IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST OF OTHER JUDGES: ~~YES~~/NO
(3) REVISED
_____ _____
DATE SIGNATURE

Case no: 2021/592036

In the matter between:

BITUMPROOF (PTY) LTD **Applicant**

and

AJP MANAGEMENT ENTERPRISES (PTY) LTD **First Respondent**

KIDS LOVE US (PTY) LTD **Second Respondent**

RONEN BARASHI **Third Respondent**

AJPG ELGIN MALL (PTY) LTD **Fourth Respondent**

AJPG ATLAS MALL (PTY) LTD **Fifth Respondent**

In re:

BITUMPROOF SA (PTY) LTD **Plaintiff**

and

AJP MANAGEMENT ENTERPRISES (PTY) LTD **Defendant**

JUDGMENT: INTERLOCUTORY APPLICATION

FRIEDMAN AJ:

INTRODUCTION

Housekeeping

1 This is an opposed application in terms of rules 30 and 30A in which the plaintiff in the main action seeks to have various documents filed by the respondents struck out as irregular. As I explain in more detail below, the defendant, fourth respondent and fifth respondent are essentially on the same side of this dispute and have collectively opposed this interlocutory application. I shall therefore describe the parties as follows:

1.1 The applicant in this interlocutory application as "**the plaintiff**".

1.2 The defendant, fourth and fifth respondents, collectively, as "**the opposing respondents**".

1.3 I shall then refer to "**the defendant**" and each of the respondents (ie "**second respondent**", "**third respondent**" etc) individually, when it is appropriate to do so.

2 Although this application could technically fall under either rule 30 or 30A of the Uniform Rules, rule 30 appears to me to be the more appropriate vehicle. Therefore, I shall describe this application below as "**the rule 30 application**".

3 At the outset, I would like to apologise to the parties for the delay in handing down this judgment. It ought to have been delivered some months ago and, as a result of an oversight which was entirely attributable to me, it was delayed. The parties, and the administration of justice, deserve better.

4 If I understand correctly, one of the plaintiff's complaints is that some of the documents to which it objects were not properly served. I shall assume for present purposes (in favour of the opposing respondents) that all relevant documents were properly served. In the light of my conclusion in this matter, it is not necessary for me to decide if that is correct.

The issue

5 In the main action, the plaintiff claims R531 587.50 (and interest and costs) arising from an alleged oral agreement relating to the supply by the plaintiff of personal protective equipment ("**PPE**") to the defendant. In the particulars of claim, the plaintiff alleges that it delivered various PPE items to the defendant, and invoiced the defendant in the amount now claimed. It says that the defendant failed to pay for the PPE as it was required to do in terms of the contract.

6 In response to the summons and particulars of claim, the opposing respondents filed the following documents:

6.1 The defendant filed a plea.

6.2 The fourth respondent – in the same document as the defendant's plea – filed a "conditional claim in reconvention".

6.3 The fifth respondent – in the same document as the defendant's plea – filed a "conditional claim in reconvention".

6.4 The fourth respondent – yet again, in the same document as the defendant's plea – filed a "claim in reconvention".

6.5 The fifth respondent – at the risk of repetition, in the same document as the defendant's plea – filed a "claim in reconvention".

7 So, a document, purporting to incorporate five different pleadings in one, was served by the attorneys acting for the opposing respondents on the plaintiff's attorneys. This happened on 22 March 2022. On the same date, the attorneys acting for the opposing respondents served a notice of intention to defend the main action, by email, on behalf of the fourth and fifth respondents.

8 Then, on several dates after 22 March 2022, the defendant caused the following further documents to be served and filed:

8.1 A third-party notice purporting to join the second respondent as a defendant in the main action.

8.2 A third-party notice purporting to join the third respondent as a defendant in the main action.

8.3 A third-party notice purporting to join the fourth respondent as a defendant in the main action.

8.4 A third-party notice purporting to join the fifth respondent as a defendant in the main action.

9 In this application, the plaintiff seeks an order striking out all of the documents mentioned in paragraphs to , and above, which I shall describe collectively below as "**the strikeout documents**". Although, in its rule 30 notice, the plaintiff also described the defendant's plea as an irregular step, there is no order sought in these proceedings in respect of the plea.

THE DISPUTE

10 In order to assess the merits of the rule 30 application, it is necessary to have regard to the nature of the strikeout documents in more detail. I should say, at the outset, that the plea is not a model of clarity. Part of the problem, but by no means the only one, is that it often refers to the "First Defendant" when the context strongly suggests that the drafter intended to refer to the "Second Defendant" (ie, the second respondent). In any event, no exception is before me and I express no view on whether it may be interpreted robustly (to preserve its validity) or whether it is excipiable in any respect. I would have been reluctant to mention this issue at all, save for the fact that I have to understand the plea in order to understand whether the plaintiff's complaints in this application are good. This necessarily engages interpretive questions. However, what I say about the plea below is based on my best understanding of the document as it reads now. It is not intended, in any way, to pre-empt the question of its proper interpretation for the purposes of the main action in due course.

11 With that out of the way, my consideration of the strikeout documents starts with the plea:

11.1 In the plea, the defendant effectively concedes that an agreement between the plaintiff and defendant was concluded in respect of the supply by the plaintiff to the defendant of PPE. The essence of the defence reflected in the plea is that the second respondent, represented by the third respondent, concluded lease agreements with the fourth and fifth respondents (which are part of the same group of companies as the defendant) to enable the second respondent to occupy their malls.

11.2 It says that the third respondent, in addition to representing the second respondent in the conclusion of the lease agreements described above, concluded a suretyship agreement with the fourth respondent in respect of the obligations incurred by the second respondent to it.

11.3 The defendant pleads that, as of 1 April 2021, the second respondent was in arrears in respect of the lease agreements described above, in an amount of R254 610.50. The defendant says that all of the parties (ie, the opposing respondents, in essence, on the one side, and the plaintiff and the second respondent, represented by the third respondent, on the other) concluded an agreement, which the defendant describes as a *stipulatio alteri* in favour of the second, third, fourth and fifth respondents. Without making a finding on the proper characterisation of the alleged agreement, I describe it below as "***the stipulatio alteri***".

11.4 The defendant says that the terms of the *stipulatio alteri* were the following:

11.4.1 The plaintiff would supply PPE to the defendant.

11.4.2 Instead of paying the plaintiff for the PPE, the defendant, together with the fourth and fifth respondents, would in essence credit the second respondent in respect of its rental accounts with the fourth and fifth respondents. As best as I can make out, it would seem that what is alleged is that the *stipulatio alteri* envisaged that credits would be passed in favour of the second respondent's rental liability up to the value of the PPE. Or, as the plea also seems to put it, the fourth and fifth respondents agreed to waive payment of the rental, up to the value of the PPE.

11.4.3 The defendant says that, pursuant to the *stipulatio alteri*, the plaintiff delivered PPE to the defendant in an amount of R514 970.00. The plea then says that the defendant caused this full amount to be credited to the second respondent's rental accounts with the fourth and fifth respondents. This, according to the defendant, means that it owes the plaintiff no money in respect of the PPE and that there is therefore no basis for the plaintiff's claim in the main action.

11.5 The astute reader will notice that the sum pleaded by the defendant and mentioned in paragraph above is different to the quantum claimed by the plaintiff. In the various documents attached to the papers in the rule 30 application there are two invoices, which have the potential to account for this difference. But, since the issue is not before me, and no evidence has yet been led to explain the difference, I do not address that issue further. I only mention this discrepancy to assure anyone considering this judgment that I have not made an error in describing the defence in the plea.

12 There are then, as I mentioned above, various claims in reconvention which form part of the defendant's plea even though they are claims of the fourth and fifth respondents. It seems that the rationale for including these claims in reconvention in the plea is that, according to the heading of each claim in reconvention, the opposing respondents say that the fourth and fifth respondents' counterclaims will extinguish the plaintiff's claim in whole or in part. Importantly, though, the counterclaims are not against the plaintiff, but against the second respondent and/or the third respondent. Equally importantly, for reasons I explain below, the main ones are conditional. In particular:

12.1 The fourth respondent's conditional counterclaim, which is conditional on the plaintiff's claim not being dismissed and/or the defendant's defences not being upheld, is against both the second and third respondents, is based on an alleged breach of the lease agreement, and is in an amount of R305 070.27.

12.2 The fifth respondent's conditional counterclaim, which is conditional on the same basis as described above, is essentially identical to the fourth respondent's conditional counterclaim (although based on a different underlying agreement, of course), but is for a sum of R209 899.73.

12.3 There are then two further claims in reconvention, for very small amounts, which are not conditional. The fourth respondent's claim in reconvention (which I shall describe as "**the fourth respondent's unconditional counterclaim**", to distinguish it from the others) is for the sum of R7150 for an alleged breach by the second and third respondents of the lease agreement. The fifth respondent's claim in reconvention which, predictably, I shall describe as "**the fifth respondent's unconditional counterclaim**", to distinguish it from the others, is essentially identical, except it claims R3450.

RULE 13

13 I find it helpful, in assessing the merits of this application, to break the strikeout documents into three categories:

13.1 There are the third-party notices, which purport to be the vehicles that join the second to fifth respondents to the main proceedings.

13.2 There is the notice of intention to defend filed by the fourth and fifth respondents, which sits in a category by itself.

13.3 And then there are the substantive documents – the claims in reconvention – which seek to delineate the position of the fourth and fifth respondents in the main proceedings. I describe these below as "**the substantive strikeout documents**".

14 I agree with *Mr Du Plooy*, who appeared for the plaintiff, that the procedure adopted by the opposing respondents was, to put it diplomatically, somewhat strange. The substantive strikeout documents and the notice of intention to defend were served and filed before the third-party notices. So, technically, substantive pleadings were filed by entities which, on everyone's version, were not yet parties. In other words, if one looked at the file in this matter at 8pm (a time I choose randomly for illustration) on 22 March 2022, one would see a notice of intention to defend and counterclaims filed by non-parties, and no explanation as to how, as a procedural matter, this could be possible.

15 But I see no purpose in dwelling on that issue. It would put form over substance to become sidetracked by that procedure. The real issue is whether the plaintiff's

argument – that the strikeout documents do not comply with rule 13 of this Court's rules – has any merit.

16 Rule 13 provides as follows:

> "13 **Third-party Procedure**
>
> (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."

17 The defendant, in argument, relies on both rule 13(1)(a) and rule 13(1)(b) as the basis for suggesting that the approach reflected in the strikeout documents is legitimate. Rule 13(1)(b) may be dispensed with swiftly. As may be seen from the quoted text above, rule 13(2) provides that the third-party notice must "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".

18 All of the third-party notices, on their face, are brought in terms of rule 13(1)(a). No express reference is made to the sub-rule, but each one says in express terms, at the

beginning of the document, that the defendant "claims a contribution or indemnification on the grounds set forth in the Conditional Claims in Reconvention" etc. This is self-evidently the language of rule 13(1)(a). None of the third-party notices purports to identify a "question or issue" as envisaged by rule 13(1)(b). I should say that, in any event, I struggle to imagine, conceptually, how any of the counterclaims raise questions or issues which fall within the parameters of rule 13(1)(b). But since the third-party notices themselves make clear that rule 13(1)(b) does not apply, it is not for me to speculate precisely what the defendant has in mind when it relies on rule 13(1)(b) in argument.

19 Rule 13(1)(b) may, therefore, be left to one side. The question then becomes whether the third-party notices, and the underlying substantive strikeout documents, fall within rule 13(1)(a).

20 The wording of rule 13(1)(a) is clear. In order to fall within the rule, a third-party notice must have the following features:

20.1 It must be issued by a party to the action.

20.2 It must be based on the premise that the party to the action which issues the notice has a claim against a third-party – ie, a party which is not a party to the action.

20.3 The claim on which it must be based must be a claim that the party to the action is entitled, in respect of any of the relief claimed against him/her/it, to a contribution or indemnification from the third-party.

21 It should be immediately apparent that none of the substantive strikeout documents falls within the parameters of rule 13(1)(a). The fundamental defect in the approach adopted by the opposing respondents – at least in so far as rule 13(1)(a) is concerned – is that the substantive strikeout documents reflect claims which are not claims of a party to the action. The claims in reconvention, whether the conditional or unconditional ones, all purport to be claims of the fourth and fifth respondents. Those entities are not party to the action. So the third-party notices essentially seek to join the fourth and fifth respondents to the action so that they can then bring claims in reconvention. To make matters worse, the claims in reconvention are directed at the second and third respondents. They are brought on the purported basis that they will partially or fully extinguish the plaintiff's claim. But they are not brought against the plaintiff.

22 The third-party notices in respect of the second and third respondents suffer from a similar defect. They are issued by the defendant (so the first requirement is met, because the defendant, is of course, a party to the action) but the defendant does not purport, in the notices, to have a claim against either the second or third respondent. So, one of the requirements of rule 13(1)(a) is not met.

23 It is true, of course, that on the defendant's version there was a new agreement – the *stipulatio alteri* – which changed the nature of the contractual relationship between the parties and which, according to the defendant, has an impact on the plaintiff's claim. In particular, the defendant says that the arrangement reflected in the *stipulatio alteri* constitutes one of its defences to the plaintiff's claim for payment. But this does not change the fact that the claims in reconvention are not directed at the plaintiff, and none of the third-party notices is based on the premise that any of the subjects of the notice owes the defendant (which issued them) a contribution or indemnification.

24 So, clearly, neither the third-party notices nor the substantive strikeout documents fall within the parameters of rule 13(1)(a).

25 *Mr Xavier*, who appeared for the opposing respondents, submitted heads of argument in which he advanced various arguments in opposition to the plaintiff's rule 30 application. It is necessary for me to address some of them but I have not, in the discussion below, attempted to address them all. *Mr Xavier* argues that:

25.1 None of the plaintiff, the second respondent or the third respondent has been prejudiced by the procedure followed by the defendant. Rather, the administration of justice has benefited from this procedure.

25.2 The steps taken have "fast-tracked" the pleadings without prejudicing the plaintiff, second respondent and or respondent.

25.3 The conduct of the plaintiff constitutes a "preposterous" attempt to prevent the defendant from ventilating defences to the plaintiff's claim and is a violation of natural justice.

25.4 It would be convenient for the fourth and fifth respondents' claim in reconvention to be dealt with together with the plaintiff's claim.

25.5 The plaintiff has no mandate to speak for the second and third respondents. If they have a difficulty with the procedure followed by the defendant, they can exercise their rights in terms of rule 13(9). *Mr Xavier* goes so far as to characterise this as a point i*n limine*. He points out that a rule 7 notice was served by the defendant, and the fourth and fifth respondents challenging the authority of the plaintiff to represent the second and third respondents.

25.6 If the plaintiff is successful in its claim against the defendant, then the defendant "will be required to be indemnified by the fourth and fifth respondents, who [sic] in turn, will be required to be indemnified by the second and third respondents. This encompasses the very purpose and rationale of the Rule 13 procedure."

25.7 Relying on the case of *Soundprops 1160 CC v Karlshavn Farm Partnership* 1996 (3) SA 1026 (N) at 1033C-J, *Mr Xavier* says: even if it is found that the strikeout documents do not comply fully with rule 13, the plaintiff, the second respondent and the third respondent have not been prejudiced and are in the same position as they would have been had there been full compliance.

26 The argument which I have summarised in paragraph above is ill-conceived and may be rejected swiftly. The issue is not about who may speak for whom and who represents whom. The plaintiff is entitled to say that it is prejudiced by a procedure which seeks to introduce a series of disputes which do not fall within the parameters of the case as formulated by the plaintiff (which is, after all, the dominus litis). The plaintiff is either right or wrong about that. But, in making the argument, it does not seek to speak for the second and third respondents, but rather for itself. A rule 7 notice was, in the circumstances, entirely inappropriate and unjustified. As far as I can tell from the Caselines file, it was rightly ignored by the plaintiff.

27 I do not intend to deal with the rest of the arguments one by one. Rather, what I say below will hopefully make clear why all of them must fail:

27.1 The premise of all of *Mr Xavier's* arguments (with the exception of the one which I have already rejected for the reasons given in paragraph above), is, in

essence, that I must put substance over form. His argument is that we should not become bogged down in the order in which the various strikeout documents were filed – something on which Mr Du Plooy placed emphasis in argument – and rather look at them holistically. According to the argument, when we do that we can see that the full ambit of the dispute between the parties is properly reflected in the substantive strikeout documents read together with the particulars of claim, and that once all of those documents form part of the pleadings in this matter, all of the interconnected disputes between the parties may be resolved together. This, according to the argument, is clearly to the advantage not only of the parties but to the administration of justice.

27.2 As I have noted, it was very strange for the opposing respondents to file the substantive strikeout documents before the third-party notices. But I have already noted above that I am prepared to overlook this odd procedure. So, I agree with *Mr Xavier* that it would not be productive – or, to be more precise, an appropriate use of judicial resources – to focus on that aspect of the dispute.

27.3 The problems, from my perspective, are far more fundamental. I say this for two reasons.

27.4 As to the first: the defendant appears to believe that it needs to bring the second to fifth respondents into the dispute in order to ventilate its defence. But what the defendant appears to overlook is that there is simply nothing stopping it leading evidence as to the *stipulatio alteri* as part of its defence of the action. I have summarised, above, the defendant's version in its plea. On its version, it has discharged its liability to the plaintiff by "paying" the plaintiff's invoices in the form of credits given to the second and third respondents. If it were to lead

cogent evidence to support its version of events – and, in particular, the terms of the *stipulatio alteri* – then it would succeed in its defence. There is no reason for the second to fifth respondents to be parties to the litigation for it to be able to do so. In fact, as ought to be commonly known, there is nothing compelling any party to litigation to participate, let alone give evidence. So, the joining of the second to fifth respondents is neither a necessary nor sufficient condition to enable the defendant to ventilate its defence. Its complaint that the plaintiff seeks to deny it natural justice, by objecting to the participation of the second to fifth respondents, is hard to understand in the circumstances.

27.5 Then there is the second difficulty.

27.6 If one reads the answering affidavit in the rule 30 application, but even more so, *Mr Xavier's* heads of argument, it is clear that one of the problems facing the opposing respondents is that various documents do not reflect what I believe they intended them to reflect. It is clear from the answering affidavit, and especially Mr Xavier's argument – see paragraph above – that what the opposing respondents intended to do is to expand the parameters of the case by saying that the fourth and fifth respondents had to indemnify the defendant (as a result of the arrangements to do with the lease agreements); and, once that premise is accepted, that the second and third respondents had to indemnify the fourth and fifth respondents for any amounts which they had to credit to the defendant.

27.7 In order for me to uphold *Mr Xavier's* arguments, and dismiss the rule 30 application, the essential first precondition would have to be a willingness to overlook the fact that the strikeout documents (including the substantive

strikeout documents) do not accord with what *Mr Xavier* says is the true dispute between the parties. I have addressed this above, but reiterate: nowhere in the strikeout documents (including the substantive strikeout documents) is it ever alleged that the fourth and fifth respondents owe an indemnity or contribution to the defendant. So, what *Mr Xavier* is essentially asking me to do – in his quest for me to put substance over form and get to the heart of the true dispute between the parties – is to ignore what the strikeout documents actually say, and read them as conveying what is reflected in the answering affidavit (albeit cursorily) and in *Mr Xavier's* heads of argument (in more detail).

27.8 It is not apparent how I could possibly do that, without essentially predetermining the meaning of the documents in a way which would preclude the plaintiff from excepting to them. What I mean by this is that, in order to uphold *Mr Xavier's* arguments, I would have to, at the very minimum, agree with him that they reflect what he calls the true disputes between the parties. This, in turn, necessarily would require me to make a finding as to what they mean which is entirely discordant with their plain text. If I do that, the plaintiff, and more importantly, the trial court would probably be bound by my interpretation of the strikeout documents. I appreciate that, in any application of this nature, that would generally be the case because part of deciding whether the rule 30 application is good, is to determine what is said in the objectionable documents. But here, the situation seems slightly different because I am being called upon – in the interests of placing substance over form – to adopt an interpretation which is simply incompatible with the plain meaning of the documents. I should add that an attempt appears to have been

made by the opposing respondents to amend some of the substantive strike out documents. But the plaintiff objected to the proposed amendments and that issue appears to remain pending. Again, therefore, it is necessary for me to deal with the pleadings as I find them.

27.9 But let us assume for the sake of argument that I would be willing to adopt *Mr Xavier's* interpretation of the documents. There is an even more fundamental problem, which relates entirely to the substance of what the opposing respondents have asked me to do, and has nothing to do with questions of technicalities or procedures. The fundamental problem is this:

27.9.1 The main claims in reconvention, which the fourth and fifth respondents wish to introduce, are conditional on the plaintiff's claim succeeding.

27.9.2 On the pleadings as they now stand, if the plaintiff's claim succeeds, it means that the trial court would have rejected the *stipulatio alteri* defence. The defendant could always seek to amend its plea in the future, and nothing I say here is meant to preclude that. But, for the purposes of this rule 30 application, I must proceed on the basis that the pleadings are as they stand. So, the substantive strikeout documents – ie, the conditional claims in reconvention – only come into play if the plaintiff succeeds in its claim.

27.9.3 The introductory text of the fourth respondent's conditional claim in reconvention (which I use for illustration because the fifth respondent's is to identical effect) mirrors the wording normally

used in conditional claims in reconvention. It says that, if the court does not dismiss the plaintiff's claim and/or uphold the defendant's defences, then the opposing respondents "claim that on the giving of judgment of the Plaintiff's claim, the Plaintiff's claim will be extinguished in whole or in part" by the conditional counterclaims.

27.9.4 But the problem facing the opposing respondents is that this is a conceptual impossibility. The premise of the conditional counterclaims is that the second and third respondents have breached the lease agreement with the fourth and fifth respondents and, as a result, owe them money. But, keeping in mind (for this is crucial) that the conditional counterclaims only come into play if the plaintiff is successful, there is no way in which the successful upholding of the counterclaims could ever reduce the plaintiff's liability to the defendant. This is because, once a court has rejected the argument that the *stipulatio alteri* serves as a defence to the plaintiff's claim, there is no way to link the alleged liability of the second and third respondents to the fourth and fifth respondents to the main claim.

27.9.5 The first clear legal starting point is that the plaintiff, second respondent and third respondent are separate entities. The second starting point is that the claim of the plaintiff against the defendant – ie, for failure to pay for PPE which the plaintiff supplied to the defendant – has nothing whatsoever to do with any claim that the fourth and fifth respondents (and even the defendant, for that matter) might have for breaches of entirely separate lease agreements. The

only way to create the link is via the *stipulatio alteri*; and, in particular, acceptance by a court that the defendant does not have an obligation to pay the plaintiff because a subsequent agreement (ie, the *stipulatio alteri*) essentially novated the original sale agreement relating to the PPE and created a new mechanism for payment, which was fulfilled. But, once a court rejects that defence – which, at the sake of repetition – is the precondition for the counterclaims to come into play, there is no way to link the main claim to the conditional counterclaims.

27.9.6 As a consequence, the plaintiff is not being unduly technical by objecting to the procedure which the opposing respondents have adopted. The plaintiff cannot stop the defendant from raising the *stipulatio alteri* defence. And, as I have already explained, even if the strikeout documents are all removed from the picture, the defendant will still be able to ventilate the *stipulatio alteri* defence. But, the plaintiff is entitled to object to having a series of disputes about lease agreements to which it is not a party wrapped up into its claim, in circumstances where a court (by upholding the plaintiff's claim, which is the necessary precondition for the counterclaims to come into play) has already held that any arrangements made in respect of the lease agreements do not serve to exonerate the defendant from having to pay the plaintiff.

27.9.7 It follows that the plaintiff would be prejudiced if the rule 30 application were to be dismissed. *Mr Xavier's* argument that the

second and third respondents have not been prejudiced by the approach of the opposing respondents – see paragraph above – is beside the point. It is only the plaintiff's prejudice which is relevant to this application.

28 I agree, in principle, that it is best to avoid being too technical in applications such as this. But, as I hope I have demonstrated, the defects in the approach taken by the opposing respondents are substantive, not only procedural. It follows that the substantive strikeout documents, and the third-party notices, must be struck out. I should add, for completeness, that the unconditional counterclaims of the fourth and fifth respondents do not suffer from the defects discussed in paragraph above. But since they bear no relationship at all to the main claim and do not, on their own terms, relate to any indemnification or contribution owed to the defendant, they should not be allowed in.

29 As for the notice of intention to defend filed by the fourth and fifth respondents:

29.1 As should be clear from what I have said above, the notice of intention to defend was filed on the premise that the remaining procedures which the opposing respondents adopted were valid. Overlooking, for a moment, the strange order in which the documents were served: the opposing respondents proceeded from the assumption that the third-party notices made the fourth and fifth respondents defendants in the main action. Given the nature of the underlying dispute, it then followed logically that they would wish to oppose the plaintiff's claim.

29.2 Since I have found that the entire procedure of introducing the strikeout documents was irregular, it follows that the notice of intention to defend filed by the fourth and fifth respondents was also irregular. It too, therefore, must be struck out.

PUNITIVE COSTS?

30 In the notice of motion in the rule 30 action, there is a prayer for a punitive costs order. Not much emphasis was placed on this aspect of the case by the plaintiff in argument; in fact, in the heads of argument, the issue is not addressed at all. But, in any event, the underlying premise of the request is that the conduct of the opposing respondents (acting through the vehicle of the defendant) was so unreasonable that a mark of displeasure was warranted.

31 My discussion above reveals that there were some deeply troubling aspects to the approach adopted by the opposing respondents. However, I also understand, at least to some degree, what they were trying to achieve. What does give me pause is that much of the problematic nature of the approach of the opposing respondents is based on what I see as an unacceptable ignorance of the separate juristic nature of each of the parties. There seems to have been an assumption that the defendant, fourth respondent and fifth respondent could essentially be treated as the same entity, which is troubling to me.

32 If *Mr Du Plooy* had pressed the point more vigorously, I would have been very tempted to make a punitive costs order. However, in all of the circumstances I do not wish to go so far as to describe the conduct by the opposing respondents of this leg of the litigation as so unreasonable as to justify a punitive costs order, even though it leaves much to be desired. In my view, it is therefore appropriate for me to make an ordinary costs order

against the defendant. (I should add, for completeness, that since the opposing respondents all opposed the rule 30 application there would have been a basis to make a costs order against them all. But since the plaintiff only seeks a costs order against the defendant, that is what I intend to order.)

THE ORDER

33 Some of the third-party notices have been purportedly filed on behalf of both the defendant and one or more of the third parties themselves. It is for this reason that, in the notice of motion, the plaintiff at times seeks the striking out of third-party notices described as, for example, "the Fourth Defendant's third-party notice". For the sake of clarity, when referring to any documents in my order which might trigger some confusion, I provide the Caselines reference next to them.

34 I make the following order:

1. The notice of intention to defend filed by the fourth and fifth respondents on 22 March 2022 is struck out.

2. The following documents in the main action under case no: 2021/592036, filed by the various parties identified in this paragraph of the order, are struck out:

2.1. The fourth respondent's "conditional claim in reconvention".

2.2. The fifth respondent's "conditional claim in reconvention".

2.3. The fourth respondent "claim in reconvention".

2.4. The fifth respondent's "claim in reconvention".

3. **The following documents, filed by the defendant in the main action under case no: 2021/592036, are struck out:**

   3.1. **A third-party notice purporting to join the second respondent as a defendant in the main action (Caselines 013-1).**

   3.2. **A third-party notice purporting to join the third respondent as a defendant in the main action (Caselines 013-15).**

   3.3. **A third-party notice purporting to join the fourth respondent as a defendant in the main action (Caselines 013-23).**

   3.4. **A third-party notice purporting to join the fifth respondent as a defendant in the main action (Caselines 013-30).**

4. **The defendant in the main action under case n: 2021/592036 is ordered to pay the costs of this application.**

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ADRIAN FRIEDMAN
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Delivered: This judgment was prepared and authored by the Judge whose name is reflected above 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 21 August 2023.

APPEARANCES:

Attorney for the applicant/plaintiff: Hajibey-Bhyat & Mayet Inc

Counsel for the applicant/plaintiff: Mr A Du Plooy

Attorney for the first, fourth and fifth respondents: Biccari Bollo Mariano Inc

Counsel for the first, fourth and fifth respondents: Mr E Xavier – Attorney with right of appearance

Date of hearing: 13 March 2023

Date of judgment: 21 August 2023