

SOUTH AFRICA / JUDGMENT

Smits v Member of the Executive Council: Police, Roads and Transport, FS (1657/2012) [2014] ZAFSHC 75 (12 June 2014)

[2014] ZAFSHC 75

COURT

Free State High Court, Bloemfontein

BEFORE

A. Kruger

CASE / FILE NUMBER

1657/2012

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FREE

STATE HIGH COURT,

BLOEMFONTEIN

REPUBLIC

OF SOUTH AFRICA

Case

No. : 1657/2012

In

the matter between:-

MAGDALENA

SMITS

.....Plaintiff/Respondent

and

MEMBER

OF THE EXECUTIVE
COUNCIL:POLICE,
ROADS AND TRANSPORT, FS

.....Defendant/Applicant

TEFO

EPHRAIM GOPANE

.....Third

Party

HEARD

ON: 5 JUNE 2014

JUDGMENT

BY: KRUGER, J

DELIVERED ON: 12 JUNE 2014

- [1] This case concerns the interpretation of Uniform Rule 13. The defendant has brought an application for default judgment against the third party and the defendant wants this court to declare that the third party is solely liable to the plaintiff. The plaintiff opposes the form of the relief sought.
- [2] The plaintiff, Magdalena Smits sued the defendant, the Member of the Executive Council for Police, Roads and Transport, Free State Province (the MEC) for R612 000 being damages she suffered as a result of the death of her husband (the deceased) who died when he was involved in a motor collision on 29 April 2009 on the Bothaville/Viljoenskroon road. Plaintiff alleged that the collision was caused by a hole which was made on the driving surface of the road by employees of the MEC.
- [3] In the plea the defendant (MEC) alleged that the repair work was carried out by an independent contractor, Phahamang Construction CC (Phahamang) in terms of its contract with defendant. Defendant also pleaded that the collision was caused by the sole negligence of the driver of the vehicle with which the deceased collided, being Tefo Ephraim Gopane (Gopane).
- [4] The defendant served two third party notices. One on Phahamang, citing it as the first third party, and the other on Gopane, citing him as the second third party. Gopane filed no papers.

In the third party notice against Gopane defendant alleges:

“7. In the premises, the Defendant is entitled to an order declaring that:

7.1 The Third Party’s negligent driving is the sole cause of the collision and therefore the Third Party is liable to the plaintiff.

7.2 Alternatively the Third Party’s negligent driving contributed to the collision.”

The relief sought by defendant against Gopane in the third party notice was the following:

“WHEREFORE the Defendant claims against the Third Party:

An order that the Third Party is liable to the Plaintiff; alternatively that the amount of damages to be awarded to the Plaintiff as against the Defendant be reduced in terms of section 1 of Act 34 of 1956 to such an extent as may seem just and equitable, having regard to the Third Party’s degree of negligence.”

- [5] The matter was on the trial roll for hearing on 19, 20 and 22 November 2013. On 19 November 2013 Gopane was at court and by agreement between the parties the matter was postponed sine die and Gopane was ordered to place himself on record within 20 days. Gopane filed no papers, and on 29 January 2014 defendant gave notice to the registrar and the plaintiff that it intended to apply for judgment by default against the third party, Gopane, in the following terms:

“1. Declaring that the Third Party’s negligent driving is the sole cause of the collision [and therefore the Third Party is liable to the Plaintiff].

2. No order as to costs.”

- [6] At the hearing before me Mr Moerane, for the defendant, said he was not seeking the relief in the square brackets in prayer 1.

- [7] The plaintiff lodged a notice to oppose the relief sought by the defendant, and filed an answering affidavit wherein she stated that she opposes the form of the orders sought by the defendant. The plaintiff’s attitude is set out as follows in her affidavit opposing the relief sought by the defendant:

“9.1 the Second Third Party is not a co-defendant;

9.2 the lis is only between the party issuing the notice (the Defendant) and the Third Party. There is no lis between the Third Party and the Plaintiff;

9.3 Rule 13 is complimentary to, but does not supersede the provisions laid down in Section 2 of the Apportionment of Damages Act 34 of

1956. The difference being inter alia in the form of relief which can be sought. Under section 2(6) (a) of the said Act, a wrongdoer sued in an action can seek relief from a wrongdoer not so sued in the form of a judgment for the payment of an amount of money determined by Court. Under the rule all that can be sought by the Defendant against the said Third Party is an apportionment of fault in the form of a declaratory order.

9.4 The Defendant vis-à-vis the Third Party is therefore entitled to a contribution or an indemnification.

9.5 Accordingly, it is respectfully submitted that the Defendant can only seek an order against the Second Third Party that in the event of Plaintiff succeeding against Defendant, the Third Party will indemnify the Defendant in such amount as Defendant is ordered to pay (together with costs), alternatively an order declaring the degree and/or apportionment of fault vis-à-vis the Defendant and the Second Third Party.

10. The Defendant, however, does not seek such an order. The order that it seeks, is a final declaratory order that the Third Party’s negligent driving is the sole cause of collision and that the Third Party is liable to the Plaintiff.

11. I respectfully submit that the Plaintiff cannot allow the Defendant to obtain such an order. Should such an order be granted, a final order would already have been granted declaring that the Third Party is liable to the Plaintiff. Such could have the effect that when Plaintiff wishes to pursue its action against the Defendant, the Defendant might have the view that there is already a declaratory order declaring the Third Party liable to the Plaintiff. In any event, even if Plaintiff should proceed with the matter against Defendant, same might have the effect that there might be two conflicting orders in the same Court wherein the Court might declare that the Defendant is liable to Plaintiff whilst there is another order declaring that the Third Party is liable to the Plaintiff.
12. I accordingly respectfully submit that Defendant is not entitled to the order as prayed for and that the granting thereof might prejudice the Plaintiff in its action as aforesaid.”
- [8] Mr Moerane commenced his argument by saying this is an application for default judgment under Rule 31(2)(a) which he quoted:

“Whenever in an action the claim or, if there is more than one claim, any of the claims is not for a debt or liquidated demand and a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff may set the action down as provided in subrule (4) for default judgment and the court may, after hearing evidence, grant judgment against the defendant or make such order as to it seems meet.”

- [9] Rule 13(1) provides:

“13(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.”
- [10] In *Eimco (SA) (Pty) Ltd v P Mattioda's Construction Co (SA) (Pty) Ltd* 1967 (1) SA 326 (N) Caney J dealt with an exception taken to a rule 13 notice. The learned judge analysed the origin and meaning of rule 13 and referred to the English rule on which Rule 13 was based. Rule 13(1)(a) relates to a claim to a contribution or an indemnity. The finding in the judgment is based on paragraph
- (a) of Rule 13(1), and the exception was upheld. But Mr Moerane disavows reliance on Rule 13(1)(a); he bases defendant's case on Rule 13(1)(b).

- [11] In *Shield Insurance Co Ltd v Zervoudakis* 1967 (4) SA 735 (E) an exception was taken to a third party notice. In the third party notice the defendant said that, in the event of the court finding that the plaintiff suffered injuries as a result of the negligence of the defendant, then the defendant says that the third party is a joint wrongdoer for purposes of section 2 of the Apportionment of Damages Act 34 of 1956. Accordingly the defendant claimed a contribution from the third party. Prescription of plaintiff's claim against the third party was raised. The exception was dismissed. The court held that the third party is not a defendant vis-à-vis the plaintiff (739C-D)
- [12] Mr Reinders relies on the decision in *Hart and Another v Santam Insurance Co Ltd* 1975 (4) SA 275 (ECD) where the court held that under Rule 13 all that can be sought by one alleged wrongdoer against another is an apportionment of fault in the form of a declaratory order (at 277F-G) with reference to *Shield Insurance Co Ltd v Zervoudakis* (supra) at 739C. In the Hart case the defendant sought an order that the third party be ordered to pay to the defendant a contribution, meaning judgment in its favour in a specified sum of money (277H). Smalberger AJ (as he then was) held that the defendant is only entitled to judgment if it proceeds in terms of the Apportionment of Damages Act 34 of 1956 and alleges and proves the necessary prerequisites for such judgment. He held that the defendant misconceived its remedy against the third party and upheld the exception of the third party to defendant's third party notice which contained the prayer:

“That the third party be ordered to pay to the defendant a contribution, in a proportion to be determined by the above Honourable Court, towards any damages ...”

- [13] Mr Moerane stresses that defendant's claim is based on Rule 13(1)(b), not (a). In terms of (b) the third party is joined because the issue between the plaintiff and the defendant in the action are substantially the same as the issue between the defendant and the third party. He says there is no lis between the plaintiff and the third party. Vis-à-vis the third party, defendant is a plaintiff. He says defendant has made out a case for the relief sought. Mr Moerane relies on *IFP Nominees (Pty) Ltd v Nedcor Bank Ltd (Basfour 130 (Pty) Ltd, Third Party)* 2002 (5) SA 101 (W), where the third party was ordered to pay a sum of money to the defendant.

CONCLUSIONS

- [14] Under Rule 13(1)(a) where the third party is alleged to be a joint wrongdoer, no judgment sounding in money may be sought against such third party (IPF Nominees case 116C-D). In the IPF Nominees case defendant's claim against the third party was not based on allegations that the defendant and the third party are joint wrongdoers against the plaintiff. There were common issues in the claims of the plaintiff against the defendant and the claim of the defendant against the third party (116G-H).

- [15] In the present case the defendant does not go as far as asking the court to order the third party to pay a contribution, but Mr Moerane does seek an order that the third party is solely to blame, meaning that the defendant is not to blame at all. Mr Moerane confirmed in argument that if the court grants an order as sought in the present application, namely that the third party is solely to blame, in the main trial the defendant will raise that order as a type of *res judicata* to avoid liability. The defendant is seeking an order that it is not liable.
- [16] It is undesirable to deal with cases on a piecemeal basis. The third party, for reasons of his own, is not before court. The merits of plaintiff's claim have not been addressed at all. This matter proceeded on a default basis against the third party. Defendant is seeking an order against the third party by default. It is undesirable to make a finding as defendant seeks relating to exclusive liability on a default basis without having regard to any evidence.
- [17] *IPF Nominees (Pty) Ltd v Nedcor Bank Ltd (Basfour 130 (Pty) Ltd, Third Party)* (supra) concerned a cheque. Ex facie the cheque the payee was "Basfour 130 T/A IPF Nominees (Pty) Ltd". In the IPF Nominees case there was a trial, and all three parties, the plaintiff, defendant and third party, were represented by counsel. All the issues were ventilated. All the parties were before the court. In those circumstances Claassen J deemed it appropriate to order the defendant to pay the plaintiff R1 109 351,84 (the amount written on the cheque), and at the same time to order the third party to pay that same amount to the defendant. The third party indemnified the defendant.
- [18] There is no lis between the plaintiff and the third party. No order can be made against the third party in favour of the plaintiff at the behest of the defendant in these proceedings. All that the plaintiff is possibly entitled to is an order as suggested in Mr

Reinders's heads of argument namely that in the event of the plaintiff succeeding against the defendant, the third party will indemnify the defendant. This is what happened in the IPF Nominees case. The court found that the party who was liable, was the third party. Yet the court did not give judgment for the plaintiff against the third party. The court gave judgment for the plaintiff against the defendant, and judgment for the defendant against the third party, thereby indemnifying the defendant. That is not what the defendant is seeking here. The

defendant wants the court at this stage, by virtue of the non-appearance and non-opposition of the third party, to direct that

the third party is liable to the plaintiff. That cannot be done. It is undesirable to limit the trial court at this stage, when no evidence has been heard. The relief sought against the third party should be assessed *pari passu* with the plaintiff's claim against the defendant. The judgment against the third party and that in respect of the defendant covers the same incident. The interests of justice demand that those two findings be made together (see *IPF Nominees* case at 118J – 119A). It may well be that the third party does not attend the trial. Then the trial court should be free to make an order which is just and equitable in the circumstances as they appear at the end of the trial. The defendant is not entitled to any relief at this stage.

[19] As to costs, the plaintiff was entitled to come to court to protect its interests which it did successfully. Points raised by the plaintiff in her affidavit and during argument assisted the court in coming to a conclusion. The plaintiff is entitled to the costs of this application.

ORDER

1. The application is dismissed.
2. The defendant is ordered to pay the plaintiff's costs of this application.

A. KRUGER, J

On behalf of plaintiff/respondent: Adv S.J. Reinders

Instructed by:

Rosendorff Reitz Barry

BLOEMFONTEIN

On behalf of defendant/applicant: Adv M.T.K. Moerane SC

With B.S. Mene

State Attorney

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