24 Claim in reconvention

(1) A defendant who counterclaims shall, together with his plea, deliver a claim in reconvention setting out the material facts thereof in accordance with rules 18 and 20 unless the plaintiff agrees, or if he refuses, the court allows it to be delivered at a later stage. The claim in reconvention shall be set out either in a separate document or in a portion of the document containing the plea, but headed 'Claim in Reconvention'. It shall be unnecessary to repeat therein the names or descriptions of the parties to the proceedings in convention.

[Subrule (1) substituted by GN R2164 of 2 October 1987 and by GN R2642 of 27 November 1987.]

(2) If the defendant is entitled to take action against any other person and the plaintiff, whether jointly, jointly and severally, separately or in the alternative, he may with the leave of the court proceed in such action by way of a claim in reconvention against the plaintiff and such other persons, in such manner and on such terms as the court may direct.

(3) A defendant who has been given leave to counterclaim as aforesaid, shall add to the title of his plea a further title corresponding with what would be the title of any action instituted against the parties against whom he makes claim in reconvention, and all further pleadings in the action shall bear such title, subject to the proviso to subrule (2) of rule 18.

(4) A defendant may counterclaim conditionally upon the claim or defence in convention failing.

(5) If the defendant fails to comply with any of the provisions of this rule, the claim in reconvention shall be deemed to be an irregular step and the other party shall be entitled to act in accordance with rule 30.

[Subrule (5) inserted by GN R2164 of 2 October 1987 and by GN R2642 of 27 November 1987.]

Commentary

General. It not infrequently happens that a defendant not only defends the action brought against him by the plaintiff but also has an action of his own to bring against the plaintiff. This cross-action may arise out of the same transaction that gave rise to the plaintiff's claim or may be quite separate and distinct from it. In both cases it is desirable that the defendant, instead of being required to institute a separate cross-action with his own summons, and which proceeds eventually to a separate trial and judgment, should be allowed to link his action with the plaintiff's so that in a proper case the two actions may be heard together, and so that judgment in the two may be pronounced at the same time. This prevents one party from getting a judgment against the other where the other has a claim which, when adjudicated upon in its turn, may compensate and wipe out the first claim. [1] The Roman-Dutch writers were emphatic that any right of action might be brought by way of claim in reconvention. [2] A claim in reconvention is, therefore, a convenient surrogate for an independent action. If a separate action were instituted by a defendant against the plaintiff, the actions could be consolidated, so that the situation would be no different from that which arises where there is a claim and counterclaim. The essence of the defence is that the two claims

may be adjudicated upon simultaneously and judgment thereupon entered according to the balance which might result from such adjudication. [3]

Although the claims in convention and reconvention are normally dealt with *pari passu* and judgment on both is delivered simultaneously, the court has inherent power, in a proper case, to grant judgment by default on a claim in reconvention before the claim in convention is disposed of. [4] It has, however, been held that this power ought not be exercised where the claims are so closely interconnected that if they were heard together one could not be granted without the rejection of the other. [5]

The wording of rule 32 would appear clearly to limit the right to apply for summary judgment to a plaintiff in convention. It is furthermore submitted that to allow a plaintiff in reconvention to claim summary judgment against the defendant in reconvention might well result in frustration of the principle that the parties' claims should be set off, one against the other. See further, in this regard, the notes to rule 32(1) s v 'The plaintiff' below.

Section 8 of the Close Corporations Act 69 of 1984 makes provision for security for costs to be given by a plaintiff in reconvention. See further the notes to rule 47 s v 'General' below.

Subrule (1): 'A defendant who counterclaims.' The rules do not make provision for a counterclaim to a claim in reconvention, but such a procedure may be countenanced where the plaintiff's claim is withdrawn in its entirety. The defendant's claim in reconvention would in such a case become in reality the main claim and a counterclaim by the plaintiff a permissible response. [6]

It is not competent for one defendant to join a co-defendant as a defendant in a claim in reconvention except with the leave of the court in terms of subrule (2). [7] See further the notes to subrule (2) below.

'Shall, together with his plea, deliver a claim in reconvention.' Although as a general rule the claim in reconvention must be delivered with the plea, this subrule makes delivery possible at a later stage with the consent of the plaintiff or the leave of the court. [8] A notice of intention to amend a plea so as to introduce a claim in reconvention without the procedure in this subrule having been followed is an irregular step. [9]

'Setting out the material facts . . . in accordance with rules 18 and 20.' Although the two claims may proceed to trial simultaneously, they remain two separate actions [10] with two

wholly distinct sets of pleadings. [11] Thus, the defendant should make the allegations necessary for his defence in his plea, and must make the allegations necessary to support his counterclaim in his claim in reconvention. [12]

'The court allows it.' The introduction of a claim in reconvention subsequent to the delivery of a plea requires the leave of the court if the plaintiff refuses to consent thereto. The criteria in an application for such leave are, first, that there must be a reasonable and acceptable explanation for the lateness and, secondly, that the defendant must show an entitlement to institute the claim in reconvention (i e the proposed claim in reconvention must comply with the provisions of rules 18 and 24). [13] The court, however, retains a discretion whether or not to allow the introduction of the proposed claim in reconvention. [14]

'Either in a separate document or in a portion of the document containing the plea.' In terms of this subrule the claim in reconvention can be set out either in a separate document or in a portion of the document containing the plea. In the latter case it must be clearly headed 'Claim in Reconvention'. Since the claim and claim in reconvention are two separate and distinct actions, each with its separate set of pleadings, it is preferable that the claim in reconvention be set out in a separate document. [15]

'It shall be unnecessary to repeat therein.' It is customary to state in the claim in reconvention that the plaintiff in reconvention is the defendant in convention and that the defendant in reconvention is the plaintiff in convention and that the parties are referred to as before. [16] It is usual to incorporate by way of reference allegations contained in the plaintiff's pleadings in convention as well as allegations made in the plea. [17]

Subrule (2): 'If the defendant is entitled to take action against.' The defendant would be entitled to take action against

('geregtig om aksie in te stel teen') those mentioned in the rule if:

(a) he is eligible in law to institute action against the persons contemplated in the rule; and

(b) they are eligible in law to be sued.

The defendant would be eligible in law to institute action against the persons contemplated in the rule (and they would be eligible in law to be sued):

(i) under the common law, on grounds of convenience, equity, the saving of costs and the avoidance of multiplicity of actions; or

(ii) if the action fits into the mould of rule 10(3).

Entitlement to take action is not the equivalent of a prima facie case of potential success in an action against the persons concerned. [18]

'Against any other person and the plaintiff.' This subrule is limited to a claim in reconvention against the plaintiff and the other person and cannot be invoked where there is not a claim in reconvention against the plaintiff. The only way in which a defendant can bring a claim against a co-defendant in the absence of a claim in reconvention against the plaintiff would be by virtue of the provisions of rule 13. [19]

'May with the leave of the court proceed in such action.' An applicant who applies for leave in terms of this subrule to institute a claim in reconvention against the plaintiff and other persons need not in his application make out a prima facie case for the relief claimed in the claim in reconvention. The applicant is required to show that he is 'entitled to take action' against the persons concerned, to disclose his *locus standi* and that of the persons against whom he proposes to institute the claim in reconvention, and to disclose in terms of rule 10(3) the cause or causes of action upon which the action against them would be based. These facts together with such further facts as may possibly be material in a particular case, such as overriding considerations of justice, equity or convenience, form the subject matter for the exercise of the court's discretion under the subrule. [20]

Subrule (4): 'A defendant may counterclaim conditionally.' This subrule renders inapplicable decisions such as *Munro v Tayfield* [21] and (on this point) *Pilcher and Conways (Pty) Ltd v Van Heerden*. [22]

Subrule (5): 'The claim in reconvention shall be deemed to be an irregular step.' See rule 30 and the notes thereto below.

1 See *Du Toit v De Beer* 1955 (1) SA 469 (T); *J R & M Moffett (Pty) Ltd v Kolbe Eiendoms Beleggings (Edms) Bpk* 1974 (2) SA 426 (O); *Marshall Timbers Ltd v Hauser and Battaglia (Pty) Ltd* 1976 (3) SA 437 (D) at 439C–F.

2 Voet 5 1 78–80; and see *Brunett v Stanford* (1859) 3 Searle 221 at 225. At common law, however, there can be no counterclaim at all in cases of spoliation and of penal interdict (Van der Linden *Jud Prac* 2 4 13).

3 *Marshall Timbers Ltd v Hauser and Battaglia (Pty) Ltd* 1976 (3) SA 437 (D) at 439C–F.

4 *SA Fisheries and Cold Storage v Yankelowitz* (1906) 23 SC 667; *Smith NO v Brummer NO* 1954 (3) SA 352 (O) at 362F; *Matyeka v Kaaber* 1960 (4) SA 900 (T) at 904C; *Botes v Botes* 1966 (4) SA 295 (T) at 296B; *ACS v ACS* 1981 (2) SA 795 (W) at 796H–797C; *Mauritz Marais Bouers (Pty) Ltd v Carizette (Pty) Ltd* 1986 (4) SA 439 (O).

5 *Botes v Botes* 1966 (4) SA 295 (T) at 296B–H; *Smith NO v Brummer NO* 1954 (3) SA 352 (O) at 362A–E; *Mauritz Marais Bouers (Pty) Ltd v Carizette (Pty) Ltd* 1986 (4) SA 439 (O).

6 *Levy v Levy* 1991 (3) SA 614 (A) at 619E.

7 *Soundprops 1160 CC v Karlshavn Farm Partnership* 1996 (3) SA 1026 (N) at 1031B–D.

8 The amendment of the subrule in 1987 resolved the difference of opinion in this regard which manifested itself in, on the one hand, *Searle v Searle* 1967 (2) SA 19 (O) and, on the other, *Van Jaarsveld v Nel* 1974 (1) SA 103 (T).

9 *Shell SA Marketing (Pty) Ltd v Wasserman t/a Wasserman Transport* 2009 (5) SA 212 (O) at 217I–J.

10 See, for example, *Brunette v Stanford* (1859) 3 Searle 221 at 225–6; *Fripp v Gibbon & Co* 1913 AD 354 at 360; *Fielding v Sociedade Industrial de Oleas Limitada* 1935 NPD 540 at 547–8; *Du Toit v De Beer* 1955 (1) SA 469 (T) at 472 and 473, and the other authorities referred to therein; *Matyeka v Kaaber* 1960 (4) SA 900 (T); *Fisheries Development Corporation of SA Ltd v Jorgenson* 1979 (3) SA 1331 (W) at 1337D–F; *Kritzinger v Kritzinger* 1989 (1) SA 67 (C) at 78J–79A. There should be a judgment on each claim and, if possible, each should carry its own costs (*Rodel Bros v Thole* (1905) 26 NLR 702 at 706; *Simpson v Sharp* 1948 (4) SA 73 (N); *Trade Traffic (Pty) Ltd v Cook* 1979 (2) SA 1070 (C) at 1071H–1072A; *ACS v ACS* 1981 (2) SA 795 (W) at 797A–H; *MB Service Station v Sell-Mar Installations (Pty) Ltd* 1983 (2) SA 516 (T) at 518E).

11 *Cauvin v Landsberg* (1851) 1 Searle 86 at 92; *Sammel v Clerk of Magistrate's Court, Cape* 1918 CPD 529 at 532; *Fielding v Sociedade Industrial de Oleas Limitada* 1935 NPD 540 at 548.

12 In *Hill v Lewis and Marks* (1908) 10 HCG 156 it was held that a deficiency in the counterclaim cannot be cured by a reference to the plea. Nor can a vague and embarrassing plea be sought to be excused because the matter in doubt is more clearly set out in the claim in reconvention (*Park v Bank of Africa* (1883) 2 HCG 66 at 74; *Mullins v Mond* 1921 SR 62).

13 *Lethimvula Healthcare (Pty) Ltd v Private Label Promotion (Pty) Ltd* 2012 (3) SA 143 (GSJ) at 146G–148H; *Wigget v Wannenburgs* (unreported, GP case no 62509/2020 dated 6 June 2022) at paragraphs [14]–[16]; *Orange Flamingo (Pty) Ltd v Member of the Executive Council Responsible for Public Works in the Eastern Cape* (unreported, ECB case no 909/2019 dated 1 September 2022) at paragraph [14]; *Medicross Healthcare Group (Pty) Ltd v Van Der Merwe and Associates Inc* (unreported, FB case no 2877/2021 dated 1 November 2023) at paragraphs [13] and [25]–[28].

14 *Lethimvula Healthcare (Pty) Ltd v Private Label Promotion (Pty) Ltd* 2012 (3) SA 143 (GSJ) at 148H–I; *Wigget v Wannenburgs* (unreported, GP case no 62509/2020 dated 6 June 2022) at paragraph [16]; *Medicross Healthcare Group (Pty) Ltd v Van Der Merwe and Associates Inc* (unreported, FB case no 2877/2021 dated 1 November 2023) at paragraph [24].

15 See the remarks of Lansdown J in *Fielding v Sociedade Industrial de Oleas Limitada* 1935 NPD 540 at 548, cited with approval in *Pilcher and Conways (Pty) Ltd v Van Heerden* 1963 (3) SA 205 (O) at 209B.

16 *Amler's Precedents of Pleadings* 8; Beck *Pleading* 294.

17 *Amler's Precedents of Pleadings* 8; *London & SA Exploration Co v Noonan* (1887) 4 HCG 357 at 359.

18 *Hosch-Fömrdertechnik SA (Pty) Ltd v Brelko CC* 1990 (1) SA 393 (W) at 395B–H.

19 *Soundprops 1160 CC v Karlshavn Farm Partnership* 1996 (3) SA 1026 (N) at 1031C–E.

20 *Hosch-Fömrdertechnik SA (Pty) Ltd v Brelko CC* 1990 (1) SA 393 (W) at 395B–H.

21 (1928) 49 NLR 41.

22 1963 (3) SA 205 (O).