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

**CASE NO: 2353/2016**

In the matter between:

**PATRICIA BRIDGET MASON N.O.**

Plaintiff

(In her capacity as Executrix of the Estate  
Late Ashley Robin Mason)

and

**GRAHAM ANDREW MASON**

First Defendant

(Identity No.: 6[...])

**L MASON ELECTRICAL CC**

Second Defendant

**CASE NO: 3039/2016**

In the matter between:

**L MASON ELECTRICAL CC**

First Plaintiff

**GRAHAM ANDREW MASON**

Second Plaintiff

(Identity No.: 6[...])

and

**PATRICIA BRIDGET MASON N.O.**

Defendant

(In her capacity as Executrix of the Estate  
Late Ashley Robin Mason)

REPORTABLE: YES/NO

OF INTEREST TO OTHER JUDGES: YES/NO

REVISED

## **JUDGMENT**

**POTGIETER J**

### ***INTRODUCTION***

[1] This matter is a sequel to an internecine dispute within the Mason family whose members have been successful entrepreneurs in Gqeberha, Eastern Cape Province for a considerable period of time. The principal family business (until it ceased operations) was a thriving electrical contracting enterprise which was founded by the late Mr LC Mason and conducted as L Mason Electrical CC (“the CC”). In due course Mr Mason involved his sons Ashley Robin Mason (“Ashley”) and Graham Andrew Mason (“Graham”) in the business. When it became time for him to retire, Mr Mason sold his member’s interest in the CC to his sons. Ashley, the elder brother, obtained a controlling 60% interest and Graham, the younger brother, a 40% interest in the CC. Graham was more focused on hands-on involvement in the operational/technical side of the business, while Ashley together with his wife Patricia Bridget Mason (“Pat”) and to an extent his daughter Talana Evans, were in charge of the administration and running of the business. In everyday language Graham was in charge of the work on site while Ashley was in charge of the office. Neither ventured much into the area of responsibility of the other. Clearly as brothers running a family business, they acted on trust. This arrangement worked well over time and the business continued to thrive. Things appear to have changed

dramatically upon the untimely death of Ashley on 25 April 2016 so much so that the business has since stopped operating because it has either collapsed or was closed down. Although there was not much reference to it during the trial, the abiding impression one is left with is that the real cause for the business having ceased to operate, was the strained relationship which appears to have developed between Graham and Pat after Ashley passed on. Unsurprisingly this situation eventually led to the present litigation which was conducted in the following context.

### ***RELEVANT BACKGROUND***

[2] Ashley (“the deceased”) and Graham entered into an agreement on 5 May 1999 to the effect that the member’s interest in the CC of the first dying of them would be sold to the survivor. The purchase price would be the proceeds of an insurance policy which each one of them took out on the life of the other, less any estate duty that might be payable on the proceeds. The idea clearly was to ensure that the business remained within the family and to secure the consideration due for the acquisition of the relevant member’s interest. The value of the insurance policy as at the date of death of the deceased was the sum of R4 779 372.00. This amount was duly paid to Graham and is presently held in trust by his attorneys in an interest-bearing account.

[3] The following provisions of the agreement are particularly relevant for present purposes:

#### ***“6 PAYMENT OF THE PURCHASE PRICE***

*6.1 The Purchase Price shall be paid from the proceeds of the Policy ...*

*6.1.1 the said amount shall be deposited by the Survivor at interest with a registered bank or building society; and*

*6.1.2 the said amount together with the said interest shall be paid to the Executor forthwith on the issue of the said Letters of Executorship.*

*6.2 If the deceased shall have been indebted to the corporation at the date of his death on any cause whatsoever, the survivor shall be entitled to withhold from any payment due to the Executor in terms hereof and to pay to the corporation an amount equal to the said indebtedness, and any such payment shall be deemed to be a payment to the Executor on account of the purchase price.*

## **7 DELIVERY**

*Against payment on account of the price of the first amount paid out of the proceeds of the Policy, the Executor shall deliver to the Auditor all documents duly signed to permit the transfer to the Survivor of the Deceased's membership interest."*

## **THE RESULTANT LITIGATION**

[4] After the proceeds of the policy were paid over to Graham, the previous executrix of Ashley's estate, Ms Elna van der Walt (Pat has since replaced her as executrix and was substituted for her as a party) demanded payment of the proceeds, less any estate duty, from Graham in respect of the purchase price of the deceased's member's interest in the CC. Graham resisted the demand on the basis that the deceased had misappropriated the funds of the CC. He contended that this constituted a significant debt owed by the deceased to the CC which should be deducted from the proceeds of the insurance policy pursuant to clause 6.2 of the relevant agreement.

[5] As a consequence, the executrix instituted action against Graham on 14 July 2016, under case number 2353/2016, for payment of the proceeds of the insurance policy together with interest against the tender to transfer the member's interest of the deceased

to Graham. The latter defended the action and raised a special plea of non-joinder of the CC (which was subsequently joined as the second defendant). He pleaded over that the deceased was obliged to repay an as yet undetermined sum representing the CC's funds which he unlawfully appropriated. He furthermore averred that the debt due by the deceased exceeded the proceeds of the insurance policy and that he was accordingly excused from paying such proceeds to the executrix.

[6] Graham in turn instituted a counterclaim for an order for cancellation of the agreement due to misrepresentations made by the deceased and a conditional counterclaim, *inter alia*, for the rendering of an account by the executrix and debatement thereof as well as an order that he was entitled to withhold payment of the proceeds of the insurance policy to the executrix in terms of clause 6.2 of the agreement. The executrix pleaded to the counterclaim and the conditional counterclaim basically denying that Graham was entitled to the relief claimed therein. She furthermore filed a replication to the special plea of non-joinder of the CC denying that it had a sufficient interest in the subject matter of the litigation but pleaded that she would nonetheless from an abundance of caution join the CC as the second defendant, which was in the event done as indicated above.

[7] The CC, acting as the first plaintiff, and Graham, acting as the second plaintiff ("the plaintiffs") instituted a separate action on 30 August 2016 against the executrix under case number 3039/2016 for the rendering and debatement of an account in respect of the business of the CC, alternatively that the executrix provides the accounting records of the CC that are in her possession to Graham to enable a forensic audit thereof to be undertaken and for payment of any amount due to the CC.

[8] This action was defended by the executrix who raised a special plea of prescription of the claim. She pleaded over that while the deceased managed and controlled the affairs of the CC, Graham held a 40% member's interest and was at all material times directly involved in the management and control of the CC and owed the CC a fiduciary duty as recognised by law.

[9] The plaintiffs replicated that the deceased managed and controlled the affairs of the CC to the exclusion of Graham; that the deceased wilfully prevented Graham from discovering his unlawful actions; misrepresented the affairs of the CC and created fictitious book entries to conceal his actions; and repeatedly assured Graham that the CC's affairs were properly managed which gave Graham no reason to suspect any untoward conduct on the part of the deceased, his brother whom he trusted. The plaintiffs averred that as a result, Graham only discovered the irregularities after the death of the deceased and that their claim accordingly only arose after the date of death of the deceased in accordance with the provisions of section 12(3) of the Prescription Act, 68 of 1969, and had not become prescribed.

[10] The executrix filed a rejoinder to the effect that in the discharge of the fiduciary duty owed by Graham to the CC, the knowledge of all the facts giving rise to the plaintiffs' claim could reasonably have been acquired from the outset by Graham, and therefore by the CC on its part through Graham. The executrix averred that the plaintiffs must thus be deemed in terms of the proviso to section 12(3) of the Prescription Act to have had constructive knowledge of such facts at all relevant times.

[11] The above brief background set the scene for the trial in respect of the two actions which have been consolidated by order of this court granted on 11 November 2021. Mr Rorke SC appeared on behalf of the executrix and Mr Jooste on behalf of Graham and the CC.

### ***THE ISSUES***

[12] The issues between the parties became increasingly confined in the lead up to and during the trial. Only one witness, a forensic accounting expert Mr Derek Pearton who was engaged by Graham and the CC, testified at the trial. The special plea of prescription in fact, became the central issue in the matter.

[13] It is not in serious contention that the deceased had unlawfully appropriated the funds of the CC over a considerable period of time and that these sums are to be repaid to the CC to the extent that they have not become prescribed. It is also not in issue that Graham is obliged to pay the proceeds of the insurance policy, less any debt due and payable to the CC by the deceased, to the executrix and to utilise the balance of the proceeds to pay the debt to the CC. The executrix has effectively accepted that all unlawfully appropriated amounts during the 3 years immediately preceding the date of death of the deceased are due to the CC and must be deducted from the proceeds of the insurance policy. Her case is that the balance of the debt has become prescribed. It is therefore readily apparent that the special plea of prescription is the principal issue in the matter.

### ***THE TRIAL***

[14] At the commencement of the trial I ruled, after having heard argument, that the plaintiffs must begin given that they attracted the burden of proof in respect of the unlawful appropriation defence. They called Mr Pearton to testify as indicated above and then closed their case. The executrix closed her case without presenting any evidence.

[15] The thrust of Mr Pearton's evidence is not in dispute and can be briefly set out. He is a registered accountant with expertise in the forensic investigation of accounting issues. He was employed, *inter alia*, as a captain in the Commercial Crime Unit of the South African Police Service. He currently conducts his own accounting practice and has been involved in various forensic accounting investigations and has testified as an expert witness in various court cases. His qualifications as an expert have not been seriously assailed and can be accepted without reservation.

His involvement in the matter followed a request by Graham's attorney, who has been known to him for some time. His instructions were that Graham was a member of the CC with his late brother. The latter was suspected of having unlawfully appropriated funds of the CC for private purposes. He was accordingly mandated to conduct a forensic investigation to determine the details in this regard.

He consulted with the attorney and later with Graham but none of them had much details or a clear idea of what needed to be done. At his request he was provided with the available banking and accounting records of the CC for purposes of his investigation which spanned a period of just over 17 years between March 1999 and 25 April 2016. The latter being the date of death of the deceased.

He meticulously worked through the records of the CC entry-by-entry. The CC kept manual books of account until May 2009 when it changed over to the computerised Pastel accounting system. He had regard to approximately 3500 entries in the bank statements and reviewed 5082 transactions reflected in the CC's records. He prepared a comprehensive report, supported by 37 lever arch files of documents, which he confirmed in his testimony.

[16] I should interpose that the executrix engaged the services of PriceWaterhouseCoopers Forensic Accounting Services ("PWC") to prepare a forensic report which was produced under the name of one of their officials, Mr Bruce Killerby. The mandate of PWC was, however, limited to only investigate transactions that were more than R5 000.00 in value. There was accordingly little correlation between this report and that of Mr Pearton who investigated every transaction over the relevant 17-year period that was covered by his investigation. The outcomes of the respective reports were understandably widely different. The PWC report reviewed a sample constituting only 9.7% of the total transactions dealt with by Mr Pearton representing 28% (R4 455 020.16 in value) of the total transaction value of R15 724 610.85 investigated by Mr Pearton. Given the wide divergence between the two reports, previous attempts to obtain a joint minute between Mr Pearton and Mr Killerby, were unsurprisingly not successful. I accordingly directed at the commencement of the trial that the two of them meet and prepare a joint minute of the areas of agreement and disagreement between them. The minute was prepared on 8 May 2023 and presented to the court. The outcome of the meeting, relevant for present purposes, was that Mr Pearton adjusted his report to include six transactions with a net value of R75 513.78 and re-allocated portions of transaction

values which he previously ascribed to the deceased in his report, more properly as having benefited Graham. They could not reach consensus on the classification (business or personal) of R4 293 241.79 of the said total transaction value of R4 455 020.16 that was reviewed by PWC. Appropriate adjustments were made to the respective loan account balances of, *inter alia*, the deceased and Graham in Mr Pearton's report which in the result reflected the adjusted total amount misappropriated by the deceased as R7 406 139.37.

[17] As indicated, Mr Killerby was not called to testify and the executrix had closed her case without presenting any evidence. The material aspects of the testimony of Mr Pearton were accordingly not controverted. At the end of the trial, it was clear that the fact that the deceased had misappropriated the funds of the CC and the figure of R7 406 139.37 determined in this regard by Mr Pearton, were not in dispute. The issue is whether the CC's claim in respect thereof was enforceable or had largely become prescribed.

### ***THE CASE OF THE EXECUTRIX***

[18] The gravamen of the executrix's case was that any amounts misappropriated up to 3 years immediately prior to the date of death of the deceased, had become prescribed. According to the executrix, the only relief that the plaintiffs were entitled to at best was to recover the sum of R669 305.83 which was determined in Mr Pearton's report to have been misappropriated by the deceased during the 3 years immediately preceding his death. The total nett amount of R7 406 139.37 which was determined by Mr Pearton to have been misappropriated by the deceased over the 17- year time span of his investigation, is not in dispute as indicated above. The executrix, however, contends that the bulk thereof had become prescribed and that Graham was obliged to pay the proceeds of the insurance policy, less the said sum of R669 305.83, to the estate in respect of the purchase price of the deceased's member's interest in the CC. By the same token, if the claim had not prescribed, it is not in serious contention that the deceased would have owed the amount of R7 406 139.37 to the CC in which event the estate would

not be entitled to payment of the proceeds of the insurance policy. It is therefore clear as alluded to above that the central issue is the matter of prescription to which I now turn.

### ***PRESCRIPTION***

[19] Mr Rorke submitted with regard to the special plea of prescription, that the executrix had established constructive knowledge on the part of Graham (as envisaged in section 12(3) of the Prescription Act) of the debt owed by the deceased pursuant to the latter's misappropriation of the CC's funds. According to this argument, if Graham had fulfilled his fiduciary obligations towards the CC, he would have been vigilant and would have seen the red flags. He should have investigated these and would have easily ascertained that the deceased was misappropriating the funds of the CC. Thus, so the argument ran, by exercising reasonable care and acting diligently in terms of the law, Graham could have acquired knowledge of the identity of the debtor and of the facts from which the debt arose. As a matter of law, he is therefore deemed in terms of section 12(3) to have had such knowledge at any time prior to the last 3 years immediately preceding the date of death of the deceased, presumably as from 1999 being the starting period of Mr Pearson's investigation.

[20] Mr Rorke furthermore submitted that the constructive knowledge of Graham must in turn be attributed to the CC. All potential claims of the CC up to 3 years immediately preceding the date of death of the deceased would accordingly have prescribed. I revert to the attribution argument below.

[21] In respect of the issue of prescription, it was argued on behalf of the executrix that Graham was not entitled, given the onerous fiduciary duty he owed to the CC, to sit back and by supine inaction at will postpone the commencement of prescription. The executrix relied on an inference to be drawn from 3 factors as support for the contention that Graham had constructive knowledge of the misappropriation.

[22] First, the following averments contained in Graham's affidavit filed in opposition to the application by the executrix for summary judgement: that while he and the deceased received modest earnings from the CC, the deceased '*acquired significant assets*' over a period of 15 years and that he failed to understand how this happened. Furthermore, that he obtained records of the CC for the first time after the deceased passed away and it '*immediately became apparent*' that the deceased had made large scale withdrawals from the bank accounts of the CC. His preliminary investigation revealed that millions of rands would have been diverted from the CC to the deceased.

[23] It was submitted on behalf of the executrix that, in view of these averments in Graham's said affidavit, a reasonable member of a close corporation in Graham's position given his concerns, would have exercised the rights conferred on him by the law to enable him to discharge his fiduciary obligations towards the CC. Given the ease with which he could establish that the deceased misappropriated the CC's funds, he would have been in a position to intervene timeously before any claim prescribed.

[24] Secondly, according to the report of Mr Pearton, Graham had no involvement with the financial affairs of the CC. The previous bookkeeper of the CC confirmed to Mr Pearton that she had had no dealings with Graham regarding the financial affairs of the CC. According to the report, Graham was not involved in the financial transactions of the CC and that it cannot be deemed that he misappropriated any funds. Mr Pearton reported that he was informed from the outset by Graham that the latter did not understand why his loan account was always in debit and that he made numerous fruitless enquiries in this regard with the bookkeeper or accountant/auditor. This was also confirmed by the bookkeeper. Mr Rorke submitted that despite this further material concern, Graham adopted an impermissibly, supine attitude and failed to resolve the matter pursuant to the powers conferred on him by the Close Corporations Act. This was not the conduct expected from a reasonable member of a close corporation.

[25] The last factor relied upon by the executrix was that according to Mr Pearton's report and his evidence, Graham had also received undue benefits from the CC. It was

submitted that this should have prompted Graham to look into the matter which in turn could and would have enabled him to acquire knowledge of the misappropriations by the deceased.

[26] In my view none of the above contentions, which I will deal with in turn, supports either the conclusion that the executrix had satisfied the burden of establishing constructive knowledge on the part of Graham in terms of section 12(3) of the Prescription Act or that the CC's claim against the deceased had become prescribed.

[27] First, the summary judgement affidavit by its very nature does not contain Graham's full evidence. It would have been aimed at averting the summary judgement application. In the absence of any testimony at the trial confirming and elucidating the averments in the affidavit, it cannot be concluded without more on the strength of these averments that by exercising reasonable care, Graham could have acquired knowledge prior to the death of the deceased, that the latter misappropriated the funds of the CC. There is furthermore no basis for concluding that Graham suspected the deceased of having engaged in any untoward conduct with regard to the affairs of the CC. He explicitly indicated in the affidavit that he trusted the deceased who was his elder brother.

[28] He furthermore averred in his replication in case number 3039/2016 that the deceased managed the affairs of the CC to his exclusion, wilfully prevented him from acquiring knowledge of the existence of the claim, and misrepresented the state of affairs of the CC with regard to his unlawful conduct by creating fictitious book entries designed to conceal the true unlawful nature of the instances of misappropriation. This militates against the contention that Graham could have acquired knowledge of the unlawful conduct of the deceased prior to his death.

[29] In any event, it took Mr Pearton who is a seasoned forensic accountant just over 2 years to investigate the matter and uncover the nature and extent of the misappropriations. Furthermore, the investigation was facilitated only after Graham

fortuitously discovered a code book which made it easier to identify the true nature of the transactions in issue.

[30] These grounds relied upon for the submission that Graham must be deemed to have had constructive knowledge of the deceased's wrongdoing are, to say the least, fanciful. It is therefore not reasonable or realistic to conclude that Graham ought to have exposed the irregularities before the death of the deceased and that the CC's claim had prescribed because Graham therefore had constructive knowledge of the CC's claim against the deceased as envisaged in the proviso to section 12(3) of the Prescription Act.

[31] Secondly, Mr Pearton's report does not assist the executrix. Far from establishing a supine approach to the affairs of the CC, it simply confirms that Graham was not involved in the day-to-day management of the CC or in the running of its financial affairs. It is quite apparent that he was centrally involved in and concentrated on his area of responsibility being the operations of the electrical contracting business and left the administration to the deceased whom he trusted. This obviously created the opportunity for the misappropriations to occur without Graham knowing about or suspecting it.

[32] Lastly, the fact that Graham received some benefits over the years which he was not strictly entitled to cannot, in my view, be regarded as a red flag which should have alerted Graham to the unlawful actions of the deceased. This conclusion is a *non sequitur* in the circumstances.

[33] In any event and even if Graham ought to have been aware of the misappropriations and must be deemed to have had constructive knowledge thereof, the important fact is that the claim lies in favour of the CC and not Graham. On the available evidence, I am not satisfied that the executrix had made out a case, as Mr Rorke submitted, for the averred constructive knowledge of Graham to be attributed to the CC or for the conclusion that the CC's claim had therefore become prescribed. This directly engages the issue of corporate attribution referred to earlier to which I now turn.

## **CORPORATE ATTRIBUTION**

[34] Apart from referring to the trite principle that corporations, as artificial persons, act only through the medium of their directors and officers being natural persons (which is an incident of agency), Mr Rorke referred to no specific authority in support of his submission that in the present matter the rules of attribution should be applied to bar the CC's claim. No indigenous authority that is directly in point has come to my attention dealing with the present situation. To recap, *in casu* the executrix contends that the averred constructive knowledge on the part of the sole surviving member of the close corporation that his deceased co-member during his lifetime misappropriated the corporation's funds must be attributed to the close corporation and constitutes a complete defence to the corporation's claim against the perpetrator, on the basis that the claim has become prescribed by virtue of the proviso to section 12(3) of the Prescription Act<sup>1</sup>.

[35] Such obliquely relevant authority that is available to me deals with the somewhat less complex situation where the perpetrator is a third party and the complicity or the knowledge of a director or officer of the wrongdoing is attributed to the corporation and is relied upon to defeat the corporation's claim against the perpetrator. In these situations, involving third parties, as opposed to matters where the perpetrator is a director or officer, the knowledge of directors or agents is perhaps understandably almost invariably attributed to the corporation largely on the basis of agency or pursuant to the provisions of the corporation's founding documents.

[36] The above situation obtained in *National Potato Co-operative*<sup>2</sup> where the Co-operative (NPC) instituted a claim for damages against its auditors on the basis of the

<sup>1</sup> Section 12 provides as follows in relevant part:

**'12. When prescription begins to run. -** (1) *Subject to the provisions of subsection ... (3), prescription shall commence to run as soon as the debt is due.*

...

(3) *A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.'*

(emphasis supplied)

<sup>2</sup> *PriceWaterhouseCoopers Inc & Others v National Potato Co-operative Ltd & Another* [2015] 2 All SA 403 (SCA) ['NPC']

latter's professional negligence. A special plea of prescription was upheld on appeal to the Supreme Court of Appeal (SCA) on the ground that the Board of the NPC could have acquired knowledge of the facts necessary to found a claim, prior to the expiry of 3 years from the date on which the claim arose, by exercising reasonable care. The SCA confirmed that the constructive knowledge of the Board is to be attributed to the NPC in the circumstances in the light of the provisions of section 12(3) of the Prescription Act.

[37] In *Northview Shopping Centre*<sup>3</sup> the SCA dealt with what has become known as the *rules of attribution* concerning corporations with reference to the illuminating judgment in *Meridian Global Funds Management Asia Ltd v Securities Commission*<sup>4</sup> where Lord Hoffmann explained that companies are regulated in accordance with rules which, *inter alia*, indicate which acts are those of the company and went on to say that:

*“It is therefore a necessary part of corporate personality that there should be rules by which acts are attributed to the company. These may be called the ‘rules of attribution’.*<sup>5</sup>

Lord Hoffmann continued:

*“The company’s primary rules of attribution will generally be found in its constitution, typically the articles of association ... There are also primary rules of attribution which are not expressly stated in the articles but implied by company law. ...*

*These primary rules of attribution are obviously not enough to enable the company to go out into the world and do business. ... The company therefore builds upon the primary rules of attribution by using general rules of attribution which are equally available to natural persons, namely, the principles of agency. ...*

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<sup>3</sup> *Northview Shopping Centre (Pty) Ltd v Revelas Properties JHB CC & Another* 2010(3) SA 630 (SCA)

<sup>4</sup> [1995] 2 AC 500 (PC)

<sup>5</sup> At 506B-D

*The company's primary rules of attribution together with the general principles of agency, vicarious liability and so forth are usually sufficient to enable one to determine its rights and obligations. In exceptional cases, however, they will not provide an answer. This will be the case when the rule of law, either expressly or by implication, excludes attribution on the basis of the general principles of agency or vicarious liability. ... How is such a rule to be applied to a company?*

*One possibility is that the court may come to the conclusion that the rule was not intended to apply to companies at all; for example, a law which created an offence for which the only penalty was community service. Another possibility is that the court might interpret the law as meaning that it could apply to a company only on the basis of its primary rules of attribution, i.e. if the act giving rise to liability was specifically authorised by a resolution of the board or an unanimous agreement of the shareholders. But there will be many cases in which neither of these solutions is satisfactory; in which the court considers that the law is intended to apply to companies and that, although it excludes ordinary vicarious liability, insistence on the primary rules of attribution would in practice defeat that intention. In such a case the court must fashion a special rule of attribution for the particular substantive rule. This is always a matter of interpretation: given that it was intended to apply to a company, how was it intended to apply? Whose act (or knowledge, or state of mind) was for this purpose intended to count as the act etc of the company? One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute), and its content and policy.”<sup>6</sup>*

(emphasis supplied)

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<sup>6</sup> At 506C-507F

[38] To revert to *Northview Shopping Centre*<sup>7</sup>, the SCA there dealt with the rules of attribution in the context of authority to sign a deed of sale on behalf of a corporation in respect of the alienation of land. In response to an argument advanced on behalf of the appellant that the rules of attribution expressed in *Meridian*<sup>8</sup> were not part of South African law, Lewis JA (writing on behalf of the court) expressed approval of the rules in the following terms<sup>9</sup>:

*“It seems to me, however, that they are simply rules of logic. And in any event, I consider that they are expressed (although more concisely) by Bristowe J in Potchefstroom Dairies*<sup>10</sup>.”

[39] As indicated above, the issue in the present matter is whether or not the averred constructive knowledge of Graham must be attributed to the CC in the context of section 12(3) of the Prescription Act where the corporation’s claim lies not against a third party, but against the deceased managing member who misappropriated its funds. Section 12(3) is clearly intended to apply to corporations. As it was put in *Meridian*, the pertinent question is whose knowledge was for the purposes of the section intended to count as the knowledge of the CC in the present matter. In my view this must be determined in the light of the nature and particular circumstances and factual context of the claim which issues I need to consider next.

[40] I have found a great deal of assistance and guidance in the decision of the Supreme Court of the United Kingdom in *Jetivia SA & Another v Bilta (UK) Ltd & Others*<sup>11</sup> which I perforce would be referring to rather extensively given the paucity of comparable indigenous authority. I should add at the outset that in my view the fact that the company in question in that matter was in liquidation and the CC in the present matter is not, does

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<sup>7</sup> Above fn 2. It is necessary to point out that in the case of attribution the actions of someone else are treated as the actions of the corporation, as opposed to the case of vicarious liability where the corporation is held liable for the actions of someone else.

<sup>8</sup> Above fn 3

<sup>9</sup> At para [21]

<sup>10</sup> *Potchefstroom Dairies & Industries Co Ltd v Standard Fresh Milk Supply Co* 1913 TPD 506 at 512

<sup>11</sup> [2015] 2 All ER 1083 (*‘Jetivia’*)

not render that decision either distinguishable or inappropriate on the issue of attribution. In that matter the liquidators lodged a claim for damages in tort, *inter alia*, against the two former directors of Bilta (UK) Ltd (a United Kingdom company in liquidation) on the basis that they breached their fiduciary duties by having been parties to a conspiracy to injure Bilta by means of a fraudulent scheme entailing so-called ‘carousel or missing trader frauds’ relating to European Emissions Trading Scheme Allowances, commonly referred to as ‘carbon credits’. The allegation was that Bilta had been deliberately formed to perpetrate VAT fraud on the fiscus pertaining to fraudulent trading in ‘carbon credits’<sup>12</sup> recorded on the Danish Emission Trading Registry. The scheme caused substantial losses to Bilta.

[41] The defendants applied to strike out the claim on the ground of illegality or *ex turpi causa non oritur actio* (effectively that the company should be precluded from claiming due to its own illegal actions) arguing in this regard that the culpable knowledge of the former directors should be attributed to Bilta. The matter eventually came before the Court of Appeal. The attribution argument of the defendants was rejected by that court in light of the particular circumstances of the matter. The court held that this conclusion should apply irrespective of whether or not there was a ‘sole actor’ in control of the company (which was not the case with Bilta) and that earlier authorities had moved away from the position where the concept of the ‘directing mind and will’ was fundamentally significant in determining the question of attribution. It further found that the issue of *ex turpi causa* was irrelevant to the matter.

[42] A further appeal to the Supreme Court was dismissed and the earlier finding of the Court of Appeal was confirmed that in an action by a company against its directors it

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<sup>12</sup> The scheme briefly involved the purchase of carbon credits free of VAT by Bilta from Jetivia SA (a Swiss company) followed by resale of the credits subject to VAT to UK companies registered for VAT. The onsale price was artificially set marginally below the purchase price paid by Bilta thus enabling the buyer to sell at a small profit. The proceeds of Bilta’s sales together with VAT thereon were remitted to Jetivia. Bilta had no other business or any assets apart from the cash generated by the transactions which cash was alienated to Jetivia. The scheme thus deliberately rendered Bilta insolvent and unable to pay the output VAT in excess of £38m due to Her Majesty’s Revenue & Customs whom as a result effected Bilta’s winding up. The liquidators pursued, *inter alia*, the former directors for the losses suffered by Bilta as a result of the scheme.

would be inappropriate to attribute the wrongdoing of the directors to the company, as a defence against a claim instituted by the company against the directors in respect of such wrongdoing. The court held that whether or not the knowledge and state of mind of a director or agent can be attributed to a company depends on the purpose for which the attribution is sought to be made and the context in which the question arises. The common *ratio decidendi* of the four different judgements produced by the panel of seven Justices, relevant to the present issue, has been aptly summarised as follows by Lord Neuberger (President):

*‘Where a company has been the victim of wrong-doing by its directors, or of which its directors had notice, then the wrong-doing, or knowledge, of the directors cannot be attributed to the company as a defence to a claim brought against the directors by the company’s liquidator, in the name of the company and on behalf of its creditors, for the loss suffered by the company as a result of the wrong-doing, even where the directors were the only directors and shareholders of the company, and even though the wrong-doing or knowledge of the directors may be attributed to the company in many other types of proceedings.’<sup>13</sup>*

[43] The Supreme Court effectively re-affirmed these principles in its later decision in *Daiwa Capital Markets Europe Ltd v Singularis Holdings Ltd*<sup>14</sup>.

[44] In my view, the applicable legal position has been accurately set out by a Full Court of the Western Cape High Court in *Eclipse Systems*<sup>15</sup> with which I align myself, namely:

*‘Generally, it can be said that in instances involving actions by innocent third parties against a company, or by a company against such parties, the acts and knowledge of its agents will ordinarily be attributed to it. This will also be the case where a company is charged with a criminal offence. On the other hand, as was*

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<sup>13</sup> At para 7

<sup>14</sup> [2019] UKSC 50

<sup>15</sup> *Eclipse Systems & Another v HE & She Investments (Pty) Ltd* [2020] JOL 48467 (WCC) at para 51

*held in Jetivia SA where a company sues its agents or directors for loss caused to it by their conduct, such as in matters involving a breach of fiduciary duty, or fraud, it would be obviously inappropriate for them to seek to avoid liability on the basis that their knowledge and state of mind, and their acts should be attributed to it.'*

[45] It needs to be emphasised, as amply stated in *Meridian* and *Jetivia supra*, that the key to any question of attribution is ultimately to be found in paying attention to the important considerations of the context in and the purpose for which attribution is invoked or disclaimed. Where the context relates to the breach of fiduciary duties owed by a director or officer to the company (as in the instant case), the knowledge and state of mind of the former must necessarily be separated from those of the company. The purpose of the rule establishing such duties itself requires that the company cannot be identified with its director or officer. As correctly stated in *Jetivia* (at para 42): *"It is self-evidently impossible that the officer should be able to argue that the company either committed or knew about the breach of duty, simply because the officer committed or knew about it. ... Any other conclusion would ignore the separate legal identity of the company, empty the concept of duty of content and enable the company's affairs to be conducted in fraud of creditors."*

[46] I respectfully agree with the lucid summary of Lord Neuberger in *Jetivia* (at para 9) indicating that the issue of attribution entails a general rule and that *"the question is simply an open one: whether or not it is appropriate to attribute an action by, or a state of mind of, a company director ... to the company ... in relation to a particular claim ... must depend on the nature and factual context of the claim in question"*. The issue of attribution (like many other aspects of the law) is undoubtedly highly context specific. Considerations of injustice and absurdity also have a role in determining questions of attribution. As correctly indicated in *Jetivia* (at para 38) *"... it is certainly unjust and absurd to suggest that the answer to a claim for breach of a director's (or any employee's) duty could lie in attributing to the company the very misconduct by which the director or employee has damaged it"*. The injustice and absurdity of allowing such a defence is obvious.

[47] In dealing with the issue of attributing specifically the knowledge of a director to the company the following dicta of Lord Mance in *Jetivia* (at para 44) are particularly instructive:

*“It follows that I would, like Lords Toulson and Hodge (para 191), endorse the observations of Professors Peter Watts and Frances Reynolds QC as editors of Bowstead & Reynolds on Agency 19<sup>th</sup> ed, (2010) para 8-213, in relation to the argument that a principal should be attributed with the state of mind of his agent who has defrauded him, so as to relief either the agent or a third party who had knowingly assisted in the fraud:*

*‘Such arguments by defendants, though hazarded from time to time, are plainly without merit. However, in such situations, imputation has no reason to operate. The rules of imputation do not exist in a state of nature, such that some reason has to be found to disapply them. Whether knowledge is imputed in law turns on the question to be addressed.’*

*The same point is made in rephrased terms in their 20<sup>th</sup> ed (2014), para 8-213:*

*‘The simple point is that, were the principal deemed to possess the agent’s knowledge of his own breaches of duty, and thereby to have condoned them, the principal could never successfully vindicate his rights. ... [T]here is no need for an exception as such. The putative defence that the exception is used to rebut is premised on the fallacy that the principal is prima facie deemed to know at all times and for all purposes that which his agents know. As observed already, imputation never operated in such a way. Before imputation occurs, there needs to be some purpose for deeming the principal to know what the agent knows.’ “*

[48] Put simply, a director is not entitled to attribute his own dishonesty to the company for the purpose of giving himself immunity from the ordinary legal consequences of his breach of duty where the company brings a claim against the director based on such dishonesty. This accords with common sense, rationality and justice.

## **DISCUSSION**

[49] In applying the above principles (which in my view correctly reflect the applicable law) to the facts of the present matter, it is readily apparent in my view that the rules of attribution find no application in the context and circumstances of this matter. First, in the present context the corporation is generally not attributed with the knowledge of a director or member. In my view, the CC should not be so attributed with the knowledge of Graham. The context of the present claim requires closer attention. This matter concerns a claim by the CC against a member for misappropriating in excess of R7m of its funds over a considerable period of time. It is not in contention that the perpetrator was in charge of the administration of the CC's business and that the sole co-member had no actual knowledge of such malfeasance until after the death of the perpetrator. The nature and details of the wrongdoing were only exposed after an extensive investigation by a forensic expert that took just over two years to complete. The relevant claim was instituted within three years of finalisation of the investigation. It is also not really in issue that the amount in question was in fact misappropriated by the deceased and would ordinarily have been due and payable to the CC. While accepting liability for just over R600 000.00 that was misappropriated during the three-year period immediately preceding the demise of the perpetrator, his executrix disputed liability in respect of the balance (that was misappropriated earlier) on the basis that the claim in respect thereof has prescribed as averred in her special plea in case number 3039/2016. The executrix relied on the averred constructive knowledge of the wrongdoing by the surviving member in support of her special plea, more particularly to resist the averment in the plaintiffs' replication in the same case that the claim had not prescribed because knowledge of the misappropriation only came to light after the death of the perpetrator and that the action was instituted within three years of the date of death. She contended that such constructive knowledge should be attributed to the CC. It should therefore be regarded as having been aware of the misappropriation all along and that its claim for the balance has accordingly become prescribed by virtue of the proviso to section 12(3) of the Prescription Act. According to the argument, the CC should have been aware earlier of the misappropriations and

should have taken steps to intervene earlier, which failure now precluded it from recovering the bulk of the misappropriated amount. So much for the context.

[50] The purpose for which attribution is being invoked in this matter must be sought in the provisions of section 12(3) of the Prescription Act which are being relied upon by the executrix. The purpose of the proviso to section 12(3) has been aptly stated as requiring the creditor “... *not to be content to play a purely passive role. If she could have acquired this knowledge by acting diligently her inertia, inaptitude or indifference will not excuse the delay. The creditor who fails to exercise the reasonable care prescribed by the Act must pay the penalty...*”<sup>16</sup> and also that a “... *creditor cannot simply sit back and by supine inaction arbitrarily and at will postpone the commencement of prescription*”.<sup>17</sup> The purpose is accordingly to require the creditor to act reasonably and pursue the claim timeously. In my view, this purpose does not necessarily require that the rules of attribution should apply in this case, since non-attribution in this matter would not frustrate or undermine the achievement of this purpose. In the circumstances of the present matter, the CC can hardly be described as a creditor who failed to exercise reasonable care or sat back and by supine inaction arbitrarily and at will postponed the commencement of prescription. Once the details of the misappropriation came to hand, the CC acted timeously to pursue its claim. Considerations of fairness and justice dictate that the CC should not be non-suited on the basis suggested by the executrix.

[51] It would undoubtedly not have been open to the deceased to attribute his own knowledge of the misappropriation to the CC as the basis for a successful special plea that the CC’s claim against him, has become prescribed. The absurdity and injustice of allowing such a defence are manifest. It is not feasible in the present situation where the corporation is recovering its loss from a delinquent member who acted in flagrant breach of his fiduciary duties.

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<sup>16</sup> *Gericke v Sack* 1978(1) SA 821 (A) at 832B-D

<sup>17</sup> *Macleod v Kweyaya* 2013(6) SA 1 (SCA) at 6C-E

[52] It occurs to me that there is equally no reason in principle, policy or logic to allow the very same assumed knowledge (constructive and not even actual) of Graham to bar the legitimate, duly established claim of the CC. This is especially so where Graham's failure to have acquired actual knowledge of the wrongdoing and to intervene earlier is itself being ascribed to (and assumed for purposes of determining the issue of attribution to be due to) a breach of his own fiduciary duties. It would be as absurd and unjust as in the case of the deceased, to prejudice the CC as a result of a breach of his fiduciary duties by Graham, and to allow the perpetrator to escape liability in such circumstances. I accordingly decline in the circumstances of this case to attribute any knowledge on the part of Graham to the CC and treat such knowledge as a basis for defeating the CC's claim against the deceased for misappropriation on the ground that the claim had become prescribed.

[53] It follows in my considered view that even assuming that Graham had constructive knowledge at all material times of the misappropriation by the deceased, the executrix has failed to establish that the CC's claim against the deceased had become prescribed pursuant to the provisions of section 12(3) of the Prescription Act on the basis of attributing such knowledge to the CC. The special plea of prescription therefore cannot be sustained.

## **CONCLUSION**

[54] The plaintiffs under case number 3039/16 (the CC and Graham) had duly established that the total sum misappropriated by the deceased amounted to R 7 406 139.37 which amount is due and payable to the CC. The deceased was accordingly indebted in this amount to the CC as at the date of his death for the purposes of clause 6.2 of the agreement dated 5 May 1999 concluded by the deceased and Graham. The latter is therefore entitled in terms of clause 6.2 to withhold payment of the proceeds of the Old Mutual insurance policy to the executrix and to pay the same to the CC in liquidation of the indebtedness of the deceased and in lieu of the purchase price of the deceased's

member's interest in the CC. To this extent, the claim under case number 3039/16 must succeed.

[55] It follows that the claim of the executrix under case number 2353/16 for payment of the proceeds of the insurance policy in the sum of R 4 779 372.00 cannot succeed given the fact that the indebtedness of the deceased to the CC exceeds such proceeds. By the same token, the estate remains liable to pay the outstanding balance of the misappropriated amount to the CC, while the executrix is obliged to facilitate transfer of the member's interest to Graham.

### ***RELIEF***

[56] Although the evidence indicated that the CC had ceased its operations, there is no indication that it has been wound up. Effect can thus still be given to the provisions of clause 6.2 of the agreement by effecting payment of the amounts due to the CC and to transfer the deceased's member's interest to Graham in accordance with clause 7 of the agreement.

[57] As indicated, the proceeds of the insurance policy have been paid over to Graham's attorneys and are being kept in an interest-bearing account presumably pursuant to the provisions of clause 6.1.1 of the agreement. In terms of clause 6.1.2 of the agreement the interest would ordinarily have accrued for the benefit of the deceased estate and it must therefore be applied towards liquidating the deceased's debt to the CC.

[58] The report and evidence of Mr Pearton indicated that the amounts misappropriated were calculated for each financial year commencing in 1999 and the totals so determined are separately reflected as such in the report. Mr Jooste has provided a convenient schedule in this regard which was not objected to by Mr Rorke and which will be utilised for present purposes. Furthermore, interest *a tempore morae* is payable at the legal rate on such amounts calculated as having been misappropriated for each financial year

determined from the first day of the immediately succeeding financial year until the date of payment thereof.

[59] Mr Jooste has also handed in a draft order reflecting the relief that his clients, the CC and Graham, are seeking. It includes an indemnity with regard to potential penalties or interest arising from the misappropriation that might be payable to the South African Revenue Services and provides that the executrix should personally pay costs on a punitive scale jointly and severally with the deceased estate. This relief was opposed by Mr Rorke. Having considered the matter and the relevant arguments, I am not persuaded that it would be appropriate in the circumstances of the case that such indemnity be provided or such costs be awarded. I accordingly decline to accede to Mr Jooste's submissions in this regard.

[60] The CC and Graham have been substantially successful and it is proper in the circumstances for the executrix (in her representative capacity) to pay the costs of the consolidated action on the party and party scale.

### **ORDER**

[61] In the result I make the following order:

- (a) The plaintiff's claim under case number 2353/16 is dismissed;
- (b) The defendant under case number 3039/16 (being the executrix of the estate late Ashley Robin Mason) is directed, subject to paragraph (d) below, forthwith to pay the sum of R 7 406 139.37 misappropriated by the late Ashley Robin Mason to L Mason Electrical CC (the first plaintiff under case number 3039/16) together with interest at the legal rate *a tempore morae* calculated in accordance with the schedule set out in annexure "A" hereto;

(c) Graham Andrew Mason (the second plaintiff under case number 3039/16) is directed forthwith to pay the proceeds of the Old Mutual insurance policy in the amount of R 4 779 372.00 presently being held in trust by his attorneys together with all the interest accrued thereon to L Mason Electrical CC;

(d) The total amount paid in terms of paragraph (c) above shall be deducted from the sum payable in terms of paragraph (b) above;

(e) The executrix of the estate late Ashley Robin Mason shall forthwith deliver all documents duly signed in accordance with the provisions of clause 7 of the agreement dated 5 May 1999 concluded by the late Ashley Robin Mason and Graham Andrew Mason, to permit transfer to Graham Andrew Mason of the member's interest of the late Ashley Robin Mason in L Mason Electrical CC;

(f) The executrix of the estate late Ashley Robin Mason, in her representative capacity, shall pay the costs of suit of the consolidated action on the party and party scale.

**D.O. POTGIETER**  
**JUDGE OF THE HIGH COURT**

### **ANNEXURE A**

Interest shall be payable as follows:

|       |                                                                      |             |
|-------|----------------------------------------------------------------------|-------------|
| (i)   | On R138 153.92 from 01/03/2000 at the legal rate to date of payment  | R138 153.92 |
| (ii)  | On R161 458.60 from 01/03/2001 at the legal rate to date of payment  | R161 458.60 |
| (iii) | On R152 906.88 from 01/03/2002 at the legal rate to date of payment  | R152 906.88 |
| (iv)  | On R191 827.90 from 01/03/ 2003 at the legal rate to date of payment | R191 827.90 |

|              |                                                                                                                           |                             |
|--------------|---------------------------------------------------------------------------------------------------------------------------|-----------------------------|
| (v)          | On R374 752.39 from 01/03/2004 at the legal rate to date of payment                                                       | R374 752.39                 |
| (vi)         | On R515 814.13 from 01/03/2005 at the legal rate to date of payment                                                       | R515 814.13                 |
| (vii)        | On R491 758.91 from 01/03/2006 at the legal rate to date of payment                                                       | R491 758.91                 |
| (viii)       | On R839 138.11 from 01/03/2007 at the legal rate to date of payment                                                       | R839 138.11                 |
| (ix)         | On R988 323.80 from 01/03/2008 at the legal rate to date of payment                                                       | R988 323.80                 |
| (x)          | On R979 421.05 from 01/03/2009 at the legal rate to date of payment                                                       | R979 421.05                 |
| (xi)         | On R270 319.40 from 01/03/2010 at the legal rate to date of payment                                                       | R270 319.40                 |
| (xii)        | On R577 048.44 from 01/03/2011 at the legal rate to date of payment                                                       | R577 048.44                 |
| (xiii)       | On R618 953.29 (R868 953.29 less contingency of R250 000.00 conceded by<br>Mr Pearton) from 01/03/2012 to date of payment | R618 953.29                 |
| (xiv)        | On R632 543.32 from 01/03/2013 at the legal rate to date of payment                                                       | R632 543.32                 |
| (xv)         | On R336.791.04 from 01/03/2014 at the legal rate to date of payment                                                       | R336 791.04                 |
| (xvi)        | On R65 019.00 from 01/03/2015 at the legal rate to date of payment                                                        | R 65 019.00                 |
| (xvii)       | On R210 945.47 from 01/03/2016 at the legal rate to date of payment                                                       | R210 945.47                 |
| (xviii)      | On R59 550.72 from 26/04/2016 at the legal rate to date of payment                                                        | R 59 550.72                 |
| <b>TOTAL</b> |                                                                                                                           | <b><u>R7 406 139.37</u></b> |

## APPEARANCE

For the plaintiff: Adv Rorke SC, instructed by Rushmere Noach Inc., 5 Ascot Office Park, Conyngham Road, Greenacres, Gqeberha

For the defendants: Adv Jooste SC, Instructed by Friedman Scheckter, 75 Second Avenue, Newton Park, Gqeberha

Dates of hearing: 08 – 11 May 2023 and 05 June 2023

Delivery of judgment: 14 September 2023