

IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape Division)

Case Nr: 1450/2006

Case Heard: 27/10/2006
Date delivered: 3/11/2006
In the matter between:

SectionI.1YOUR TRADE 26 CC

Plaintiff

and

SectionI.2MEC: DEPARTMENT OF HEALTH:
SectionI.3NORTHERN CAPE Defendant

SectionI.4and

SectionI.5SEKUNJALO MEDICAL LOGISTICS (PTY) LTD
Third Party

Coram: Olivier J

JUDGMENT

OLIVIER J:

1. The plaintiff, Your Trade 26 CC, issued summons against the defendant, the MEC of the Department of Health, Northern Cape Province, for the delivery of shelves (of which the plaintiff claims to be the owner), alternatively for payment of R400 000,00 (the alleged value of the shelves). The defendant denies that the plaintiff is the owner of the shelves. In its plea it alleges that it is indeed the lawful owner thereof, having purchased it from Sekunjalo Medical Logistics (Pty) Limited (the third party).
2. The defendant, seeking to join the third party, issued a notice in terms of Rule 13. When that notice was excepted to by the third party the defendant filed a notice of amendment thereof, by means of which the defendant basically seeks to substitute its original Rule 13 notice with a new Rule 13

notice, together with an annexure (*"the annexure"*) thereto. The third party has lodged an objection to the proposed amendment and the defendant is now applying for an order that the amendment be allowed.

NOTICE OF AMENDMENT

3. According to the notice of amendment the defendant's attempt to join the third party is, very broadly speaking, to the effect that, should it be found that the plaintiff is indeed the lawful owner of the shelves, and should the defendant then be ordered to deliver the shelves to the plaintiff (or to pay to the plaintiff the value thereof), the defendant would claim from the third party certain relief upon *"facts and circumstances"* set out in the annexure.
4. The defendant's main claim against the third party, as set out in paragraphs 11 to 20 of the annexure, is based on misrepresentation, the allegation being that the third party misrepresented itself to the defendant as being the lawful owner of the shelves. In paragraph 14 of the annexure the defendant declares that it *"will claim the purchase price of R199 750,00, which it paid to the Third Party, as damages from the Third Party (my emphasis)"*, and according to paragraphs 15 and 16 of the annexure it also intends claiming certain consequential damages.
5. The defendant's alternative claim is based on a warranty against eviction and is simply for the restitution of the purchase price that it had allegedly paid to the third party for the shelves.
6. The annexure is concluded with prayers for payment of the amount of R364 750,00 (being the purchase price of R199 750,00 allegedly paid to the third party and the amount of the consequential damages), alternatively payment of the amount of R199 750,00.

OBJECTIONS TO AMENDMENT

7. Briefly summarised the third party's objections are as follows:

7.1. According to the *"amended"* rule 13 notice the defendant intends claiming the relief against the third party *"in terms of Rule 13(1)(a) and/or (b)"*. The third party's objection is that the claims for the payment of money

would not be competent in terms of Rule 13 (1) (a) and that the reference to this subrule would render the third party notice excipiable.

It is trite that an amendment will normally not be granted if it would render a pleading excipiable (see **Barnard v Barnard** 2000 (3) SA 741 (C) at 754F) and the same would obviously apply to a proposed amendment to a Rule 13 notice (see **Mercantile Bank Ltd v Carlisle and Another** 2002 (3) SA 886 (W) at 889D-E).

7.2.Secondly it is stated that *“the proposed amendment lacks averments necessary to sustain a cause of action”*. The gist of this objection is that, because the defendant’s main claim is for damages, the defendant’s allegation of a *“misrepresentation”* (on the part of the third party) is insufficient and that the defendant should have alleged either an intentional (fraudulent) or negligent misrepresentation; the contention on behalf of the third party being that, while innocent misrepresentation is also a recognised form of misrepresentation, it cannot found a claim for damages and that an allegation that the *“misrepresentation”* was either fraudulent or negligent would have been essential to sustain a cause of action for damages.

7.3.The third objection is that the defendant’s proposed main claim has not yet vested and that Rule 13 does not provide for the joinder of a third party on the basis of a claim which has not yet vested and a cause of action which has not yet arisen. This objection is based on the defendant’s allegation (in paragraph 13 of the annexure) that it will only be entitled to cancel (the alleged agreement with the third party) and claim damages once the Court has made a finding that the defendant never became the lawful owner of the shelves, *“by reason of the fact that the Third Party was not the lawful owner thereof”*.

7.4.The third party furthermore contends that the defendant’s alternative claim is vague and embarrassing. This objection is based upon the fact that, while it is stated in paragraph 21 of the annexure that the alternative claim is dependent upon the defendant being ordered to deliver the shelves to the plaintiff (which would imply that the defendant is at this stage still in possession of the shelves), it is elsewhere alleged that the defendant *“has been evicted”*

7.5. The fifth objection is that, until the defendant has indeed been evicted from possession of the shelves, the alternative claim could not have vested in the defendant and that Rule 13 does not provide for the joinder of parties on the basis of contingent claims. This objection is very similar to the third objection.

UNIFORM RULE 13

8. It is necessary at this stage to take a closer look at the provisions of Rule 13, and more specifically subrule 1 thereof:

“(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 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”.

9. The authors of **Erasmus: Superior Court Practice** (Farlam **et al**, at B1-109) state that *“All that can be sought under the rule by one alleged wrongdoer against another is an apportionment of fault in the form of a declaratory order”*. On behalf of the defendant reference has however been made to **IPF Nominees (Pty) Ltd v Nedcor Bank Ltd (Basfour 130 (Pty) Ltd, Third Party)** 2002 (5) SA 101 (W), as support for the contention that monetary claims are competent under Rule 13.
10. What is immediately apparent when regard is had to the cases referred to in **Superior Court Practice** is that they all concerned matters where the third parties were indeed joined on the bases that the defendants were entitled to a contribution or indemnification from them, either delictually (as joint wrongdoers) or contractually (as insurers).

11. The same applies to **Luthuli v Santam Insurance Company Ltd and Another** 1977 (2) SA 97 (D), to which I was also referred. In all of these matters, therefore, the defendants' claims for contributions or indemnification were contingent upon the findings in the matters between them and the plaintiffs.
12. The facts in the **IPF** case were different from those in the **Luthuli** case (and in the cases referred to in **Superior Court Practice**). In that case the plaintiff's claim against the defendant was based on negligence, while the defendant's claim against the third party was based on enrichment, alternatively contract. The defendant's claim was in no way dependent upon the findings in the matter between it and the plaintiff. The defendant did not claim a contribution or an indemnification, but indeed payment of an amount of money with which the third party's account had earlier been credited.
13. **Claassen J** found that there was "*no reason in principle why a judgment sounding in money cannot be issued against a third party joined under subRule 13 (1) (b)*", but not under subrule (a) of Rule 13 (1) (at 116C-D and 118E-F).

THIRD AND FIFTH OBJECTIONS

14. When the facts of the **IPF** case are, however, compared with those in the present matter it is clear that they are distinguishable. In the present case both the main claim and the alternative claim against the third party are entirely dependent upon findings by the Court that the plaintiff is the lawful owner of the shelves, that the third party had never been the lawful owner thereof and that the defendant is therefore obliged to deliver the shelves to the plaintiff.
15. The manner in which the defendant's claims are formulated makes it clear that it will be only then that the defendant will suffer damages or that it will lose possession. Until then there can therefore be only one possible issue between the defendant and the third party, and that is who the owner of the shelves was at the relevant stage.
16. Whether the third party had made a misrepresentation and whether the

defendant had suffered damages because thereof could, on the defendant's own version (as set out in the annexure), not become a "*question or issue*" before the Court has made an adverse finding regarding ownership.

17. The same applies to the defendant's alternative claim. Whether it had been an implied term of the purchase contract that the third party (and not the plaintiff – see paragraph 23 of the annexure) had warranted against eviction could, again on the defendant's own construction, not become a "*question or issue*" between the third party and the defendant before the defendant is by order of the Court evicted from possession of the shelves.
18. Accordingly, and as already mentioned, it is only the matter of ownership that could, on both the defendant's causes of action (as set out in the annexure), at this stage be regarded as a "*question or issue*" substantially the same as the main issue between the plaintiff and the defendant.
19. Had the defendant merely claimed (*vis-a-vis* the third party) a declaratory order regarding ownership (at the time when the alleged purchase contract was concluded), the third party would have found it very difficult to object to a joinder in terms of Rule 13.
20. What the defendant is, however, effectively attempting to do, is to join the third party on the basis that the defendant and the third party must then be permitted to traverse a number of issues which have not yet even arisen between them (and which would have no relevance at all to the plaintiff). I cannot for a moment imagine that Rule 13 could have been intended to have such results.

CAUSE OF ACTION

21. It could be argued that the defendant's causes of action have not yet arisen, because at this stage no damages have been suffered by the defendant, nor has it been evicted of the shelves (compare **Philotex (Pty) Ltd v Snyman and Others** 1994 (2) SA 710 (T)).
22. Mr Halgryn, who appeared on behalf of the defendant, argued that the words "*or will arise*" in subrule (b) of Rule 13 (1) entitle the defendant to follow this course. I disagree. When these words are read in context it is plain that they refer to a "*question or issue*" that will arise, and not to a

cause of action which will at some point in the future arise.

23. Mr Halgryn's reliance upon the **Luthuli** case in this regard is also misplaced. In that case it was the defendant's claim that was contingent upon the Court finding in favour of the plaintiff, and not its cause of action. The cause of action of the defendant in that case would have arisen at the moment of the collision, and not only when the Court found in favour of the plaintiff.
24. During argument Mr Halgryn relied on the cases of **Mercantile Bank Ltd v Carlisle and Another, supra, Sarkady v De Paiva and Another** 1977 (1) SA 157 (T) and **Montana Steel Corporation (Pty) Ltd v New Zealand Insurance Company (South Africa) Ltd and Another** 1975 (4) SA 339 (W) as authority for the proposition that it would be competent to join a third party for a judgment sounding in money on the basis of a cause of action which had not yet completely arisen or vested in the defendant.
25. In my view the facts of these matters are distinguishable from those in the matter at hand. In the **Mercantile Bank** case the plaintiff sued the defendant (Mercantile Bank) on a contractual basis for the payment of funds which the defendant had allowed to be withdrawn by or on behalf of, **inter alia**, Crespin-Hue. The defendant joined Crespin-Hue as a third party. The defendant's claim against the third party was that *"Should the plaintiff's case against the defendant be sustained then the amounts paid were not due or owing to the recipient thereof"*.
26. In the first place there is no indication that the defendant in that case claimed judgments sounding in money in its third party notice. In fact, it appears as though the relief claimed was *"to be indemnified by the third party against any payment that it may be ordered to make to the plaintiff"*. The claim against the third party in that case therefore purported to be based on Rule 13 (1) (a) (whereas in the present matter the defendant's claims are based on Rule 13 (1) (b)).
27. It furthermore seems clear that, although Mercantile Bank would only proceed with its claim against the third party in the event of the plaintiff's case succeeding against it, its cause of action (enrichment) would actually already have arisen at the stage when the third party received the money. In the present matter the defendant's cause of action for its main claim will only be complete at the moment when it actually suffers damages, in other

words when it is ordered to deliver the shelves to the plaintiff or to pay its value to the plaintiff. The cause of action in the defendant's alternative claim will only arise at the moment when it is evicted from possession by an order of the Court.

28. I find it hard to understand how the **Sarkady** case could be seen as support for Mr Halgryn's proposition. In that case the claim against the third party was based upon Rule 13 (1) (a) and the relief claimed was an indemnity in terms of an agreement between the defendant and the third party. In the present matter the defendant's claims are for judgments sounding in money and are based on the provisions of Rule 13 (1) (b).
29. The facts of the **Montana Steel** case were that the plaintiff (the insured) had claimed damages from the defendant (the insurer) in terms of an insurance contract. The defendant denied liability and pleaded a material non-disclosure on the part of the person who had negotiated the insurance contract on the plaintiff's behalf. The plaintiff then issued a third party notice to join the agent on the basis that, should it be unable to recover its damages from the defendant because of such non-disclosure, the third party would be liable for its damages.
30. There is, in the first place, no indication that the plaintiff's claim against the third party was for a judgment sounding in money and not merely for a declaratory order. Secondly, and even if it is to be assumed that the claim against the third party in that matter was indeed for a judgment sounding in money, it is quite clear that the plaintiff's cause of action against the third party in that matter would have arisen when such non-disclosure took place (and not only at the stage when the Court found it to have taken place). It was only the prosecution of the defendant's claim that was contingent upon the Court findings in favour of the plaintiff.

CONVENIENCE

31. It could also not by any stretch of the imagination be argued that it would be convenient for the plaintiff to become involved in a trial where its ownership and the value of the shelves are no longer the only issues, but where it will have to listen to evidence regarding the alleged misrepresentation, the terms of the alleged purchase contract and the defendant's consequential damages.

32. Insofar as the procedure under Rule 13 could be likened to that under Rule 11 (consolidation of actions – see the **IPF** case at 118), it is difficult to conceive how such a “consolidated” trial could be “convenient” in the sense of connoting “not only facility or expedience or ease, but also appropriateness in the sense that (the) procedure would be convenient if, in all the circumstance of the case, it appears to be fitting and fair to the parties concerned” (see **Mpotsha v Road Accident Fund and Another** 2000 (4) SA 696 (C) at 700I-J).
33. In the **IPF** case **Claassen J** stated that the “objects of the rule are to prevent multiplicity of actions and to enable the court to settle disputes between all parties to them in one action and to prevent the same question from being tried twice with possibly different results” (at 117I). In the present matter it is only the question of ownership that could (in the absence of a joinder) end up being “tried twice” and it is only in that sense that a failure to join could result in a multiplicity of actions. The other potential issues (between the defendant and the third party) would not otherwise be relevant in the matter between the plaintiff and the defendant and would therefore not, in the absence of a joinder, end up being tried twice.
34. Insofar as it might have been held in the **IPF** matter that a “complete” joinder in terms of Rule 13 (like was done in that case, and therefore a joinder in respect of all the issues between the defendant and the third party) would always be in order even if only one of the issues between the defendant and the third party is substantially the same as the issue/s between the plaintiff and the defendant, and irrespective of what other issues there might be between the defendant and the third party (and which would then also have to be dealt with in the trial between the three parties), I find myself in respectful disagreement.
35. In my opinion the defendant should therefore have joined the third party for the purposes of a declaratory order on the question of ownership only. It could then, in the event of a finding that the third party had never been the owner of the shelves, have instituted its claim for damages, alternatively for restitution of the purchase price, armed with the declaratory order (compare the **Luthuli** case and **Callender-Easby and Another v Grahamstown Municipality and Others** 1981 (2) SA 810 (E)).

36. In the circumstances the third party's third and fifth objections (paragraphs 7.3 and 7.5 above) are in my view well-founded.

FIRST OBJECTION

37. This makes it unnecessary to consider the first objection, but I must say that I would otherwise have regarded it as without any merit at all. The use of the phrase "*and/or*" in these circumstances would have entitled the defendant to rely on Rule 13 (1) (b), and the reference to subrule (a) would not have rendered the Rule 13 notice excipiable.

FOURTH OBJECTION

38. The same applies to the fourth objection (paragraph 7.4 above). It is absolutely clear what the defendant's case was intended to be and the so-called contradiction could not be said to render the notice either vague or embarrassing.

SECOND OBJECTION

39. This brings me to the objection that the "*proposed amendment lacks averments necessary to sustain a cause of action*". In view of what has already been found above it is also not necessary to deal with this objection in any detail.
40. It is clear that the defendant's main cause of action is for damages on the grounds of misrepresentation. It is trite that there are three recognised forms of misrepresentation in our law, *viz* fraud, negligent misrepresentation and innocent misrepresentation. An innocent misrepresentation cannot found a claim for consequential damages (see **Indrieri v Du Preez** 1989 (2) SA 721 (C) at 729A). For some reason the defendant has merely alleged a misrepresentation on the part of the third party, without specifying whether it had been a fraudulent or a negligent misrepresentation.
41. It was submitted (on behalf of the defendant) that the word "*misrepresentation*" could only mean intentional misrepresentation and in this regard I was referred to the fact that the definition of "*misrepresent*" in **Chambers Thesaurus, Chambers Cambridge** includes "*belie, distort, falsify, misstate, misquote*".

42. Apart from the fact that “*misstate*” is defined in the **Concise Oxford Dictionary** as meaning to “*make wrong or inaccurate statements*” (which could clearly also happen negligently or innocently), it is a fact that intentional misrepresentation is not the only form of actionable misrepresentation in our law. There is, as already mentioned, also two other forms of actionable misrepresentation and each of the three forms of actionable misrepresentation has its own peculiar elements and requirements.
43. The definitions of the word “*misrepresentation*” in the **Engels-Afrikaanse Regswoordeboek** of Hiemstra en Gonin (2nd edition) and in their **Trilingual Legal Dictionary** (3rd edition) make it clear that it could connote not only intentional misrepresentations, but also “*innocent*” misrepresentations. It cannot therefore be said that the word “*misrepresentation*”, as pleaded in the annexure to the proposed third party notice, could only be interpreted as referring to an intentional misrepresentation.
44. Mr Halgryn submitted that, even if the misrepresentation had to be taken to have been an innocent one, the defendant would be entitled to restitution of the purchase price on the basis of the Aedilician remedies. That is not, however, how the defendant chose to plead its case against the third party. Its main claim is not for the restitution of the purchase price. It is for damages and the purchase price merely forms a part of the total amount of damages claimed.
45. The defendant’s failure to specify the form of misrepresentation would not, however, in my view, have been sufficient to render the proposed Rule 13 notice excipiable on the basis of a lack of averments necessary to sustain the main cause of action. The test for an exception on this basis would be whether the word “*misrepresentation*” could not on any of its possible interpretations sustain such a cause of action. If so, an exception on this basis would fail (see **Callender-Easby and Another v Grahamstown Municipality and Others, supra**, at 813A).
46. I am, however, of the view that this failure would have rendered the third party notice, as a pleading, at least vague and embarrassing and I cannot see how it could be expected of

a Court to allow an amendment which would, on the face of it, cause an embarrassment to parties who have to consider and respond to such a pleading.

47. While Mr Halgryn persisted with his argument that it had not been necessary to plead whether the alleged misrepresentation had been intentional, negligent or innocent, he later applied, in the course of his argument, for an amendment to insert into the annexure, as paragraphs 12.1, 12.2 and 12.3, the following averments:

“a. ‘The representation was material and would have influenced a reasonable person to enter into the contract.’ and

b. ‘The representation was intended to induce the Defendant to enter into the transaction.’ and/or

c. *‘The Third Party knew that the representation was false.’”*

48. This application (in other words for the amendment of the notice of amendment) was not opposed and was accordingly granted. Mr Halgryn argued that the insertion of these allegations remedied the problem regarding the form of misrepresentation the defendant intended to rely upon and that the inserted averments would make it clear that the defendant would rely on a negligent misrepresentation “and/or” on an intentional misrepresentation. Apart from the fact that it is inconceivable how a misrepresentation could be both negligent “and” intentional at the same time, the amendment effectively put an end to Mr Halgryn’s argument that the defendant might have relied on an innocent misrepresentation. It is plain that it had never been the intention of the defendant to rely on an innocent misrepresentation.

49. Be that as it may, in view of the conclusion to which I have already come as regards the third party’s third and fifth objections, the defendant’s application for amendment dated 7 July 2006 has to fail. There is no reason why the normal rule should not be applied as far as costs are concerned and the costs should therefore follow the result.

50. In the premises the following order is made:

The application for amendment dated 7 July 2006 is

dismissed with costs.

C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION

For the Defendant: Adv L Halgryn
Instructed by: Fletchers Attorneys, KIMBERLEY

For the Third Party: Adv C H Botha
Instructed by: Duncan & Rothman, KIMBERLEY
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