REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION – MTHATHA)

In the matter between:	**Case No: 1565/2007**
AFRICAN BULK EARTHWORKS (PTY) LTD /	
NEW HEIGHTS 55 (PTY) LTD	**Plaintiff**
and	
LANDMARK MTHATHA (PTY) LTD	**1st Defendant**
LANDMARK REAL ESTATE SERVICES (PTY) LTD	**2nd Defendant**
HENDERSON MPUMELELO MBANGA	**3rd Defendant**
CHIEF MFUNDO MTARARA	**4th Defendant**
SES' FKILE INVESTMENTS (PTY) LTD	**5th Defendant**
and	
KING SABATA DALINDYEBO MUNICIPALITY	**3rd Party One**
PROVINCIAL GOVERNMENT OF THE EASTERN CAPE	**3rd Party Two**
GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	**3rd Party Three**

Coram: **Chetty, J**

Date Heard: **26 August 2008**

Date Delivered: **25 September 2008**

Summary: *Practice: Parties – Uniform Rules of Court – Joinder – Rule 13 (1) (a) and (b) – Judgment sounding in money – substantially same questions – determination of exceptions to third party notice*

JUDGMENT

CHETTY, J

[1] On the approach to Mthatha along the N2 from the western reaches of the Eastern Cape, a large bill board erected on a vast tract of vacant land (the property) on the left advertises the proposed development of a shopping mall. As long ago as October 2006, the developer, to whom I shall in the judgment refer to merely as Landmark, concluded a written agreement of lease in respect of the property with its owner, the King Sabata Dalindyebo Municipality in terms of which the latter let the property to Landmark for the construction of a shopping mall (the development).

[2] Thereafter and during April 2007 African Bulk Earthworks (Pty) Ltd (African Bulk), in its previous incarnation as New Heights 55 (Pty) Ltd, and Landmark concluded a written agreement for bulk earthworks (the earthworks agreement) on the property. African Bulk commenced work on the property. Shortly thereafter and on 25 May 2007 a notice, No 642 of 1997 was published in the Government Gazette in terms of s 11 (1) of the **Restitution of Land Rights Act 22 of 1994** (RLRA) to the effect that a claim for restitution of land rights in respect of the property had been submitted to the regional land claims commissioner

for the Eastern Cape. In view of the work in progress on the property the land claimants sought urgent relief in the Land Claims Court for a cessation of the earthworks (case no LCC 66/07).

[3] Publication of the notice was followed by another urgent application to the Land Claims Court by the King Sabata Dalindyebo Municipality for a review and setting aside of the notice aforesaid (case no LCC 69/07). Both applications were consolidated and Landmark, who had sought to be joined, granted given leave to intervene in the proceedings. On 2 October 2007, the Land Claims Court made the following orders:-

> *"LCC66/07*
>
> *A. (i) The interim interdicts prayed for in paragraphs 2.1 of case number LCC66/07 is granted and is immediately operative pending the finalization of serious and consultative negotiations with all parties concerned but before 30 November 2007. This does not concern any of the respondents who neither supported nor opposed the application.*
>
> *(ii) In the event of the negotiations contemplated in paragraph 1 reaching an impasse, on or before 30 November 2007, the 1st respondent (KSD) is granted leave, if so advised, to make an application in terms of section 34 of the Restitution of Land Rights Act No. 22 of 1994 as amended.*

(iii) The respondents opposing the application in case LCC66/07 are ordered to pay the costs of the application jointly and severally, the one paying the other to be absolved.

LCC69/07

B (i) The relief sought in paragraphs 2 and 3 of the Notice of Motion in case Number LCC69/07 is dismissed. The 1st respondent (RLCC) is, nonetheless ordered to republish an amended notice in terms of section (11) (1) (d) of the Act that is suitably specific and intended to clear any confusion that may arise from any inept description in the claim forms. The notice must clearly establish a link between the property being developed as being the property under claim. Such a notice is to be published before 15 November 2007, after consultation with the KSD Municipality and steps must be taken to make it known in the district of the KSD Municipality. This order does not concern any of the respondents who neither supported nor opposed the review proceedings.

(ii) No order as to costs is made."

The proceedings as aforesaid have to date not been finalised.

[4] In the interim African Bulk issued certificates for payment for work done in terms of the earthworks agreement. Landmark failed, despite demand, to pay the amounts due in respect of the certificates issued on 22 August 2007 and 8 September 2007 in the sum of R3 159 941, 06 and R4 804 846, 44 respectively. Bulk Earthworks duly instituted an action for payment of the aforesaid amounts against Landmark as the first defendant and four other defendants (as per the heading to this judgment) by virtue of suretyship agreements concluded between themselves and the latter. In this judgment henceforth a reference to Landmark includes the second defendant.

[5] Landmark's entry of appearance to defend elicited an application for summary judgment. It duly filed opposing papers to the application, filed its plea in the action and simultaneously served notices in terms of Rule 13 of the Uniform Rules of Court on the King Sabata Dalindyebo Municipality as the first third party, the Provincial Government of the Eastern Cape as the second third party and the Government of the Republic of South Africa as the third third party. In the course of this judgment I shall refer to them merely as the municipality, the Provincial Government and the National Government. In terms of the third party notice, Landmark's claim against the municipality and the Provincial and National Government was two-fold. It claimed a contribution or indemnification in terms of Rule 13 (1) (a) and in terms of Rule 13 (1) (b) claimed that the questions and issues

in the action instituted against it by Bulk Earthworks (the main action) were substantially the same as those which had arisen or will arise between it and the third parties and should therefore properly be determined between all the parties including the third parties.

[6] In its plea Landmark raised a number of defences to the action instituted against it. It, *inter alia*, disputed its liability to pay any of the amounts demanded by Bulk Earthworks by virtue of the operation of s 11 (7) (aA) of the RLRA, which precluded it from proceeding with the development.

[7] At the hearing of the application for summary judgment, Bulk Earthworks, Landmark, the municipality and the Provincial and National Governments were all legally represented by counsel save that attorney *G.J. Friedman* appeared on behalf of Bulk Earthworks. It appears from the transcript of those proceedings that all counsel were in agreement that, in view of the third party notices which had been issued, the application be dismissed. The submissions advanced on behalf of counsel prevailed, attorney *Friedman's* argument rejected and the application was dismissed, Landmark being given leave to defend the action.

[8] Landmark's claim against the municipality, the Provincial Government and the National Government foreshadowed in its third party notices

was succinctly formulated in its statement of claim. It commenced with the citation and identification of each of the parties, pleaded the terms of the lease agreement including what it contended were the implied and tacit terms viz, that the municipality was under an obligation to give it vacant possession and that it (the municipality) was unaware of any facts which would adversely affect the completion of the development. It further pleaded that the land claim had been lodged with the Eastern Cape land claims commissioner as far back as 1998 and that at the time the lease agreement with the municipality had been concluded it was unaware of the fact that a land claim had been lodged. Landmark alleged that the omission on the part of the municipality to divulge the existence of the land claim amounted to a breach of the agreement to give it vacant possession of the property; in consequence of the breach or in the alternative, misrepresentation by the municipality, the development was delayed causing a loss of profit in an aggregate amount of R147 253 435, 00. In the alternative to the claim for specific performance it particularised a claim for damages for breach of the lease agreement in the amount of R114 211 425, 00. In the further alternative it particularised a claim for damages based on misrepresentation in an amount of R45 324 315, 00.

[9] Landmark's claim against the Provincial Government and National Government as formulated in the statement of claim is conditional. It is premised upon the municipality not being aware of the land claim at

the time the lease agreement was concluded. In that event, the cause of action against the Provincial Government and National Government is founded upon what is alleged to be a legal duty to have divulged the existence of the land claim to Landmark and their corresponding intentional failure to act accordingly. The statement of claim particularises the cause of action against the Provincial Government on the basis that when it donated the property to the municipality it was aware of the land claim; knew that the municipality was unaware of the land claim; knew the municipality would cause a developer(s) to develop the land; knew that the development would constitute development of land contemplated in s 11 (7) (aA) of the RLRA and knew that if the commissioner for land restitution published the land claim in the government gazette the provisions of s 11 (7) (aA) of the RLRA would become operative. It further relied on the intentional non disclosure on the part of the Provincial Government to the municipality of the lodgement of the land claim. Landmark's claim against the National Government mirrored that against the Provincial Government save that it relied upon the National Government's empowerment of the Provincial Government by way of a deed of delegation to donate the property to the municipality.

[10] It is apposite at this juncture to note that in terms of ss (6) of s 11 of the RLRA that immediately after publishing notice of the land claim, the

regional land claims commissioner was charged to advise the municipality in writing of the lodgement of the land claim and to refer it to the provisions of s 7 of the RLRA. As adumbrated hereinbefore the land claim had been lodged with the regional land claims commissioner as far back as 1998 but notice thereof only published in 2007. S 11 (1) of the RLRA is couched in peremptory terms and imposes a duty on the regional land claims commissioner to publish notice of the claim if satisfied that the claim fulfils the requirements set forth in ss (1) (a), (b) and (c) of s 11. Absent a plea from the either the municipality or the Provincial or National Governments, Landmark has no knowledge at this stage as to when notice as aforesaid was given to the municipality or whether it was given any notice whatsoever.

[11] This rather prolix history of the stillborn development has a material bearing on the real issue this judgment is concerned with, viz, the exceptions to the third party notices filed by the municipality and the Provincial and National Governments in terms of Rule 23 (1) of the Uniform Rules of Court. The gravamen of the exception raised by the municipality is encapsulated in paragraph 5 of its notice in terms of Rule 23 (1) and reads:-

"5. The relief being sought against the first third party is-

> *5.1* *an order for specific performance to wit, directing the first third party to give the first defendant such vacant possession of the subject land so that the first defendant can lawfully conduct and complete the development in terms of the lease agreement aforesaid;*
>
> *5.2* *payment of damages in the sum of R147 253 435, 00; . . .* (emphasis supplied)

[12] The Provincial and National Governments raised four exceptions to the statement of claim of which only the first three remain relevant. The first and second exceptions are in effect one exception, the gravamen of the complaint being that in as much as the statement of claim does not sufficiently identify the particular organ of state in the Provincial and National Governments to which the third party notice is directed at, the notice is vague and embarrassing.

[13] The third exception raised by the Provincial and National Governments is in all material respects identical to that raised by the municipality and I shall firstly deal with this exception and refer to them jointly as the excipients. The argument advanced on behalf of the excipients was

two-fold – both Mr Mbenenge and Mr Dukada on behalf of the municipality and Provincial and National Governments respectively submitted that the provisions of Rule 13 upon which Landmark's application for joinder is predicated are not of application. In order to test the validity of the submissions advanced it is necessary to consider the relevant rule.

[14] Rule 13 (1) provides as follows:-

> *"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 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.

[15] There is a long line of authority to the effect that the purpose of the Rule is to enable a litigant to avoid multiplicity of actions relating to the same subject matter. However, before I proceed to consider the competing submissions advanced by counsel it is important to stress that Landmark's application for joinder of the excipients though brought in terms of both subsection (1) (a) and (b) of Rule 13 is primarily based on subrule (b).

[16] Counsel for the excipients, in contending that Landmark's joinder of them in terms of sub-rule (a) is entirely misplaced, rely primarily on *dicta* in **Hart v Santam Insurance Co Ltd**[1], **Eimco (SA) (Pty) Ltd v P Mattoids Construction Co (SA) (Pty)**[2] and **Dodd v Estate Cloete**[3] to the effect that the sub-rule permits only an alleged wrongdoer to seek against another who is not a party to the proceedings an apportionment of fault in the form of a declaratory order and makes no provision for a judgment sounding in money in favour of one alleged wrongdoer. The application for the joinder of the excipients is however, unlike the situation in the cases referred to, not limited to sub-rule (a) but is based, as adverted to earlier, primarily on

[1] 1975 (4) SA 275 (E) at P. 227D-G
[2] 1967 (1) SA 326 (N)
[3] 1971 (1) SA 376 (E)

the provisions of sub-rule (b). In both **Eimco**[4] and **Dodd**[5] the court recognised that a claim for damages could be instituted under sub-rule (b). In **IPF Nominees (Pty) Ltd v Nedcor Bank Ltd**[6], Claasen J, after an analysis of a number of authorities both here and in England remarked "*… when it is convenient or expedient in the sense of being fit and fair to the parties concerned, I can see no reason in principle why a judgment sounding in money cannot be issued against a third party joined under subrule 13 (1) (b)"*. In my view the third party notice indicates, quite clearly, that joinder is sought in terms of the provisions of both sub-rules (a) and (b) of Rule 13. Consequently, the rule is not a bar to Landmark seeking a judgment sounding in money against the excipients. In my judgment, this is precisely the type of matter postulated by Claasen J when *"considerations of justice, equity and convenience would permit a court to exercise its inherent discretion to entertain judgments sounding in money against a third party"*[7] where joinder is sought in terms of Rule 13 (1) (b).

[17] The excipients further contend that the questions or issues raised by African Bulk against Landmark are different and distinct from those which have arisen or will arise between Landmark and themselves. *Ergo*, so counsel for the excipients contend, it is not only inappropriate but it would be impermissible for joinder to be ordered because of the

[4] Eimco (SA) (Pty) Ltd v P Mattioda's Construction (*supra*) at pp. 327H-328A
[5] Dodd v Estate Cloete and Another (*supra*) at p. 379D-G
[6] 2002 (5) SA 101 (W)
[7] IPF Nominees (Pty) Ltd v Nedcor Bank Ltd (*supra*) at p. 119F

absence of the commonality of questions or issues enjoined by sub-rule (b).

[18] In the third party notice Landmark alleges:-

> *"2(a) . . .*
>
> (b) *that the questions or issues in the action are substantially the same as the questions or issues which have arisen or will arise between the first defendant and the third parties, and should properly be determined not only as between any parties to the action but also between the first defendant and the third parties."* (emphasis supplied)

[19] Landmark's counsel, Mr *Coetzee*, forcefully argued that the important issue at the trial, leaving aside the other defences raised by Landmark to African Bulk's claim, relates to the land claim. The municipality's ownership of the land, the existence of the lease agreement and the question whether the municipality was aware of the land claim when the lease agreement was concluded, would arise in both actions. In addition the *bona fides* of the municipality would feature in both actions. In essence the claim of African Bulk is inextricably linked to the damages claim of Landmark against the excipients. It is abundantly clear from the formulation of Landmark's claim against the municipality that substantially the same issues will arise for

determination between African Bulk and Landmark and between the latter and the municipality.

[20] The joinder of the Provincial and National Governments is resisted, not only on the basis that African Bulk's claim against Landmark is different and distinct from the latter's claim against the Provincial Government and the National Government, but moreover on the ground that the statement of claim does not sufficiently allege a causal link between the alleged wrongful conduct of the Provincial and National Governments and the damages suffered by Landmark. Landmark's cause of action against the Provincial and National Governments as formulated in its statement of claim is however detailed. It is presaged upon the municipality not being aware of the land claim and is premised upon the existence of a legal duty owed to disclose the fact that a land claim had been lodged. The existence of a legal duty upon government to disclose information in certain circumstances is recognised in our law. See **Minister of Safety and Security v Van Duivenboden**[8]. The regional land claims commissioner was, as adverted to earlier, under a duty to cause publication of notice of the land claim once it had been lodged. As adumbrated hereinbefore the regional land claims commissioner failed to do so. Almost 10 years elapsed before the notice was published.

[8] 2002 (6) SA 431 (SCA) at pp. 445F-446H

[21] As in the case of the municipality, the lodgement of the land claim is central to the defence raised by Landmark and evidence thereanent will inevitably be adduced in both actions. In fact, counsel for the Provincial and National Governments strenuously submitted during the summary judgment proceedings that the issues and questions were substantially the same. Although Mr *Dukada* sought to distance himself from the aforegoing concessions, I am satisfied that Landmark has made out a case for joinder in terms of sub-rule (b) of Rule 13.

[22] The remaining exception, raised only by the Provincial and National Governments and fully set out in para [12] hereinbefore is, in essence, the same. The complaint is that the third party notice is vague and embarrassing in that neither the notice nor the statement of claim identifies the particular organ of state in either the Provincial or National Governments. Mr *Dukada* submitted that it would have been relatively easy to have established that the MEC for Local Government and the Minister of Land Affairs were the correct juristic persons to have been cited.

[23] The short answer to the complaint it succinctly provided by Froneman J in **Kate v MEC for the Department of Welfare, Eastern Cape**[9] where the learned judge held as follows:

[9] 2005 (1) SA 141 (E) at pp. 153J-154B

> *"To read the judgment in Jayiya as deciding that no one other than the political head of a government department may be cited as a party to proceedings against the State would be contrary to the explicit permissive (not mandatory) terms of s 2 of the State Liability Act, contrary to a line of cases that held it to be convenient, but not exclusive, way to sue the State . . ."*

It is apparent from the aforegoing that the complaint raised is baseless. Both the Provincial and National Governments joined the fray by making common cause with Landmark in resisting Bulk Earthworks' application for summary judgment and it is disingenuous to now assert that the third party notice is vague and embarrassing.

[24] In the result therefore the following orders will issue:

1. All the exceptions are dismissed with costs.

_____

D. CHETTY
JUDGE OF THE HIGH COURT

Obo 1st defendant: Mr Coetzee

Obo Third Part One: Mr Benenge

Obo Third Party Two and Three: Mr Dukada