IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case no. 38287/2012

DELETE WHICHEVER IS NOT APPLICABLE

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

11 MARCH 2016 .....
DATE SIGNATURE

In the matter between

BASF Construction Chemicals South Africa (Pty) Ltd **Applicant**

And

CLF Concrete Laser Flooring (Pty) Ltd **Respondent**

In re

BASF Construction Chemicals South Africa (Pty) Ltd **Plaintiff**

And

CLF Concrete Laser Flooring (Pty) Ltd **Defendant**

And

Urochem Trading (Pty) Ltd **Third Party**

JUDGMENT

Van der Linde, J

[1] The applicant, called the plaintiff, applies for leave to serve a rule 13 notice on the proposed third party after the close of pleadings between it and the defendant. The defendant does not object but the proposed third party does. So the plaintiff needs the leave of the court under rule 13(3)(b). The parties are agreed that the discretion of the court is wide, meaning that it may take into account a wide range of factors in arriving at its decision, and that what the plaintiff seeks is an indulgence. But that is where the agreement ends.

[2] As the submissions unfolded, five issues remain to be addressed. They are standing, delay, prescription, commonality, and costs. This shorthand way of describing the issues will be expanded upon below, and in this sequence. But first it is necessary to explain what the case is about.

[3] The plaintiff sues the defendant for R1130831.55 for goods sold and delivered. The goods are a joint filler which the plaintiff calls Masterflex 310 which is used in flooring. The defendant counterclaims that the product was defective; it was supposed to be a semi-rigid joint filler, but was too hard, causing cracking, spalling and crazing in the cement slabs adjacent to the joints filled with it. That meant that the defendant had to repair joint fillers and floor slabs at a total cost of R16705150.80, and it was counterclaiming against the plaintiff for this amount.

[4] The plaintiff's intended cause of action against the proposed third party is this. The plaintiff had bought the product from the proposed third party. If the plaintiff should be held liable to the defendant, then it followed, according to the plaintiff, that the proposed third party should be liable to it, because in the sale between them, the proposed third party agreed that the Masterflex would have a certain hardness, and warranted against latent defects.

[5] The first point taken by the plaintiff in the present application is that the proposed third party has no right to be heard in opposition to the plaintiff's application under rule 13(3)(b). The argument was that that followed from the fact that the proposed third party was, in fact, not a party to the litigation. This was an issue, according to the submission, only between the plaintiff and the defendant.

[6] I do not think that is right. To begin with, the fact that the proposed third party is not a party to the litigation is of course the very issue, so that fact cannot serve of itself to exclude it from being heard. Second, it is difficult to see why, if the joinder of the proposed third party should legitimately be the business of the defendant, it should not also legitimately be the business of the proposed third party. After all, it is the same litigation to which the proposed third is sought to be joined. The court could do with assistance from all the potential participants in deciding whether the anticipated litigation was manageable.

[7] But third, at the level of principle, our law generally decrees that interested parties should be afforded an opportunity to be heard in matters in which they have a direct and substantial interest.[1]By this principle parties are joined for reasons of convenience, even where their joinder is not essential, to avoid multiplicity of actions. And there is no doubt that in applications for their joinder, the proposed parties are entitled to be heard.

[8] The argument against this is that the plaintiff is entitled, as of right, to issue a third party notice before the close of pleadings, and the proposed third party cannot stop it. That is a valid proposition, but only because the rule allows it. In any matter where there is already a pending suit, the joinder of another party to it, meaning a party who was not joined from the outset, requires service on the proposed new party, and that party is entitled to be heard to resist its joinder.

[9] It makes perfect sense why that should be so. The proposed new party may want to explain to the court that there is good reason why it should not be joined to litigation between

[1] Herbstein & Van Winsen, The Civil Practice of the High Courts of South Africa, 5th ed, Cilliers, Loots & Nel, vol 1, p208.

others; after all, it was not joined from the outset, and there may have been good reason for it.

[10]So viewed, the entitlement to serve a rule 13 notice before close of pleadings without first affording the proposed third party an opportunity of resisting joinder, should be regarded as the exception, and not the rule. The rule is rather that whenever an outsider to pending litigation is sought to be joined to it, that outsider has the right to be heard on whether it is appropriate that such a joinder should take place.

[11]The plaintiff submitted that it was the practice in this division not to permit the proposed third party any standing to oppose its joinder. But in Mercantile Bank Ltd v Carlisle and Another[2] this court laid it down as a rule that in applications under this sub-rule, the proposed cause of action against the proposed third party must be examined, and if the cause of action were excipiable, the joinder should be refused. In that matter it was, like here, the proposed third party who resisted the joinder. The practice to which the plaintiff refers was thus not followed.

[12]It follows that in my view the proposed third party has standing to oppose the plaintiff's application.

[13]The proposed third party argued that the delay in bringing the application has not been satisfactorily explained. This has been proposed as a requirement,[3] and the authors of Erasmus, Superior Court Practice, [4]have not noted any dissent. The delay is from the beginning of March 2013 when the pleadings closed to July 2014 when the application was launched.

[14]This long. The explanation is that throughout 2013 and during the early months of 2014, thus covering the entire period of delay, the plaintiff has been obtaining advice in regard to its case. It consulted experts, and it has made enquiries regarding other floors laid by the

[2] 2002(4)SA886(WLD)
[3] Wapnick v Durban City Garage, 1984(2)SA414(D)
[4] Second ed by DE van Loggerenberg, vol 2, pD1-147

defendant where failures have occurred but Masterflex had not been used. In December 2013 counsel advised this joinder, but this application was in the event only brought mid-2014.

[15]The plaintiff argues that the dots of events, connect the entire period of the delay. That is true, but only because time moves forward, and events occur in a forward direction, not backwards. There is also much merit in the submission by the proposed third party that the explanation is lacking in material detail. Where does it all go though?

[16]The proposed third party cannot really contend for meaningful prejudice. There is the prejudice of the passage of time, and what does to witnesses, their availability and their memories. But this is not real prejudice, because the plaintiff is free with impunity to issue summons afresh against the proposed third party without the latter being able to stop it.

[17]In my view the concern is with the administration of justice, respect for the law, and the rule of law, all very relevant in a democratic state based on a constitution, and where the law and its supremacy has become central to our state order. If courts are viewed as places that will permit lax conduct and laissez-faire attitudes to rules, the fear of the chilling effect on our order is not fanciful.

[18]In the scheme of litigation delays this one is however not criminally long. And the defendant does not appear to have been overly anxious to accelerate its pace. The alternative, that of the plaintiff suing the proposed defendant afresh, is worse. Also, the delay has not been deliberate or male fide.

[19]In these circumstances I would excuse the delay, but its extent is relevant to the costs of this application.

[20] The next point is prescription, the proposed third party contending that the plaintiff's proposed claim against it has long prescribed. This argument is founded on the May 2010 enquiries made by the plaintiff of the batch number of the Masterflex supplied by the proposed third party to the plaintiff. At a meeting just after that, the plaintiff told the

proposed third party about the defendant's intended action against the plaintiff for damages arising from a complaint about the Masterflex.

[21]The plaintiff's response was that its cause of action was conditional upon the court awarding damages against it in favour of the defendant. Since that has not occurred, prescription could not yet have begun to run.

[22]I am not persuaded that that submission is correct. The liability of the defendant to the plaintiff will arise from the breach of contract between the plaintiff and the defendant, and not the court order. The debt is due when the *facta probanda* supporting that cause of action are known or could by the exercise of reasonable care have become known. It may be that it is only when the court fixes the quantum by order that the precise extent of the liability is known. But the court order is as little a peg in the cause of action of the plaintiff against the proposed third party as it is a peg in the cause of action of the defendant against the plaintiff.

[23]Having said that, however, I cannot on these relatively thin papers find that prescription has been shown. The proposed third party, who bears the onus, has not determined a date when its debt to the plaintiff was due; to the contrary, it has said (my emphasis): *"The plaintiff accordingly knew that if the defendant had a claim against the plaintiff, the plaintiff had a claim against Urochem, irrespective of the merits of such claim."*

[24]The merits of the potential claim against the proposed third party are, of course, what it is all about. The plaintiff must know the facts supporting its cause of action, and these include the facts concerning the question whether the Masterflex was defective. That is an expert issue, and I cannot say, nor does the proposed third party say, that the plaintiff could reasonably have obtained their views any earlier than say March 2013.

[25]In my view prescription of the proposed claim has not been established.

[26]Commonality is concerned with rule 13(1)(b) and the requirement that *"any question or issue in the action is substantially the same as a question or issue which has arisen or will*

arise between such party and the third party, and should properly be determined not only as between any parties to the action but also as between such parties and the third party."

[27]It is in this area where to my mind the proposed third party's true objection to joinder may potentially lie. Such a party may be able to say, if the facts bear it out, that it is being joined to an action in which its interests are only marginal or peripheral. If joined, it may thus be forced to sit by and expend legal costs and management time in a court which debates issues that does not concern it. That would make for disastrous judicial economy, so the argument may go.

[28]But there are answers to this. The first is that the rule does not require that there be a complete overlap. It requires only an overlap of *"any question or issue"*. That was intended to leave it to the application court to assess whether judicial economy will be flouted or enhanced. Some crystal ball gazing is necessary to be able to do that, which brings me to the second answer.

[29]It seems to me, from my present vantage point, that the three major issues in the two sets of *lites* will be whether the Masterflex was defective, whether the defective (if so) Masterflex caused the failure of which the defendant complained or whether it was the defendant's own remissness, and the computation of the defendant's damages. In all three of these issues the proposed third party is centrally involved.

[30]Although it is impossible now to make an accurate assessment of the time that will be taken up by the issues that will arise, because some of them may actually settle along the way, as matters presently stand there appear to me to be sufficient reason to converge the two sets of disputes into a single litigation process.

[31]That leaves costs. Plaintiff seeks an indulgence and has additionally been culpably dilatory. The proposed third party has not been unreasonable in its opposition. My concern about the extent of the delay is reflected in the costs order against the plaintiff.

[32]In the result I make the following order:

(a) Leave is granted to the applicant to serve the third party notice attached to the founding affidavit as annexure "A1" on Urochem (Pty) Ltd within (10) ten days of this order.

(b) The applicant is to pay the costs of the application, including any costs associated with the previous appearance in the matter in 2015 when it was crowded out.

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WHG van der Linde
Judge, High Court
Johannesburg

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Date argued: 10 March 2016
Date judgement: 11 March 2016