



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case No: 2020/15023

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO


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SIGNATURE

9 July 2024

.....
DATE

In the application between:

AMAKHAZA MOIA (PTY) LTD

Applicant

and

GOVERNMENT EMPLOYEES PENSION FUND

Respondent

In re:

AIR INNOVATION HVAC SOLUTION (PTY) LTD

Applicant

and

MOWANA PROPERTIES (PTY) LTD

First Respondent

AMAKHAZA MOIA (PTY) LTD

Second Respondent

GOVERNMENT EMPLOYEES PENSION FUND

Third Respondent

and

AMAKHAZA MOIA (PTY) LTD

Third Party

JUDGMENT

FORD AJ,

Introduction

1. At the heart of this matter lie two questions, one raised by the court and the other raised by the applicant, namely: Can a party be joined as a third party in terms of the provisions of Uniform Rule 13, where such party is already before court in the pending proceedings; and does the relevant rule contemplate a notice only, or can a party issue the notice in the form of an affidavit, to which the third party is invited to respond to.
2. For ease of reference, I refer to the applicant as *Amakhaza* and to the respondent as the *GEPF*.

Rule 13

3. The relevant rule provides as follows:
 - (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.
- (7) The rules with regard to the filing of further pleadings shall apply to third parties as follows:
 - (a) In so far as the third party's plea relates to the claim of the party issuing the notice, the said party shall be regarded as the plaintiff and the third party as the defendant.
 - (b) In so far as the third party's plea relates to the plaintiff's claim, the third party shall be regarded as a defendant and the plaintiff shall file pleadings as provided by the said rules.
- (8) Where a party to an action has against any other party (whether either such party became a party by virtue of any counter-claim by any person or by virtue of a third party notice or by any other means) a claim referred to in subrule (1), he may issue and serve on such other party a third party notice in accordance with the provisions of this rule. Save that no further notice of intention to defend shall be necessary, the same procedure shall apply as between the parties to such notice and they shall

be subject to the same rights and duties as if such other party had been served with a third party notice in terms of subrule (1).

- (9) Any party who has been joined as such by virtue of a third party notice may at any time make application to the court for the separation of the trial of all or any of the issues arising by virtue of such third party notice and the court may upon such application make such order as to it seems meet, including an order for the separate hearing and determination of any issue on condition that its decision on any other issue arising in the action either as between the plaintiff and the defendant or as between any other parties, shall be binding upon the applicant

Can a party already before court in the same proceedings be joined as a third party?

4. The purpose of the third party procedure is to enable a litigant to avoid a multiplicity of actions concerning the same or related subject matter.¹
5. In his insightful article in respect of the relevant Rule, Bekker, expressed himself as follows:

In *Eimco (SA) (Pty) Ltd v P Mattioda's Construction Co (SA) (Pty) Ltd*, 1967 1 SA 326 (N), Caney J stated that Uniform Court rule 13 was based on the equivalent English rule. The English rule initially allowed a defendant to issue a third party notice where he claimed to be entitled to a contribution, or indemnity or, any other relief over against any third party. In 1883, the third party procedure in England was confined to claims for a contribution or indemnity and the provision relating to any other remedy or relief over was deleted.⁷ This amended English rule was adopted in the South African law in the form of Uniform Court rule 13. In *Eimco* the court held that Uniform Court rule 13(1)(a) was limited in scope to actions based strictly on a contribution or indemnification and does not include any other cause of action against the third party concerned².

6. A purposive reading of Subrule 13(8) seems to extend the definition of a third party in subrule (1) to include parties, who might be parties to the litigation already. The object of this subrule is to enable a party to an action

¹ Erasmus: Superior Court Practice, Vol 2, p D1-144. See also: *MCC Contracts (Pty) Ltd v Coertzen* [1998] 4 All SA 503 (A); *Robertson v Durban Turf Club* 1970 (4) SA 649 (N); *Gross v Commercial Union Assurance Co. Ltd* 1974 (1) SA 630 (A); *Spier Estate v Die Bergkelder Bpk* 1988 (1) SA 94 (C) 100.

² Third party joinder: A plea for reform, Dr. T. Bekker, p.622-623

or application having a claim of the nature contemplated in subrule (1) against another party to the same action, which could not be brought within the ambit of a counterclaim under Rule 24, to enforce such a claim in the same action instead of in a separate action.³

7. A further reason why, in my view at least, a third party notice can be issued in respect of a party, who is already a party to the litigation is based on the fact that, the purpose for the inclusion of a party in the litigation may not always be to seek specific relief against that party. Parties are often sighted, only because they have an interest in the outcome of a matter. The relief sought in respect of a third party notice procedure, applies wider than just mere interest in the outcome.
8. A party is accordingly entitled to issue a third party notice, as against a party who is already a party in the litigation.

Does the relevant rule contemplate a notice only, or can a party issue the notice in the form of an affidavit, to which the third party is invited to respond to

9. In the matter before me, the GEPF issued a third party notice, by way of an affidavit and not a notice. Amakhaza objects thereto, submitting in turn that the manner in which the notice was issued was irregular.
10. Rule 6 (14) provides that the provisions of Rule 13, including third party processes, apply to applications as well.
11. Ms. Kotze, for the respondent argued that the third party would be able to contest the liability of the GEPF in respect of the claim instituted by the applicant in the main application. This would mean that Amakhaza may raise a defence or a ground of opposition available to the GEPF against the claim of the applicant in the main application. And that this may be done by way of an answering affidavit. However, in the pending proceedings, Amakhaza has already filed a notice to abide by the decision of the court in

³ *Soundrops 1160 CC v Karlshaven Farm Partnership* 1996 (3) SA 1026 (N) 1032

the main application.

12. It was further argued that the GEPF, who filed the third party notice against Amakhaza would, for purposes of Rule 13 in these proceedings be the applicant and Amakhaza cited as the third party, the respondent. In that regard, the third party would therefore be entitled to file an answering affidavit to the GEPF's third party notice and statement of claim. The third party notice and statement of claim would essentially serve as the notice of motion and founding affidavit whereafter the GEPF will be entitled to file a replying affidavit to Amakhaza's answering affidavit as provided for in Uniform Rule 6.
13. Mr. Nxumalo, for the applicant, argued that Rule 13(2) requires a third-party notice to state the nature and grounds of the claim of the party issuing same, the question or issue to be determined, and any relief or remedy claimed, and to comply with the rules with regard to pleadings and summonses. Further that, it is apparent from Rule 13(4) and 13(7)(a) and (b) that after being served with a third-party notice that satisfies the above requirements, such party can do either or both of the following:
 - 13.1. challenge the claim of the party issuing the third-party notice;
 - 13.2. challenge the claim of the main applicant, Air Innovations HVAC Solutions ("Air Innovation") in this case, against the party issuing the third-party notice (GEPF in this case);
14. It is pointed out that, Amakhaza has elected only to abide by the court's decision in Air Innovation's claim against Amakhaza. It has not elected to forego its right to challenge the claim that Air Innovation may wish to make against GEPF once Air Innovation's application for leave to supplement its founding affidavit has been granted, if it is granted.
15. Mr. Nxumalo submitted that in its third-party notice, the GEPF specifically calls upon Amakhaza, if it disputes Air Innovation's claim against the GEPF, to give notice of intention to oppose and within fifteen (15) days of giving such notice to oppose, to file an answering affidavit to Air Innovation's claim

against the GEPF.

16. The difficulty with the above, of course, is that there is, as yet, no claim by Air Innovation against the GEPF, which is admitted by the GEPF at paragraphs 4.12 to 4.15 of its statement of claim. There is therefore nothing, so it was argued, for Amakhaza to file an answering affidavit to.
17. I have considered the submissions of the parties. From a process point of view, it is readily admitted that third party notices are generally issued in the form of a notice. There is notwithstanding, nothing in our Rules (purposively considered) that prohibits the filing of an affidavit. Where the notice is set forth in an affidavit, that affidavit will stand as the notice and the answering affidavit (if any) will have the same standing as a plea.
18. The concern expressed by Mr. Nxumalo is readily disposed of by Rule 13(6), which provides that the third party may plead or except to the third party notice as if he were a defendant to the action. In the event that the third party has nothing to plea to, the third party may justifiably raise an exception.
19. For all these reasons, I find that the application to have the third party notice set aside as an irregular step must fail.
20. In the result, I make the following order:

ORDER

1. The application is dismissed.
2. The applicant is ordered to pay the respondent's costs of this application on the ordinary (party-and-party) scale. Counsel costs shall be on Scale A.



B. FORD
Acting Judge of the High Court
Gauteng Division of the High Court, Johannesburg

Delivered: This judgment was prepared and authored by the Judge whose name is reflected on 9 July 2024 and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 9 July 2024.

Date of hearings:	26 February 2024
Date for filing of supplementary heads:	7 March 2024
Date of judgment:	9 July 2024

Appearances

For the applicant:	Adv. N. Nxumalo
Instructed by:	Lee Attorneys

For the respondent:	Adv. L. Kotze
Instructed by:	Gildenhuis Malatji Inc