CASE NO: I 2265/2009

IN THE HIGH COURT OF NAMIBIA

In the matter between:

LUDMILLA MARIA VON KORF **APPLICANT**

And

SUNSAIL CHARTERS CC **FIRST RESPONDENT**

HANS JÖRG MÖLLER **SECOND RESPONDENT**

CORAM: UEITELE, AJ.

Heard on: 21 APRIL 2011

Delivered: 06 MAY 2011

JUDGMENT

UEITELE A J [1] This is an application brought by Ms von Korf in which application she seeks the following relief:

"1 Joining the Second Respondent as Second Defendant in the action so instituted by the First Respondent as Plaintiff against the Applicant as Defendant under case number 2265/2009.

2 Ordering that the costs of the application be costs in the main cause, save if opposed by either the Respondent when cost will then be sought against them.

3 Such further and/or alternative relief."

[2] The application is opposed by the Second Respondent. I will refer to the parties as Ms von Korf (who is the applicant in this matter, but the defendant in the main action), Sunsail Charters CC (the plaintiff in the main action and the First Respondent in the application) and Mr. Möller (the second respondent in the Application).

[3] I find it appropriate to briefly sketch the background to this application. Ms von Korf and Möller were married to each other. During their marriage von Korf and Möller incorporated the Sunsail Charters CC in which they each held a 50% members' interest.

[4] The marriage between von Korf and Möller was, at the instance of Ms von Korf, (as the Plaintiff) dissolved on 10 August 2009. Ms von Korf and Mr. Möller concluded a settlement agreement in respect of the divorce. The settlement agreement was made an order of this Court. The settlement agreement among others contained paragraphs 1.6 and 1.7 which read as follows:

"1.6 Once the irrevocable bank guarantee having been furnished by Defendant's said Bank, shall *(sic)* Plaintiff transfer her 50% (fifty percent) membership interest in "Sunsail Charters CC" with all its assets and liabilities into Defendant's name and an amended founding statement shall be signed by the Plaintiff ceasing to be a member of "Sunsail

Charters CC" and the amended founding statement shall be registered by the Plaintiff's legal representative with the registrar of Close Corporations at Windhoek, once Defendant has duly signed the said Amended Founding Statement as sole member.

1.7 The Defendant hereby agrees and undertakes to indemnify the Plaintiff and to hold her harmless against all loss, damages or claims from any cause arising which Plaintiff may sustain or be held liable as a result of having transferred her 50% members' interest in "Sunsail Charters CC" and Defendant shall taken *(sic)* over all liabilities directly or indirectly attached to "Sunsail Charters CC", including the Swiss Loan."

[5] As contemplated in paragraph 1.6 of the settlement agreement, Ms von Korf transferred her 50% member's interest in Sunsail Charters CC on 19 June 2009 to Möller. From that date, Ms von Korf ceased to be a member of Sunsail Charters CC.

[6] On 26 June 2009, Sunsail Charters CC issued summons against Ms von Korf claiming payment in the amount of N$ 121 157-73. The basis of Sunsail Charters CC claim is that during her tenure as a 50% members' interest holder:

- Ms von Korf stole, alternatively misappropriated funds belonging to it; or
- Ms von Korf made private international calls on Sunsail Charters CC's Telecom Namibia account.

[7] After pleadings closed, a trial date was obtained and the trial duly commenced before me on 06 July 2010. Mr. Möller was the first witness to be called by Sunsail Charters CC. During his testimony Mr. Möller made certain

allegations against the legal representative of Ms von Korf. The legal representative then elected to withdraw as Ms von Korf's representative and to become a witness. These events necessitated a postponement of the trial. I postponed the matter to 18 January 2011, for continuation of trial.

[8] On 17 January 2011 that is one day before the hearing was to continue, Ms von Korf delivered a notice of amendment indicating that she intended to amend her plea. On the same day, Sunsail Charter CC indicated that it will object to the intended amendment. These turn of events again necessitated a postponement of the trial. I consequently postponed the proceedings to 19 April 2011, for continuation of the trial.

[9] When I postponed the matter to 19 April 2011 I made specific orders, the orders that I made were amongst others as follows:

"1.1 That the Plaintiff must file its objection to the notice to amendment by no later than 31 January 2011.

1.2 The Defendant (Applicant) must then file its application for leave to amend by no later than 15 February 2011.

1.3 The Plaintiff (Respondent) will then have until 28 February 2011 to file its opposing affidavit (if any).

1.4 The Defendant (Applicant) must file its replying affidavit if any, by no later than 09 March 2011.

1.5 The Defendant (Applicant) must file its heads of arguments in respect of the application for leave to amend by no later than 31 March 2011.

1.6 The Plaintiff (Respondent) must file its heads of arguments in respect of the application for leave to amend by no later than 12 April 2011.

2 That if the Defendant (Applicant) fails to file its application for leave to amend as stated in paragraph 1.2 of this order, then in that event the amendment is deemed to be dismissed and the matter will proceed for continuation of trial on 19 April 2011.

3 That any party who wishes to file any interlocutory application must do so by no later than 15 February 2011."

[10] Sunsail Charter CC filed its objection to the intended amendment as I ordered. Ms von Korf on the other hand did not file her application for leave to amend but instead filed a joinder application on 15 February 2011.

[11] I pause here to indicate that Mr. Van Vuuren who appeared on behalf of Sunsail Charters CC and Möller invited me, in his written heads (although he did not press that point in oral argument) to rule that the failure by Ms von Korf to file her application for leave to amend on or before 15 February 2011 resulted in paragraph 2 of the Court order, I made on 18 January 2011, coming into operation and thus deeming that the notice to amend is dismissed.

[12] I do not take it that Mr. Van Vuuren is persisting with this point as he did not press it in oral argument, nor did he lay a basis or put facts before me to establish that Ms von Korf's application to join Mr. Möller as second defendant was vexatious or simply to delay the proceedings. I accordingly decline the invitation and will consider the application to join Mr. Möller as the Second Defendant.

[13] On 19 April 2011, Mr. Möller filed an application seeking to strike out certain portions of Ms von Korf's replying affidavit in respect of the joinder application. I deem it appropriate to, in view of the conclusions I have arrived at with respect to the application for joinder, not express any opinion on the application to strike. I will thus start of by having regard to the legal principles governing joinder of parties.

Legal principles governing joinder of parties

[14] Joinder refers to the joining of more than one party or more than one cause in a single action. A joinder of parties takes place where two or more plaintiffs join together in bringing an action against a defendant or where a plaintiff joins two or more defendants in the same matter. It is also not uncommon to have a defendant apply to have another person joined as a co-defendant.

[15] Herbstein & Van Winsen in their work; ***The Civil Practice of the Supreme Court of South Africa*** 4th Edition at page 165 opine that the reason for joinder is usually convenience, *"Time, effort and costs are saved by joining parties or causes in one action instead of bringing separate actions. Apart from considerations of convenience, however, there are circumstances in which it is essential to join a party because of the interest that he has in the matter*." A party may thus be joined as matter of convenience or as a matter of necessity.

[16] At common law the court had a discretion to allow a joinder of a party on the basis of convenience. See ***Khumalo v Wilkins and Another*** 1972 (4) SA 470 (N) at page 474 where Milne J, said the Court have the 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 authorized."* Also see the case of ***Ex Parte: Sudurhavid (Pty) Ltd: In Re Namibia Marine Resources (Pty) Ltd v Ferina (Pty) Ltd*** 1992 NR 316 (HC).

[17] In ***Vitorakis v Wolf*** 1973 (3) SA 928 (W) Coetzee, J said at pages 929-930:

> "Nowadays, however, a matter like the present-[i.e. joinder of the parties] falls to be resolved by an examination of the Rules of Court, which have drastically changed these common law principles… On the contrary our modern Rules of Court are so explicit on this point that there is now - since the promulgation of the Uniform Rules - hardly anything left of the basic common law approach to joinder and intervention."

[18] Rule 10 of the High Court Rules provides as follows:

> "10 (1) Any number of persons, each of whom has a claim, whether jointly, jointly and severally, separately or in the alternative, may join as plaintiffs in one action against the same defendant or defendants against whom any one or more of such persons proposing to join as plaintiffs would, if he or she brought a separate action, be entitled to bring such action, provided that the right to relief of the persons proposing the same question of law or fact which, if separate actions were instituted, would arise on such action, and provided that there may be a joinder conditionally upon the claim of any other plaintiff failing.
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> (2) …
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> (3) 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."

[19] Joinder of necessity arises where a party has or may have a direct and substantial interest in any order the court might make in proceedings or if such an order cannot be sustained or carried into effect without prejudicing that party. See Herbstein & Van Winsen *supra* at page 170. Also see the cases of ***Amalgamated Engineering Union v Minister Of Labour*** 1949 (3) SA 637 (A); and ***Standard Bank of Namibia Ltd v Potgieter and Another*** 2000 NR 120

[20] In the matter of ***Ex Parte: Sudurhavid (Pty) Ltd: In Re Namibia Marine Resources (Pty) Ltd v Ferina (Pty) Ltd*** Hannah J said at page 321:

> "…I understand it, the Courts do not apply the Rule in a rigid or literal manner and the test of a direct and substantial in the subject-matter of the litigation is regarded as being the decisive criterion. (See ***United Watch & Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another*** 1972 (4) SA 409 (C) at 416.) In my respectful opinion, the principles which apply to an application brought pursuant to Rule 12 {Magistrates Court Rules} were aptly summarised in ***Minister of Local Government and Land Tenure and Another v Sizwe Development and Others: In re B Sizwe Development v Flagstaff Municipality*** 1991 (1) SA 677 (Tk) as follows:
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> `The applicant must satisfy the Court that:
>
> (i) he has a direct and substantial interest in the subject-matter of the litigation, which could be prejudiced by the judgment of the Court . . .; and
>
> (ii) the application is made seriously and is not frivolous, and that the allegations made by the applicant constitute a *prima facie* case or defence - it is not necessary for the applicant to satisfy the Court that he will succeed in his case or defence . . .'.
>
> A `direct and substantial' interest means `an interest in the right which is the subject-matter of the litigation and is not merely a financial interest which is only an indirect interest in such litigation".

The legal principles applied to the facts

[21] In the present matter Sunsail Charters CC instituted action against Ms von Korf on the basis of allegations of theft and misappropriation of its funds by her. Ms von Korf now wants Mr. Möller joined as the second defendant in the action.

[22] Ms von Korf sets out her reasons for wanting Mr. Möller joined, in her supporting affidavit which is annexed to the Notice of Motion. I find it appropriate to quote in some detail those reasons. She amongst others says:

> "13 It is consequently and regard to the "**Settlement Agreement**" (Annexure "C") so entered into between the Second Respondent {i.e. Mr. Möller} and I with regard to the Court order so granted on 01 June 2009, imperative that the Second Defendant be joined as the Second Defendant in the main action so instituted against me as Defendant by the First Respondent as Plaintiff under case number 2265/2009.
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> 14 …
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> 15 Regard to the fact that the Second Respondent is the sole member of the Plaintiff and that the Second Respondent was the other member and held 50% (fifty percent) members interest with me until 19 June 2009 (when my 50% (fifty percent) member's interest was transferred to Second Respondent), and regard to the agreement (annexure '**C**") in terms whereof the Second Respondent has indemnified me against any loss, damages or claims from any cause, which I may sustain or being held liable for having transferred my 50% (fifty percent) member's interest in the Plaintiff (First Respondent) to the Second Respondent, I respectfully submit that it is essential that the second respondent be joined as Second Defendant in the main action in terms whereof the First Respondent as Plaintiff holds me liable for transaction done, while I have been a member of the Plaintiff along with the Second Respondent.
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> 16 I as a Defendant in such action is unable to raise the aforesaid defenses as against the Second Respondent as Second Defendant in my plea with the Plaintiff (First Respondent

herein) as the First Respondent and the Second Respondent are two separate and distinct legal entities. A defense against the one cannot necessarily be a defense against the other.

17 …

18 …I consequently submit that it is essential and in order for me to have may entire defense properly adjudicate upon that the Second Respondent be joined as second Defendant as per the Notice of motion to which this affidavit and annexures are attached…

19 I respectfully submit that as a consequence of the aforesaid, that the question arising between the Plaintiff (First Respondent) and me as First Defendant depends upon the determination of substantially the same question of law and/or facts which if First and Second Defendants (Applicant and Second Respondent respectively) were to be sued separately would arise in such separate action".

[23] I thus summarize Ms von Korf's reasons for wanting Mr. Möller joined as Second Defendant to the action as follows;

(a) the indemnity incorporated in the settlement agreement in the divorce proceedings between the parties;

(b) enable her to have her entire defense properly adjudicate upon.

[24] For Ms von Korf to succeed in obtaining the leave of court to join Mr. Möller as a co-defendant she must, as contemplated in Rule 10(3) of this Court Rules, demonstrate that the question arising between her and Möller (as defendants) and Sunsail Charters CC (as plaintiff) depends upon the determination of substantially the same question of law or fact which, if she and Möller, were sued separately, would arise in each separate action.

[25] I will prefix my evaluation of the facts to determine whether Ms von Korf has established that the question arising between her, Möller (as defendants) and Sunsail Charters CC (as plaintiff) depends upon the determination of substantially the same question of law or fact which, if she and Möller were sued separately, would arise in each separate action, with a quotation from the case of ***Transnamib Ltd v Imcor Zinc (Pty) Ltd (Moly-Copper Mining And Exploration Corporation (SWA) Ltd And Another Intervening)*** 1994 NR 11 (HC) where Frank J (as he than was) said at pages 15-16:

> "It is trite law that, generally speaking, an applicant must make out his case in his founding papers and that such papers are a combination of pleadings and evidence. Furthermore an applicant cannot merely set out a skeleton case in the founding papers and then fortify this in reply. If scant material is furnished in the founding papers the applicant runs the risk of his application being dismissed and should not complain if this is done as it was up to him to put more facts to the Court if he could. The Court may in its discretion allow deviations from the normal procedures but it must be borne in mind that the normal procedures developed as they did because they would almost invariably be consonant with the best interests of the administration of justice".

I will thus in my evaluation have regard to Ms von Korf's founding affidavit only.

[26] I am of the view that what Ms von Korf says in paragraphs 13 to 15 and 18 of her founding affidavit does not, tell this Court why it is essential for Mr. Möller to be joined as a second Defendant, she just reached the conclusion that it is essential to join Möller as defendant without setting out the facts on which she relies to reach her conclusion. Ms von Korf does also not set out the facts to justify her conclusion that *"that the question arising between the Plaintiff (First Respondent) and me as First Defendant depends upon the determination of*

substantially the same question of law and/or facts which if First and Second Defendants (Applicant and Second Respondent respectively) were to be sued separately would arise in such separate action".

[27] It is the responsibility and duty of this court after assessing and evaluating the evidence to come to a conclusion whether it is indeed necessary to join any person as co-defendant or not. If a party does not place sufficient evidence before the court, the court cannot properly make the assessment. I am thus not satisfied that Ms von Korf has met the requirements of Rule 10(3) and I thus decline to order that Mr. Möller be joined as co-defendant under Rule 10(3) of this Court's Rules.

[28] Even if I am wrong on that score and Ms von Korf has advanced reasons why Mr. Möller must be joined as a co-defendant I am of the view that the reasons advanced do not fall within the ambit of Rule 10(3). Rule 10(3) does not contemplated the joining defendants so that one of the defendant's defence can properly be adjudicated upon but the question is whether "the question arising between Ms von Korf, Möller (as defendants) and Sunsail Charters CC (as plaintiff) depends upon the determination of ***substantially the same question of law or fact*** which, if Ms von Korf and Möller, were sued separately, would arise in each separate action. {My emphasis}.

[29] It is appropriate to pause and observe here that Sunsail Charters CC is suing Ms von Korf on the basis of allegations that Ms von Korf stole or misappropriated it's (i.e. the Sunsail Charters CC) funds. I am thus of the view that for Ms von Korf to successfully bring her reasons within the ambit of Rule 10(3) she should have, in her founding affidavit, made allegations that Mr. Möller was either a co-wrongdoer/thief or an accomplice to the theft and misappropriation of the Close Corporation's moneys.

[30] Does this mean the end of the matter for Ms von Korf's application? I do not think so. I say so because although some may interpret the remarks by Coetzee J (quoted above in paragraph 17) as implying that the Rules of this Court are exhaustive of situations under which a party may be joined in an action, I do not think that that is the position, see in this regard the remarks by Hannah J in ***Ex Parte: Sudurhavid (Pty) Ltd: In Re Namibia Marine Resources (Pty) Ltd v Ferina (Pty) Ltd*** 1992 NR 316 (HC) at page 320 where he remarked as follows:

> "Mr. Serrurier submits that the common-law approach to joinder and intervention has been overridden or replaced by the Rules of Court and for this submission he relies on ***Vitorakis v Wolf*** *1*973 (3) SA 928 (W). In that case, Coetzee J was concerned with the question of joinder as a co-plaintiff and counsel for the respondent argued that the applicant had not shown the degree of identity in the two prospective co-plaintiff causes of action, which the common law demanded as a prerequisite of successful intervention. The learned Judge, correctly in my respectful opinion, pointed out in his judgment that the Rules of Court had made a radical departure from the common law on this question and that if the applicant could bring herself within the appropriate Rule, that was sufficient. The learned Judge said at 930H:
>
> > `*One should be careful not to look almost exclusively to the common law as counsel has done, for guidance in this problem. On the contrary, our modern Rules of Court are so explicit on this point that there is now - since the promulgation of the Uniform Rules - hardly anything left of the basic common-law approach to joinder and intervention*.'

These remarks must be read in context. The learned Judge was not, as I understand him, saying that resort cannot be made to common-law principles of intervention when a matter cannot be resolved by recourse to the Rules. All he was saying was that the Rules have widened the scope of the common-law principles and the Rules should be looked to first. If in the present case the Rules do not assist ***Sudurhavid*** in its application to intervene, it is entitled, in my view, to invite the Court to decide the application on common-law principles. Those principles include the right to intervene at any stage (see ***Orphan Board v Van Reenen*** (supra)) if Sudurhavid can show that it is specially concerned in the issue, that the matter is of common interest to itself and Ferina and that the issues are the same. (See ***Bitcon v City Council of Johannesburg and Arenow Behrman & Co***"

[31] I thus understand the law to say that if Ms von Korf cannot under Rule 10(3) of this Court's Rules satisfy this Court that the question arising between her, Möller (as defendants) and Sunsail Charters CC (as plaintiff) depends upon the determination of substantially the same question of law or fact which, if she and Möller were sued separately, would arise in each separate action, she is entitled, to invite the Court to decide the application on common-law principles. But she has unfortunately not done so.

[32] In the result I refuse the application to join Mr. Möller as Second Defendant in the action and the costs of this application will be costs in the cause.

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UEITELE, AJ

ON BEHALF OF THE APPLICANT:	MR STOLZE
INSTRUCTED BY:	CHRIS BRANDT ATTORNEYS
ON BEHALF OF THE RESPONDENT:	MR. A VAN VUUREN
INSTRUCTED BY:	THEUNISSEN & LOUW LEGAL PRACTITIONERS