IN THE HIGH COURT OF SOUTH AFRICA

(MPUMALANGA DIVISION, MBOMBELA)

CASE NO: 860/2017

REPORTABLE:NO

OF INTEREST TO OTHER JUDGES:YES

REVISED: YES

12/10/2022

In the matter between:

THE MEMBER OF THE EXECUTIVE COUNCIL FOR PUBLIC WORKS, ROADS AND TRANSPORT MPUMALANGA PROVINCE	Applicant
and	
D[....] B[....]	First Respondent
T[....] B[....]	Second Respondent
B[....] B[....]	Third Respondent
BARRY KALMIN N.O.	Fourth Respondent

J U D G M E N T

MASHILE J:

INTRODUCTION

[1] In this judgment, The MEC will mean the Applicant and reference to the Respondents shall mean the First to Third Respondents otherwise and depending on the context, the First Respondent will henceforth be referred to as B[....] and the other two as T[....] and B[....] respectively. The MEC seeks leave for the late institution of a counterclaim as contemplated in Uniform Rule of Court 24(1) against the Respondents. The MEC is a Defendant in an action for loss of support instituted by B[....] and her children, T[....] and B[....], against him. The loss of support action ("the main action") emanated from the death of B[....]'s husband ("the deceased") whose death the MEC is alleged to have vicariously caused on 14 May 2016 through lack of maintenance of the road on which the deceased was travelling shortly prior to his demise. The Fourth Respondent ("Kalmin") is the executor of the late estate of the deceased.

[2] In the main action, the MEC maintains that the deceased was responsible alternatively, was partly negligent in the manner in which the accident happened. If so, continues the argument, the MEC is entitled to join Kalmin as the executor of the late estate, <u>alternatively</u> the deceased's heirs who have received inheritances. The MEC can either seek a contribution from the estate as deemed joint wrongdoer in terms of Section 1(1)(b) of the Apportionment of Damages Act, 34 of 1956 ("the Apportionment of Damages Act") or if the estate of the deceased has been finalised, from the heirs who had received inheritances, based on an enrichment action such as the *condictio indebiti*.

[3] Additionally to the relief sought in terms of Rule 24(1), the MEC also seeks, insofar as it may be necessary, the leave of the Court to institute conditional counterclaim proceedings against B[....] after close of pleadings, as envisaged in Section 2(4) of the Apportionment of Damages Act. This will be founded on the joint wrongdoing of the deceased in the occurrence of the accident of 14 May 2016, which forms the subject matter of the main action, in circumstances where no notice was given as required in terms of Section 2(2)(b) of the Apportionment of Damages Act.

[4] This application became opposed on 18 August 2021 following its launching on 27 July 2021. Opposing the application, B[....] reasons that the relief sought cannot be granted because the proposed counterclaim has become prescribed. Besides, the MEC has been short on proffering reasonable and acceptable explanation of the lateness of the filing of the counterclaim. B[....] contends that the inactivity and/or ignorance of the Rules of Court by the MEC and his legal representatives are at a juncture where they ought not to be tolerated by the Court.

FACTUAL MATRIX

[5] On 14 May 2016, along the R553 Road near Graskop, Mpumalanga Province, a motorbike ridden by the deceased hit a pothole and lost control. In consequence of the accident, the deceased was fatally injured. Alleging that the negligent and wrongful conduct of the MEC caused the death of the deceased, the Respondents instituted an action for loss of support on 8 May 2017. The MEC defended the action.

[6] The MEC pleaded that he was entitled to claim a contribution from Kalmin in the estate of the deceased based on the deceased's own negligence in causing the accident. As an Alternative, from the heirs of the deceased and referred to his third party notice, which would be served upon Kalmin and/or heirs of the estate of the deceased once the particulars of Kalmin and/or heirs become known to him.

[7] On 24 July 2018, the MEC filed Rule 37 questions for purposes of a pre-trial conference. At Paragraphs 10.5 to 10.10, the MEC requested the Respondents to provide him with full particulars of Kalmin, the particulars of the heirs and a copy of the liquidation and distribution account to enable the MEC to join Kalmin as a third party in the main action. In the event that the estate had already been finalised, the MEC requested that he be furnished with the particulars of the heirs to enable him to claim from such heirs. The MEC simultaneously complained in his answers to the Respondents' Rule 37 questions which he had filed on 24 July 2018 that he had not been provided with the required particulars and that the failure was prejudicing him.

[8] On 17 August 2018, the Respondents filed their discovery affidavit but omitted to include any of the relevant documents, such as the Last Will and Testament of the deceased, the letters of executorship, or the liquidation and distribution account in the estate of the deceased. In the circumstances, the MEC was left in no better position to identify the executor or the heirs. The matter lay dormant in 2019 while the parties were awaiting trial date. From March 2020, both the case management and the Court rolls were disrupted by COVID-19, and trial as well as case management rolls were suspended.

[9] The suspension notwithstanding, the parties successfully held a virtual pre-trial conference on 30 and 31 July 2020. The MEC alleges that the Respondents subsequently and for a considerable amount of time failed to respond formally to the Rule 37 questions posed by the MEC. In the end, the Respondents replied to the questions posed and the minute of 30/31 July 2020 pre-trial conference was signed on 8 September 2020 on behalf of the MEC and on 14 September 2020, by the attorneys for the Respondents.

[10] At paragraph 3.1.1 of the pre-trial minute, the MEC reiterates that he was still awaiting the particulars of Kalmin and the heirs from the Respondents to enable him to claim a contribution from Kalmin as the executor in the estate of the deceased, based on the deceased's own negligence in causing the accident alternatively, from the heirs of the deceased based on the *condictio indebiti*. Furthermore, at Paragraph 3.1 of this minute it is recorded that the MEC was awaiting the particulars of Kalmin and the heirs to enable him to institute the counterclaim against the heirs if any of them were one of the Respondents.

[11] At Paragraph 3.4.2 of the Rule 37 minute dated September 2020, the MEC was asked whether he had any complaint of prejudice. The MEC answered in the affirmative and recorded that he had as long ago as 24 July 2018 requested the particulars of Kalmin and of the heirs, and of the relevant liquidation and distribution account. The requested information would assist the MEC to join Kalmin as a third party in the proceedings <u>alternatively,</u> if the estate was finalised, to join the heirs as third parties. Additionally, the MEC specifically complained that the matter would not be ripe for hearing as long as the joinder of the executor, Kalmin, or the heirs remained unresolved.

[12] The response by the Respondents to the questions again posed about the identity of Kalmin and the heirs and to the complaint raised by the MEC was the following at paragraph 3.4.2 of the Rule 37 minute:

> "*PLAINTIFFS COMMENT:*
>
> *The Plaintiff records that the envisaged Pre-Trial meeting in terms of the defendant's Rule 24 July 2018 filed Rule 37 questions was never held therefore the plaintiff did not have the opportunity to respond to the questions."*

[13] No further information was given to the MEC's questions and even at that point, the Respondents failed to disclose the identity of Kalmin and/or the heirs. At paragraph 3.4.3 of the minute, the MEC also complained about the incomplete discovery of the Respondents. The complaint was recorded as follows:

> "*It is incomplete, because plaintiffs have failed to discover vital relevant documents, such as the liquidation and distribution account in the estate of the deceased and the letter of appointment of relevant executor."*

[14] When the Respondents still failed to provide the necessary documents, the MEC delivered a notice in terms of Rule 35(3) on 1 September 2020. The purpose of the notice was once again, to request the Respondents to furnish the:

14.1 The Will of the deceased;

14.2 the letters of executorship;

14.3 The final liquidation and distribution account;

14.4 The discharge form of the Master.

[15] The MEC needed these documents to establish what the position was with respect to the executor and the heirs, and to enable the MEC to approach the Court for leave to serve a belated third party notice in the proceedings. On 4 September 2020, the Respondents provided an affidavit in terms of Rule 35(3) wherein for the first time they supplied documents that included amongst others: the letters of executorship, the Will of the deceased and the liquidation and distribution account. On 20 November 2020 and as a result of the documents made available to the MEC, he wrote to Kalmin to enquire about the status of the estate of the deceased and to find out whether or not it has been finalised.

[16] At that stage, it was still unknown whether or not B[....], as the apparent sole heir according to the liquidation and distribution account, had in fact received her inheritance or part thereof. It was also not known whether or not Kalmin had been discharged as the executor by the Master. On 22 November 2020, Kalmin responded by e-mail stating that despite numerous requests, he was still not in receipt of the Master’s discharge in the estate.

[17] It is not contested that it was only on 4 September 2020, that the MEC could reasonably have become aware of the:

17.1 Identity of the heirs of the deceased;

17.2 A cause of action founded on the *condictio indebiti* or other enrichment remedy against B[....] as the deceased's sole heiress.

[18] It was also only upon receipt of an answer from Kalmin on 22 November 2020 that the MEC could have become aware that Kalmin had not been discharged as yet. This knowledge made it abundantly clear that Kalmin, as the executor of the deceased's estate, ought to be joined as a necessary party to the main action.

[19] A further delay was brought about by the transfer of the estate late file from Frans Schutte Attorneys to Swanepoel Attorneys to which Mr van Heerden had taken up new employment following his departure from the former firm of attorneys. This added interruption occurred between 20 November 2020 and 14 April 2021 during which Frans Schutte Attorneys had to be substituted for Swanepoel Attorneys as corresponding attorneys for the State Attorney. Subsequently, Counsel was instructed to draft the Rule 13 application to obtain leave to join Kalmin as a third party and in the same application, leave was also sought to join B[....] as a third party.

[20] B[....] opposed the Rule 13 Application on the ground that the provisions of Rule 13(1)(a), properly construed, exclude her joinder as a third party because she was

already a party in the main action before the Court. On 26 July 2021 and succumbing to the opposition, the MEC withdrew the Rule 13 Application. On 14 July 2021, the MEC requested the attorneys of B[....] to agree to late filing of a counterclaim, which they rejected. As a consequence, and on 27 July 2021, the MEC launched the Rule 24 Application against B[....].

ISSUES

[21] From the facts above, this Court is required to decide on whether or not:

21.1 The MEC has made out a case for the late introduction of a counterclaim;

21.2 The MEC should be permitted to deliver a Rule 13 notice late;

21.3 The MEC presented a proper explanation for the delay; and

21.4 The MEC has made out a case that the Court should exercise its discretion in favour of granting the indulgence sought.

LEGAL FRAMEWORK

[22] Rule 24(1) is headed: Claim in Reconvention and it provides:

"A defendant who counterclaims shall, together with his plea, deliver a claim in reconvention setting out the material facts thereof in accordance with rules 18 and 20 unless the plaintiff agrees, or if he refuses, the court allows it to be delivered at a later stage. The claim in reconvention shall be set out either in a separate document or in a portion of the document containing the plea, but headed 'Claim in Reconvention'. It shall be unnecessary to repeat therein the names or descriptions of the parties to the proceedings in convention."

Although settled that a counterclaim ought to be served simultaneously with a plea, it is acceptable for it to be delivered later during the proceedings. This can be achieved with the permission of a Plaintiff. Where the plaintiff, however, refuses to grant consent, a Defendant can do so with the leave of the Court.

[23] The jurisdictional factors that a party must establish to succeed with a Rule 24(1) Application are:

23.1 The Defendant (the MEC) must furnish a reasonable and acceptable explanation for the late delivery of the counterclaim;

23.2 The Defendant (the MEC) must show an *entitlement* to institute the counterclaim. In other words, the anticipated counterclaim must comply with the provisions of Rules 18 and 20. See, *Lethimvula Health Care (Pty) Ltd v Private*

Label Promotions (Pty) Ltd[1].

[24] When considering whether or not to allow the introduction of the proposed counterclaim, the Court possesses extensive discretion. See, Lethimvula at 148 H – I *supra*. A Defendant would qualify to institute a counterclaim and a Plaintiff eligible to be sued at common law firstly, on grounds of convenience, equity, the saving of costs and the avoidance of a multiplicity of actions or secondly, If the action fits into the mould of Rule 10(3). See, *Erasmus, Superior Court Practice*,**[2].**

[25] The Court in *Hosch-Förnrdertechnik SA (Pty) Ltd v Brelko CC* [3]said the following on the question of entitlement:

> *"to take action is not the equivalent of a prima facie case of potential success in an action against the plaintiff concerned, and a defendant who applies for leave in terms of Rule 24(1) to institute a counterclaim against a plaintiff, need not in his application made out a prima facie case on the merits for the relief claimed in the counterclaim."*

[26] The Applicant in a Rule 24(1) application (the MEC) is required to show his *locus standi* and that of B[....], and to disclose in terms of Rule 10(3), his cause of action, upon which the counterclaim would be based. These facts, together with such further facts as may possibly be material in a particular case, such as overriding considerations

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[1] 2012 (3) SA 143 (GSJ)
[2] Vol 2, p. D1 – 313
[3] 1990 (1) SA 393 W at 395 B – H

of justice, equity or convenience, form the subject matter for the exercise of the Court's discretion under the sub-rule. See the *Hosch-Fömrdertechnik SA (Pty) Ltd case supra* at 395 B – H.

[27] To the extent that the MEC seeks to institute a claim against B[....] founded on the Appportionment of Damages Act and on enrichment, depending of course on the outcome of the main action, I deem it necessary to refer to its amendment that was effected in 1971 by the presentation of Section 2(1B), which reads:

> "*2(1B) Subject to the provisions of the second proviso to subsection (6)(a), if it is alleged that the plaintiff has suffered damage as a result of any injury to or the death of any person and that such injury or death was caused partly by the fault of such injured or deceased person and partly by the fault of any other person, such injured person or the estate of such deceased person, as the case may be, and such other person shall for the purposes of this section be regarded as joint wrongdoers.*" [4]

ANALYSIS

WHETHER OR NOT THE LATE DELIVERY OF THE COUNTERCLAIM IS JUSTIFIABLE

[28] The issue here is whether Rule 24(1) allows the procedure adopted by the MEC to deliver the proposed counterclaim, if it does, are there any conditions with which the

[4] See: Section 1 of Act 58 of 1971.

MEC ought to comply? To turn then to the first question. The provisions of Rule 24(1) are unequivocal where the Defendant has failed to simultaneously deliver his plea together with a counterclaim, he can still do so later in the proceedings with the consent of the Plaintiff. However, Where the Defendant is unable to secure the approval of the Plaintiff, he can do so only with the leave of the Court. If the Defendant wishes to do so with the leave of the Court, he is expected to furnish cogent reasons for his failure to comply with the general rule –simultaneous delivery of the counterclaim with the plea.

[29] Reasons for the MEC's failure to adhere to the general rule are manifest from the facts of this matter, which are largely not contested. The MEC first intimated in his plea that he would be entitled to claim a contribution from the deceased's estate represented by Kalmin as the deceased was the cause of his own demise and the loss sustained by the MEC. In the alternative, the MEC indicated that he would seek contribution from other heirs of the deceased estate as soon as he became aware of their particulars. Again, the MEC in his Rule 37 questions delivered on 24 July 2018, he asked that he be supplied with the following information:

29.1 Full particulars of Kalmin;

29.2 Full particulars of the heirs;

29.3 Copy of the liquidation and distribution account to enable him to join Kalmin as a third party in the main action; and in the event that the deceased estate has already been concluded,

29.4 The particulars of the heirs to enable him to claim from such heirs.

[30] It was not contested or at least not seriously so that when the initial plea, and later, when the amended plea was filed, the MEC was not in possession of any of the facts that would have allowed him to formulate either a third party joinder of Kalmin or a conditional counterclaim against the heirs, such as:

30.1 Whether the deceased had left an estate with assets in it;

30.2 Whether an executor had been appointed for the administration of the estate of the deceased;

30.3 Who the executor was (if any) and his particulars;

30.4 Whether or not the estate had been reported and if so, at which offices of the Master of the High Court?

30.5 Whether or not the deceased died intestate or testate;

30.6 The extent to which the liquidation and distribution of the assets of the deceased had progressed;

30.7 The date on which the executor was appointed;

30.8 Who the heirs were, if any, and their contact particulars;

30.9 What they have inherited, if at all;

30.10 Whether or not they have received their inheritances, if any.

[31] All these facts had to be established by the MEC to formulate a conditional counterclaim and all of them were in the possession of B[....]. Those facts were also

required to establish the identity of the debtor, the existence of the debt and the facts from which the possible debt arises, as envisaged in Sections 12(1) to 12(3) of the Prescription Act, 68 of 1969.

[32] When the Respondents delivered their discovery affidavit on 17 August 2018, it included none of the relevant documents that would enable the MEC to perfect his conditional counterclaim. Subsequently, the parties awaited a trial date and while so waiting COVID-19 intervened. The 30 and 31 July 2020 pre-trial conference that the parties successfully held failed to yield positive results. Following numerous requests and complaints of prejudice by the MEC, fully described in the factual background above, the Respondents and only in response to the MEC's Rule 35(3) Notice, eventually delivered an affidavit on 4 September 2020 in reply providing the liquidation and distribution account, the will of the deceased, letters of executorship and other related documents.

[33] Information that remained outstanding at the time was whether or not B[....] had been paid her inheritance or part thereof and whether or not Kalmin had been discharged as the executor by the Master. In an e-mail message of 22 November 2020, Kalmin confirmed that he had not been discharged yet from the estate by the Master. As such, it was only on 4 September 2020 that the MEC became aware of the identity of the heirs of the deceased and a cause of action founded on the *condictio indebiti* or other enrichment remedy against B[....] as the deceased's sole heiress. The receipt of the answer from Kalmin on 22 November 2020 alerted the MEC that Kalmin was a necessary party to the proceedings to be joined as the master had not discharged him.

[34] The Respondents have contended that the MEC failed to give a reasonable and acceptable explanation of the lateness of the filing of the counterclaim. Additionally, argued the Respondents, the inactivity and/or ignorance of the Rules of Court by the MEC and his legal representatives are at a juncture where they ought not to be tolerated by the Court. This submission cannot find favour with this Court. On the contrary, it is inexorable to conclude from the aforesaid account that the MEC could not

have delivered the counterclaim concomitantly with the plea.

[35] The inordinate delay in effecting punctual delivery of the counterclaim was exacerbated by the Respondents themselves. It is extraordinary that B[....] had been in possession of some of the information needed by the MEC as early as three months after the accident on 16 May 2016 but would not provide the documents until service of the Rule 35(3) on her. Had she provided the information as and when required by the MEC, the counterclaim would have been delivered earlier. In the circumstances, I am satisfied that the MEC has given this Court a reasonable and acceptable explanation for his failure to deliver the counterclaim alongside the plea.

ESTABLISH ENTITLEMENT TO INSTITUTE THE COUNTERCLAIM

[36] For the MEC to succeed on the requirement of entitlement to institute a counterclaim and that the Respondents qualify to be sued he must show convenience, equity, the saving of costs and the avoidance of a multiplicity of actions or that the action fits into the mould of Rule 10(3). See, Erasmus, Superior Court Practice, *supra*. Rule 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."*

[37] It is indubitable that it will be convenient for both parties that the counterclaim be instituted and decided at the same time as the main action. This will obviously avoid a multiplicity of actions and incurring gratuitous costs were a separate claim to be instituted another time aside the fact that the action fits into the mould of Rule 10(3) outline above. There is as such, no valid reason not to allow the MEC not to deliver the counterclaim albeit at this late juncture of the proceedings. Accordingly, I hold the view

that it will be equitable and in the interest of justice that delivery of the counterclaim be effected.

[38] The Respondents have strongly asserted that the proposed counterclaim has prescribed as envisaged in the Prescription Act 68 of 1969. It should suffice to state that I disagree with the Respondents. It is evident from the case of *Hosch Fomrdertechnika supra* that it is not a requirement that a *prima facie* case be shown prior to the delivery of a proposed counterclaim. It will not serve any purpose to traverse this subject further than I have already done.

[39] I am in agreement with the MEC that it is inappropriate to raise prescription at this stage of the proceedings. These proceedings are not concerned with the prescription of the intended counterclaim but rather with whether or not the MEC, as of right, can deliver the counterclaim. The Respondents may, when pleading to the counterclaim, still raise prescription. It will be only then that the Court adjudicating the main action can appraise the merits and demerits of the counterclaim.

[40] Moreover, sight must not be lost that the counterclaim is dependent on the decision of this Court in the main action. Were the Court in the main action to decide that the MEC is exclusively to blame for the accident, there will be no counterclaim to consider. Thus, the conditional counterclaim will only become unconditional and tangible upon the Court deciding in the main action that the deceased was entirely or partly to blame for the accident and making definitive determinations on:

40.1 The deceased was indeed involved in the accident as alleged;

40.2 The deceased sustained injuries in the accident as alleged;

40.3 The deceased passed away as a result of the injuries sustained in the accident;

40.4 unlawful and negligent conduct of the MEC caused or contributed to the accident, the deceased's injuries and his resultant death;

40.5 The deceased provided support to the Respondents;

40.6 The MEC is liable for the said loss of support which is claimed by the Respondents or for any other amount in respect of loss of support;

40.7 The deceased's negligent riding of the motorbike contributed to the manner in which the accident happened;

40.8 The respective degrees of blame between the MEC and the deceased;

40.9 The determination of the amount owing by the MEC to the Respondents, if any;

40.10 The administration of the estate of the deceased has indeed been finalised, and that Kalmin has been discharged of his duties as executor;

40.11 The net value of the estate has already been paid to the B[....] in terms of the first and final liquidation and distribution account in the estate of the deceased;

40.12 B[....] has indeed been unjustly enriched at the expense of the MEC when she received her inheritance before a decision on whether or not there should be apportionment of damages against the estate.

[41] Accordingly, a cause of action founded on *condictio indebiti* or Apportionment of Damages Act will become alive upon satisfaction of all these requirements and only then will prescription commence to run. In the alternative, prescription will start to run twelve months after this judgment. It is settled that since the advent of the

Apportionment of Damages Act, Act 58 of 1971 by which Section 1(1B) of the Apportionment of Damages Act was introduced, if the death of the deceased was caused partly by his own fault and partly by the fault of another, their estates are deemed joint wrongdoers, for purposes of the Apportionment of Damages in terms of Section 1 of the Apportionment of Damages Act.

[42] An exception to the above is to be found in the Assessment of Damages Act, 9 of 1969, which provides that insurance monies, pensions and certain benefits shall not be taken into account in the assessment of damages for loss of support. The word "*benefit*" is described in the Act as meaning any payment by a friendly society or trade union for the relief or maintenance of a member's dependents, and insurance monies includes a refund of premiums and any payment of interest of such premiums, and pension includes a refund of contributions and any payment of interest on such contributions, and also any payment of a gratuity or other lump sum by a pension or provident fund or by an employer in respect of a person's employment. That said, this Court cannot concern itself with that exception as it does not find application here.

[43] Furthermore, it is also trite that where an heir was paid an inheritance before the claim of a creditor is satisfied such that nothing is left in the estate to pay the claim, the creditor has a recourse against the estate from the heir under the *condictio indebiti* or the *condictio sine causa*, based on the unjust enrichment of the heir at the expense of the creditor. This too is dependent on the finding or the court in the main action and I find it unnecessary to traverse it fully. Save to the extent dealt with herein above, I purposely desist from dealing with these issues at this juncture because the decision of the main case cannot be predicted and in any event, they are irrelevant for purposes of deciding this case.

<u>RULE 13 APPLICATION</u>

[44] Lastly, I turn to the Rule 13 Application. This should not occupy this Court for long. Rule 13 in relevant part provides that:

"Third Party Procedure

(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, 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, accompanied by a copy of all pleadings filed in the action up to the date of service of the notice, shall be served on the third party and a copy of the third party notice, without a copy of the pleadings filed in the action up to the date of service of the notice, shall be filed with the registrar and served on all other parties before the close of pleadings in the action in connection with which it was issued.

(b) After the close of pleadings, such notice may be served only with the leave of the court.

(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"

[45] From the onset, I need to point out that the Rule 13 Application is not opposed by Kalmin, which in the circumstances of this matter is a sound decision. The MEC has posed the question whether B[....] should nonetheless be allowed to make submissions. B[....] cannot be allowed to do so without a prior application to formally intervene as an intervening party. Since she has not done so, I do not deem it necessary to delve into the issue.

[46] The MEC has demonstrated good cause in the Rule 13 Application why he did not file the application punctually. His failure to file the third party notice in terms of Rule 13 alongside his plea and before close of pleadings was brought about by his lack of knowledge of the identities of the debtor and the third party, Kalmin. Besides, he did not even know the facts from which the debt arose. Regarding proof of a *prima facie* case, the MEC has also established that he has a *prima facie* case on the merits. Here he has demonstrated good cause why the Court should allow him to institute proceedings against Kalmin after close of pleadings in circumstances where no notice was given as required in terms of Section 2(2) of the Apportionment of Damages Act.

CONCLUSION

[47] In terms of the relief sought under Rule 24(1), I am satisfied that the MEC has met all the requirements and as such, he has placed this Court in a favourable position to exercise its discretion to accede to the prayers. Insofar as the Rule 13 application is concerned, the MEC is entitled to the relief sought in prayers 1, 2 and 3 of the notice of motion.

COSTS

[48] There Being nothing to persuade me to think otherwise on the general rule that costs follow results, the MEC must succeed with costs. Against that background, the application succeeds and I make the following order:

1. Leave is granted to the MEC in terms of Rule 24(1) to serve a counterclaim on B[....] in the main action in case number 860/2017;

2. Leave is granted to the MEC, insofar as it may be necessary, in terms of Section 2(4) of the Apportionment of Damages Act to institute a counterclaim against B[....] based on the joint wrongdoing of the deceased in causing the accident of 14 May 2016, which forms the subject matter of the main action in case number 860/2017;

3. B[....] is ordered to pay the costs of this application.

RULES 13(1) AND 13(2)

4. Leave is granted to the MEC to serve a third party notice in terms of Court Rules 13(1) and 13(2) on Kalmin as third party in the main action in case number 860/2017;

5. Leave is granted to the MEC, insofar as it may be necessary, in terms of Section 2(4) of the Apportionment of Damages Act to institute third party proceedings against the fifth respondent based on the joint wrongdoing of the deceased in causing the accident of 14 May 2016, which forms the subject matter of the main action in case number 860/2017;

6. The MEC is directed to pay the costs of this application.

B A MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 11 October 2022 at 10:00.

APPEARANCES:

Counsel for the Applicant:	**Adv D Mills SC**
Instructed by:	**Swanepoel & Partners Inc**
Counsel for the Respondents:	**Adv P Sieberhagen**
Instructed by:	**MED Attorneys**
Date of Judgment:	**11 October 2022**