**IN THE HIGH COURT OF SOUTH AFRICA**
**(WESTERN CAPE DIVISION, CAPE TOWN)**

Case number: 2025-041536

In the matter between:

**GUTSCHE INVESTMENT & MANAGEMENT COMPANY (PTY) LTD** Plaintiff

and

**RENOCARE SERVICE CENTERS (PTY) LTD** Defendant

**ASSETMATRIX (PTY) LTD** Third Party / Excipient

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| ***Coram*:** | | Van Zyl, J |
| **Heard on:** | | 9 June 2026 |
| **Judgment:** | : | 5 August 2026 |

**Summary:** Exception to third party notice – no cause of action – defendant seeking monetary amount from third party – not competent under Rule 13 - defendant seeking "indemnity or contribution" from third party on delictual basis despite plaintiff's claim against defendant being contractual – no contractual, common law, or statutory basis present for indemnity from or contribution by third party – exception upheld

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**ORDER**

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1. The exception is upheld, and the defendant's third party notice is set aside.

2. The defendant is given leave to, should it so wish, deliver an amended third party notice within 20 days of the date of this order.

3. The defendant shall pay the costs of the exception, including the costs of two counsel where so employed. Counsel's fees shall be taxed on Scale B.

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**JUDGMENT**

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**VAN ZYL, J:**

**Introduction**

1. The dispute before me arises from an indifference displayed in the defendant's pleadings and argument towards the distinction between a contractual and a delictual cause of action.

2. The third party ("Assetmatrix") raises an exception to a third party notice delivered by the defendant ("RSC") in the main action between the plaintiff ("GIMCO") and RSC.

3. In the main action, GIMCO alleges that RSC breached the terms of a written lease agreement concluded between the parties. GIMCO claims payment of a total amount of R2 239 468.72, representing the contractual damages it alleges that it has suffered as a result of RSC's breach of contract.

4. RSC defends GIMCO's claim by denying a breach of the lease agreement. It instituted a counterclaim against GIMCO for payment of R3 516 724.54 based on unjustified enrichment, alternatively, "*an amount not less than R3 516 724.54*" based on GIMCO's alleged fraudulent or negligent

misrepresentation in the conclusion of the contract.

5. In the third party notice RSC pleads, as its main claim, a monetary claim against Assetmatrix for the amount of R3 516 724.54 (that is, the same amount as it claims in its counterclaim against GIMCO), together with interest and costs. It claims, in the alternative, "*such contribution or*[1] *indemnity as the…Court may deem just and equitable should the defendant be found liable to the plaintiff in any amount*".

6. Assetmatrix contends that the third party notice is bad in law for three reasons:

   6.1 First, RSC pleads no contractual, statutory, or other basis implied by law for claiming an indemnity from Assetmatrix.

   6.2 Second, insofar as a contribution is sought, GIMCO's claim against RSC is framed in contract, not in delict. Our law does not recognise contributory negligence as a common law defence to a claim based upon a breach of contract. Accordingly, Assetmatrix cannot be a joint wrongdoer with RSC in respect of the GIMCO's claim.

   6.3 Third, inasmuch as the notice suggests an independent cause of action for a money claim against Assetmatrix, it is bad. The third party procedure is confined to circumstances in which a defendant is entitled to a contribution or indemnification from a third party in respect of any relief claimed against it. A defendant may not invoke the third party procedure for the purposes of bringing a claim sounding in money against a third party.

7. I briefly refer to the relevant legal principles underlying exceptions before returning to the pleadings in more detail, and discussing the parties' contentions.

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[1] My emphasis.

## **The legal principles relating to exceptions**

8. The applicable principles are trite.

9. An exception is a legal objection to an opponent's pleading, which complains of a defect inherent in the pleading. As stated in *Pretorius and another v Transport Pension Fund,*[2] admitting for the purpose of the exercise that all the allegations in the pleading under attack are true, the complaint is that even with such admission the pleading does not disclose a cause of action or a defence, as the case may be, or against a third party, as in the present case. The object of an exception is to dispose of the case, or a portion thereof, in an expeditious manner, or to protect a party against an embarrassment which is so serious as to merit the costs of an exception.[3]

10. In *Living Hands (Pty) Ltd v Ditz*[4] the court summarised the principles that pertain to exceptions, as follows:

> *"(a) In considering an exception that a pleading does not sustain a cause of action, the Court <u>will accept, as true, the allegations pleaded by the plaintiff to assess whether they disclose a cause of action.</u>*
> *(b) The object of an exception is not to embarrass one's opponent or to take advantage of a technical flaw, <u>but to dispose of the case or a portion thereof in an expeditious manner</u>, or to protect oneself against an embarrassment which is so serious as to merit the costs even of an exception.*
> *(c) The purpose of an exception <u>is to raise a substantive question of law which may have the effect of settling the dispute between the parties.</u> If the exception is not taken for that purpose, an excipient should make out a very clear case before it would be allowed to succeed.*
> *(d) An excipient who alleges that a summons does not disclose a cause of action must establish that, upon any construction of the particulars of claim, no cause of action is disclosed.*

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2 2019 (2) SA 37 (CC) para 15.
3 Van Loggerenberg *et al Erasmus Superior Court Practice* [Service 22, 2023] at D1 Rule 23-3 to 23-5, and the cases cited at footnote 1.
4 2013 (2) SA 368 (GSJ) at 374G. My emphasis.

*(e) An over-technical approach should be avoided because it destroys the usefulness of the exception procedure, which is to weed out cases without legal merit.*

*(f) Pleadings must be read as a whole and an exception cannot be taken to a paragraph or a part of a pleading that is not self-contained.*

*(g) Minor blemishes and unradical embarrassments caused by a pleading can and should be cured by further particulars."*

11. If a pleading is bad in law, the answer is to except. A party cannot "*sit back, say nothing and then complain [at the trial of the matter] that the pleading was defective and that she was taken by surprise*".[5]

12. When an exception is allowed, the court will usually give the party against whom the exception has been raised an opportunity to remove the cause of complaint and file an amended pleading (if it is able to do so) within a stated time period.[6]

**<u>The provisions of Rule 13, in the context of the pleadings</u>**

13. Uniform Rule 13(1) and (2) provides as follows:[7]

"*(1) Where a party in any action claims—*

*(a) as against any other person not a party to the action (in this rule called a "third party") that such party is entitled, in respect of any relief claimed against him, to <u>a contribution or indemnification</u> 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*

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5 *MN v AJ* 2013 (3) SA 26 (WCC) para 38.

6 *Erasmus* at D1 23-9, and the cases cited in footnote 4.

7 My emphasis.

*be served by the sheriff.*

*(2) Such notice shall state the nature and grounds of the claim of the party issuing the same, the question or issue to be determined, <u>and any relief or remedy claimed</u>. In so far as the statement of the claim and the question or issue are concerned, the rules with regard to pleadings and to summonses shall mutatis mutandis apply*."

14. GIMCO's claim against RSC is squarely based in contract. This is clear from the particulars of claim, as also paragraph 1 of the third party notice, which states that GIMCO "*has instituted action against the Defendant for payment of rental arrears and damages allegedly due under a written lease agreement ….*"

15. RSC states that if GIMCO's claim against it succeeds, it claims a "*contribution* or *indemnification*" from Assetmatrix on the grounds set forth in the notice:

"*3. The Defendant alleges that-*

*3.1 Any liability that may be established against the Defendant in favour of the Plaintiff arises directly from your conduct; and*

*3.2 the Defendant is entitled to recover from you the whole of its resultant loss, alternatively such contribution or indemnity as the Honourable Court may deem just and equitable, as set forth in the Plea and Counterclaim, a copy of which is herewith served on you.*"

16. The grounds upon which the joinder is sought are set out as follows in the third party notice:

"*4. The Defendant's claim against you arises from the following statements of material facts:*

*4.1 At the instance and with the knowledge of the Plaintiff, the Third Party furnished a quotation dated 18 November 2022 representing that the total tenant installation cost for the premises would be R4,503,450,08 (inclusive of VAT), which quotation is attached to the Plea as 'P4';*

*4.2 Relying on that representation, the Defendant concluded the lease with the Plaintiff;*

4.3 *On 7 August 2024, the Third Party issued a revised pro forma budget escalating the total cost to R6,393,737,82, an increase of approximately 42%, which revised budget is attached to the Plea as 'P5';*

4.4 *The said representation was false and/or negligently made, and it induced the Defendant to enter into the lease and to expend R3,516,724,54 on tenant installations;*

4.5 *At all material times, Vivianne Sarah Gutshe was a director of both the Plaintiff and the Third Party. Your misrepresentation and conduct are thus attributable to you and constitute a wrongful and negligent act causing loss to the Defendant.*"

17. In these paragraphs that RSC invokes a cause of action against Assetmatrix based on the latter's alleged "*false or negligent misrepresentation*" which "*induced RSC to enter into the lease and expend R3 516 724.54 on tenant installations*". The notice culminates in seeking, as primary relief, payment from Assetmatrix of R3 516 724.54 "*as damages for misrepresentation*". In the alternative RSC seeks "*[s]uch contribution or indemnity as the … court may deem just an equitable should the defendant be found liable to the plaintiff in any amount*".

18. In its heads of argument, RSC contends that the third party notice, read "*fairly and as a whole*, advances "*pleaded contractual causes of action that are properly characterised*" as follows:

18.1 A "*contractual claim for restitution against Assetmatrix … in relation to the said misrepesentation, as well as the extent of the contractual nexus that exists between the Parties*" and evidenced by certain clauses of the Lease Agreement.

18.2 Alternatively, "*the piercing of the corporate veil and that the two companies should be treated as a single economic entity*".

18.3 A "*conditional indemnification claim under Rule 13(1)(a), pleaded* *that in the event Renocare is held liable to GIMCO in any amount, Assetmatrix is liable to indemnify Renocare for that liability, on the basis that any such liability flows causally from Assetmatrix's alleged misrepresentation*".

18.4 Alternatively, a "*conditional contribution claim under Rule 13(1)(a), insofar as Assetmatrix is liable, to the extent of which is to be determined by the trial court, on the basis that Assetmatrix is liable to Renocare to recover an equitable contribution from Assetmatrix*".

19. I proceed to consider these contentions.

*The damages claim*

20. In oral argument RSC persisted with its monetary claim, in the face of the provisions of Rue 13(1)(a). It characterised (in argument) this part of the relief sought in the third party notice as a contractual claim for restitution against Assetmatrix, despite not having pleaded, anywhere, the existence of a contract between itself and Assetmatrix.

21. The monetary claim can readily be disposed of.

22. Rule 13(1) is not intended to enable a defendant to make a monetary claim against a third party. A defendant joining a third party in terms of Rule 13(1)(a) may only ask for a declaratory order (in the event that the plaintiff's claim against it is successful) that the third party is obliged to indemnify it, where the plaintiff's claim is based in contract, or that the third party is declared a joint wrongdoer with the defendant (and for an apportionment of damages), where the plaintiff's claim is based in delict.

23. In other words, a defendant seeking to invoke the third party procedure is put to a choice[8] which is determined by the nature of the plaintiff's claim against

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8 In the present matter, RSC has not made this election. It straddles both possibilities by

it. If that claim is in contract, the defendant may only claim that the third party is obliged to indemnify it if the plaintiff's claim succeeds. In *Eimco (SA) (Pty) Ltd v P Mattioda's Construction Co (SA) (Pty) Ltd*[9] the court confirmed that there must be a contractual or statutory basis, or a basis implied by law, for such indemnification. If the plaintiff's claim is in delict, the defendant may only seek a declaratory order that the third party is a joint wrongdoer with it, and for a contribution from the third party according to the extent of its negligence as determined by the court.

24. A claim for the payment of damages cannot be equated with a right to claim indemnity; it is the converse of such right.[10] As far as a contribution is concerned, all that can be sought under the rule by one alleged wrongdoer against another is an apportionment of fault in the form of a declaratory order. The rule makes no provision for a judgment sounding in money in favour of one alleged wrongdoer against the other.[11] It does not matter what RSC calls this claim. It is unsustainable under Rule 13.

25. RSC is not without a remedy in the circumstances. If it sought damages from Assetmatrix, it could have joined it as a co-defendant to its counterclaim under Rule 24.[12] It could also have instituted proceedings for its alleged loss against Assetmatrix in separate proceedings for fraud or negligent misrepresentation. Its loss (which are for amounts paid to Assetmatrix for the fitting out of the leased premises) are not dependent on a finding in the main proceedings and bear no relation to GIMCO's claim. Having instituted such proceeding, RSC could have sought to consolidate such proceedings with the main action in the present matter.

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claiming a "*contribution* <u>*or*</u> *indemnification*".

9 1967 (1) SA 326 (N) at 332H-333A, followed in *Dodd v Estate Cloete* 1971 (1) SA 376 (E).

10 *Dodd* at 379G.

11 *Hart v Santam Insurance Co Ltd* 1975 (4) SA 275 (E) at 277G. At 277H the court held: "*It is apparent from this that what defendant is seeking is a judgment in its favour in a specified sum of money as determined by the Court. Defendant is only entitled to such judgment if it proceeds in terms of the provisions of Act 34 of 1956 and alleges and proves the necessary prerequisites for such a judgment. While defendant professes to proceed against the third party (first plaintiff) under the provisions of Rule 13, the relief it seeks cannot competently be granted in terms of that Rule.*"

12 Rule 24(4) also permits a counterclaim conditional upon the claim or defence in convention failing.

*The alternative claim*

26. RSC's alternative claim is for a "*contribution or indemnification*", and Rule 13(1)(a) is therefore the appropriate subrule for consideration. RSC disavows reliance on Rule 13(1)(b).

27. There are at least three problems with RSC's alternative claim.

28. First, RSC doggedly persists with its catch-all reliance both on the right to an indemnity <u>or</u> the right to a contribution as envisaged in terms of Rule 13(1)(a) without making an election between the two forms of relief. The question as to whether a defendant is obliged to elect between claiming an indemnity, or a contribution, and when, has not been raised as an issue in the notice of exception, and need not be determined. RSC criticises Assetmatrix's argument on this score, but misses the point that is being made.

29. The point is that it is impermissibly vague simply to plead a right to "*a contribution or indemnity*" under Rule 13 as "*as this Honourable Court may deem just and equitable, as set forth in the plea and counterclaim*". This is what RSC has done.

30. This manner of pleading offends against the express provisions of Rule 13(2), namely *that "such notice shall state the nature and grounds of the claim of the party issuing the same, the question or issue to be determined, and any relief or remedy claimed*". It also overlooks the basic rule of pleading as set out in Rule 18(4), namely that every pleading *"shall contain a clear and concise statement of the material facts upon which the pleader relies for his or her claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto*".

31. Merely referring to allegations made in the plea and counterclaim in heads of argument and during oral argument, as RSC's attorney did, does not rescue a deficiently pleaded third party notice. I keep in mind that, in determining the

merits of an exception, one should not be over-technical in considering the pleading under attack. A line must nevertheless be drawn somewhere, and I think that RSC's third party notice crosses it.

32. RSC tries to wriggle free of these constraints by arguing that the court must accept, as true, all of the allegations contained in its plea and counterclaim, whether pleaded in the third party notice or not. RSC says the fact that the third party notice incorporates these pleadings by reference ("*as set forth in the plea and counterclaim*") is sufficient to render those pleadings part and parcel of the third part notice. It says that, if one accepts that the allegations contained in its plea and counterclaim are true (and, necessarily for the purposes of RSC's argument, that the legal conclusions as drawn in those pleadings are correct), then it follows that RSC is entitled to either a contribution from or an indemnity by Assetmatrix.

33. This approach is not correct. The principle that all the allegations of fact made in the relevant pleading to which exception is taken must be accepted to be true, applies to the pleading in question. In the present matter that is the third party notice. There is no authority for the proposition that it applies to a party's other pleadings, in this instance, RSC's plea to GIMCO's particulars of claim, or its counterclaim. A sweeping and, in my view, impermissibly vague reference to those pleadings is not sufficient to render the allegations contained therein part of the notice. The third party notice must stand on its own feet,[13] even if this entails explicit cross-references to allegations or annexures in the other pleadings:

"*A third heading of the attack is that the third party notice is contradictory with the defendant's plea. I will not consider whether there is contradiction. A third party notice, like a counterclaim, is a pleading which is completely independent of the main claim and of any pleading in response thereto. Except insofar as*

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13 *Absa Bank Ltd v Boksburg Transitional Local Council (Government of the Republic of South Africa, Third Party)* 1997 (2) SA 415 (W) at 419I-420A. See also *Shell Auto Care (Pty) Ltd v Lagger and others* 2006 (1) SA 162 (D&CLD) at 170D-E (dealing with an exception to a third party notice): "*I am at this stage not concerned with the merits of the case. At this stage I must look at [the] pleading excepted to as it stands. No facts outside those stated in the pleadings can be brought into issue and no reference may be made to any other documents.*"

*dependence is created by incorporation by reference (which saves time and effort but really amounts to a repetition of that to which reference is made), the soundness of a counterclaim is not added to or subtracted from by what a defendant says in response to a plaintiff's claim.*"

34. In RSC's third party notice explicit cross-reference is, in fact, permissibly made to in relation to two annexures to the plea. That does not, however, open the door to the wholesale acceptance of all of the allegations in the plea and counterclaim as part of the pleading to which exception is being taken.

35. The second problem is that RSC is not entitled to invoke delictual principles to seek an indemnity or contribution from Assetmatrix where GIMCO's claim against it (RSC) is purely contractual. In *Palomino Plant SA (Pty) Ltd v Dust-A-Side (Pty) Ltd and others*[14] the first defendant sought to hold the third party liable in delict as a joint wrongdoer. The third party excepted to the third party notice on the basis that the plaintiff's claim against the first defendant was purely contractual in nature. The third party thus contended that the defendant's claim against it was neither recognised, nor sustainable in law. In upholding the exception, the court[15] stated as follows:

*"In the present matter, <u>the third party raised an exception that it cannot be held liable as a joint wrongdoer where the plaintiff's claim against the first defendant is based on a written agreement and therefore founded in contract</u>. <u>Joint wrongdoers are persons who are jointly and severally liable in delict. No provision is made in our law of contract for the concept of a joint wrongdoer.</u> A similar argument was raised in OK Bazaars (1929) Ltd and others v Stem and Ekermans. In that matter, the plaintiff instituted a claim for damages on the ground of breach of contract. Similar to this matter, the defendant served third party notices on the first and second parties claiming that, in the event it being held that it had breached the contract, that the first and second third parties were negligent and therefore joint wrongdoers in terms of section 2 of the Apportionment of Damages Act 34 of 1956. <u>The third party took an exception to the third party notice. The court held that the legislature did not in this Act intend to introduce the principle of apportionment of damages in contractual</u>*

[14] [2024] ZAGPPHC 719 (16 July 2024).
[15] At para 10. My emphasis.

*claims:* *The court held as follows:*

> *"To sum up then, inasmuch as prior to the passing of the Act, contributory negligence was not one of the recognised common law defences to a claim based upon a breach of contract it seems to me unlikely that, had the Legislature intended to introduce a radical change in the law of the nature contended for by Mr. Ipp, it would have done so in an oblique way and without using clear language to express such intention."*

36. RSC has not pleaded any contractual, or statutory, or legally implied basis upon which an indemnity may be sought from Assetmatrix. Our law does not recognise contributory negligence as a defence at common law to a claim founded upon breach of contract. To the extent that RSC seeks to rely thereon, such reliance is bad in law.

37. The third problem is related to the second. In its plea, RSC pleads that "*Assetmatrix…is accordingly liable to contribute towards, alternatively indemnify the defendant in respect of any judgment that may be granted in favour of the plaintiff against the defendant in terms of the defendant's delictual claims against the plaintiff and Assetmatrix*."[16]

38. In its heads of argument and in oral argument RSC – having pleaded no reliance on contract, and having disavowed reliance on the Apportionment of Damages Act 34 of 1956[17] - distances itself from characterizing its counterclaim against GIMCO and its claim against Assetmatrix as being based in delict. It argues that it has a common law right to an indemnity against Assetmatrix based on misrepresentation, and that it has a common law equitable claim for a contribution from Assetmatrix as a joint wrongdoer.

39. I deal first with the indemnity claim, and thereafter with the claim for a contribution.

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16 My emphasis.

17 This Act does not apply to contractual claims. The long title states: "*To amend the law relating to contributory negligence and the law relating to the liability of persons jointly or severally liable in delict for the same damage, and to provide for matters incidental thereto.*"

*The claim in relation to indemnity*

40. In *Eimco*[18] the court accepted the following definition of "indemnity" in a contractual context (by reference to Wessels *Contract)*:[19] :*The person who undertakes to indemnify another enters into an original contract to make good the loss which the promise may suffer."*

41. The term is defined in Classens' *Dictionary of Legal Words and Phrases*[20] as follows:

> "*The primary meaning of 'indemnify' is to pay something to a person who has already paid something out …. In a particular contract it was held that the more probable meaning attached by the parties to the word 'indemnify' was 'to preserve, protect, keep free from, secure against (any hurt, harm or loss); to secure against legal responsibility for past or future actions or event; to give indemnity to', and therefore in its context it did not mean to compensate . . . for loss suffered, expenses incurred . . . ".*

42. As stated, RSC does not rely on a contractual right of indemnity as between it and Assetmatrix should the plaintiff's contractual claim against it be successful. It relies instead, in its heads of argument, on "*allegations [that provide] a pleaded foundation for an indemnity implied by law*". The allegations relied upon are extracted from its plea and its third party notice, not always as accurately as one would expect. Be that as it may, even if these allegations are accepted as true, they do not give rise to an indemnity, but to a claim for damages based on misrepresentation.

43. The allegations relied upon culminate in the contention that Assetmatrix's representations (whether fraudulent or negligent) induced RSC to enter into an agreement with GIMCO which induced it to "*expend R3 415 724.54 on tenant installations*", and thus "*causing loss to the defendant*". RSC contends for a common law right of indemnity arising from these allegations. It argues

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18 *Supra* at 333F-G.
19 2nd ed, at para 3794.
20 Volume 2 (Butterworths; 1976).

that if Assetmatrix, through a negligent or intentional misrepresentation, induces RSC to contract with GIMCO, then Assetmatrix is legally bound to indemnify RSC against any contractual claim made by GIMCO against RSC.

44. I do not agree with RSC that the case pleaded against Assetmatrix is not delictual. A plain reading of the plea and counterclaim dispels any doubt in this respect. In any event, RSC's claim to a common law right to an indemnity against Assetmatrix based on misrepresentation is made without authority. Counsel could not refer me to any precedent, and I could not find any.

45. The claim is also contradicted by the legal position in relation to extra-contractual misrepresentations, which is that they give rise to a self-standing claim for damages based on the *Lex Aquila*,[21] and not to any remedy of indemnity.

46. The representation by Assetmatrix relied upon is alleged to have been "*false and/or negligently made*". A fraudulent representation causing loss gives rise to a claim by the sufferer of the loss against the fraudulent party for damages arising from fraud.[22]

47. A negligent representation[23] gives rise to different forms of relief depending on its context, namely a misrepresentation giving rise to a contract between the misrepresentor and the misrepresentee, or an extra- or pre-contractual misstatement.

47.1 A negligent misrepresentation giving rise to a contract with the party making the misrepresentation permits remedies of (i) relief under the Aedialitian remedies; (ii) cancellation of the contract and restitution; (iii) damages; or (iv) damages and cancellation. An indemnity from the misrepresentor is not an available remedy. In

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21 See, for example, *C.W v G.T* [2023] ZASCA 23 (13 March 2023) in relation to a contract of marriage.

22 *Amler's Precedents of Pleading* (10ed, LexisNexis) *sv* "Fraud" at p 205.

23 *Amler's op cit sv* "Misrepresentation: Negligent misrepresentation" at p 269.

any event, RSC does not allege a contract between it and Assetmatrix.

47.2 Extra- or pre-contractual misstatements, in turn, give rise to a remedy of damages under the *Lex Aquila* for pure economic loss, assuming the requirements of such remedy, including wrongfulness are satisfied.[24] A claim for damages is the opposite of a claim for an indemnity.[25]

48. The following statement from *Eimco*[26] makes the position plain:

*"A right to damages arising from a breach of contract or from a breach of warranty is not an indemnity, and the fact that the damages amount, or might amount, to the same sum as that for which the party entitled to those damages is in turn liable does not make the case one of indemnity; nor is the fact that the evidence to establish each claim is the same or virtually the same, relevant to the question of whether there is an indemnity. There must be a right arising from contract or by statute or from the law, to indemnify in respect of, or a contribution towards the claim of the plaintiff."*

49. This is the end of RSC's claim in relation to an indemnity.

***The claim to a contribution***

50. RSC does not rely on the statutory apportionment regime under the Apportionment of Damages Act, but "*on the broader common-law right of contribution as between solidary debtors, recognized in Pickitup...*" This claim to the right to a contribution from a joint wrongdoer is misplaced, and is based on a misinterpretation of the judgment in *Pickitup Johannesburg SOC Ltd v Nair (Maharaj and others, third parties/excipients)*.[27]

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24 *Amler's op cit sv* "Misrepresentation" at pp 268-271.
25 *Dodd supra* at 379G.
26 *Supra* at at 332H-I.
27 2019 (5) SA 540 (GSJ).

51. In *Pickitup* the plaintiff's claim was not based in contract. The plaintiff is an organ of state and a municipal entity whose claim was against the defendant in his capacity as a former municipal official. The claim was based on section 176(2) of the Municipal Finance Management Act 56 of 2003 ("MFMA"), which provides as follows:

***"176. Liability of functionaries exercising powers and functions in terms of this Act***

*….*

*(2) Without limiting liability in terms of the common law or other legislation, a municipality may recover from a political office-bearer or official of the municipality, and a municipal entity may recover from a director or official of the entity, any loss or damage suffered by it because of the deliberate or negligent unlawful actions of that political office-bearer or official when performing a function of office.*"

52. The defendant sought to join fellow officials who were "*party to and/or aware of and abided by the conduct of the defendant that forms the basis of the plaintiff's claims against her*" by means of a third party notice for a contribution for any amount awarded against him (the defendant) in terms of s176(2) of the MFMA.[28] The third parties excepted to the third party notice on the basis that the law did not recognize a right to a contribution as between joint wrongdoers in the circumstances.

53. The question to be determined by the court was articulated as follows:[29]

*"Having regard to what has been pleaded by the defendant the issue can be defined more particularly as follows: Is the defendant entitled under the common law to <u>recover a contribution from the third parties</u> in circumstances where the cause of action is founded on a statutory entitlement under section 176(2) of the MFMA <u>and the third parties are joint wrongdoers together with the defendant</u> in respect of such damages in terms of section 176(2) of the MFMA?"*

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28 *Pickitup supra* para 9.

29 *Pickitup supra* para 16 (my emphasis).

54. The question decided by *Pickitup* is as articulated above, and not as summarised in RSC's heads, namely that "*the narrow question decided in Pikitup is precisely the narrow question Assetmatrix raises here, whether the common law recognises a right of contribution between co-debtors in the absence of a joint delict. The answer given by Leech AJ, after exhaustive review of the Roman-Dutch authorities including Justinian, Voet, Van Leeuwen, Van der Keessel, Grotius, Van der Linden and Pothier, is that it does, except where the claimant's conduct is turpitudinous or the claim arises under the actio iniuriarum. Neither exception applies here*."

55. After discussing various decisions to which it was referred, the court in *Picitup* concluded in general terms as follows:[30]

*"In the circumstances, there has been <u>no authority</u> put before me in support of the third parties' contention <u>that a joint wrongdoer sued by a plaintiff for the full amount of the plaintiff's loss may not recover a contribution from his/her fellow joint wrongdoers</u>. Indeed, on the contrary, the cases I have been referred to on behalf of the third parties point to the opposite conclusion."*

56. The court continued:

"*[69] … There doesn't appear to be any reason why a <u>joint wrongdoer</u>[31] in the position of the defendant should not similarly be afforded recourse to these equitable considerations. If there is doubt, therefore, the residual equitable nature of the remedy of contribution should tilt the balance in favour of the defendant in this case.*
*[70] Laggar[32] accepts that a right to claim a contribution exists in the context of a statutory claim in circumstances that closely parallel the circumstances of this case. I was asked to find that the case is obviously wrong and therefore not to follow it. While I do not necessarily follow or adopt all of the reasoning of Laggar, and do not consider it to be binding on me, I am not inclined to find that it is obviously wrong.*
*[71] The common law therefore is in favour of the defendant and against the third parties. There is, however, a further question to be considered, which is whether or*

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30 *Pickitup supra* para 65 (my emphasis).
31 My emphasis.
32 That is, *Shell Auto supra*.

*not there is any reason arising from the statute or from the statutory regime applicable to the MFMA that requires that s 176(2) of the MFMA be more restrictively interpreted so as to preclude a right of contribution. I think not.*"

57. The court concluded,[33] upon a consideration of the statutory position, that the defendant was entitled to make a claim by way of third party notice against fellow wrongdoers under section 176(2), reasoning that "*if a defendant has no right of recourse <u>against other officials</u> then there may arise a multiplicity of actions, including review proceedings that are surely not desirable*".

58. These findings demonstrate RSC's misconception about the relevance of *Pickitup* to its case. The right to invoke a common law right to a contribution is given to a wrongdoer against fellow wrongdoers, not to a party who alleges that another party committed a delict against it or made misrepresentations to it, causing it to suffer damages.

59. In the present matter, GIMCO's claim is based on contract and not statutory wrongdoing. The claim by the defendant against the third parties in *Pickitup* was based on the same statutory wrongdoing. RSC does not plead that it is a joint wrongdoer with Assetmatrix in relation to the loss claimed by GIMCO; on the contrary, it eschews any notion of wrongdoing in connection with GIMCO's claims.

60. RSC's claim for a contribution from Assetmatrix is therefore without merit.

**<u>Piercing the corporate veil</u>**

61. RSC's attorney conceded in argument that the only basis upon which this alleged cause of action (as formulated in RSC's heads of argument) rests is the allegation that GIMCO and Assetmatrix share a director. It is patent that no such case has been pleaded in the third party notice and, whatever relief

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33 At para 72 (my emphasis), read with the discussion in paras 71-76.

RSC expects to flow therefrom, it is not available under Rule 13. In any event, Assetmatrix did not raise this aspect as a ground of exception.

## Conclusion, and costs

62. I agree with the submissions made on Assetmatrix's behalf that the third party notice discloses no cause of action against Assetmatrix. The exception falls to be upheld.

63. RSC invokes the notions of fairness and the interests of justice to submit that I should nevertheless not set the third party notice aside should I have any doubts about the merits of its claims. I think, however, that the applicable and established legal principles, in which fairness and the interests of justice are inherent, sufficiently address the dispute and its outcome

64. Assetmatrix is the successful party, and there is no reason to depart from the general rule that costs should follow the event. In the exercise of my discretion under Rule 67A, I consider that counsel's fees should be taxed on Scale B. The exception was of moderate complexity. The third party notice seeks to advance a substantial monetary claim against Assetmatrix, in the glaring absence of a cause of action. But for the exception, Assetmatrix would have been unjustifiably bound into protracted and costly proceedings between GIMCO and RSC.

## Order

65. It is accordingly ordered as follows:

    1. **The exception is upheld, and the defendant's third party notice is set aside.**

    2. **The defendant is given leave to, should it so wish, deliver an amended third party notice within 20 days of the date of this order.**

3. **The defendant shall pay the costs of the exception, including the costs of two counsel where so employed. Counsel's fees shall be taxed on Scale B.**

**P. S. VAN ZYL**
**Judge of the High Court**

**Appearances**:

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|---|---|
| **For the third party / excipient:** | M.D. Edmunds SC and Z. Sing |
| Instructed by: | Bernadt Vukic Potash &Getz |
| **For the defendant**: | Q. Zimmerman |
| Instructed by: | Liddle & Associates Inc. |