

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 21010/2016

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

NOT REVISED

02.07.23

In the application between:

E M V

Applicant/Defendant

and

C[...] (PTY) LIMITED

First Respondent

G V

Second Respondent

Neutral Citation: *V v C(...)Pty Ltd and another* (Case No:21010/2016) [2023]
ZAGPJHC 619 (2 June 2023)

This judgment was handed down electronically by circulation to the parties' legal representatives by email and by being uploaded to Caselines. The date and time for hand-down is deemed to be 10h00 on 3 June 2023

SUMMARY

Joinder of third party – Uniform Rule 13 – prescription

Joinder of third party – Uniform Rule 13 – exception taken to Annexure

ORDER

1. The defendant is granted leave to serve a third-party notice on Mr V, the second respondent.
2. The costs of the opposition in this application are to be paid by the third party, Mr V, in his personal capacity.

JUDGMENT

TURNER AJ

- [1] This is an application to join the second respondent as a third party to an action instituted by the first respondent against the applicant. For ease of reference, I will refer to the parties as they are cited in the action: C[...] as “the plaintiff”; Mrs V as “the defendant”; and Mr V, by his name.
- [2] When the plaintiff was registered in about 1998 and for a period thereafter, Mr V was the sole director and shareholder of the plaintiff, Mr V and the defendant were married and they had three minor children. During these early years, the defendant spent her time primarily as a housewife and assisted Mr V in the business of the plaintiff, to create a family business. Later, she was appointed as a director with Mr V and a trustee in the “G[...] Trust” which was registered in August 2004 and acquired the shares in the company from Mr V.
- [3] The plaintiff’s business was a success. However, by 2013, acrimony had increased between the defendant and Mr V to the extent that they split and the

defendant left both the household and the business. Divorce proceedings were instituted by the defendant in 2014 and in 2017, a decree of divorce was finally granted.

- [4] After the divorce proceedings were instituted, but before the divorce was finalised, the plaintiff, still under the control of Mr V, instituted the current action against the defendant for payment of an amount of R8,551,524.50. This amount is the aggregate of amounts which are alleged to have been paid out from the plaintiff's accounts on the instructions of the defendant in breach of various allegations owed by the defendant *inter alia* as a director of the plaintiff. The plaintiff's claim is based on the assertion that the defendant was "the director responsible for all duties associated with the financial affairs of the Plaintiff." The defendant's duties are described as including: (i) the safe custody and control of cash received by the plaintiff and control of bank accounts; (ii) payment of creditors and employees; and (iii) management and administrative functions relating to the accounting records of the plaintiff.
- [5] The particulars of claim also allege that: (i) the defendant collected cash from the plaintiff's customers (pursuant to cash sales) which she recorded in the cashbook but failed to reflect in its accounting records; (ii) the defendant drew cheques on the plaintiff's account and paid the amounts drawn into her personal bank account; (iii) the defendant made payments from the plaintiff's online banking facility into her personal bank account. The plaintiff alleges that the defendant breached common law and statutory fiduciary duties owed to the plaintiff in that she: (i) failed to keep safe custody and control of cash received by the plaintiff; (ii) failed to keep proper accounting records; and (iii) either

retained funds belonging to the plaintiff for herself, alternatively expended these funds for reasons unrelated to the business and interests of the plaintiff. The particulars of claim rely on a report prepared by a firm of chartered accountants who reported on withdrawals from the plaintiff's accounts during the period February 2011 to August 2014.

[6] In response to these allegations, the defendant first raises a special plea of non-joinder, asserting that the plaintiff was obliged to join Mr V as, she alleges, he was also a director, aware of the withdrawals and a beneficiary of the funds withdrawn. On the merits, the defendant denies liability to the plaintiff and sets out the following pertinent allegations:

- 6.1 That she and Mr V are (or were) the only directors of the company;
- 6.2 All extra income that was derived from their successful company maintained a great lifestyle for Mr V, the defendant and the children born from the marriage;
- 6.3 After the defendant vacated the joint household, a meeting was held to discuss the defendant's future in the company and Mr V offered the defendant a demoted position in the company as a forklift driver. During this period, Mr V did not accuse the defendant of having stolen funds from the company. These allegations were only made after the divorce proceedings were launched.
- 6.4 All decisions regarding the company were made jointly by Mr V and the defendant as the plaintiff was at all material times a family

business. This included decisions made in respect of all amounts withdrawn from the company.

6.5 That the action against her was vindictive and launched in the name of the plaintiff at the instance of Mr V, against the backdrop of the divorce proceedings.

6.6 That funds withdrawn from the family business were used for family expenses and business expenses from time to time, and for the benefit of Mr V.

[7] In her affidavit supporting the joinder application, the defendant has provided further detail to support these allegations in the plea. The defendant alleges that there were agreements between her and Mr V on monies that should be drawn out of the business to pay for various expenses, for Mr V personally, for each of their children and for the household.

[8] As I understand the defendant's contentions, she denies any wrongdoing vis-à-vis the plaintiff company as she alleges that all payments made from the business were authorised by her and Mr V and were consequently legitimate. She goes further, however, to state that if it were found that she was not entitled to have made any of these withdrawals from the plaintiff for the benefit of the V family, then Mr V is equally liable with her in respect of those amounts withdrawn.

[9] Uniform Rule 13(1) permits a party to deliver a third-party notice where a party in the action (the defendant in this case) claims as against any other person not a party to the action, that such party is entitled, in respect of any relief claimed

against her, to a contribution or indemnification from such third party. A notice can also be delivered where a 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. A third-party notice can be delivered as of right before the close of pleadings in the action. After the close of pleadings, Uniform Rule 13(3)(b) states that such notice may be served only with the leave of the court.

[10] As pleadings have closed in the action, the defendant has made this application in terms of Uniform Rule 13(3)(b). Mr V has opposed the joinder application on a number of grounds. I deal with these below.

[11] His first point relies on the Prescription Act. He alleges that the third-party notice was only delivered in March 2021, many years after the facts on which he says the debt arises. In support of his argument, Mr V relies on a judgment of this court (Pretoria) in *Mativa Manufacturing (Pty) Ltd v Keymax Investments 125 (Pty) Ltd and others* 2020 (1) SA 235 (GP). However, that case is distinguishable from the current one. In that case, the plaintiff sought to join an additional defendant (Marce) in an action for damages which it had instituted against the first and second defendants. It was not an application for joinder of a third party.

[12] As matters currently stand, the defendant in the current matter does not allege that she has suffered a loss at the hands of Mr V and so she does not have an independent claim for a debt against him. All that has occurred is that the defendant has received a claim against her by the plaintiff alleging that it has suffered a loss. *Prima facie*, there appears to be a good argument in favour of the defendant that the claim for a contribution or an indemnity using the third-

party joinder procedure is not a claim to recover a “debt” for purposes of the Prescription Act. In the circumstances, the first point *in limine* falls to be dismissed. Any dispute of the application of the Prescription Act can be resolved at trial.

[13] The second point *in limine* contends that the third-party notice is excipiable. In his heads of argument, Mr V’s counsel contends that the defendant’s allegations that Mr V had access to the bank accounts of the plaintiff, was a co-director of the plaintiff and that he was a beneficiary of the funds disbursed from the plaintiff, are inadequate allegations to sustain a cause of action for a contribution. In my view, this approach is too formalistic and ignores the thrust of what is asserted in the third-party notice, which must be interpreted in a manner most favourable to the defendant when deciding whether or not it is excipiable. If the defendant can prove the allegations pleaded in the third-party notice, then the facts will establish *inter alia* that all the funds claimed from her by the plaintiff were amounts which had been withdrawn with the consent and knowledge of Mr V and all amounts had been used for the benefit of Mr V and his family. In my view, these facts would disclose a cause of action to support a claim for a contribution.

[14] Once Mr V has been joined as a third party and has pleaded to these allegations of fact, he will be entitled to request particulars and obtain any additional particularity required.

[15] Third, Mr V alleges that the defendant did not set out a satisfactory explanation for her failure to give notice before the close of pleadings. This requirement was noted in *Wapnick and Another v Durban City Garage and others* 1984 (2) SA

414 (D) at 424 B-C. In her founding affidavit, the defendant has explained that her previous attorneys believed that the special plea of non-joinder (discussed above) was sufficient to deal with the co-liability of Mr V. She says that her current attorneys had advised her that the better procedure was to serve a third-party notice and join Mr V as a third party. In my view, this is a satisfactory explanation, particularly considering the allegations made in the special plea which support this version, recording that Mr V should bear equal responsibility with the defendant.

[16] The final defence raised by Mr V is recorded under the heading “The application has no merit and no *prima facie* case was made out against the second respondent”. In making this case, Mr V argues that the allegations in the third-party notice do not set out how he “as a co-director was in any manner whatsoever responsible for the financial affairs of the first respondent”. He goes on to argue that he did not sign cheques or pay creditors, that was done by the defendant. Not that it would necessarily assist him in this application, but it is noteworthy that, in his answering affidavit, Mr V does not pertinently deny that the monies withdrawn from the plaintiff were used for his personal benefit or for the benefit of the household. Instead, the essence of his allegations is that the defendant did all the work involving handling the cash, cheques and payments in the business and consequently, she should be the one solely responsible for repaying those amounts, even if they were used for his benefit and the benefit of the household.

[17] To the extent that there may be a dispute of fact over the manner in which financial records were kept and how the money was distributed, these are

factual disputes that should be resolved at trial. In my view, they do not provide a basis on which to justify refusing the joinder of Mr V.

[18] In the circumstances, I do not find merit in any of the grounds relied on by Mr V to resist the delivery of the third-party notice and consequently, I find that a case has been made out to justify the delivery of the third-party notice after the close of pleadings.

[19] There is no reason why costs should not be awarded. The application was self-contained and the entitlement to join Mr V will not be addressed again at trial. While the costs of the joinder application should be costs in the cause in the main action, I find that the opposition by Mr V was unreasonable and consequently, Mr V is liable, in his personal capacity, for the costs of opposing this application, including the costs of the hearing.

[20] In the circumstances I make the following order:

- (1) The defendant is granted leave to serve a third-party notice on the second respondent, Mr V.
 - (2) The costs of the joinder application that would have been incurred on an unopposed basis are to be costs in the cause in the action proceedings.
 - (3) The costs of the opposition in this joinder application, including the costs of the hearing, are to be paid by Mr V in his personal capacity.
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Counsel for the applicant: M Kohn

Instructed by: Tracy Sischy Attorneys

Counsel for the respondent: AC Roestorf

Instructed by: Faber Goertz Ellis Austen Inc

Date of hearing: 19 January 2023

Date of Judgment: 2 June 2023

