the defamation is concerned, the plaintiff claimed that the defamatory statements that were published in the Defendant's internal newsletter and another publication. These were accepted as exhibits during the trial and plaintiff's led extensive evidence on the details of the publication during their respective testimonies. The plaintiff have already closed their case.

PLEADINGS

[2] The plaintiffs' pleaded as follows insofar as the defamatory claim against the defendant:

“5. On or about 18 March 2018

5.1. The Defendant damaged the good name and reputation of the Plaintiffs by providing public newspapers, such as Semphete Newsletter and other media sources with false information regarding the Plaintiffs.

5.2. The Defendant alternatively, its representatives made the following false statements to the media:

5.2.1 That information regarding the Department’s finances was leaked by the Plaintiffs;

5.2.2. That the Plaintiffs were paid to leak the information;

5.2.3. The Plaintiffs were subjected to lie-detector tests;

5.3. The various newspaper articles are annexed hereto marked “B”;

5.4. Although the Plaintiffs are not mentioned by name, their fellow employees witnessed the Plaintiffs being subject to a two day interrogation and could reasonably draw the conclusion that

the Plaintiffs are the persons being mentioned in the various articles.

5.5. It is also common knowledge that the Plaintiffs are members of the finance department as described in the articles.

5.6. The said statements in the context of the articles are wrongful and defamatory of the Plaintiffs in that they were intended and were understood by the readers of the newspaper to mean that the Plaintiffs are dishonest which is evident by the fact that the Plaintiffs were subjected to polygraph tests.

5.7. The Plaintiffs experienced a great deal of embarrassment and humiliation as their reputation were injured.

5.8. The Defendant has created an impression in the Plaintiffs workplace and in the community that the Plaintiffs are without moral fiber and untrustworthy which has an increasingly negative effect on the Plaintiffs work performance and well-being.”

[3] The Defendant pleaded as follows to the Plaintiff's claim:

“AD SUB-PARAGRAPHS 5.1 TO 5.8 THEREOF

7.1 *The Defendant admits that the North West provincial government provided the media publication referred to in these sub-paragraphs with the information published therein;*

7.2. *The Defendant denies that any statement so published was made wrongfully or with the intention to injure the reputation of the Plaintiffs or to portray the Plaintiffs as dishonest, without moral fibre and untrustworthy;*

7.3. *The Defendant pleads that the publications, as contained in Annexure “B” to the particulars of claim;*

7.3.1. *Contained the true facts on what transpired in the sense that there was leakage of information and that the individual Plaintiffs were subjected to a polygraph test to find out who leaked such information and eventually, the Eighth Plaintiff conceded to have been responsible for the leakage at*

the request of the First plaintiff, who confirmed that fact to the HOD; and

7.3.2. The publication was made in the public interest as there were media enquiries relating to the security of information held by the provincial government, especially relating to payments made to service providers, and thus the need for the provincial government to assure members of the public about the steps undertaken by government to unearth the people responsible for the leakage of information and steps undertaken in that process;

7.4. The Defendant further pleads that the information was not published with any intent to injure any of the Plaintiffs and were made as it involved a matter of public interest....”

[4] The Defendant brought an application to amend the above mentioned plea. After having heard both the Defendant and the Plaintiffs' submission on the amendment of the plea, the following

order was made on 7 November 2022 the following order was made:

“Notice to amend and delete paragraph 7.1, 7.3, 7.3.1, 7.3.2, 7.4 and 7.5 of the Defendant’s plea is refused.

The Defendant to file and serve the amended plea on 21st day of NOVEMBER 2022.”

[5] On 18 November 2022, the Defendant filed and served the amended plea as per the order granted on 7 November 2022. The Defendant included the special plea of joinder in their amended plea in which the following was mentioned:

“1.

1.1 In paragraph 5.1 to 5.8 of the particulars of claim, it is alleged that, the Defendant damaged the reputation, and defamed the Plaintiffs (“as a group”) by providing certain Publications, including Semphete Newspaper, with false information regarding the Semphete Newspaper, with false information regarding the Plaintiffs.

1.2 It is trite law that, where the aforesaid cause of action is with regard to a Media Statement relating to a Group Defamation, the Plaintiffs must cite the following parties, namely:

1.2.1 The Editor of the News Paper;

1.2.2 The Owner and Publisher of the said newspaper;

*1.2.3 The Distributor of the said Newspaper;
and*

1.2.4 The Printer of the said newspaper.

1.3 The Plaintiffs must allege and prove the 'group of persons' they belong to and which are specifically mentioned in the article.

1.4 In their Particulars of Claim, the Plaintiff failed to: join the Editor, Owner and Publisher; and the Printer of the News Paper concerned as Parties to the Action Proceedings.

1.5 In the Premise, the Defendant prays that the Plaintiffs' claim for defamation be dismissed with cost."

[6] The special plea was opposed by all the Plaintiffs. It was submitted on behalf of the Plaintiffs that, the Defendant's amendment seeks to withdraw the admission it was made regarding the publication. I am in agreement with the Plaintiffs, I made an order refusing the amendment of the paragraphs relating to the publication made.

SPECIAL PLEA: NONEJOINER

[7] None-joinder is the failure by the Plaintiff to join a particular defendant with another whom he is suing, in circumstances in which the law requires that both should be sued together.

[8] Though it was said in **Morgan v Salisbury Municipality**¹ that the right of a defendant to demand joinder of another party is limited to the cases of joint owners, joint contractors and partners, the question as to whether all necessary parties had been joined does not depend upon the nature of the subject matter of the suit, but upon the manner in which, and the extent to which, the court's order may affect the interests of the third parties. The test for joinder is whether or not a party has a 'direct and substantial interest' in the subject matter of the action, that is, a legal interest

¹ 1935 AD 167 at 171

in the subject matter of the litigation which may be affected prejudicially by the judgement of the court.

[9] The rule is that, any person is a necessary party and should be joined if such person has a direct and substantial interest in any order the court might make, or if such an order cannot be sustained or carried into effect without prejudicing that party, unless the court is satisfied that he has waived his right to be joined.

[10] **Uniform Rule of Court 10(3)** provides that:

“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 defendants were sued separately, would arise in each separate action.”

[11] Substantially the same question of law or fact means that the question of law and fact must 'in the main' or in their 'principal essentials' be essentially the same.

[12] **Tolmay J in Myeni v Organisation Undoing Tax Abuse NPC and Others (15996/2017) [2019] ZAGPPHC 565** (2 December 2019) paras 63-70 as follows:-

"[63] In common law a defendant's right to join other parties are narrowly confined.

[Burger v Rand Water & another 2007 (1) SA 30 SCA par 7 where the following was said: "The right to demand joinder is limited to specified categories of parties such as joint owners, joint contractors and partners and where the other party(s) has a direct and substantial interest in the issues involved and the order which court might make... kKock & Schmidt v Alma Modehuis (Edms) Bpk 1959 (3) SA 308 (A) At 318E-F".]

[64] Non-joinder arises where another party has a direct and substantial interest in the matter, which is determined by the relief that is sought. A party can only be said to have a direct and substantial

interest in the matter if the relief cannot be sustained and carried into effect without prejudicing their interests.

[Amalgamated Engineering Union v Minister of Labour 1949(3) SA 637 (A) at 653 ('Amalgamated Engineering); Gordon v Department of Health, KwaZulu Natal [2008] ZASCA 99; [2008] ZASCA 99; 2008(6) SA 522 (SCA) at para 9; Absa Bank Ltd v Naude NO 2016 (6) SA 540 (SCA) at para 10.]

[65] In Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637(A) the Appellate Division explained further that “[t]he question of joinder should ... not depend on the nature of the subject-matter of the suit...but...on the matter in which, and the extent to which, the Court’s order may affect the interests of third parties”

[66] This means that the relief is decisive, not the facts or issues in dispute. Even where a Court may be called on to make findings that are adverse to another party this does not establish

grounds for non-joinder if the relief sought does not adversely impact on that party's interests.

[Gordon v Department of Health, KwaZulu Natal [2008] ZASCA 99[200] ZASCA; 2008(6) SA 522(SCA) at para 10; Judicial Service Commission and Another v Cape Bar Council and Another 2013(1) SA 170 (SCA) at para 15-17.]

[67] In this instance the Respondents seek relief only against the Applicant and not against the other Board Members. The relief claimed therefore does not impact on the other director[s] at all and as a result they do not have direct and substantial interest in this matter.

[Amalgamated Engineering at 653; Gordon v Department of Health, KwaZulu-Natal [2008] ZASCA 99[2008] 2008(6) SA 522 (SCA) at para 9, where, inter alia, the following was said: "If the order or 'judgement sought cannot be sustained and carried into effect without necessarily prejudicing the interest' of a party or parties not joined in the proceedings, then that

party or parties have legal interest in the matter and must be joined.”; Absa Bank Ltd v Naude NO 22016(6) SA 540 (SCA) at para 10.]

[68] That does not mean that they may not be called as witnesses and that their evidence may be determinative of the success of the Respondents claims against the Applicant.

[69] The other directors do not have a direct and substantial interest in the relief sought even if the evidence ultimately reveal that they were complicit in any unlawful conduct that may be proved.

[70] In any event a Plaintiff is entitled to choose their defendant from a group of wrongdoers.”

[13] In South African History Archive Trust v South African Reserve Bank and Another 2020 (6) SA 127 (SCA) para 30, Gorven AJA (writing for a unanimous bench) recognize and applied the test for joinder of necessity as it was restated by Brand JA in Bowring NO v Vrededorp Properties CC and another 2007 (5) SA 391 (SCA) ([2007] ZASCA 80) para 21, namely, that:

“The substantial test is whether the party that is alleged to be necessary party for purposes of joinder has a legal interest in the subject-matter of the litigation, which may be affected prejudicially by the judgement of the Court in the proceedings concerned...”

[14] The learned author Harms summarized the legal position as follows:-

- “a) If a party has a direct and substantial interest in any order the court might make in proceedings, or if such order cannot be sustained or carried into effect without prejudicing that party, he is a necessary party and should be joined in the proceedings unless the court is satisfied that he has waived his right to be joined.*
- b) The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder objection.*
- c) The term “direct and substantial interest” means an interest in the right, which is the subject-matter of the litigation, and not merely an indirect financial interest in the litigation.*

- d) *An academic interest is not sufficient. On the other hand, the joinder of joint wrongdoers as defendants is not necessary, although advisable.*
- e) *Likewise, if parties have liability, which is joint and several, the plaintiff is not obliged to join them as co-defendants in the same action but is entitled to choose his target.*
- f) *A mere interest is also insufficient. A litigation funder may be directly liable for costs and may be joined as a co-litigant in the funded litigation. This would be the case where the funder exercise a level of control over the litigation or stands to benefit from the litigation.”*

[As quoted in Knoesen and Another v Huijink-Maritz and others (50001/2018) ZAFSHC 92 (31 May 2019), para 8]

CONCLUSION

[13] It is my view that it was never the intention of the Plaintiffs to bring actions against any other person except the Defendant. The Plaintiffs' claim is based on the media publication which it alleged was provided by the Defendant. It is therefore my view that, in this

matter, the relief sought is only against the Defendant and not any other media or publisher as stated in the Defendant's special plea.

ORDER

[14] In the circumstances, I make the following order:

- (i) The applicant's special plea is dismissed;
- (ii) That the applicant is liable to the costs occasioned by this application on a party and party scale C.

M E MAHLANGU
ACTING JUDGE: NORTH WEST DIVISION

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