IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: 21453/10

In the matter between:

MICHAEL DAVID VAN DEN HEEVER **Plaintiff**
In his representative capacity on behalf of
Pierre van den Heever

And

NETCARE CAPE (PTY) LTD **Defendant**
DR DEON SMITH **Third Party**

JUDGMENT: 8 NOVEMBER 2013

LE GRANGE, J

[1] This is an application by the Defendant to permit the joinder of Dr. Smith (the Respondent) as a Third Party in an action. The Application is premised on the provisions of Rule 13(3)(b) of the Uniform Rules of Court which provides that, after close of pleadings, a third party notice may only be served with leave of the court.

[2] In the present instance, the Plaintiff instituted action against the Defendant and the summons was served on 22 December 2010.

[3] The action between the Plaintiff and the Defendant arises from post-natal nursing services which were rendered, or ought to have been rendered, by the nursing staff of the Defendant's hospital to the Plaintiff's son Pierre during the period 9 to 10 July 1997. The Plaintiff alleges that Pierre developed Group B Streptococcus ("GBS") septicaemia and GBS meningitis and various *sequelae* and complications thereof and maintains the damage which Pierre (and, in the premises, the Plaintiff) sustained was caused by the negligent conduct of the professional nursing staff of the Defendant. The Plaintiff seeks to hold the Defendant liable for such damages.

[4] Defendant's Plea, filed on 6 April 2011, sets out the grounds on which it defends the action. The Pleadings had closed on 4 May 2011.

[5] The Notice of Motion to join the Respondent as a Third Party was served on him on 14 January 2013. In resisting the relief sought the Respondent raised a number of grounds, inter alia that a case for condonation and joinder had not been made out. The Respondent also sought an order to strike out the annexure 'CB1' attached to the Defendant's founding affidavit on the basis that the relevant annexure was not incorporated either by reference or otherwise into the founding affidavit and constitutes irrelevant hearsay evidence.

[6] Mr. A La Grange, SC who appeared on behalf of the Defendant argued the Defendant has *prima facie* established that the Respondent is a joint wrongdoer in respect of the Plaintiff's damages as contemplated in the Apportionment of Damages Act 34 of 1956. Moreover, according to him the facts alleged by the Defendant, as

mentioned in the outline in the draft annexure to the Third Party Notice, if established at the trial, is sufficient to entitle the Defendant to succeed with its relief sought. He also relied on the dictum in Niemand v SA Eiendomsbestuur SWD (Edms) Bpk en 'n Ander 1985 (2) SA 710 (C) at 712, for the proposition that it is not necessary in this instance to make out a prima facie case in the founding papers to be successful in this application.

[7] The Defendant, in respect of the explanation for its failure to timeously deliver the notice to the Respondent, admitted that it did consider the possibility of joining the Respondent prior to the close of pleadings, but the argument advanced by Mr. La Grange was that "*the issue required significant and extensive further investigation due to the complex nature of the Plaintiff's claim against the Defendant, and particularly the issue of causation*". It was also contended that although the Defendant's legal representatives attended a number of consultations with the various experts during October to November 2012, "*it was only during the final consultation with Professor Smith on 6 December 2012 that it was finally concluded that Dr Smith should be joined as a third party on the grounds as identified in the draft Annexure to the Third Party Notice*".

[8] Mr. La Grange also submitted that it would be in the interest of justice to join the Respondent as joint wrongdoer in these proceedings in order to scrutinise the involvement and actions of the Respondent as the paediatrician who was appointed to manage the immediate post natal care of the Plaintiff's son in order to avoid a

multiplicity of actions. Furthermore, it was argued that the Respondent will not suffer any real prejudice if he is joined in these proceedings.

[9] Ms T Dicker SC appeared on behalf of the Respondent. The Respondent's opposition is essentially based on three main grounds. Firstly, the founding affidavit of the Defendant contains no satisfactory facts to show sufficient cause why it should be excused from compliance with the Court Rules. Secondly, the Defendant in the founding affidavit failed to set out the nature and extent of the further investigations it undertook, why it took so long and what information came to light which it deemed relevant in finally making the decision to join the Respondent. Thirdly, the averments in annexure 'CB1' attached to the Defendant's founding affidavit should be struck out on the basis that they constitute irrelevant hearsay evidence. According to the Respondent the Defendant has failed in support of the vague and unsubstantiated allegations made against him to annex supporting affidavits to its papers.

[10] Before dealing with these grounds it is perhaps convenient to have regard to Rule 13(3)(b). In the past the sub-Rule had been subject to some judicial scrutiny. The approach the courts adopted has been succinctly set out in Erasmus Superior Court Practice at B1-110 and the cases referred to therein. In applications of this nature Niemand v SA Eiendomsbestuur SWD (Edms) Bpk en 'n Ander 1985 (2) SA 710 (C) at 712 adopted the test as formulated in Wapnick and Another v Durban City Garage and Others 1984 (2) SA 414 (D) at 424B – C, where the following was held:

> *"Whilst I am not prepared to say that it is a sine qua non to the success of the application that the applicant should make out a prima facie case*

on the merits, I do believe it correct to state that it is in general required of such an applicant to furnish a satisfactory explanation for his failure to give the notice before close of pleadings and to make out a prima facie case against the person he seeks to sue by alleging facts which, if established at the trial, would entitle him to succeed."

[11] In Mercantile Bank Ltd v Carlisle & Another 2002 (4) SA 886 (W) at 889 C – D a different view was expressed and the following approach was adopted:

"It is difficult to see why it should not be a sine qua non to the success of such an application that the applicant should make out a prima facie case on the merits, in the sense of alleging facts, which if established at the trial, would entitle it to succeed. An applicant in this situation ought normally (I am prepared to say always) to attach a draft third party notice and annexure in which his cause of action against the third party is set out, and to confirm or adopt those allegations under oath. If no prima facie case is made out in those allegations (i.e. the claim as set out in the notice and annexure is excipiable in that it does not disclose a cause of action), it is inconceivable that a court would permit the third party joinder. Accordingly, I would, at the very least, expect an applicant to set out a prima facie case in the sense described above, whether in his founding affidavit or in the draft third party notice and annexure"

[12] At paragraph F, the court continued to qualify what it meant by *prima facie* case and absence of excipiability and states the following:

"The prima facie case, or absence of excipiability, must of course be weighed in the light of the totality of the available facts. The applicant may, for instance, present a technically correct pleading, whereas the common cause facts as they emerge from the affidavits may make it clear that the case against the third party, if pleaded according to those facts, could never succeed. To that extent, the prima facie case, or absence of excipiability, must be qualified by having regard to the

> *totality of the facts. In this exercise, it must be borne in mind that the purpose of the Rule is to prevent a multiplicity of actions (MCC Contracts (Pty) Ltd v Coertzen and Others 1998 (4) SA 1046 (SCA) at 1049J – 1050A), the Court is given a wide discretion (Wapnick v Durban City Garage (supra at 423E)), and a lenient approach is called for. Accordingly, if on the totality of the facts, the case against the third party is totally unfounded, the joinder would be refused. It must be a clear case, for it is the function of the trial Court to decide disputes, and joinders should in my view not be refused save in the clearest of cases."*

[13] In Pitsiladi and Others v ABSA Bank and Others 2007 (4) SA 478 (SE), the sub-Rule came under scrutiny again. The court considered the Wapnick, Niemand and the Mercantile Bank cases (*supra*) and came to the conclusion that it was unable to agree with the finding in the Mercantile Bank case that 'the application must fail if the applicant's third party notice, which at this stage of the proceedings before leave for its late filing has been granted is basically in draft form, is excipiable.'

[14] Despite the notion expressed in the Wapnick and Niemand cases, that establishing a prima facie case is not a sine qua non for a successful application under the sub-rule, the requirement to establish a prima facie case was nonetheless considered in the Pitsiladi case and at page 484 E the court expressed the following views:-

> "*To establish a prima facie case for purposes of Rule 13(3)(b) means that the applicant's case on the merits must not be totally unfounded, and should be based on facts mentioned in outline, which, if proved, would constitute a claim. (Wapnick v Durban City Garage (supra at 424A). In my view, and unless the Court is satisfied on a conspectus of all the facts that the applicant's case is clearly without merit, factual and legal issues raised by an application in terms of sub-rule (3) are rather*

> *to be determined at the trial or left to be addressed in the pleadings which the third party is entitled to file in terms of Rule 13."*

[15] In considering whether the applicant has made out *a prima facie* case, the court in Pitsiladi took into account the transcript of the evidence in a criminal trial including all the affidavits filed in support of the application. It came to the conclusion that the Respondent has not gainsaid the factual allegations and the documentation put up by the defendant in support of its claims against the respondent and found that the defendant's claims were not unfounded. (Pitsiladi *supra* at 486 E)

[16] What is evident from the abovementioned decisions is that the court has a wide discretion, to be exercised judicially upon a consideration of all the facts and dependent upon what is fair to both sides in deciding if to grant applications under this sub-Rule. Moreover, the court should not lightly refuse leave in terms of the sub-rule because such refusal might result in a multiplicity of actions. On the other hand, leave should not be granted as a mere formality when the applicant seeks an indulgence because he failed to join the third party prior to the close of pleadings when that would have been possible. Furthermore, as stated in the Pitsiladi case supra at 482 H 'it must be accepted that where the applicant's case against the third party is undoubtedly without any merit, the granting of leave to join the third party would be pointless and be prejudicial to the plaintiff, whose claims would be unnecessarily delayed, and to the proposed third party, who would unnecessarily become a party to the proceedings and incur costs'.

[17] Moreover, even though in the Wapnick, Niemand and Pitsiladi cases the view was expressed that it may not be essential for an applicant to make out a *prima facie* case on the merits, the general requirements seems to be that an applicant under this sub-rule, firstly, had to furnish a satisfactory explanation for his/her failure to issue the notice before the close of pleadings and, secondly, had to make out a *prima facie* case against the person it seeks to join by alleging facts which, if established at the trial, would entitle him/her to succeed. In the present instance these two requirements, which in my view is the correct approach to adopt, have sharply come into focus again in particular whether the Defendant has indeed made out a *prima facie* case against the Respondent whom it seeks to join as a Third Party.

[18] Turning then to the facts of the present matter. The Defendant's right of action against the Respondent is in the main based upon the allegation that the Plaintiff's wife was at the relevant times a patient and under the care of Dr. R Cheifittz, an obstetrician and gynaecologist and by accepting the appointment by Dr Cheifittz , alternatively the Plaintiff's and or his wife as attending paediatrician, the Respondent owed Pierre alternatively the Plaintiff as father and natural guardian of Pierre, a duty of care to take all reasonable, required and necessary steps and/or measures to treat Pierre in accordance with the skill, care and diligence reasonably expected of a specialist paediatrician which he allegedly failed to do.

[19] The reasons for the delay in joining the Respondent were recorded in the founding affidavit by the attorney for the Defendant in paragraphs 5-6 as follows.

"5. Although the possibility of joining Dr Smit was considered prior to close of pleadings, the issue required significant and extensive further investigation due to the complex nature of the Plaintiff's claim against the Defendant, and in particular the complexities surrounding the issue of causation. Only after a number of medical experts were consulted, the latest of whom was Professor Johan Smith on 6 December 2012, did it come to light that there are in fact grounds upon which to join Dr Smith as a third party to this action, which grounds have been set out in the Annexure to the Third Party Notice. A copy of the Defendant's draft Annexure to the Third Party Notice is attached hereto marked "CB1".

6. Dr Smith was accordingly not joined to this action as a third party within the time period provided for in the Uniform Rules of Court, and this application could not be brought at an earlier stage, as the on-going investigations had to be completed to establish whether such a joinder is in fact necessary to protect the Defendant's rights and interests, whereafter I had to obtain instructions from my client as to whether to pursue the joinder of Dr Smith as a third party to this action."

[20] The Respondent has filed an extensive answering affidavit setting out his response why the Defendant's reasons to justify their late delivery of the Third Party Notice are inadequate, vague and insufficient and why no *prima facie* case has been made out against him on the merits. At paragraph 7 of the answering affidavit the following is *inter alia* recorded:

"7.3 Defendant states that it considered the possibility of joining me prior to the close of pleadings but elected not do so as the issue required significant extensive further investigation particularly regarding causation.

7.4 Defendant fails to state what further investigations it undertook, which medical experts were consulted, what grounds came to light and why it took nearly two years for this process to take. Defendant provides

no explanation as to why this process could not have been completed prior to or shortly after the close of pleadings.

7.5 Defendant provides no details of the relevance of the input of the various medical experts, including Prof Johan Smith, who was only consulted on 6 December 2012. No explanation is provided regarding why he was consulted at such late stage.

7.6 The grounds detailed in annexure "CB1" to the founding affidavit must have been within Defendant's knowledge at the time that it filed its plea. Defendant has at all times been in possession of the hospital records and its legal representatives clearly consulted with the nursing staff who were involved at the relevant time.

7.7 Defendant's attorneys of record (Norton Rose) in fact contacted me in February 2012 and asked me to consult with them regarding this matter and in particular, regarding what caused and contributed to the deterioration of baby Pierre van den Heever's (Pierre's) condition.

7.8 On 1 March 2012, Norton Rose addressed a letter to me in which they inter alia requested me to confirm when I would be available to consult with them. A copy of the letter is annexed hereto marked "DS1".

7.9 At this stage I had already consulted with Plaintiff's attorneys of record, MacRobert Inc., and at their request provided them with an affidavit regarding my views on certain aspects regarding what caused and/or contributed to the deterioration of Pierre's condition. I accordingly advised Norton Rose that I would consult with them but as I had already consulted with MacRobert Inc., I would prefer to do so in the presence of Plaintiff's legal representatives. They were amenable to this and a consultation was arranged for 24 May 2012. The day of the scheduled consultation Norton Rose cancelled the consultation due to the unavailability of the attorney and counsel dealing with the matter as they were apparently both involved in another matter which required their urgent attention and included consulting with witnesses from out of town. They undertook to reschedule the consultation, which they never did.

> *7.10 It is apparent form annexure "DS1" that as at 1 March 2012 Norton Rose had already consulted with the nurses who were on duty at the hospital on 9 and 10 July 1997 and that certain of the grounds detailed in annexure CB1" are contradicted by the contents of annexure "DS1". In particular, it is clearly stated that their understanding was that I was contacted by Sister Coldicott on 10 July 1997, after she had established that Pierre's condition had deteriorated. No mention is made of any contact with me prior to 10 July 2007. This belies, inter alia, the allegations in paragraph 12 of annexure "CB1"."*

[21] The Respondent also denied the allegation in the draft annexure to the Third Party's Notice that he had received a telephone call at or about 15h18 on 9 July 1997 from sister L Quelch advising him of Pierre's birth and requesting him to review him, and stated that if indeed he had received such call he would have attended thereto as soon as possible. He stated that he had only become aware of and met with Pierre and his mother on the morning of 10 July 1997. Sister L Quelch, who would be the obvious person to confirm the correctness of any entries made in the nursing notes on 9 July 1997, could not be contacted and her evidence established; it was confirmed that she was last registered with the SA Nursing Council in 2006. The Respondent stated that to the extent that it may be contended by Sister Quelch that she had made a call to his rooms on the above date, and left a message regarding Pierre, such could not be gainsaid considering his receptionist at that time had since passed away. In the light of the above Mr Smith concludes that he cannot lead such evidence at the trial and that he is prejudiced as a result thereof. He further claimed that it was impossible to either prove or disprove the allegations set out herein with reference to the telephone records for two reasons: if the records had existed, they would have been destroyed by now; and even if records could be produced confirming that he had been telephoned by

nursing staff at the maternity ward on the morning in question (which is denied), such a call could have related to a number of patients in respect of whose care he was responsible.

[22] I am alive to the basic notion that factual disputes are better left to the trial Court to decide or left to be addressed in the pleadings, which the Respondent is entitled to file in terms of sub Rule 13 and that joinder should only be refused in the clearest of cases. However, the Respondent's complaint that the Defendant did not furnish a satisfactorily explanation for its failure to timeously issue its Third Party Notice before close of pleadings is not without substance. The information detailed in the annexure to the Defendant's Third Party notice must have been within the Defendant's knowledge before or at the time pleadings were closed. I say this because on the papers filed it is evident the Defendant has at all times been in possession of the hospital records and its legal representatives clearly consulted with the nursing staff members who were involved at the relevant time. It may be so that further investigation, particularly regarding causation, was required, but for reasons only known to the Defendant, it has failed to inform this court, from whom it seeks an indulgence, what information came to light which it deemed relevant in finally making the decision to join the Respondent. Furthermore, the Defendant appears to rely on an opinion expressed by Professor Smith at a meeting on 6 December 2012. However, no report, statement or detail is provided regarding why Prof Smith concluded that the Respondent should be joined as a third party to the action. This scant information can hardly be regarded as a satisfactorily explanation for the Defendant's failure to timeously file the Third Party Notice.

[23] I now deal with the question whether the Defendant made out a *prima facie* case against the Respondent which, if established at the trial, would entitle the Defendant to succeed. In as much as an application in terms of the sub-rule falls in the same category as applications for rescission of a default judgment, removal of bar, leave to defend and extension for the fillings of pleadings (Pitsiladi supra at 481 H), this approach clearly does not do away with the well-established body of law in motion proceedings. Although in Pitsiladi the court came to the conclusion that it is unable to agree with the finding that 'the application must fail if the applicant's third party notice, which at this stage of the proceedings before leave for its late filing has been granted is basically in draft form, is excipiable.' The views expressed in the Mercantile Bank case that '*An applicant in this situation ought normally (I am prepared to say always) attach a draft third party notice and annexure in which his cause of action against the third party is set out, and to confirm or adopt those allegations under oath,'* were not criticised and cannot be regarded as objectionable in applications of this nature. In my view an applicant must accordingly raise the issues upon which it would seek to rely in the founding affidavit and ought to confirm and adopt those allegations it relies upon under oath. If not, the Applicant needs to be open and frank with the Court why it cannot do so. Moreover, as stated in Swissborough Diamond Mines v Government of the RSA 1999 (2) SA 279 (T) at 324 F –G '..it is not open to an applicant or a respondent to merely annex to its affidavit documentation and to request the Court to have regard to it. What are required are the identification of the portions thereof on which reliance is placed and an indication of the case which is sought to be made out on the strength thereof. If this were not so the essence of our established practice would be destroyed.'

[24] In this matter what is apparent from the founding affidavit is that no supporting affidavit or reports have been filed by any medical practitioner, in support of this application to join the Respondent as a third party, be it on the reasons for the delay or the merits. Of particular interest is that no confirmatory affidavit has been filed by Prof Smith in respect of the information which came to light after the consultation with him on 6 December 2012. The Defendant elected also not to tender an explanation for the absence of such supporting affidavits. In my view, in this instance, basic fairness and the interest of justice at the very least demands that the Defendant should have filed a short report or synopsis by Prof. Smith outlining why he is of the opinion that the Respondent should be joined as a third party on the merits.

[25] On a conspectus of all the evidence and the averments made in the annexure to the Third Party Notice be it only in draft form, in the absence of any supporting or confirmatory affidavits by Prof Smith or any other medical practitioner consulted by the Defendant, it is my view there are insufficient facts to make out a *prima facie* case, which if established at the trial, would entitle it to succeed. To view it any differently would be to allow non-observance of this Court's Rules as a mere formality.

[26] I have given consideration to the notion that the Defendant should perhaps be granted leave to amend its papers even though this issue was not raised by counsel. In this instance, the Defendant was made aware by the Respondent of the deficiency in its papers and in particular, the absence of any supporting or confirmatory affidavits by Prof Smith. As a result of the Defendant's persistence in refusing to remedy these

shortcomings, I am inclined not to grant such an order. The defendant can start *de novo* if it elects do so.

[27] It follows that the Application cannot succeed. In the result the following order is made:-

The Application is dismissed with costs.

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LE GRANGE, J