Third party joinder: A plea for reform

T Bekker
B Iur LLB LLM LLD
Senior Lecturer in Civil Procedure, University of Pretoria

OPSOMMING

Derdepartyvoeging: 'n Pleit vir hervorming

Die derdepartyvoegingsprosedure vorm 'n belangrike deel van die Suid-Afrikaanse regstelsel en die hoofdoel daarvan is om 'n veelvuldigheid van aksies te vermy. Hierdie artikel beoog om 'n kritiese analise van die toepassing en praktiese uitwerking van die derdepartyvoegingsprosedure in die Suid-Afrikaanse reg te verskaf. Die bespreking fokus eerstens op die historiese ontwikkeling van derdepartyvoeging in beide die Hoë en Landdroshowe. Tweedens word die interaksie tussen derdepartyvoeging en die Wet op Verdeling van Skadevergoeding kortliks bespreek. Derdens word sommige van die voorstelle van die Suid-Afrikaanse Regshervormingskommissie met betrekking tot die Wet op Verdeling van Skadevergoeding en derdepartyvoeging ondersoek. Laastens word sommige moontlike alternatiewe tot die huidige toepassing van derdepartyvoeging oorweeg. Die gevolgtrekking is dat die huidige toepassing van die derdepartyvoegingsprosedure nie altyd daarin slaag in sy hoofdoel om 'n veelvuldigheid van aksies te vermy nie en derhalwe misluk om 'n spoedige en koste-effektiewe finalisering van 'n dispuut in alle gevalle te bevorder. Daar word ook aangevoer dat die huidige toepassing van die derdepartyvoegingsprosedure in sekere gevalle uiters onbillike gevolge mag meebring vir 'n geringe aanspreeklike verweerder waar 'n grootliks aanspreeklike mededader insolvent, 'n sogenaamde "man van strooi" is, of nie beskikbaar is nie. Daar word geargumenteer dat die Wet op Verdeling van Skadevergoeding en die hofreëls gewysig behoort te word om voorsiening te maak vir 'n prosedure ingevolge waarvan 'n derde party *vis-à-vis* die eiser gevoeg word in 'n geding en dat die beginsel van aanspreeklikheid *in solidum* vervang moet word met die beginsel van proporsionele aanspreeklikheid ten aansien van gesamentlike mededaders.

1 INTRODUCTION

The third party joinder procedure forms an integral part of the South African legal system and its main purpose is to avoid a multiplicity of actions.[1] This article provides a critical analysis of the application and practical effect of the third party joinder procedure in South African law.[2] The discussion firstly focuses on

1 See, eg, *SA v Steel Equipment Co (Pty) Ltd v Lurelk (Pty) Ltd* 1951 4 SA 167 (T) 172 where it was held that: "The reason for the existence of such power is to ensure that persons interested in the subject matter of the dispute and whose rights may be affected by the judgment of the court shall be before the court, and it also enables the court to avoid multiplication of actions and to avoid waste of costs."

2 Although the discussion focuses mostly on the application of the third party procedure in relation to motor vehicle collisions, the arguments made relate just as well to other forms of delictual causes of action. The discussion is also limited to the joinder of a third party to an action by a defendant and does not deal with the situation envisaged by Uniform Court rule 13(8) where the third party is not joined as an "outsider" to the action, but where a party issues a third party notice against a party who formed part of the action from the onset.

the historical development of third party joinder in both the High and Magistrates' Courts. Secondly, the interaction between third party joinder and the Apportionment of Damages Act[3] is briefly discussed. Thirdly, some of the proposals of the South African Law Reform Commission[4] in relation to the Act and third party joinder are critically examined. Lastly, some possible alternatives to the current application of third party joinder are considered.

In conclusion, it is contended that the current application of the third party joinder procedure in both the High and Magistrates' Courts does not always succeed in its main purpose of avoiding a multiplicity of proceedings and therefore fails in promoting a speedy and cost-efficient resolution of a dispute in all instances. It is also contended that the current application of the third party joinder procedure may in certain instances be extremely unfair towards a marginally responsible defendant where a substantially responsible joint wrongdoer is insolvent, a so-called "man of straw" or unavailable. It is argued that the Act and rules of Court should be amended to provide for a procedure in terms of which a third party is joined *vis-à-vis* the plaintiff in a matter and that the principle of liability *in solidum* should be replaced by the principle of proportionate liability in relation to joint wrongdoers.

2 HISTORICAL BACKGROUND: HIGH COURT

Uniform Court rule 13(1) provides a follows:

> "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[5] 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."

In *Eimco (SA) (Pty) Ltd v P Mattioda's Construction Co (SA) (Pty) Ltd*,[6] Caney J stated that Uniform Court rule 13 was based on the equivalent English rule. The English rule initially allowed a defendant to issue a third party notice where he claimed to be entitled to a contribution, or indemnity or, any other relief over against any third party. In 1883, the third party procedure in England was confined to claims for a contribution or indemnity and the provision relating to any other remedy or relief over was deleted.[7] This amended English rule was adopted in the South African law in the form of Uniform Court rule 13. In *Eimco* the court held that Uniform Court rule 13(1)(a) was limited in scope to actions based

3 34 of 1956 ("the Act").

4 South African Law Reform Commission *The Apportionment of Damages Act 34 of 1956*, Project 96 (2003) ("SALC report").

5 The situation where an indemnification is claimed against a third party, or where damages are contractually claimed, and the Act is therefore not applicable, falls outside the scope of the discussion in this article.

6 1967 1 SA 326 (N).

7 328G–329C.

strictly on a contribution or indemnification and does not include any other cause of action against the third party concerned.[8]

In *Shield Insurance Co Ltd v Zervoudakis*[9] the court held that the third party joined in terms of Uniform Court rule 13 was not a defendant *vis-à-vis* the plaintiff and that a judgment sounding in money therefore cannot be granted against the third party in favour of the plaintiff. In *Hart v Santam Insurance Co Ltd*[10] the court held that all that can be sought under Uniform Court rule 13 by one alleged wrongdoer against another, is an apportionment of fault in the form of a declaratory order. In *Callender Easby v Grahamstown Municipality*[11] it was held that a defendant cannot execute upon the declaratory order but will have to sue the third party in a subsequent action if such a party is recalcitrant to pay.

In *IPF Nominees (Pty) Ltd v Nedcor Bank Ltd (Basfour 130 (Pty) Ltd, Third Party)*[12] the court apparently deviated from this viewpoint and ordered the third party to pay a sum of money to the defendant, where the third party was joined under Uniform Court rule 13(1)(b). The court held that where it is convenient and expedient, in the sense of being fit and fair to the parties concerned, and the relief sought against the third party is assessed *pari passu* with the plaintiff's claim against the defendant, there is no reason in principle why a judgment sounding in money could not be issued against a third party where he was joined under Uniform Court rule 13(1)(b).[13]

However, in *Smits v Member of the Executive Council: Police, Roads and Transport FS*[14] the court qualified the facts in *IPF Nominees* by stating that there was a trial, and all three parties, namely, the plaintiff, defendant and third party, were represented by counsel. All the issues were ventilated and all the parties were before the court. In those circumstances the court therefore deemed it appropriate to order the defendant to pay the plaintiff the relevant amount due and payable on a cheque, and at the same time ordered the third party to pay that same amount to the defendant as the third party indemnified the defendant.[15] The essence of the court's decision on this point in *Smits* can be stated as follows:[16]

> "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

8 333A–E.

9 1967 4 SA 735 (E) 739C–D. *Geduld Lands Ltd v Uys* 1980 3 SA 335 (T) 340G–341C.

10 1975 4 SA 275 (E) 277F–G. See also *Du Raan v Maritz* 1973 4 SA 39 (SWA); *Windrum v Neunborn* 1968 4 SA 286 (T) 292D–E; *Rondalia Assurance Corporation of SA Ltd v Page* 1975 1 SA 708 (A) 721G–H; *Laubscher v Commercial Union Assurance Co of SA* 1976 1 SA 908 (E) 913E 914H; *Viljoen v Cloete* 1978 3 SA 23 (OK); and *SA Onderlinge Brand en Algemene Versekeringsmaatskappy Bpk v Van den Berg* 1976 1 SA 602 (A) 607H as well as the discussion of these cases by Honey "Die Wet op Verdeling van Skadevergoeding 34 van 1956 soos gewysig – Praktiese aspekte by die toepassing daarvan" 1981 *De Rebus* 525 527–528.

11 1981 2 SA 810 (E) 813.

12 2002 5 SA 101 (W).

13 118E–H.

14 Case no 1657/2012 (FB) (unreported).

15 Para 17.

16 Para 18.

> 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."

3 HISTORICAL BACKGROUND: MAGISTRATE'S COURT

Before 2010, there was no equivalent rule to Uniform Court rule 13 available in the magistrates' courts. In *Khumalo v Wilkins*[17] the court held that rule 28(2) of the Magistrates' Courts Act was wide enough to grant an application by a defendant to join another person as a defendant. However, rule 28(2) was problematic as the effect of joinder under rule 28(2) was much more limited in scope than the joinder of a third party under Uniform Court rule 13. The finding of a magistrate's court, as opposed to a declaratory order issued by a High Court, was not binding on the party joined under rule 28(2), and therefore did not have the effect of avoiding a multiplicity of actions.[18] At best the finding of the magistrate's court would encourage the parties to settle out of court.[19] However, if the third party did not agree with the finding of the court, the defendant would have to institute a subsequent action against the third party and would have to lead evidence on the merits of the matter again.

Magistrate's Court rule 28(A) was enacted in 2010[20] and provides:

> "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 or her, 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 third party notice, similar to Form 43 of Annexure 1, which notice shall be served by the sheriff."

This rule is similar in nature to Uniform Court rule 13 and provided for the necessary machinery in the magistrates' courts to effect third party joinders. Due to the fact that a magistrate's court is not authorised to issue a declaratory order, a new subrule was also introduced, the equivalent of which is not provided for in Uniform Court rule 13. Magistrate's Court rule 28A(10) provided that:

> "Where a court makes a decision with regard to the liability of a defendant and any third party defendant and either of such defendants discharges the obligation to the plaintiff of the full amount or more than its fair share of the amount found to be due by it to the plaintiff, any of such defendants who discharges that obligation may execute against the other defendant for the amount which the court has found that defendant to be liable."

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17 1972 4 SA 470 (N) 473H.

18 Jones and Buckle *Civil practice of the Magistrates' Courts* Vol II (1991) 248; SALC report para 6.91.

19 Wessels "Die skim van derdepartyprosedure" 1976 *De Rebus* 374 375; SALC report para 6.91.

20 The rules regulating the conduct of the proceedings of the magistrates' courts were repealed and replaced by a comprehensive set of new rules with effect from 15 October 2010. The new rules were published in parts 1 to 3 of *GG* 33487 (23 August 2010) and were put into operation by GN 888 in *GG* 33620 (8 October 2010).

Unfortunately this subrule was, for some unknown reason, repealed by the Rules Board in 2014 and no longer forms part of rule 28A.[21] The consequences of the abolition of rule 28A(10) are discussed below.[22]

4 INTERACTION BETWEEN THE ACT AND THE THIRD PARTY JOINDER PROCEDURE

Section 2(2) of the Act provides that:

> "Notice of any action may at any time before the close of pleadings in that action be given –
> (a) by the plaintiff;
> (b) by any joint wrongdoer who is sued in that action,
> to any joint wrongdoer who is not sued in that action, and such joint wrongdoer may thereupon intervene as a defendant in that action."

Section 2(4)(b) provides that:

> "If no notice is under paragraph (a) or (b) of subsection (2) given to a joint wrongdoer who is not sued by the plaintiff, no proceedings for a contribution shall be instituted against him under subsection (6) or (7) by any joint wrongdoer except with the leave of the court on good cause shown as to why notice was not given to him under paragraph (b) of subsection (2)."

Before a third party is therefore joined to the proceedings as a joint wrongdoer, it is necessary to first send a notice to the third party in terms of section 2(2)(b) of the Act. The notice basically invites the third party to intervene in the action on his own accord. If the third party joins the action after he was invited to do so by the required section 2(2)(b) notice, the court can, in terms of section 2(8)(a) of the Act,

> "if it is satisfied that all the joint wrongdoers have been joined in the action, apportion the damages awarded against the said joint wrongdoers in such proportions as the court may deem just and equitable having regard to the degree in which each joint wrongdoer was at fault in relation to the damage suffered by the plaintiff, and give judgment separately against each joint wrongdoer for the amount so apportioned".

However, the proviso to this subrule provides that

> "any amount which the plaintiff is unable to recover from any joint wrongdoer under a judgment so given (including any costs incurred by the plaintiff in an attempt to recover the said amount and not recovered from the said joint wrongdoer) whether by reason of the said joint wrongdoer's insolvency or otherwise, may be recovered by the plaintiff from the other joint wrongdoer or, if there are two or more other joint wrongdoers, from those other joint wrongdoers in such proportions as the court may deem just and equitable having regard to the degree in which each of those other joint wrongdoers was at fault in relation to the damage suffered by the plaintiff".

If the third party fails to intervene in the action, it would be necessary for the defendant to join the third party by way of a third party notice in terms of Uniform Court rule 13 or Magistrate's Court rule 28A.[23]

The section 2(2)(b) procedure in terms of the Act is complimentary to the third party joinder procedure and does not supersede it. The main difference between the two procedures lies in the type of relief that may be granted by the court. If

21 GN R507 in *GG* 37769 (27 June 2014).
22 See the discussion *infra* para 6 2.
23 *Du Raan v Maritz* 40G–H.

the third party intervenes, the court may grant a judgment sounding in money against the third party but where the third party fails to intervene, the court can only grant a declaratory order apportioning the degree of fault between the defendant and the third party (the joint wrongdoers).[24]

5 LAW REFORM COMMISSION

In 2003 the South African Law Reform Commission made certain recommendations with regard to the third party joinder procedure and the Act. Two of these proposals are considered more closely, namely, the principle of proportionate liability and the uncollectable contribution.

5 1 Proportionate liability

Several contributors to the discussion paper of the Law Reform Commission recommended that the principle of joint and several liability should be abolished and substituted for a system of proportionate liability whereby each wrongdoer would be liable in proportion to his fault. This would alleviate the need to collect contributions and would also solve the problem of uncollectable contributions.[25] The Law Reform Commission pointed to the fact that in New Zealand and Ontario there have been strong lobbying groups for the abolition of joint and several liability in favour of the principle of proportionate liability. These groups assert that the retention of the principle of joint and several liability is inconsistent with the principle underlying comparative fault in terms of which each party should be held liable only to the extent of his respective degree of fault.[26]

The Law Society of the Cape of Good Hope, in its submission to the Law Reform Commission, was in agreement with this approach and stated that:[27]

> "The committee considered the relative positions of a substantially responsible wrongdoer, who is a man of straw, and that of a marginally responsible wrongdoer, who, because of his healthy financial circumstances, is inevitably faced with the sum of the plaintiff's claim for damages . . . The committee debated at length the relative positions of the plaintiff and the joint wrongdoers and came to the conclusion that a better result would be achieved if, after the determination by the court of the parties' respective degrees of liability for the damage, the plaintiff's right of recovery against the joint wrongdoers is always limited to that percentage, irrespective of the financial circumstances of the parties. The committee believes that it would be wrong to continue to permit the innocent plaintiff to recover in full against a marginally responsible wrongdoer because the substantially responsible wrongdoer lacks financial resources and recommends that recovery always be limited to the degree of the joint wrongdoer's negligent conduct. In effect, the committee recommends that the proviso to section 2(8) of the Act be deleted."

Searle also endorsed this approach and recommended that no party should be liable to pay a plaintiff more than that party's percentage of fault. He stated that:[28]

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24 Herbstein and Van Winsen *The civil practice of the High Courts and Supreme Court of Appeal of South Africa* Vol I (2009) 233–234; Erasmus *Superior court practice* Vol II (2015) D1-144-145.

25 SALC report para 6.20.

26 Para 6.22.

27 Para 6.24.

28 Para 6.31.

> "It does not make sense that someone who is 25% at fault in regard to (say) a motor accident has to pay the Plaintiff in full and then recover the other 75% from the other joint wrongdoer. This effectively means that the one party has become the insurer of the Plaintiff's claim."

Although the Law Reform Commission recognised the force of these arguments in favour of full proportionate liability, it was not convinced that there should be any change in the law in this regard. The Law Reform Commission stated that it was not possible in the absence of further study and consultation to predict what the overall impact of the abolition or modification of the principle of joint and several liability would be and that the joint and several liability rule should therefore remain intact.[29]

5 2 Uncollectable contribution

The South African Law Reform Commission recommended that provision be made for the defendant who is unable to recover a contribution from one of the other defendants to apply for a secondary judgment having the effect of distributing the deficiency among the other defendants at fault in such proportions as may be just and equitable. In terms of the Commission's recommendation, the reattribution of uncollectable contribution will not discharge the joint wrongdoer whose contribution is uncollectable from liability to pay a contribution. Costs incurred by a joint wrongdoer in an attempt to recover an uncollectable contribution should also be taken into account in determining the re-attribution of that contribution.[30]

6 CRITICAL ANALYSIS

If one analyses the relevant case law, it becomes clear that there are several scenarios that can present itself when it comes to the third party joinder procedure. These different scenarios can best be illustrated by way of a practical example.

Suppose D (the defendant) drives at a speed of 70km/h on a public road in a residential area where the speed limit is 60km/h. T (the third party) reverses out of his driveway from one of the adjacent properties to the road on which D is travelling. Without any warning, and without keeping any lookout whatsoever, T drives his motor vehicle right in front of the oncoming vehicle of D. In an attempt to avoid a collision with T's motor vehicle, D swerves out of the way and collides with a stationary motor vehicle, which is legally parked on the opposite side of the road, and of which P (the plaintiff) is the owner. P sues only D for damages sustained to his motor vehicle and fails to join T to the proceedings. T intervenes in the action, or D joins T to the action by way of a third party notice. At the trial, the court finds that D was 10% at fault and T 90% in relation to the damages sustained by P to his motor vehicle.

6 1 Effect of court order in different scenarios of third party joinder in High Court

6 1 1 Notice in terms of section 2(2)(b) of the Act where T intervenes in the action

In terms of section 2(2)(b) of the Act, D will have to send a notice to T informing him of the action and inviting him to intervene. If T intervenes in the action,

29 Para 6.34.
30 Para 6.100.

he will become a second defendant *vis-à-vis* P and the court can therefore order judgment against D and T separately, in terms of section 2(8)(a) of the Act, in such proportions as the court may deem just and equitable having regard to the degree in which D and T was at fault in relation to the damage suffered by the plaintiff.[31] If T is solvent this would not be problematic as D would only have to pay the 10% of P's damages for which he is liable and T would have to pay the 90% for which he is responsible. If T is however insolvent, a man of straw or unavailable in the sense that his whereabouts cannot be ascertained, the situation becomes extremely unfair towards D as the proviso to section 2(8)(a) fully protects P in that any amount which P is unable to recover from T under the judgment of the court (including any costs incurred by P in an attempt to recover the said amount from T) whether by reason of T's insolvency or otherwise, may be recovered by P from D. In this instance, it is therefore clear that the risk of an inexecutable process against T by P rests squarely with D.

6 1 2 Notice in terms of section 2(2)(b) of the Act where T fails to intervene in the action

If T fails to intervene in the action pursuant to a section 2(2)(b) notice, D will have to formally join T by way of a third party notice in terms of Uniform Court rule 13(1)(a) or (b). If D joins T in terms of Uniform Court rule 13(1)(a), the court will not be in a position to give a judgment for P against T sounding in money, but would only be entitled to issue a declaratory order setting out the apportionment of fault of D and T respectively. D will therefore have to pay the full claim of P, even though he is only marginally liable towards P, and then institute a separate action against T, based on the declaratory order, if the matter is not settled outside of court. Firstly, this will have the effect of a multiplication of actions, a situation that directly contradicts the main purpose of the third party joinder procedure. Secondly, if T is insolvent, or a man of straw, it may give rise to the situation where D, who is marginally liable, paid P's claim in full and is unable to recover anything from T, who is substantially liable towards P's damages. Once again the risk of an inexecutable judgment lies with D.

If D joins T in terms of Uniform Court rule 13(1)(b), the court may, in terms of *IPF Nominees* give a judgment sounding in money against T where:

(a) it is convenient or expedient in the sense of being fit and fair to the parties concerned; and

(b) the relief sought against the third party is assessed *pari passu* with the plaintiff's claim against the defendant.[32]

However, as explained by the court in *Smits*, T is still not joined as a party *vis-à-vis* P. The court will basically give two separate judgments; a judgment in favour of P against D and a judgment in favour of D against T, in effect indemnifying D. D will therefore have to first satisfy P's full claim and will then be in a position to immediately execute against T without having to institute an action against T first. D would basically be in the same position as a defendant would

31 Herbstein and Winsen Vol I 234 point out that this will also be the position where the plaintiff serves a third party notice on the third party. In such instance, a *lis* is created between the plaintiff and the joined third party.

32 This in effect means that a defendant would not be able to obtain an order by default, in the form of a declaratory order, against the third party where he fails to file any pleadings, before the trial of the matter where the merits of the plaintiff's claim against the defendant is adjudicated on. See *Smits v Member of the Executive Council* paras 16–18.

have been in terms of the previous repealed Magistrates' Court rule 28A(10). The only advantage in this instance for D is the prevention of a multiplication of actions but D still bears the risk of an inexecutable order where T is insolvent, a man of straw or unavailable.

6 2 Effect of court order in different scenarios of third party joinder in Magistrate's Court

6 2 1 Notice in terms of section 2(2)(b) of the Act where T intervenes in the action

The position would be exactly the same as in the High Court.[33]

6 2 2 Notice in terms of section 2(2)(b) of the Act where T fails to intervene in the action

If T fails to intervene in the action pursuant to a section 2(2)(b) notice, D will have to formally join T by way of a third party notice in terms of the new Magistrate's Court rule 28A(1)(a) or (b). If D joins T in terms of Magistrate's Court rule 28A(1)(a), a magistrate's court could have previously, between the periods of 2010 and 2014, in terms of Magistrate's Court rule 28A(10), made an order sounding in money against the third party and the defendant would have been able to immediately execute against the third party, but only on condition that the defendant first paid the full claim of the plaintiff. The reason for the insertion of rule 28A(10) seems clear – as already mentioned, a magistrate's court is not entitled to issue a declaratory order but can only make a finding in respect of the respective degrees of fault of a defendant and a third party. This subrule therefore created a clear advantage in favour of a defendant who basically obtained an immediate judgment against the third party where he satisfied the full claim of the plaintiff. The defendant however still bore the risk of an inexecutable judgment where the third party was insolvent, a man of straw or unavailable.

As already mentioned, rule 28A(10) was repealed by the Rules Board in 2014 for some unknown reason. Due to the removal of this subrule, the position in the magistrates' courts relating to joint wrongdoers now becomes problematic. By reason of the fact that a magistrate's court is not allowed to issue a declaratory order, but can only make a finding as to the respective degrees of negligence between the defendant and the third party, the only advantage to D, in the example, is that it may persuade T to settle the matter out of court. The finding is however not binding on T, and where T disagrees with the finding of the court, it basically means that D would have to sue T in a separate action where D will once again have to lead evidence on the merits of the matter. It was exactly for this reason why Magistrate's Court rule 28A(10) was inserted, which makes its deletion even more perplexing.

If D joins T in terms of Magistrate's Court rule 28A(1)(b) it may solve this problem as the court would then apparently be able to grant a direct judgment against T in favour of D, but only in the narrowly defined circumstances as set out in *IPF Nominees*.[34] Although this may solve the problematic situation of a multiplication of actions, D still bears the risk of an inexecutable judgment against T if he is insolvent, a man of straw or unavailable.

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33 See discussion *supra* para 6 1 1.

34 It is in any event uncertain if a court would allow a third party joinder in circumstances like these where it seems clear that a contribution is claimed by the defendant against the third party, which clearly falls under the ambit of rule 28A(1)(a).

In light of the aforementioned there seems to be two problematic aspects relating to third party joinders, namely, firstly, the fact that there is still a multiplication of actions in certain instances and, secondly, the fact that a defendant still bears the risk of an inexecutable judgment against a third party in all of the scenarios discussed. These two aspects will therefore be analysed in more detail and possible alternative solutions will be considered.

7 MULTIPLICATION OF ACTIONS

The main purpose of the third party joinder procedure is to avoid a multiplication of actions. Unfortunately the wording of the Act, Uniform Court rule 13 and Magistrate's Court rule 28A (as amended) in most instances do not succeed in reaching this objective. The main problem, where a third party fails to intervene subsequent to the service of a section 2(2)(b) notice, is that the third party is joined *vis-à-vis* the defendant and not *vis-à-vis* the plaintiff. The simple solution seems to be to create a situation to ensure that the third party is indeed joined *vis-à-vis* the plaintiff, which would enable a court to give separate final judgments against the defendant and third party concerned. In this regard, the following options may be considered:

7 1 Placing the onus on the plaintiff to join all relevant third parties

In one of the submissions to the Law Reform Commission, Searle was of the opinion that the defendant should not give notice to the other joint wrongdoers, but rather the plaintiff. In his view, the plaintiff is the best person to identify all the relevant joint wrongdoers, to prove a case against them and therefore best suited to join all joint wrongdoers as co-defendants in the action. If this is made a requirement, the third party will be joined *vis-à-vis* the plaintiff as a second defendant which would enable a court to give a judgment against the defendant and third party separately in terms of section 8(a) of the Act.[35]

It is contended that this reasoning is flawed. In practice it would be the defendant who would usually be in the best position to identify a joint wrongdoer and in most instances the plaintiff would not even be aware of the existence of such a third party. For this same reason, it is usually the defendant who issues a third party joinder notice and not the plaintiff. To refer back to the above example: in this instance P would probably not even know about the existence of T and that he was mostly to blame for the damages sustained to his motor vehicle. Even if P was informed of this by D, he would in all probability still only sue D for his damages and leave the joinder of T up to D. In this regard, the viewpoint of the Law Reform Commission is to be preferred in that a plaintiff should have the right to proceed against any wrongdoer it deems to be most appropriate in the circumstances.[36] It is therefore contended that this would not be a viable option to prevent a multiplication of actions.

7 2 Amendment of the Act

Another option would be for the legislature to amend the provisions of the Act to provide for the joinder of the third party *vis-à-vis* the plaintiff.

The reason why the courts are reluctant to grant a judgment sounding in money against a third party joined under Uniform Court rule 13 and Magistrate's Court rule 28A, is the fact that "the wording of section 2(8)(a) of the Act makes

35 SALC report para 6.32.
36 Para 6.40.

it clear that that section is not applicable to the situation where the plaintiff claims against one wrongdoer only".[37] The reason for this attitude by the courts are the opening words of section 2(8)(a): "If judgment is in any action given in favour of the plaintiff against *two or more* joint wrongdoers, the Court may".

In *Windrum v Neunborn*,[38] Trollip J, in explaining the practical meaning of section 2(8)(a) of the Act, held that

> "those provisions were designed to apply in those cases where the plaintiff under sec. 2 (1) sues two or more joint wrongdoers in the same action, or sues one and the other or others intervene (see sec. 2 (2)) or are joined as co-defendants and judgment is given in the plaintiff's favour against them all".

In *Khumalo v Wilkins*,[39] Milne J held that it was clear that the court in *Windrum* meant that the joint wrongdoers were joined in the sense that the plaintiff claimed against them as co-defendants.

One has to agree with Honey that the decisions in *Windrum* and *Khumalo* as to the meaning of the wording of section 2(8)(a) were incorrect, as the wording of this subsection simply does not support the interpretation of the courts in these matters.[40] Honey convincingly argues that it is not clear why the courts are reluctant to issue orders in terms of section 2(8)(a) of the Act in instances where the plaintiff chooses to only institute action against one of the joint wrongdoers. He is of the view that this situation directly contradicts the main purpose of the third party joinder procedure, namely to avoid a multiplication of actions.[41] Unfortunately, the courts in later decisions did not question this interpretation of section 2(8)(a) of the Act.

It is contended that this situation can now only be resolved if the legislature amends the Act

(a) by amending the first part of section 2(8)(a) to read: "If judgment is in any action given in favour of the plaintiff against *the defendant and one or more joint wrongdoer(s)*, the Court may"; and

(b) by adding to the first part of section 2(8)(a)(ii) the following: "if it is satisfied that all the joint wrongdoers have been joined in the action *by the plaintiff, or by the defendant in terms of Uniform Court Rule 13 or Magistrate's Court rule 28A*".

7 3 Amendment of rules of court

It is also recommended that the provisions of Uniform Court rule 13 and Magistrate's Court rule 28A should be amended to make provision for those instances where a contribution is not claimed by a defendant against a third party, for example where an indemnification is claimed against a third party or where a third party is joined in terms of Uniform rule 13(1)(b) or Magistrate's Court rule 28A(1)(b). These amendments should set out clearly that any third party joined

37 *Khumalo v Wilkins* 477A. The court also stated that it is clear that the power of the court to order the joinder of a defendant does not include the power to compel a plaintiff to claim relief against a defendant whom he has not sued and does not wish to sue.

38 1968 4 SA 286 (T) 292D.

39 1972 4 SA 470 (N) 477C–D.

40 It could simply be that the legislature intended the defendant to be included in the definition of "two or more joint wrongdoers".

41 Honey 527–528.

under these rules would be deemed to be joined *vis-à-vis* the plaintiff and that a court is therefore allowed to make a judgment sounding in money against the third party which is immediately executable.

8 RISK OF AN INEXECUTABLE JUDGMENT

It seems clear that in all instances of third party joinder, the defendant bears the risk of an inexecutable order against a third party who is insolvent, a man of straw or unavailable. It is submitted that this position is fair in instances where a court finds that the defendant was hundred percent at fault in causing the plaintiff's damages, and that the third party is in turn hundred percent at fault in causing the defendant's damages. Where a defendant is hundred percent blameworthy there seem to be ample justification that he should also bear one hundred percent of the risk associated with execution against a third party who is insolvent, a man of straw or unavailable.

The decision in *IPF Nominees* is a good example of this. In this matter the court ordered judgment in favour of the plaintiff against the defendant bank, for the full amount claimed, where one of its tellers negligently deposited a fraudulent cheque into the bank account of the third party. The court also ordered judgment for the defendant against the third party for the full amount claimed by the defendant against the third party. In such an instance, where the defendant then pays the full claim amount to the plaintiff and is thereafter unable to successfully execute against the third party, one could hardly argue that this would be unfair towards the defendant who himself was hundred percent blameworthy.

Where the defendant and the third party are joint wrongdoers for the purposes of the Act, and the defendant is only blameworthy in part, it seems utterly unfair to expect such a defendant to pay the full claim amount to the plaintiff and then to have to assume the risk of proceeding against the third party for a contribution, in instances where the third party is insolvent, a man of straw or unavailable. Some possible solutions in this regard are considered below.

8 1 Abolition of principle of joint and several liability in favour of proportionate liability

The reason for the stance in our law that the defendant should bear the risk of an inexecutable judgment against a third party, has to do with the principle of joint and several liability.

As already stated, there was an overwhelming support in the submissions to the Law Reform Commission in favour of moving away from a principle of joint and several liability in favour of a system of proportionate liability whereby each wrongdoer would be liable in proportion to his fault.[42] Although the Law Reform Commission acknowledged the weight of the arguments in favour of full proportionate liability, it was of the opinion that it would be uncertain what the overall impact of the abolition or modification of the principle of joint and several liability would be and that the joint and several liability principle should therefore remain unaltered.[43] To combat this problem the Law Reform Commission proposed a procedure in terms of which the problem of an uncollectable contribution could be addressed. In terms of this proposal, a defendant who is unable to

42 SALC report para 6.20.
43 Para 6.34.

recover a contribution from another joint wrongdoer, may apply for a secondary judgment having the effect of distributing the deficiency among the other defendants at fault in such proportions as may be just and equitable.[44]

This proposed approach of the Law Reform Commission is, however, problematic for a number of reasons. Firstly, the procedure will only grant relief to a defendant where there are more than one joint wrongdoer joined in the relevant action. In the overwhelming majority of cases, there is only one joint wrongdoer who is cited as a third party. If the defendant is therefore unable to recover a contribution from this only third party, he would be unable to distribute the deficiency among other defendants at fault.

Secondly, this procedure will once again give rise to a multiplication of proceedings as the defendant, who is unable to collect a contribution, will now have to apply for a secondary judgment for the re-attribution of such an uncollectable contribution.

It is agreed with the Law Reform Commission that it would be uncertain what the overall impact of the abolition or modification of the principle of joint and several liability would be, but this begs the question of why this principle should be abolished or modified *in toto*. It is contended that the principle of joint and several liability should only be abolished in relation to the law relating to joint wrongdoers and should remain intact in relation to the remainder of the South African law, such as suretyships. If this argument is accepted it would mean that the Act, as well as Uniform Court rule 13 and Magistrates' Court rule 28A will have to be amended.[45] Certain proposals in this regard are made below.

8 2 Amendment of the Act

It is contended that the Act should be amended extensively to make provision for the principle of proportionate liability only. In very general terms the following sections of the Act should, at least, be amended:

8 2 1 Section 6

This section, which deals with the recovering of a contribution by one joint wrongdoer from another, should be deleted in its entirety and replaced with a section which clearly sets out that each wrongdoer would only be liable to the plaintiff in proportion to his fault, and if this proportionate liability towards the plaintiff is extinguished, such a wrongdoer will be absolved from any further liability.

8 2 2 Section 8

Firstly, section 8(a)(i), (iii) and (iv) which deal with judgments where a court can order that all the joint wrongdoers are jointly and severally liable towards the plaintiff, should be deleted and only the first part of section 8(a)(ii) should remain which provides that if a court is satisfied that all the joint wrongdoers have been joined in the action, the court must apportion the damages awarded against the said joint wrongdoers in such proportions as the court may deem just and equitable having regard to the degree in which each joint wrongdoer was at fault

44 Para 6.100.

45 It is submitted that all joint wrongdoers should still be joined in the action to prevent a subsequent multiplication of actions.

in relation to the damage suffered by the plaintiff, and give judgment separately against each joint wrongdoer for the amount so apportioned. The proviso to this subsection which provides that any amount which the plaintiff is unable to recover from any joint wrongdoer under a judgment, including costs, whether by reason of the said joint wrongdoer's insolvency or otherwise, may be recovered by the plaintiff from the other joint wrongdoer or, if there are two or more other joint wrongdoers, from those other joint wrongdoers in such proportions as the court may deem just and equitable having regard to the degree in which each of those other joint wrongdoers was at fault in relation to the damage suffered by the plaintiff, should also be deleted in its entirety.

Secondly, section 8(c) and (d), which deals with the situation where a joint wrongdoer pays more than the amount apportioned to him, should be deleted in its entirety.

9 CONCLUSION

If one analyses the case law in relation to the third party joinder procedure it seems clear that there are many instances in which the main purpose thereof, namely to avoid a multiplication of actions, is not achieved. It furthermore seems clear that the risk of an inexecutable judgment is, without exception, on the defendant who must first make payment of the plaintiff's full claim and thereafter proceed against the third party against the risk that he may be insolvent, a man of straw or unavailable. It is contended that the legislature and Rules Board should intervene to ensure that, where all the relevant parties are before court and irrespective of the way in which they were joined, the court should be in a position to give a judgment sounding in money which is binding on all such parties and which disposes of all the issues before the court in one sitting. It is also contended that the legislature should amend the provisions of the Act to ensure that the principle of joint and several liability, in as far as it relates to joint wrongdoers only, should be abolished and replaced by the principle of proportionate liability in terms of which a defendant and third party would only be liable towards the plaintiff's damages in proportion to the degree of their own fault.