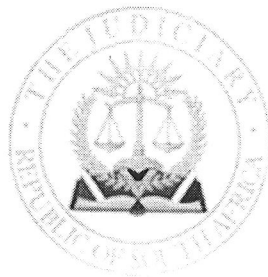


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)

Case Number: 86576/2019

|           |                                                                                   |
|-----------|-----------------------------------------------------------------------------------|
| (1)       | REPORTABLE: NO                                                                    |
| (2)       | OF INTEREST TO OTHER JUDGES: NO                                                   |
| (3)       | REVISED                                                                           |
| 16/7/2024 |  |
| DATE      | SIGNATURE                                                                         |

In the matter between:

PALOMINO PLANT SA (PTY) LTD Plaintiff

and

DUST-A-SIDE (PTY) LTD Respondent / First Defendant

EXXARO RESOURCES LIMITED Second Defendant

EXXARO COAL (PTY) LTD Excipient/ Third Defendant/ Third Party

JUDGMENT

**BASSON, J***Introduction*

[1] The plaintiff, Palomino Plant (Pty) Ltd, was the lawful and beneficial owner of a Bell 770G Motor Grader ("the grader"). The plaintiff hired the grader to the first defendant/respondent (Dust-a Side (Pty) Ltd), for a monthly fee of R 107,635.00. The grader was delivered to the first defendant in August 2016.

*Claim against the first defendant*

[2] On or about 17 May 2017, whilst the grader was being used by the first defendant at the site, the grader was involved in a motor vehicle collision with an articulated dump truck ("the dump truck") owned by, or, alternatively, under the control of the second defendant, (EXXARO Resources Limited). The grader was damaged beyond repair and was written off. The salvage value of the grader after the accident was about R 202 920.00.

[3] The plaintiff claims that as a result of the fact that the first defendant was unable to continue using the grader, it therefore was in breach of its obligations under the agreement to return the grader to the plaintiff, fair wear and tear excepted, in the same condition as it had been in when delivered by the plaintiff to the first defendant in terms of the contract of hire. As a result, the plaintiff suffered damages for R 3,365,261, 75

*Claim against the second defendant*

[4] In the alternative to the claim against the first defendant, the plaintiff also claims damages from the second defendant ("EXXARO Resources Limited") on the basis that the grader was involved in the collision with a dump truck which was driven by an employee of the second defendant who, at the time, so it is alleged, was acting in the course and scope of his employment (vicarious liability). Alternatively, it is claimed that he drove the dump truck as an agent of the second defendant, who at all material times was acting in furtherance of his mandate with the second defendant. The plaintiff further claims that the collision was occasioned solely due to the negligence of the second defendant and/or the employee acting in that capacity, alternatively, as an agent of the second defendant.

[5] In essence, the plaintiff has therefore instituted a *contractual* claim against the first defendant and, in the alternative, the plaintiff claims *delictual* damages from the second defendant flowing from an alleged collision with the grader.

[6] On 9 July 2020, the first defendant delivered a third-party notice against the third party (EXXARO Coal (Pty) Ltd – the excipient). The first defendant claims that the third party is to be held liable as a joint wrongdoer with the first defendant. In terms of the third-party notice, the first defendant claims a contribution or indemnification from the third party on the ground that, at the time of the collision, the first defendant was in a contractual relationship with the third party in terms of a written service agreement. It is claimed that, at the time of the collision upon which the plaintiff's particulars of claim are reliant, the first defendant was the hirer of the said grader which belonged to the plaintiff. It is further alleged that the first defendant was utilising the grader at the third party's Leeuwpan site for the purpose of fulfilling the obligations of the first defendant's partnership in terms of the written service agreement between them (first defendant and the third party)

#### *Exception*

[7] The third party (the excipient) filed its exception on 4 September 2020. The third party excepted to the third party notice on the basis that as the claim against the first defendant is purely contractual and as the first defendant seeks to hold the third party liable in delict as a joint wrongdoer such a claim is not recognized, nor sustainable, and is in fact bad in law. Accordingly, so it is submitted, the Rule 13 notice is bad in law and cannot sustain a claim against the third party. Rule 13 reads as follows:

“(1) Where party in 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 as between any parties to the action but also as between such parties and the third party or between any of the,

such party may issue a notice, hereinafter referred to as a third party notice, as near as maybe 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.

...

- (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."

[8] In broad terms, the first defendant is opposing the plaintiff's claim on three grounds. Firstly, the first defendant claims that it can only be held liable *ex contractu*, for damages caused to the grader if such damage was not caused by the wrongful and culpable conduct of the third party or if the first respondent's failure to return the grader to the plaintiff, fair wear and tear excepted, was objectively not possible. Conversely, the first defendant can only be held liable for damages to the said grader if such damage was caused by the wrongful and culpable conduct of the first defendant. Secondly, it is claimed that the damage to the grader, and thus the first defendant's inability to return the grader to the plaintiff, was not due to any fault of the first defendant and was objectively impossible due to it having been damaged due to the exclusive negligence of the employee, or alternatively, agent of the third party. Thirdly, and in the alternative, the first defendant denies being liable for all the plaintiff's



damages and pleads that the plaintiff's damages were caused by both the first defendant and the third party. In that event, the first defendant prays the first defendant be held liable for the plaintiff's damages but only to the extent of such damages remaining after the first third party's negligence has been determined and an amount commensurate with the third party's contributory negligence is deducted from the plaintiff's damages.

### *Discussion*

[9] Rule 13 contemplates the scenario where the defendant would be entitled, in law, to a contribution or indemnification in circumstances where 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. Rule 30 requires that the defendant has a valid cause of action against the third party.

[10] In the present matter, the third party raised an exception that it cannot be held liable as a joint wrongdoer where the plaintiff's claim against the first defendant is based on a written agreement and therefore founded in contract. Joint wrongdoers are persons who are jointly and severally liable in delict.<sup>1</sup> No provision is made in our law of contract for the concept of a joint wrongdoer.<sup>2</sup> A similar argument was raised in *OK Bazaars (1929) Ltd and others v Stern and Ekermans*.<sup>3</sup> In that matter, the plaintiff instituted a claim for damages on the ground of breach of contract. Similar to this matter, the defendant served third party notices on the first and second parties claiming that, in the event it being held that it had breached the contract, that the first and second third parties were negligent and therefore joint wrongdoers in terms of section 2 of the Apportionment of Damages Act 34 of 1956. The third party took an exception to the third party notice. The court held that the legislature did not in this Act intend to introduce the principle of apportionment of damages in contractual claims: The court held as follows:

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<sup>1</sup> Visser & Potgieter *Law of Damages* 3<sup>rd</sup> ed at 289.

<sup>2</sup> Christie's *Law of Contract in South Africa*, (7ed) at 294 *et seq.*

<sup>3</sup> *OK Bazaars (1929) Ltd and others v Stern and Ekermans* 1976 (2) SA 521 (C).

“To sum up then, inasmuch as prior to the passing of the Act, contributory negligence was not one of the recognised common law defences to a claim based upon a breach of contract it seems to me unlikely that, had the Legislature intended to introduce a radical change in the law of the nature contended for by Mr. *Ipp*, it would have done so in an oblique way and without using clear language to express such intention.”<sup>4</sup>

[11] Although counsel on behalf of the first defendant submitted that the *OK Bazaar* decision is distinguishable from the present matter, I am not persuaded that this matter is distinguishable.

[12] I therefore conclude that the third party notice is bad in law and that the first defendant has no legal basis to join the third party as such.

*Order*

[13] In the event, the following order is made:

1. The exception against the first defendant's third party notice and claim is upheld.
2. The first defendant is granted leave to amend their third party notice and claim within 15 days of this order.
3. The first defendant is ordered to pay the costs of the exception according to scale C.

  
JUDGE A.C. BASSON  
JUDGE OF THE HIGH COURT  
GAUTENG DIVISION, PRETORIA

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<sup>4</sup> Ibid at 529F.

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for the reasons is deemed to be 16 July 2023

APPEARANCES:

For the Excipient/ Third Party

AC Bothma SC

A Mabotsela

Instructed by

WEBBER WENTZEL

For the Respondent / First Defendant

TALL Potgieter SC

Instructed by

SAVAGE JOOSTE & ADAMS INC