



**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GQEBERHA**

Date Heard: 25 May 2023

Date Delivered: 5 September 2023

Case No: 919/2020

In the matter between:

MTO FORESTRY (PTY) LTD

Plaintiff

and

ESKOM HOLDINGS (SOC) LIMITED
First Defendant

**MINISTER OF ENVIRONMENT,
FORESTRY AND FISHERIES**

Second Defendant

and

**NELSON MANDELA BAY
METROPOLITAN MUNICIPALITY**

First Third Party

CYPHERFONTEIN 379 (PTY) LTD

Second Third Party

Heard with

Case No: 926/2020

In the matter between:

ANDREA FRANCO PUGGIA N.O.

First Plaintiff

DAVID GRAHAM NEZAR N.O.

Second Plaintiff

GEORGE YEROLEMOU N.O.

Third Plaintiff

NEIL RUSSEL CRAWFORD N.O.

Fourth Plaintiff

WELLIE VICTOR MOSS N.O.

Fifth Plaintiff

(in their capacities as the trustees for the
time being of the WOODBRIDGE TRUST)

and

ESKOM HOLDINGS (SOC) LIMITED

First Defendant

**MINISTER OF ENVIRONMENT,
FORESTRY AND FISHERIES**

Second Defendant

and

**NELSON MANDELA BAY
METROPOLITAN MUNICIPALITY**

First Third Party

CYPHERFONTEIN 379 (PTY) LTD

Second Third Party

JUDGMENT

RONAASEN AJ:

Introduction

General

[1] This judgment, in respect of case number 919/2020 (“the MTO action”), concerns an opposed application for amendment (“the application”) and in respect of case number 926/2020 (“the Woodridge action”) relates to an exception (“the exception”).

[2] As will be apparent from my summary of the litigation history and the facts underlying the litigation, set out below, it was appropriate for the application and exception to be heard at the same time.

The MTO action

- [3] The plaintiff in this action is MTO Forestry (Pty) Ltd (“MTO”). In April 2020 it instituted action against the first defendant, Eskom Holdings SOC Ltd (“Eskom”), and the second defendant, the Minister of Environment, Forestry and Fisheries (“the Minister”), seeking the payment of damages from Eskom.
- [4] MTO had the right to and benefit of, alternatively, bore the risk of profit and loss in respect of certain plantations and a sawmill situated on immovable property owned by the Government of the Republic of South Africa (“MTO’s property”).
- [5] Eskom is a public utility established to provide electricity to consumers in South Africa, including to MTO’s property.
- [6] The Government owns another immovable property situated to the southwest of MTO’s property, the management and control of which was delegated by the Government to the Minister (“the Minister’s property”).
- [7] Eskom has repeatedly attempted to join the Nelson Mandela Bay Metropolitan Municipality (“the municipality”) as a third party to the MTO action in terms of the provisions of rule 13 of the Uniform Rules (“rule 13”). The basis, if any, of the joinder of the municipality as a third party is the principal issue for determination in the application.

The Woodridge action

[8] In this action the plaintiffs are the trustees for the time being of the Woodridge Trust (the plaintiffs and the trust will be collectively referred to as “Woodridge”). Woodridge is the registered owner of two immovable properties on which it conducts business as a private school known as Woodridge College and Preparatory School.

[9] In May 2020 Woodridge instituted an action for damages against Eskom and the Minister. In this action Eskom joined the municipality and MTO as the first and second third parties, respectively, in terms of rule 13. In the exception, too, the central question for determination is the basis, if any, for the municipality’s joinder.

Summary of the grounds on which MTO and Woodridge claim the payment of damages from Eskom

[10] Both MTO and Woodridge’s claims for damages against Eskom stem from the same factual scenario. The grounds for the claims can be summarised as follows:

10.1. Eskom owns and, at all material times, operated the MKSB005 powerline, which extends over several farms;

- 10.2. a veld fire started on the Minister's property, in the vicinity of poles with numbers 31 and 33 on the Eskom powerline, between 15:00 and 16:00, on 7 June 2017;
- 10.3. the fire spread rapidly in an easterly direction until it reached MTO's property where it caused extensive damage to certain of the compartments of the plantation and to the sawmill and its contents;
- 10.4. the fire also spread to the Woodridge properties where it, equally, caused vast damage to the buildings, other improvements on the property and the contents of the buildings;
- 10.5. Eskom failed to extinguish or reasonably contain the fire while it was still in its infancy;
- 10.6. the fire was the result of the malfunctioning of Eskom's equipment caused by wind and/or poor maintenance and/or lack of inspection; arcing currents between powerlines; sparks from the hot aluminium or steel setting the veld alight; powerlines clashing with overgrown vegetation beneath the Eskom line or by induction or electrolysis from the electricity transmitted by Eskom; and
- 10.7. the sole cause of the damage suffered by MTO and Woodridge was the wrongful and negligent actions of Eskom (for purposes of this judgment it is not required of me to analyse the legal basis on which

MTO and Woodridge contend that Eskom acted wrongfully and negligently and is liable to it in damages).

Summary of Eskom's defence in the MTO action

[11] Eskom's defence in its amended plea in this action can be summarised as follows:

- 11.1. there were two fires on 7 June 2017;
- 11.2. the first fire started between 10:00 and 10:30 at or directly adjacent to a municipal power utility pole structure owned and controlled by the municipality ("the first fire"). Eskom attributes the cause of the first fire to the negligence of the municipality;
- 11.3. the second fire commenced between approximately 15:00 and 15:30, approximately 15 m south-west of Eskom pole 31, referred to above ("the second fire"). MTO attributes the cause of the second fire to the negligence of Eskom and it is the second fire which it alleges caused the fire damage which is the subject matter of its claim for damages against Eskom;
- 11.4. Eskom maintains that the second fire was not caused in the manner alleged by MTO; the first fire and not the second caused the damage allegedly suffered by MTO in respect of which it now claims damages from Eskom;

- 11.5. alternatively, if it is found that the second fire was caused in the manner alleged by MTO then, says Eskom, it was not the sole cause of the fire damage suffered by MTO as the first fire first entered and spread over the MTO property and only after that the second fire entered and spread over the property; and
- 11.6. thus, Eskom's alternative defence is that the first and second fires resulting from the independent negligent conduct of two different parties (i.e., the municipality and Eskom caused the fire damage in respect of which MTO seeks payment of damages from Eskom.

Summary of Eskom's defence in the Woodridge action

[12] Eskom attributes the first fire to the negligence of the municipality and insists that it is this fire which caused the fire damage Woodridge suffered and not the second fire, which Woodridge attributed to the negligence of Eskom, and which is the subject matter of its claim for damages against Eskom.

[13] Over the period 7 June 2017 to 10 June 2017 the first fire spread onto the Woodridge property and caused the fire damage Woodridge suffered.

[14] According to Eskom the second fire, on 7 June 2017, spread but did not reach or burn across the Woodridge property and that in the result it is not liable for the fire damage suffered by Woodridge.

[15] In the alternative Eskom seeks to join the municipality in terms of rule 13(1)(b) should it be found that both fires caused the fire damage alleged by Woodridge.

Litigation history: the MTO action

[16] On 24 April 2020 MTO instituted action against Eskom and the Minister.

[17] MTO delivered amended pages to its particulars of claim on 29 June 2020.

[18] Eskom's plea followed on 9 September 2020.

[19] On 25 September 2020 Eskom issued a third party notice and annexure in terms of which it sought to join the municipality and Cypherfontein 379 (Pty) Ltd as third parties in the action.

[20] The municipality responded to the third party notice and annexure by way of an exception on 3 March 2021, contending that the third party notice and annexure thereto were vague and embarrassing, alternatively, lacked averments necessary to sustain Eskom's claims against the municipality. This exception was opposed and was argued on 16 September 2021. Judgment was handed down on 23 November 2021 in terms of which the municipality's exception was upheld with costs, the third party notice and annexure were set aside and Eskom was given leave to amend the notice and annexure ("the earlier judgement").

[21] On 2 February 2022 Eskom delivered an amended annexure to its third party notice and an amended plea on 21 February 2022.

[22] The amended third party annexure attracted a further exception from the municipality, on 24 February 2022. This caused Eskom to produce a notice of its intention to further amend the annexure to the third party notice on 18 March 2022. Almost inevitably the municipality objected to the proposed amendment, on 31 March 2022.

[23] Eskom, tirelessly, delivered yet another notice of its intention to amend the annexure to its third party notice, on 4 May 2022. Not surprisingly the municipality again objected to the proposed amendment. This objection resulted in the application which I am required to determine, namely a formal application by Eskom to amend the annexure to its third party notice. The principal objection to the amendment is that it would render Eskom's annexure to its third party notice excipiable in that if amended as asked by Eskom, it would not contain averments to sustain Eskom's claims against the municipality.

Litigation history: The Woodridge Action

[24] Woodridge issued summons against Eskom on 6 May 2020. Eskom pleaded to the particulars of claim on 2 July 2020. It amended its plea on 21 February 2022.

[25] On 23 July 2020 Eskom issued its third party notice and annexure in terms of which it sought to join the municipality and MTO as third parties to the action.

[26] The municipality excepted to Eskom's third party annexure on 8 March 2021 on the basis that it was vague and embarrassing, alternatively, that it lacked averments necessary to sustain Eskom's claims against the municipality.

[27] The exception was opposed by Eskom and the exception was argued in this court contemporaneously with the municipality's exception to Eskom's third party annexure in the MTO action, on 16 September 2021. As stated, the earlier judgment was handed down on 23 November 2021 in terms of which the exception was upheld, with costs, the third party notice and annexure thereto were set aside and Eskom was given leave to amend its third party annexure.

[28] On 2 February 2022 Eskom's second attempt at a third party annexure was produced. The amendment attracted another exception from the municipality, on 24 February 2022, which, in turn, prompted a further notice by Eskom to amend its annexure and the filing of a further amended annexure on 17 March 2022 and 12 April 2022, respectively.

[29] The municipality again excepted to the further amended annexure, on 25 May 2022. This, third, exception led to yet another notice by Eskom to

amend its annexure to its third party notice, on 2 November 2022 with the amendment being perfected on 18 November 2022.

[30] The municipality delivered its fourth exception to the latest iteration of Eskom's annexure to its third party notice on 7 December 2022. That exception is the subject of this judgment. It is confined to the ground that the annexure lacks averments necessary to sustain Eskom's claims against the municipality.

The MTO action and the application by Eskom to amend its third party annexure

[31] Central to the application is Eskom's reliance on the provisions of the Apportionment of Damages Act, 34 of 1956 ("the Act") and in particular section 2(1) thereof, which is in the following terms:

"Where it is alleged that two or more persons are jointly and severally liable in delict to a third person (hereinafter referred to as the plaintiff) for the same damage, such persons (hereinafter referred to as joint wrongdoers) may be sued in the same action."

[32] Given Eskom's contention that this provision applies in the circumstances, it contends further that it is accordingly entitled to rely on the provisions of rule 13(1)(b) to obtain the joinder of the municipality as a third party to the MTO action. This rule provides that where a party in any action claims that:

“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 party 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.”

[33] It was held in *Absa Brokers (Pty) Ltd v RMB Financial Services and Others* 2009 (6) SA 549 (SCA) at [15] that the clear purpose of the Act is to avoid a multiplicity of actions arising “*from a single loss-causing event*”.

[34] Eskom proceeds from a flawed premise where it submits in its heads of argument that the material issues in the dispute between all the parties are the same namely whether the fire damage alleged by MTO was caused by the first or second fires and/or the converged fires. There are no such issues in dispute arising from MTO’s claim. The single loss-causing event on which MTO relies in its action is the second fire. It has not averred in its particulars of claim that it suffered any damage as a result of the first fire. It is only Eskom which has introduced the first fire into the proceedings.

[35] Eskom fixates on the words “*the same damage*” appearing in section 2(1) of the Act to support its contentions. It argues that the first fire caused MTO’s damage and that this is the same damage relied upon by MTO to sustain its claim for damages against Eskom, which it alleges arose from the second fire. Kruger AJ, in the earlier judgment, correctly, in my view,

disposed of Eskom's argument in this regard, with reference to sound authority, by finding in paragraphs [38]-[42] that:

- 35.1. the two fires were separate loss-causing events with separate instances of negligence by separate wrongdoers, causing separate damage; and
- 35.2. Eskom and the municipality are therefore not joint wrongdoers for purposes of the Act and the Act does not find application in this case.

[36] In confirmation of the correctness of Kruger AJ's approach in the earlier judgment it is apposite to refer to two further passages from the judgment in *Minister of Communications v Renown Food Products* 1988 (4) SA 151 (C) in respect of the meaning of the words "*the same damages*", at:

36.1. 153J:

"I do not agree that the words are ambiguous and there is accordingly no warrant for ascribing to them any meaning other than the plain ordinary meaning, i.e., the very damage or one and the same damage."

36.2. 154C-D:

"To interpret s 2(1) of the Act so as to widen the scope of the words 'the same damage' which are unambiguous is not justified. The Act specifically defined joint wrongdoers with reference to the damage that they cause,

i.e., the same damage. There is nothing in the Act to indicate that the Legislature intended when it used these words 'the same damage', to include in that phrase both damage which was clearly not the same damage but caused within an unspecified period of time after previous damage, but which was incapable of being attributed to one cause or the other".

[37] As Kruger AJ stated the above-mentioned judgment was cited with approval by the Supreme Court of Appeal in *Minister of Safety and Security v Rudman* 2005 (2) SA 16 (SCA) at [79], where the court stated that:

"As was held in *Mkwanazi v Van der Merwe and Another* 1970 (1) SA 609 (A) at 622B - D and *Minister of Communications and Public Works v Renown Food Products* 1988 (4) SA 151 (C), to fall within the Act the two defendants must have caused 'the same damage' and, where two separate acts of negligence have caused different damage and resultant loss to a plaintiff, each defendant is liable only for such damage as he or she has personally caused. There is nothing in the Act which detracts from this position. See also *Rahman v Arearose Ltd and Another* [2001] QB 351 (CA), a judgment of the English Court of Appeal, to which counsel for the appellants referred, which concerned the meaning of the expression 'same damage' in s 1(1) of the United Kingdom Civil Liability (Contribution) Act 1978 (c 47)."

[38] The proposed amendment by Eskom to its third party annexure does not in any meaningful way address the findings in the earlier judgment and thus those findings remain of application. The proposed amendment does not

establish any new factual or legal basis for me to revisit or distinguish those findings. In the circumstances the Act is still not applicable.

[39] Thus, the application stands to be dismissed, as the proposed amendment would render the annexure excipiable – it would not contain sufficient facts to sustain Eskom’s claims against the municipality. On the facts relied upon by Eskom there is no triable issue as between Eskom and the municipality.

[40] On those facts the Act and rule 13 do not apply and thus do not afford Eskom any legal basis for the joinder of the municipality as a party to the MTO action. On Eskom’s facts it is not able to amend its annexure to allow for the Act or rule 13 to be applicable. I deal with the inapplicability of rule 13 in more detail, below in the context of the Woodridge action. My conclusions expressed below apply equally here.

The Woodridge action and the municipality’s exception to Eskom’s latest third party annexure

[41] The only basis for the joinder of the municipality as a third party to this action relied upon by Eskom is rule 13(1)(b).

[42] In terms of its third party annexure Eskom seeks an order:

- 42.1. declaring the degree of negligence of each party in relation to the fire damage suffered by Woodridge;

- 42.2. declaring and determining the amount of compensation that each party is liable to pay to Woodridge for the fire damage suffered by it;
- 42.3. declaring that in the event that Eskom is ordered to pay and paying to Woodridge compensation for all the fire damage suffered by it, the municipality and MTO are ordered to make a contribution to Eskom in respect of the amount paid to Woodridge, and in accordance with their respective degrees of negligence;
- 42.4. in the alternative, apportioning the amount of damages awarded in favour of Woodridge against Eskom and the municipality and MTO in such proportions as the court may deem just and equitable having regard to the degrees in which Eskom, the municipality and MTO are at fault in relation to Woodridge's fire damage, and that the court give judgment separately against Eskom, the municipality and MTO for the amount so apportioned.

[43] This court in *Hart and Another v Santam Insurance Co. Ltd* 1975 (4) SA 275 (ECD) at 277F-G 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. The rule makes no provision for a court granting a judgment sounding in money in favour of one alleged wrongdoer against another. The court, in *Hart*, was also dealing with an exception to an annexure to a third party notice. In terms of this judgment (by which I am bound) the relief envisaged in sub-paragraphs 42.2-42.4 above, contemplates a judgment sounding in money being granted against the

municipality, which cannot competently be granted in terms of rule 13. See 277H of the judgment.

[44] The relief envisaged by Eskom in sub-paragraph 42.1 above is untenable, on the facts relied on by Eskom, where there were clearly two loss-causing events in the form of two different fires and two distinct instances of negligence. On Eskom's version only the municipality featured and could be negligent in relation to the first fire and only Eskom featured and could be negligent in respect of the second fire. As between Eskom and the municipality it is therefore impossible to determine degrees of negligence in respect of either the first fire or the second fire.

[45] Thus, the latest annexure to Eskom's third party notice does not disclose the facts necessary to sustain its claims in terms thereof. Here too it is clear to me, on the facts postulated by Eskom, that rule 13 does not apply as it does not give Eskom a legal basis for joining the municipality as party to the Woodridge action.

[46] The exception must therefore be upheld.

Should Eskom be afforded a further opportunity to amend the annexure to its third party notice in the Woodridge action

[47] My detailed exposition of the litigation history in respect of both actions has as its purpose to demonstrate how the litigation which commenced in April and May 2020 has been bogged down by Eskom's numerous unsuccessful

attempts to produce annexures to its third party notices which were not vague and embarrassing and which contained averments which were sufficient to sustain the claims made in the annexures. As this judgment demonstrates it is still not able to do so.

[48] Eskom's first third party annexures resulted in the municipality's exceptions being upheld in the earlier judgment. Its further attempts at producing non-exciptable annexures have been similarly unsuccessful. In summary, the facts Eskom relies on do not give it a legal basis for the relief. It seeks against the municipality. All this has motivated the municipality to request that, if I uphold the exception, I not afford Eskom the opportunity to deliver a further amendment in an to attempt to make its third party annexure non-exciptable.

[49] The starting point in considering the municipality's request is the judgment in *Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs)* 1993 (2) SA 593 (A) where it was held at 602D-E that in cases where an exception has successfully been taken to a pleading, of whatever nature, the invariable practice of our courts has been to order that the pleading be set aside and that the pleader be given leave, if so advised, to file an amended pleading within a certain period of time.

[50] In *Rowe v Rowe* 1997 (4) SA 160 (SCA) at 167G-I it was remarked, albeit *obiter*, that it is doubtful whether the established practice in exception proceedings of setting aside the pleading excepted to with leave to the

pleader to amend, if so advised, brooks of any departure and that, in the rare cases in which a departure from an order in that form may perhaps be permissible, one expects to find the reasons for such departure in the court's judgment.

[51] The current state of our law on this issue, in my view, is effectively summarised in the following passage from *Ocean Echo Properties 327 CC and Another v Old Mutual Life Assurance Company (South Africa) Ltd* 2018 (3) SA 405 (SCA) at [8]:

“The upholding of an exception disposes of the pleading against which the exception was taken, not the action or defence. An unsuccessful pleader is given the opportunity to amend the plea, even when the plea has been set aside because it does not disclose a defence. The rationale for this seems to be that, although the defence containing the pleading may be bad, the pleading as such continues to exist. Ordinarily therefore the court should grant leave to amend and not dispose of the matter. Leave to amend is not a matter of an indulgence; it is a matter of course **unless there is a good reason that the pleading cannot be amended.**” [footnote references omitted] [emphasis supplied]

[52] I have found, in respect of the Woodridge action, on the facts put up by Eskom, that rule 13 has no application and therefore does not provide Eskom with a basis for joining the municipality as a party to the action. Throughout the course of this action and Eskom's various attempts to produce a non-exciptable annexure to its third party notice the underlying facts have always remained the same and are premised on the occurrence of two fires commencing at different times of the day at different locations

and which were separate and distinct loss-causing events. Eskom denies any involvement in the first fire and does not attribute any involvement to the municipality in respect of the second fire. It is difficult, if not impossible, to conceive that in yet a further attempt to amend its annexure, Eskom would be able to postulate a different set of facts, which would allow for rule 13 to apply. Any number of attempts by Eskom on the same underlying facts have not succeeded in making rule 13 applicable.

[53] Thus, in my view, this matter falls within the scope of the highlighted qualification in the above-quoted passage from the *Ocean Echo* judgment as there is good reason why the annexure cannot be amended. I will therefore not make the usual order which is made when an exception to a pleading is upheld and the pleading set aside as a consequence.

Order

[54] In view of the conclusions I have reached I make the following order:

- 1. In respect of case number 919/2020 (the MTO action) Eskom's application, brought on 7 July 2022, for leave to amend the annexure to its third party notice is dismissed with costs, such costs to include the costs attendant on the employment of two counsel.*
- 2. In respect of case number 926/2020 (the Woodridge action):*

- 2.1 *the Nelson Mandela Bay Municipality's exception to Eskom's amended annexure to its third party notice, which amended annexure was filed of record on 18 November 2022, is upheld;*
- 2.2 *Eskom's third party notice and the above-mentioned annexure thereto are set aside; and*
- 2.3 *Eskom is directed to pay the costs of the Nelson Mandela Bay Municipality, including the costs attendant on the employment of two counsel.*

O H RONAASEN

ACTING JUDGE OF THE HIGH COURT

**The Municipality's representatives: EAS Ford SC and L Ntsepe
Instructed by BNI Attorneys**

**Eskom's representatives: TJ Bruinders SC and N Lewis
Instructed by Norton Rose Fullbright
Inc.
c/o Boqwana Burns Inc.**