

Case No 625/96

**IN THE SUPREME COURT OF APPEAL  
OF SOUTH AFRICA**

In the matter of:

MCC CONTRACTS (PTY) LTD

Appellant

and

RUDOLF GIDEON COERTZEN

First Respondent

HESTER WILHELMINA GERRARD N O

Second Respondent

SOUTH AFRICAN EAGLE  
INSURANCE CO LTD

Third Respondent

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CORAM: HOWIE, HARMS, ZULMAN, STREICHER, JJA, *et*  
MELUNSKY AJA

DATE OF HEARING: 17 September 1998

DATE OF DELIVERY: 18 September 1998

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**J U D G M E N T**

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/HOWIE JA: . . .

HOWIE JA:

Appellant company ("MCC") is the second third party in a damages suit in the Orange Free State Provincial Division. It applied to that Court under Rule 30 for an order setting aside, as an irregular proceeding, the third party notice by which it was sought to be joined. The application failed but leave was granted to appeal to this Court. The judgment of the Court *a quo* is reported in the All South African Law Reports [1997] 1 All SA 162 (O).

Summons was issued in March 1995. In April, second respondent ("defendant") had a third party notice served on the third respondent (the first third party, to which I shall refer as "SA Eagle") and about a week later filed her plea. No further pleadings were filed by the first respondent ("plaintiff"). In May SA Eagle gave notice of intention to defend and in July excepted to the first third party notice. In October defendant caused the third party notice in question to be served on MCC

which later took the necessary steps to defend. In November SA Eagle's exception was argued and in March 1996 the exception was upheld.

Plaintiff and SA Eagle were joined in the application in the Court below but did not oppose it and now abide this Court's decision.

The case for MCC in the application and on appeal is that defendant was obliged to obtain the leave of the Court *a quo* for the service of the second third party notice and, because such leave was not sought, the notice was irregular. The argument for defendant is that leave was unnecessary seeing that the notice was, to quote the relevant words of Rule 13 (3) (a),

“ . . . served before the close of pleadings in the action in connection with which it (was) issued”.

The provisions of Rule 13 at the relevant time provided as follows:

“13 (1) Where a party in any action claims —

- (a) as against any other person not a party to the action (in this rule called a 'third party') that such party is entitled, in respect of any relief claimed against him, to a contribution or indemnification from such third party, or
- (b) 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 or between any of them,

such party may issue a notice, hereinafter referred to as a third party notice, as near as may be in accordance with Form 7 of the First Schedule hereto, which notice shall be served by the sheriff.

- (2) Such notice shall state the nature and grounds of the claim of the party issuing the same, the question or issue to be determined, and any relief or remedy claimed. In so far as the statement of the claim and the question or issue are concerned, the rules with regard to pleadings and to summonses shall *mutatis mutandis* apply.
- (3)
  - (a) The third party notice shall be served before the close of pleadings in the action in connection with which it is issued.
  - (b) After the close of pleadings, such notice may only be

served with the leave of the court.

- (c) The third party notice shall be accompanied by a copy of all pleadings filed in the action up to the date of service of notice.
- (4) If the third party intends to contest the claim set out in the third party notice he shall deliver notice of intention to defend, as if to a summons. Immediately upon receipt of such notice, the party who issued the third party notice shall inform all other parties accordingly.
- (5) The third party shall, after service upon him of a third party notice, be a party to the action and, if he delivers notice of intention to defend, shall be served with all documents and given notice of all matters as a party.
- (6) The third party may plead or except to the third party notice as if he were a defendant to the action. He may also, by filing a plea or other proper pleading, contest the liability of the party issuing the notice on any ground notwithstanding that such ground has not been raised in the action by such latter party: Provided however that the third party shall not be entitled to claim in reconvention against any person other than the party issuing the notice save to the extent that he would be entitled to do so in terms of rule 24.
- (7) The rules with regard to the filing of further pleadings shall

apply to third parties as follows:

- (a) In so far as the third party's plea relates to the claim of the party issuing the notice, the said party shall be regarded as the plaintiff and the third party as the defendant;
  - (b) In so far as the third party's plea relates to the plaintiff's claim the third party shall be regarded as a defendant and the plaintiff shall file pleadings as provided by the said rules.
- (8) Where a party to an action has against any other party (whether either such party became a party by virtue of any counter-claim by any person or by virtue of a third party notice or by any other means) a claim referred to in sub-rule (1), he may issue and serve on such other party a third party notice in accordance with the provisions of this rule. Save that no further notice of intention to defend shall be necessary, the same procedure shall apply as between the parties to such notice and they shall be subject to the same rights and duties as if such other party had been served with a third party notice in terms of sub-rule (1).
- (9) Any party who has been joined as such by virtue of a third party notice may at any time make application to the court for the separation of the trial of all or any of the issues arising by virtue of such third party notice and the court may upon such application make such order as to it seems meet, including an order for the separate hearing and determination

of any issue on condition that its decision on any other issue arising in the action either as between the plaintiff and the defendant or as between any other parties, shall be binding upon the applicant.”

In the light of the competing arguments read with Rule 13, the crucial question now is whether the pleadings involving defendant and SA Eagle -which clearly were not yet closed when the third party notice was served on MCC - were

“pleadings in the action in connection with which (that notice) was issued”.

The learned Judge in the Court below (Lombard J) answered that question in the affirmative. He held (at 169 d - e) that the words “in connection with which”, as opposed to simply “in which”, indicated the drafter’s intention to refer in sub-rule (3) (a) not only to the pleadings between the plaintiff and the defendant but to the pleadings between all the parties to the action. With that conclusion I agree.

However, in reaching it the Judge reasoned (at 169 b - c) that because, on certain authority, there is no *lis* between a plaintiff and a third party

“two ‘separate actions’ each with its own set of pleadings came into existence - one between the plaintiff and the defendant and one between the latter and the third party”.

With that analysis, with respect, I do not agree. The rule was designed to avoid a multiplicity of actions and to consolidate, in specified circumstances, a multiplicity of issues between a number of litigants, all in a single action. It reads accordingly. Whether or not a *lis* does arise between the plaintiff and a third party (and conceivably one could, if regard be had to sub-rules (7) and (8) ) and even if separation of issues occurs pursuant to sub-rule (9), the Rule provides for only one action and that action is necessarily the one begun by the plaintiff. All this is plain from the first line of sub-rule (1) in which the “action” referred to cannot be any other action than that instituted by the plaintiff and the fact that the

references to “the action” or “action” in the later sub-rules are clearly to the action referred to in sub-rule (1).

It follows that the pleadings involving defendant and SA Eagle, which were not yet closed at the time the third party notice in question was served on MCC, were pleadings “in the action” within the meaning of sub-rule (3)(a). The same conclusion is in any event compelled by the fact that SA Eagle had, in terms of sub-rule (5), become a party to the action and therefore the pleadings between defendant and it were pleadings “in the action”. Finally, it cannot be doubted that the third party notice of which MCC complains was issued in connection with the action.

There was therefore proper compliance with Rule 13 (3) (a) in respect of the third party notice served on MCC.

The appeal is dismissed, with costs.

  
C T HOWIE

HARMS JA)  
ZULMAN JA) CONCUR  
STREICHER JA)  
MELUNSKY AJA)