REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 9524/2017

(1) REPORTABLE: ~~NO~~ YES
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED. YES

16/05/2019
SIGNATURE DATE

In the matter between:

PIKITUP JOHANNESBURG SOC LIMITED Plaintiff

and

AMANDA NAIR Defendant

SUREN MAHARAJ & EIGHTEEN OTHERS Third Parties/Excipients

JUDGMENT

LEECH, AJ:

INTRODUCTION

1 On 16 March 2017 the plaintiff, Pikitup Johannesburg SOC Limited, caused a combined summons to be issued forth out of this court in which it claimed against the defendant, Ms Amanda Nair, payment of various sums of money together with interest thereon and costs of suit.

2 On 7 November 2017 the defendant filed her plea and, some two weeks later, a third party notice and annexure under Rule 13 of the Uniform Rules of Court. In the annexure to the third party notice the defendant sought orders declaring the third parties to varying degrees to be jointly and severally liable together with her to the plaintiff, for payment by them of a proportionate contribution or share of the amounts claimed by the plaintiff, as well as orders for costs.

3 Fourteen of the third parties, represented by the same attorneys who represent the plaintiff, have taken exception to the annexure to the third party notice. The exception is taken on the basis that the annexure lacks averments necessary to sustain the relief claimed by the defendant against the third parties.

4 The exception was set down for argument, heads of argument exchanged, and the matter fully argued before me. Having considered the matter I am of the view that the exception falls to be dismissed and the reasons for my so finding follow.

THE PLAINTIFF'S PLEADED CASE, THE THIRD PARTY CLAIM, AND THE EXCEPTION

5 The plaintiff is an organ of state and a municipal entity as defined in section 1 of the Local Government: Municipal Systems Act, 32 of 2000 (*the Systems Act*) and in section 1(1) of the Local Government: Municipal Finance Management Act, 56 of 2003 (*the MFMA*).

6 The defendant was previously employed by the plaintiff as its managing director and, in its Particulars of Claim, the plaintiff alleges that the defendant was as a consequence subject to a number of constraints and subject to various responsibilities and obligations under both the Systems Act and the MFMA.

7 In its Particulars of Claim the plaintiff asserts twelve claims as against the defendant totalling R2 969 489.90 plus interest and costs. What is relevant, for purposes of the exception, is that these claims against the defendant are in part at least founded on section 176(2) of the MFMA.

8 In the annexure to her third party notice the defendant pleads *inter alia* the following:

> In the event of it being found that the Defendant is liable under section 176(2) of the MFMA to pay any amount in respect of loss or damages suffered by the Plaintiff, then,

and only in that event, the Defendant claims against the Third Parties on the grounds set out hereunder.[1]

9 The defendant thereafter pleads the relevant *facta probanda* on which she bases her claims against the third parties. In essence, the basis of these claims are that at all material times the third parties

9.1 were officials of the plaintiff for purposes of the MFMA,

9.2 were also subject to various responsibilities and obligations under the MFMA and the Systems Act,

9.3 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,

9.4 can be held liable in their own names to the plaintiff under section 176(2) of the MFMA, and

are joint wrongdoers together with the Defendant in respect of such damages in terms of section 176(2) of the MFMA, and are jointly and severally liable together with the Defendant to pay such damages to the Plaintiff and the Defendant is entitled to a contribution from the said Third Parties equivalent to their

[1] All quotations are rendered verbatim, except to the extent that square brackets or ellipses are used to indicate an omission or insertion. Furthermore, footnotes have been omitted from quotations.

> proportionate share, namely an amount equivalent to one-sixteenth of any amount co-paid by the Defendant to the Plaintiff.[2]

10 The third parties have filed an exception that is ostensibly founded on two grounds, both of which are asserted on the basis that the annexure to the third party notice does not disclose a legal basis for the relief claimed by the defendant against the third parties. Moreover, both are premised on the proposition that section 176(2) of the MFMA creates a statutory remedy that entitles a municipality to recover from an official any loss or damage caused by that official when performing a function or office. The third parties assert

10.1 First, that the defendant is seeking to assert an entitlement under the Apportionment of Damages Act, 34 of 1956 (*the Apportionment Act*), but that the third parties are not joint wrongdoers within the meaning of section 2(1) of the Apportionment Act, the Apportionment Act applies only to delictual and not statutory claims, and the Act is of no application as against the third parties or in respect of the claim founded on section 176(2) of the MFMA; and

10.2 Secondly, joint wrongdoers have no entitlement to claim a contribution at common law, with the result that a common law claim is not cognisable as against the third parties.

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[2] I have quoted this extract from the postscript to paragraph 43 of the annexure to the third party notice. There may be some differences in the formulation of this allegation in various places and it may not be that in every instance (or even in the instance to which this allegation specifically relates) the defendant is entitled to a one-sixteenth share. That said, the allegation conveys the gravamen of the defendant's claims against the third parties and it is for that reason I have quoted it. I do not thereby express any views on the pleading *per se*.

11 In the circumstances, the third parties ask that the exception be upheld, that the annexure to the third party notice be struck out, and that the defendant be afforded twenty days within which to file an amended annexure, failing which her claim against the third parties be dismissed with costs.

WHAT THE CLAIM IS AND WHAT IT IS NOT

12 Mr Moultrie, who appeared before me on behalf of the defendant, indicated that the defendant does not rely for her claim against the third parties on any delict committed by them or on the Apportionment Act as entitling the defendant to a contribution from the third parties.

13 The third parties' reliance, in their exception, on the Apportionment Act is therefore of no moment. It is accordingly not necessary for me to consider that Act at all and in this judgment I expressly decline from expressing any views in relation to it.

14 Mr Moultrie has also confirmed that the defendant's claims are not founded on any contractual relationship between her and the third parties.

15 The narrow issue for decision before me is whether or not the third parties are correct in contending that there is no common law right vesting in the defendant to claim from the third parties a contribution in the circumstances as pleaded.

16 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 recover a contribution from the third parties in circumstances where the cause of action is founded on a statutory entitlement under section 176(2) of the MFMA and the third parties are joint wrongdoers together with the defendant in respect of such damages in terms of section 176(2) of the MFMA?[3]

THE LEGISLATIVE PROVISIONS

17 Chapter 7 of the Constitution of the Republic of South Africa, 1996 (*the Constitution*) makes provision for local government as an integral part of South Africa's constitutional democracy. Amongst other things, the Constitution provides for the objects and basic characteristics of local government, but the detailed provisions applicable to and governing the structures of local government are required to be stipulated for in legislation to be enacted.

18 The Systems Act and the MFMA form part of the suite of legislation enacted by the National Assembly that is intended to fulfil the legislative mandate contemplated in Chapter 7 of the Constitution.

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[3] For purposes of deciding the exception the following principles, summarised by Ponnan JA in *Ocean Echo Properties 327 CC v Old Mutual Life Assurance Company (South Africa) Ltd* 2018 (3) SA 405 (SCA), apply:

> [9] Since these are proceedings on exception, Old Mutual has the duty as excipient to persuade the court that upon every interpretation which the plea can reasonably bear, no defence is disclosed. The main purpose of an exception is to avoid the leading of unnecessary evidence. By the nature of exception proceedings the correctness of the facts averred in the plea must be assumed. Because Old Mutual chose the exception procedure — instead of having the matter decided after the hearing of evidence at the trial — it had to show that the plea is (not may be) bad in law.

18.1 The long title of the MFMA provides that it seeks to secure sound and sustainable management of the financial affairs of municipalities and other institutions in the local sphere of government.

18.2 The objects of the MFMA are spelled out in section 2 thereof as follows:

> The object of this Act is to secure sound and sustainable management of the fiscal and financial affairs of municipalities and municipal entities by establishing norms and standards and other requirements for-
>
> (a) ensuring transparency, accountability and appropriate lines of responsibility in the fiscal and financial affairs of municipalities and municipal entities;
>
> (b) the management of their revenues, expenditures, assets and liabilities and the handling of their financial dealings;
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> (c) budgetary and financial planning processes and the co-ordination of those processes with the processes of organs of state in other spheres of government;
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> (d) borrowing;
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> (e) the handling of financial problems in municipalities;
>
> (f) supply chain management; and
>
> (g) other financial matters.

18.3 It is clear from a reading of the Act as a whole that the MFMA promotes accountability as an overarching principle.

19 The MFMA sets out in some detail the responsibilities of municipalities as well as of the officials who are employed by and who are charged with carrying out from day to day

these responsibilities. The net is thrown wide around people who bear these responsibilities under the Act, with the definition of officials in section 1 as follows

> **'official'**, in relation to a municipality or municipal entity, means-
> (a) an employee of a municipality or municipal entity;
> (b) a person seconded to a municipality or municipal entity to work as a member of the staff of the municipality or municipal entity; or
> (c) a person contracted by a municipality or municipal entity to work as a member of the staff of the municipality or municipal entity otherwise than as an employee;

20 Section 176 of the MFMA serves a twofold purpose: it affords these officials immunity from liability for actions in good faith, but it also imposes a liability on them in favour of municipalities for harm caused through negligent or deliberate conduct:

> **Liability of functionaries exercising powers and functions in terms of this Act**
> (1) No municipality or any of its political structures, political office-bearers or officials, no municipal entity or its board of directors or any of its directors or officials, and no other organ of state or person exercising a power or performing a function in terms of this Act, is liable in respect of any loss or damage resulting from the exercise of that power or the performance of that function in good faith.
> (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.

Section 176(2) creates a statutory remedy independent of any common law or other statutory remedy—it is a new statutory remedy that does not limit (or affect or draw upon) any other liability in terms of the common law or other legislation.

21 Lastly, it bears express mention that municipalities are organs of state and are subject to *inter alia* the provisions of the Constitution and the Promotion of Administrative Justice Act, 3 of 2000 (*PAJA*). Municipalities are obliged, in all instances, to observe and give credence to the spirit and purport of the Constitution and to act in a manner that is lawful, reasonable, and procedurally fair.

22 I turn now to consider the arguments before me.

THE PARTIES' COMPETING CONTENTIONS

23 Counsel on behalf of both Parties—Messrs Rood SC and CC Bester for the third parties and Mr Moultrie for the defendant—submitted detailed written argument, which has made my task immeasurably easier and for which I am grateful.

24 The argument put forward on behalf of the third parties is that at common law joint wrongdoers have no entitlement to claim a contribution from any other joint wrongdoers.

24.1 In his argument before me Mr Rood expressly confined his argument to "joint wrongdoers" and did so with reference to the passages from the annexure to the third party notice that refer to the liability of the third parties as arising because they are joint wrongdoers.[4]

24.2 It was submitted on behalf of the third parties that if the pleading had referred instead to "concurrent wrongdoers" then there would be no complaint. The third parties accept that a concurrent wrongdoer is entitled to claim a contribution from his/her fellow concurrent wrongdoers.

24.3 The exception is founded on the proposition that in law a wrongdoer who is sued in full by a plaintiff cannot claim a contribution from any other joint wrongdoers.

25 In the heads of argument filed on behalf of the third parties this contention is based on the following cases:

25.1 *Allen v Allen* 1951 (3) SA 320 (A) was concerned with a divorce action in which the husband claimed forfeiture of benefits. At 327, the passages referred to on behalf of the third parties, the court considered the effect on the marriage and its proprietary rights of malicious desertion. As I read it, there is no general principle stated that wrongdoers are not entitled to claim for a proportionate contribution from joint wrongdoers.

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[4] That is, in accordance with the passage from paragraph 43 of the third party annexure quoted by me at paragraph 9.4 above.

25.2 *Walker v Matterson* 1936 NPD 495 at 501 is authority for the proposition that one joint wrongdoer cannot claim a contribution from another joint wrongdoer where the wrongful delictual act had been perpetrated intentionally.

25.3 *Hughes v Transvaal Associated Hide & Skin Merchants (Pty) Ltd* 1955 (2) SA 176 (T) concerned a claim for damages arising from a motor vehicle accident. The defendant sought to join a third party who was neither a joint tort-feasor or joint wrongdoer. It follows that the case is therefore *obiter* in relation to the proposition on which the third parties seek to rely. Roper J in *Hughes'* case, at 179F, expressly said 'It is not necessary to attempt to decide whether the doctrine prohibiting contribution [by a joint wrongdoer] is part of our law, and if so what the limits of its application are, because in my view the rule, if it exists, does not apply to the present case.' I should add, however, that in its consideration of the principles and cases that informed "the doctrine", the court revealed how the origins of this doctrine lay in the *ex turpi causa* doctrine and appeared to pertain to intentional wrongdoing.

25.4 Lastly, reference was made to paragraph 11 of *Nedcor Bank Ltd t/a Nedbank v Lloyd-Gray Lithographers (Pty) Ltd* 2000 (4) SA 915 (SCA), where the following was said by Scott JA:

> Counsel for the appellant conceded that Nedbank and S were concurrent wrongdoers at common law. The concession was correctly made. However, he

> disputed that they were liable *in solidum*, in other words that the respondent could sue Nedbank for the full amount of its loss. The argument, as I understood it, was that Lee's case was distinguishable on the ground that in the present case the fault of the concurrent wrongdoers took different forms. Accordingly, so it was contended, the one could not claim a contribution from the other and this in turn precluded them from being liable *in solidum*. In my view, the argument is unsound. Joint wrongdoers are undoubtedly jointly and severally liable at common law. This has always been so even when the one paying was not entitled to recover a contribution from another. The absence of a right to a contribution *inter partes* has no effect on their joint and several liability to the plaintiff. In the case of concurrent wrongdoers a right to a contribution has generally been recognised. (See *Hughes v Transvaal Associated Hide and Skin Merchants (Pty) Ltd and Another* (*supra*).) But, even if in a particular case such a right were not to be afforded, that would not affect the nature of their liability to the plaintiff. In any event, it is difficult to appreciate why a concurrent wrongdoer guilty of *culpa* who pays a plaintiff in full should be precluded from having recourse against a concurrent debtor guilty of *dolus*. At common law a defendant guilty of *dolus* could not raise a defence of contributory negligence on the part of the plaintiff (*Pierce v Hau Mon* 1944 AD 175 at 197 - 8) and this rule and the denial of a right of recourse against a joint wrongdoer were probably founded on the principle embodied in maxims such as *ex dolo malo non oritur actio* and *ex turpi causa non oritur actio*. (See Broom's *Legal Maxims* 10th ed at 497 - 8; *Hughes' case supra* at 178F - 179F.) Joint wrongdoers, having committed the delict acting in concert or in furtherance of a common design, would usually have acted wilfully. But, if a concurrent wrongdoer guilty of *culpa* has recourse against another concurrent wrongdoer similarly guilty of *culpa*, it follows *a fortiori* that he would have such right against a concurrent wrongdoer whose fault took the form of *dolus*.

The underlining is mine, because the third parties relied heavily on this passage as authority for the legal proposition they contended for. I return to it later in considering the merits of the arguments.

26 In contradistinction with the position adopted on behalf of the third parties, Mr Moultrie asserts that the common law allows a right of contribution in precisely these circumstances.

27 In particular, the defendant points to the fact that our courts have recognised an implied or common law contribution in respect of claims in a number of cases, including *Shell Auto Care (Pty) Ltd v Laggar* 2005 (1) SA 162 (D), where Tshabalala JP considered an exception brought to a third party notice in similar circumstances to the case before me.

27.1 The plaintiff had pursued as against the defendant a statutory claim arising out of the provisions of the Companies Act, 61 of 1973. The defendant sought to join his fellow directors as third parties and to claim from them a contribution on the basis that they were joint wrongdoers having been equally remiss in their statutory duties to the plaintiff.

27.2 The excipients contended that the claim against them was unsound in law, because the defendant could not seek any contribution from them as joint wrongdoers. The learned Judge President, at 166A – B of the report, summarised the issue before him as follows:

> At the hearing of the exception it was common cause between the parties that the only issue which remained after several amendments to the third party notice and the third party's further exception to the annexure to the first defendant's third party notice, is whether a breach by the third parties, or any one of them, of the provisions of s 226(4) of the Companies Act in the manner alleged in para 10

of the annexure, entitles the first defendant (Laggar) to claim an indemnification from the third parties, as contemplated in Rule 13, or at all.

27.3 Thereafter the Court considered the position, both with reference to English cases as well as decided South African cases and the common law before concluding that our courts recognise that the right to contribution does exist, although there has been no explicit authority to that effect.

27.4 On that basis the exception was dismissed.

28 Unsurprisingly, the heads of argument submitted on behalf of the defendant reference a number of the authorities that were in turn referred to in *Laggar's* case, including the old authorities and English cases. I do not mention of all these in this judgment, because they have already been considered in the judgment of Tshabalala JP.

29 Mr Moultrie has also looked carefully at the judgment of Roper J in *Hughes'* case, in which the learned Judge also traversed a number of the older English and South African cases as well as various old authorities. A number of those cases and authorities find their way into the heads of argument filed on behalf of the defendant.

30 In an impressive act of jurisprudential dedication Mr Moultrie has gone much further still than the Courts did in *Hughes'* and *Laggar's* cases and—with reference to Justinian,[5]

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[5] C 4.65.13, C 8.39.1.1, C 8.40.11 and Novel 99 *pr* and 1 & 2 (Blume Annotated Justinian Code and Novels translation available at www.uwyo.edu/lawlib/blume-justinian/ajc-edition-2/books/) and D 3.5.29 (3), D 16.3.1.43,

Van Leeuwen,[6] Van der Keessel,[7] Grotius,[8] Voet,[9] Van der Linden,[10] and Pothier[11]—has revealed how the common law has more recently followed an approach in terms of which solidary co-debtors are entitled to claim contributions *inter se*, except where to do so would offend against the clean hands doctrine.

31 These principles appear to have carried through into South African law,[12] except in circumstances where the wrongdoer's conduct was turpitudinous or in the case of claims under the *actio iniuriarum*.[13]

32 In the *Kroon* decision referred to in footnote 12 above Wessels J based his decision on the proposition that the right of a surety to recover a contribution is not founded on contract, but is the result of general equity on the ground of equality of burden and benefit (at 385). A similar conclusion was reached in *Samancor*, where the SCA said the following:

D 27.3.1, D 27.3.1.13–15, D 46.1.17, D 46.1.36, and D 46.1.39 (Watson Digest of Justinian University of Pennsylvania, Philadelphia, 1985). D 27.3.1 and 27.3.1.13 point to this contribution arising in respect of co-tutors or co-curators; D 3.5.29 (30) points to it in the context of public officials.

[6] Van Leeuwen Commentaries on Roman Dutch Law (1780) (Kotze's translation, Steven & Haynes, London, 1886) at 4.4.1 pp 36 note (c).

[7] Van der Keessel Voorlesinge oor die Hedendaagse Reg (Van Warmelo's translation, Balkema, Amsterdam, 1966) at 1063 p 75, 1064 p 77.

[8] Grotius The Introduction to Dutch Jurisprudence (Maasdorp's Translation, Juta, Cape Town, 1909) at 3.3.8, fn 13.

[9] Voet Commentary on the Pandects (Gane's translation, Butterworth, Durban, 1955) at 45.2.1, 45.2.7, and 46.1.30.

[10] Van der Linden Institutes of Holland (Koopman's Handboek) (Juta, Cape Town, 1906) at 1.14.10.

[11] Pothier A Treatise on the Law of Obligations (Evans translation, Small, Philadelphia, 1853) at 2.6.7.4.

[12] In the context of sureties (*Kroon v Enschede* 1909 TS 374, *Gerber v Wolson* 1955 (1) SA 158 (A) at 183A, *Nelson v Hodgetts Timbers (East London) (Pty) Ltd* 1973 (3) SA 37 (A) at 44H – 45A); co-insurers (*Samancor Ltd v Mutual & Federal Insurance Co Ltd* 2005 (4) SA 40 (SCA) at [5], where the court followed a number of English cases to the same effect).

[13] Claims under the *actio iniuriarum* are, of course, distinguishable from contractual, *Aquilian*, or for that matter statutory claims in that intention is a necessary requirement of claims under the *actio*, the defendant's *solatium* is not necessarily compensatory, and there remains a punitive element in the approach to defendants.

> [16] . . . Contribution is an equitable remedy and although not based upon any contractual relationship between co-insurers, a court may nevertheless consult the relevant insurance contracts in order to determine what contribution a co-insurer who has paid should in fairness be allowed to recover. I agree with the Judge a quo (at para [11] of his judgment) that precedence provisions and excess-of-loss clauses determine relative contribution rights and do not convert the liability of a co-insurer into a liability that is not equal and co-ordinate with that of another co-insurer.
>
> [17] There is therefore no merit in the contention that there was not double insurance. Westchester fully indemnified the appellant in respect of the loss that it had suffered. The appellant does not contend that Westchester was not obliged to do so. On the appellant's own case, the loss was recoverable from either the respondents or Westchester. It is plain that as co-insurers, the liability of Westchester and the respondents was equal and co-ordinate. In these circumstances, Westchester by its payment in terms of the assets policy discharged, not only its liability to the appellant in terms of that policy, but also the respondents' liability to the appellant in terms of the works policy. Having paid a claim within the respondents' liability range because the respondents refused to do so, and being co-ordinate debtors, Westchester should have brought a claim for contribution and not a subrogated claim.

33 The general principle, the defendant asserts, therefore is that there is an entitlement to claim a contribution except in respect of a wrongdoer who acted with an intent that attracts the opprobrium of the court hearing his claim. In those circumstances, the right to a contribution is barred principally by the application of the maxims *ex dolo malo non oritur actio* or *ex turpi causa non oritur actio*, the application of which acknowledged the equitable nature of the right to claim a contribution.

34 It is for this reason, says the defendant, that there is a right on the part of concurrent wrongdoers to claim a contribution from other wrongdoers. That is, because there can be no turpitude—in the sense of a defendant having acted with knowledge of the unlawfulness of his/her conduct—that taints their right to recover.

35 On the facts of this case Mr Moultrie submits that there is no evidence of any turpitude on behalf of the defendant and therefore the exception falls to be dismissed.

ANALYSIS

36 As I have indicated above, it is for the third parties to persuade me that the exception is well taken on all reasonable interpretations of the third party annexure.

37 Shortly after the commencement of his address before me I asked Mr Rood whether or not there was any authority directly at point. That is, is there any case of which he is aware the *ratio decidendi* of which is that a wrongdoer cannot claim a contribution from a fellow joint wrongdoer.

38 In answer to my query I was referred to the *Hughes* and *Lloyd-Gray Lithographers* judgments and, at my instance, we also debated between us the decision in *Randbond Investments (Pty) Ltd v FPS (Northern Region) (Pty) Ltd* 1992 (2) SA 608 (W). I deal with each of these in turn, starting with *Hughes*.

39 *Hughes v Transvaal Associated Hide & Skin Merchants (Pty) Ltd*

39.1 It should be apparent from the extract that I quoted at paragraph 25.3 above from the *Hughes* decision, that it is not authority for the proposition advanced by the

third parties. The decision is plainly *obiter* on the question of the right, if any, of a joint wrongdoer to claim from a fellow joint wrongdoer.

39.2 That said, even if regard is to be had to the *Hughes* judgment, it is not supportive of the third parties' case. In the first place, the relevant passages are concerned principally with the question of whether or not a joint wrongdoer who is guilty of turpidinous conduct can claim at all, or if s/he is precluded from doing so because of his/her moral turpitude. This is so both in relation to English law and South African law. Secondly, Roper J never finally decided this question, as the quotation at paragraph 25.3 above makes clear: he expressly left the issue open and the rest of the judgment suggests that the reason he did so is precisely because he was unsure of the answer.

39.3 I was urged to consider the passage in the judgment at 178H—which reads 'Whether the doctrine forms part of our law appears to be open to some doubt'—as referring to the right of a joint wrongdoer to recover a contribution being in doubt. But read in context with the judgment as a whole, this is not so because "the doctrine" that Roper J refers to is the English law doctrine that a wrongdoer is prevented from recovering a contribution where his/her claim is morally wrong. It is this restriction on the right of a joint wrongdoer to recover that Roper J doubts applies in South African law, as the following somewhat lengthy extract reveals:

Street *Foundations of Legal Liability*, 1906, vol. 1 ch. 23, p. 490, regards the [English law] doctrine as a necessary consequence of the principle embodied in the maxim *ex turpi causa non oritur actio*, and states that modern decision has limited it to situations where the person who claims contribution must be presumed to have known that he was doing an unlawful act. Cf. *Restatement of the Law, Restitution*, pp. 385 et seq.

Whether the doctrine forms part of our law appears to be open to some doubt. The following authorities are in the affirmative: M. de Villiers Law of Injuries, p. 45; Maasdorp *Institutes*, vol. 4, 6th ed., p. 15; Lee *Introduction*, 5th ed., p. 339; Lee and Honore *S.A. Law of Obligations*, p. 205; *East London Municipality and Another v Ellis*, 1907 E.D.C. 308; *Gray v Poutsma and Others*, 1914 T.P.D. 203 (dictum of GREGOROWSKI, J., at p. 215); *Toerien v Duncan*, 1932 OPD 180 at p. 203; *Walker v Matterson*, 1936 NPD 495 at p. 501

In *Toerien v Duncan* the statement of FISCHER, J., as to the rule against contribution appears to be *obiter dictum*, and it was repeated without discussion by MATTHEWS, A.J.P., in *Walker v Matterson*.

The foundation in the Roman-Dutch authorities for these views appears to be decidedly slender. They all derive from a passage in *Voet*, 9.2.20, in which after discussing the position which arises when an action *de dejectis et effusis* is brought against one of several occupiers of premises, he remarks that a different rule applies if a number of persons have committed a true delict (*si plures vere deliquerint*),

> 'for in that case what one has paid in consequence of the joint delict he cannot recover from the others either in full or in part, but the others must rather also be punished, since there is no partnership or community in respect of a delict'.

It appears to be open to question whether in this passage *Voet* purported to set out the law of Holland, or was merely stating his view of the Roman Law (see Kotze *Aanspreeklikheid van Mededaders en Afsonderlike Daders*, p. 69).

Pothier *Obligations*, para. 282, after stating that in Roman Law a joint wrong-doer who had paid the whole damages could not recover from his fellow wrong-doers by the action *pro socio*, says that in French practice recovery of contribution is allowed by a sort of *actio utilis negotiorium gestorum* on the ground of equity. In a note to his translation of this passage van der Linden states that he shares the view of Pothier as to the equity of this practice; but unfortunately he says nothing to indicate what the practice was in Holland.

> In an article in 43 S.A.L.J., p. 251, the view is expressed that in Roman Dutch Law the rule prohibiting contribution applies as between intentional wrong-doers - those joined *dolo* - but not as between those only joined *culpa*, as in cases of negligence causing damage.
>
> Professor McKerron *Delict*, 4th ed. p. 144, takes the view that the rule prohibiting contribution has fallen away, and that whether the wrong committed is a true delict or a *quasi*-delict, the rule which should be applied to-day is that contribution is recoverable except in the case of intentional wrong-doing.
>
> It is not necessary to attempt to decide whether the doctrine prohibiting contribution is part of our law, and if so what the limits of its application are, because in my view the rule, if it exists, does not apply to the present case.

39.4 *Hughes'* case is therefore not authority for the proposition contended for on behalf of the third parties; indeed, on the contrary, it seems to me to at best be neutral vis-à-vis the third parties' exception, but more likely is authority for the opposite conclusion.

40 *Nedcor Bank Ltd t/a Nedbank v Lloyd-Gray Lithographers (Pty) Ltd*

40.1 *Lloyd-Gray* dealt with concurrent wrongdoers, not joint wrongdoers, and was also a claim arising in delict. Like *Hughes* it is on its face distinguishable from the case before me and any remarks made on the position in relation to joint wrongdoers are *obiter*.

40.2 That said, despite what was argued before me the contents of the case are also not helpful to the third parties. Indeed, as with *Hughes*, the *Lloyd-Gray* decision asserts the very opposite of what the third parties contend for.

40.3 In paragraph 10 of the judgment[14] Scott JA clearly and succinctly sets out the distinction between concurrent and joint wrongdoers and the relevance of that distinction in relation to what a plaintiff may claim from either. These passages do not trench on the question before me and, as the learned judge pointed out, the distinction has by and large become irrelevant in the context of delictual claims, because of the passing of the Apportionment Act. Nonetheless, the passages have some relevance because they place in context the paragraph that follows on which the third parties place reliance.

40.4 There then followed the paragraph I have quoted above at 25.4, where Scott JA records the concessions correctly made by counsel that the antagonists in that case were concurrent wrongdoers. But, there was no concession that a concurrent wrongdoer can be sued *in solidum* and it is this question that Scott JA goes on to consider. In the course of doing so he remarks *obiter* on the right of a wrongdoer

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14 [10] At common law a distinction is drawn between joint wrongdoers and concurrent wrongdoers. (The latter are sometimes referred to as 'several' wrongdoers; see, for example, Glanville Williams *Joint Torts and Contributory Negligence* at 1.) Joint wrongdoers are persons who, acting in concert or in furtherance of a common design, jointly commit a delict. They are jointly and severally liable. Concurrent wrongdoers, on the other hand, are persons whose independent or 'several' delictual acts (or omissions) combine to produce the same damage. (See generally Van der Walt *Delict* para 60; McKerron *The Law of Delict* 7th ed at 107 - 8.) It was accepted by this Court in *Union Government (Minister of Railways) v Lee* 1927 AD 202 that, subject always to there being an intact chain of causation, one concurrent wrongdoer may be sued for the full amount of the plaintiff's loss, ie that concurrent wrongdoers are liable *in solidum*. (See also *Botes v Hartogh* 1946 WLD 157 at 160; *Hughes v Transvaal Associated Hide and Skin Merchants (Pty) Ltd and Another* 1955 (2) SA 176 (T) at 180F - H; *Windrum v Neunborn* 1968 (4) SA 286 (T) at 287H - 288A.) A contrary view, *viz* that each concurrent wrongdoer should be answerable to the plaintiff in proportion to the degree at which the former was at fault, is advanced by Kotzé in his doctoral thesis *Die Aanspreeklikheid van Mededaders en Afsonderlike Daders* (1953) at 124 *et seq*. Such an approach would require a plaintiff to sue each and every concurrent wrongdoer in order to recoup his loss. This strikes me as being likely to cause undue hardship for a plaintiff. The correctness of *Lee's* case was, however, not challenged in argument and despite Kotzé's criticism I am unpersuaded that it was wrongly decided. The distinction between joint and concurrent wrongdoers is, of course, now largely academic in view of the provisions of the Act which recognise and regulate a right of contribution between 'joint wrongdoers' who are so defined as to include both joint and concurrent wrongdoers at common law.

to seek a contribution and these are the three lines that the third parties in this case have seized upon:

> Joint wrongdoers are undoubtedly jointly and severally liable at common law. This has always been so even when the one paying was not entitled to recover a contribution from another. The absence of a right to a contribution *inter partes* has no effect on their joint and several liability to the plaintiff.

40.5 Mr Rood wants me to read and keep reading these three sentences until I come to the conclusion that they mean that a joint wrongdoer cannot recover a contribution from his/her fellow joint wrongdoer. He would like the words "even when" to mean "even though" and for the second sentence to mean "This has always been so ~~even when~~ despite the fact that the one paying was not entitled to recover a contribution from another."

40.6 Any such reading would do an injustice to the carefully chosen words of Scott JA, whose meaning is abundantly clear. The passage that follows the words "even when" stand in contradistinction with the usual position; they are the exception rather than the rule. Rendered differently but retaining the meaning the sentence can be transcribed as "Even in circumstances when the wrongdoer paying was not entitled to recover a contribution from any other wrongdoer, the former is still jointly and severally liable in full to the plaintiff."

40.7 The necessary implication is that, because this is an exception to the general position, joint wrongdoers are ordinarily entitled to recover a contribution from their fellow joint wrongdoers.

40.8 Even if I err and take the implication too far, by no stretch of the imagination can these passages be construed as meaning that a joint wrongdoer can never recover from a fellow joint wrongdoer, which is what I am asked to interpret it to mean.

40.9 In the circumstances, *Lloyd-Gray* does not assist the third parties.

41 *Randbond Investments (Pty) Ltd v FPS (Northern Region) (Pty) Ltd*

41.1 In *Randbond* Mahomed J, as he then was, considered whether or not there was anything in section 2 of the Apportionment Act that limited the contribution a joint wrongdoer may claim from another wrongdoer to delictual acts performed negligently but not intentionally. Finding that there was no such limitation, the court rejected an objection from third parties to their joinder to the action.

41.2 At 619I – 620B, the Court said the following:

> The first ground for this submission was that the statute had to be read in the light of the common law and that at common law one joint wrongdoer could not make a claim for a contribution from another joint wrongdoer if the wrongful delictual act concerned was an intentional act of wrongdoing. There is undoubtedly considerable authority which supports the view that one joint

> wrongdoer cannot claim a contribution from another joint wrongdoer where the wrongful delictual act had been perpetrated intentionally. (McKerron *Law of Delict in South Africa* 1st ed at 73; I van Zyl Steyn 'Contribution Between Joint Tortfeasors' 1926 (43) *SALJ* 251 at 254, 256 and 267; *Digest* 27.3.1 para 13; *Voet* 9.2.12; *Digest* 27.8.7; M de Villiers *The Roman-Dutch Law of Injuries* at 45; *Walker v Matterson* 1936 NPD 495 at 501; *Toerien v Duncan* 1932 OPD 180 at 203.)
>
> Whatever the position may be at common law, it seems clear that the Apportionment of Damages Act was intended to constitute a major departure from certain basic common law rules.

41.3 Once again, the thrust of the passage lies in the words that recovery of a contribution was not permitted if the wrongful act was intentional. The necessary implication of the passage is that recovery by joint wrongdoers was otherwise permissible. There is no other way of reading these *dicta* either, but again they are plainly *obiter*.

41.4 Whichever way it is to be understood, the quoted passages do not stand in favour of the third parties' exception.

42 In the circumstances, there has been no authority put before me in support of the third parties' contention 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. Indeed, on the contrary, the cases I have been referred to on behalf of the third parties point to the opposite conclusion.

43 I inquired after any other authorities and there are none. Mr Moultrie stridently asserted that the third parties could not adduce any such case because there is no such case. He was not contradicted in reply.

44 What I am left with then are the old authorities to which I have been referred by Mr Moultrie, some of which are referenced in *Laggar* and *Hughes*. These point towards later Roman-Dutch Law as having recognised a right of contribution between joint wrongdoers, except in certain circumstances. In some instances this right of contribution appears to have been present even in Roman Law. Hence, the common law supports the claim advanced by the defendant against the third parties.

45 The most significant qualification to this is that there could be no claim for a contribution by a wrongdoer as against his fellow wrongdoers where there was deliberate malfeasance. This seems to be due in the main to the application of one or the other of the *ex dolo malo* or *ex turpi causa* maxims. Whether such an exception applies on the facts of this case is, however, not a question before me and I expressly refrain from expressing any views on it.

46 The decisions of *Kroon* and *Samancor* are further common law authority for the proposition that the right in law to claim a contribution resides generally in equity. In so finding, these decisions followed the English law, which is to the same effect. There doesn't appear to be any reason why a joint wrongdoer 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.

47 *Laggar* 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. Whilst 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.

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

49 I am of the view that permitting a defendant to claim a contribution from joint wrongdoers rather than allowing those joint wrongdoers to be shielded from a claim would better serve those objects and purposes of the MFMA that I have identified above.[15]

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[15] I am not thereby casting any aspersions on these third parties; I express no views in relation to their conduct or whether or not a claim should be pursued against them or what the prospects of success are of any such claim. I approach the issue from a purely conceptual perspective.

50 Furthermore, if a municipality were to be allowed to single out one individual for prosecution under section 176(2) of the MFMA to the exclusion thereafter of all others who may have been involved, this might not only be reviewable under PAJA and offensive to that municipalities Constitutional obligations, but could also lead to an improper preferring of some and a disproportionate punishment of other officials. Either way, if a defendant has no right of recourse against other officials then there may arise a multiplicity of actions, including review proceedings that are surely not desirable. Recognising the right to claim a contribution cuts through a whole host of these potential problems; restricting that right can only lead municipalities down a road to litigation perdition.

51 Having regard to the fact that municipalities are organs of state and that the origins of the MFMA lie in the Constitution, there also does not seem to be any good reason why they should be allowed to choose a single official, with the result that other officials can escape scot-free as a consequence. This does not seem to me to serve the interests of an open and transparent democracy based on the constitutional principles of equality, dignity, and freedom.

52 In other words, having regard to the provisions of the MFMA, its purpose and its statutory context I can find no good reasons that militate in favour of the curtailment of a common law right of contribution.

53 There therefore would not be any good reason to displace what I understand to be the common law position, which is that in circumstances such as these a defendant can look to a contribution from his/her joint wrongdoers in respect of any claim advanced by a plaintiff.

CONCLUSION

54 It follows from what I have said above that the third parties have failed to put any authority before me in support of the proposition that in cases such as these our law precludes the defendant, as one joint wrongdoer, from claiming a contribution from the third parties as other joint wrongdoers.

55 Indeed, as should be apparent from what I have set out above, I am of the view that the common law and the preponderance of authority stands for the opposite conclusion and that the defendant is in law entitled to claim precisely such a contribution.

56 Either way, the exception must fail.

57 Accordingly, I make the following order:

1. The exception is dismissed;

2. The third parties are to file such pleadings as they may consider appropriate as provided for in Rule 13(6) of the Uniform Rules of Court;

3. Those of the third parties who were party to the exception—being all but the fourth, fifth, seventh, and sixteenth third parties—are ordered to pay the defendant's costs arising therefrom.

Signed at Johannesburg on this the 16TH day of May 2019

BE LEECH AJ
ACTING JUDGE OF THE HIGH COURT,
JOHANNESBURG

APPEARANCES

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DATE OF JUDGMENT	:	17TH MAY 2019 2019
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