



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

Case Number: 2023-115700

(1)	REPORTABLE: YES ☒ NO
(2)	OF INTEREST TO OTHER JUDGES: YES ☒ NO
(3)	REVISED.
..... SIGNATURE 30 MAY 2025 DATE	

In the matter between:

ELKANA BODY CORPORATE

Plaintiff

and

CITY OF JOHANNESBURG

First Defendant

JOHANNESBURG ROADS AGENCY

Second Defendant

PAPERBARK BODY CORPORATE

Third Defendant

NORTHUMBERLAND PARK BODY CORPORATE

Fourth Defendant

KLUNENE CONSULTING ENGINEERS (PTY) LTD

Fifth Defendant

In re:

JOHANNESBURG ROADS AGENCY

First Third Party

PAPERBARK BODY CORPORATE

Second Third Party

JUDGMENT

WINDELL, J:

Introduction

[1] This judgment concerns an exception raised by the first third party, the Johannesburg Roads Agency (JRA), to a third-party notice issued by the fifth defendant in the main action, Klunene Consulting Engineers (Pty) Ltd (Klunene). The JRA is also cited as the second defendant in the main action.

[2] The plaintiff, Elkana Body Corporate, instituted action against the defendants, seeking the relief set out in the particulars of claim. Klunene filed a plea and, on 5 April 2024, served a third-party notice on the JRA, setting out the basis upon which it seeks a contribution. The JRA, in turn, delivered its notice of exception on 6 May 2024.

[3] The exception is founded on six grounds, three primary and three alternatives. The primary grounds are: (a) Klunene seeks to join the JRA to an action in which it is already a party; (b) the plaintiff has already sued both Klunene and the JRA on a joint and several basis; and (c) the JRA has already pleaded to the issues raised in the third-party notice. The alternative grounds are: (a) non-compliance with Rule 13(2) of the Uniform Rules of Court; (b) irregular filing without leave after close of pleadings; and (c) that the third-party notice is vague, embarrassing, and discloses no cause of action.

Conduct of attorney

[4] Klunene filed its heads of argument on 31 July 2024. Despite receiving the heads and the notice of set down in the opposed motion court, Mr Tshabalala of TP Khoza Attorneys Inc., acting for the JRA, failed to file any opposing heads of argument. He appeared in court wholly unprepared and admitted, during the hearing, that he had not even read Klunene's submissions. The matter was stood down to afford him an opportunity to advance argument. In doing so, he was specifically alerted to the decision in *Pikitup Johannesburg SOC Ltd v Nair and Others* ("Pikitup"),¹ which directly addresses the applicable principles governing third-party procedure. Despite this opportunity, Mr Tshabalala was unable to offer any meaningful submissions.

[5] In view of this conduct, I reported the matter to Mr Tyron Khoza, the principal at TP Khoza Attorneys Inc.. Mr Khoza has undertaken to take appropriate disciplinary steps against Mr Tshabalala and to report to the court on the measures taken and those to be implemented to avoid any recurrence thereof.

The Exception

First Ground: JRA Already a Party

[6] The JRA contends that it cannot be joined as a third party as it is already a party to the main action. This complaint falls under Rule 30, but is, in any event, unfounded. Rule 13(8) expressly provides for such joinder where a party seeks a contribution or indemnification from another party, even if both are already parties to the main action. As

¹ 2015 (5) SA 540 (GJ) para [42].

noted in *Soundprops 1160 CC v Karlshavn Farm Partnership and Others*,² this subrule fills an important procedural gap and avoids unnecessary litigation. The exception is thus legally unsustainable.³

Second Ground: Joint and Several Claim

[7] The JRA argues that because the plaintiff's claim against it and Klunene is joint and several, a third-party notice is impermissible. This too is without merit. The SCA in *Pikitup* rejected this argument, affirming that a defendant may claim a contribution from a fellow joint wrongdoer. The Court relied on *Randbond Investments (Pty) Ltd v FPS (Northern Region) (Pty) Ltd*,⁴ where Mahomed J confirmed that the Apportionment of Damages Act⁵ does not bar such contribution.

Third Ground: Same Issues Already Pleaded

[8] The third ground asserts that the issues raised in the third-party notice are the same as those already pleaded by the JRA in the main action. It is unclear how this amounts to a basis for exception, and no authority or argument was presented in support thereof. This is not a valid ground under either Rule 23 or Rule 30 and appears to be a repetition of the earlier grounds.

Fourth and Sixth Grounds: Rule 13(2) and No Cause of Action

² 1996 (3) SA 1026 (N).

³ See also Erasmus Superior Court Practice: Van Loggerenberg DE: 3rd Edition (Vol.2) Revision Service 22, 2023, D1 Rule 13-8.

⁴ 1992 (2) SA 608 (W).

⁵ Act 34 of 1956.

[9] The JRA contends that the third-party notice does not comply with Rule 13(2) and is vague, embarrassing, and discloses no cause of action. No particularity is provided as to why the notice is deficient. Rule 13(2) requires the notice to state the nature and grounds of the claim and the issue to be determined. These requirements are met: the claim for contribution is clearly pleaded in paragraphs 12 to 15 of the notice.

[10] The JRA has failed to demonstrate that the third-party notice is excipiable on any reasonable interpretation. In *Living Hands (Pty) Ltd v Ditz*,⁶ it was emphasised that exceptions must raise a substantive point of law that may dispose of the matter, and the excipient must establish that no cause of action can be sustained on any interpretation.⁷ That threshold has not been met.

Fifth Ground: Late Filing

[11] The fifth ground—that the third-party notice was delivered late—is a procedural complaint properly dealt with under Rule 30, not Rule 23. In any event, it is factually incorrect. The pleadings were still open at the time of service. The plaintiff's reply to the third defendant's plea was served on 13 May 2024, while the third-party notice was served on 27 March 2024 and filed on 9 May 2024. These dates are borne out by the correspondence attached to the practice note.

[12] Klunene's attorneys requested the JRA to reconsider this ground in light of these facts. The JRA responded on 13 May 2024, stating: "Please be advised our client's exception stands as it is." That response is also annexed to the practice note.

⁶ 2013 (2) SA 368 (GSJ) at 374G.

⁷ See also *Pretorius and Another v Transport Pension Fund and Others* 2019 (2) SA 37 at para [15].

Costs

[13] The exception is without legal merit and has caused unnecessary delay and expense. In *Nel v Waterberg Landbouers Ko-operatiewe Vereeniging*,⁸ Tindall JA explained that an award of attorney and client costs may be justified to ensure that the successful party is fully indemnified in light of the conduct of the losing party.

[14] In the present case, the exception was misconceived, improperly formulated, and pursued without proper preparation. There is no reason why Klunene should be left out of pocket. A punitive costs order is warranted.

[15] In the result, the following order is made:

15.1 The exception is dismissed with costs on an attorney and client scale.


L. WINDELL

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Delivered: This judgement 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 hand-down is deemed to be 30 May 2025.

APPEARANCES

⁸ 1946 AD 597. See also *Swartbooi v Brink* 2006 (1) SA 203 (CC) 213.

For the excipient:	Mr Tshabalala
Instructed by:	TP Khoza Attorneys Inc
For the fifth respondent:	Mr L.J. Choate
Instructed by:	Hiepner & Associates
Date of hearing:	6 May 2025
Date of judgment:	30 May 2025