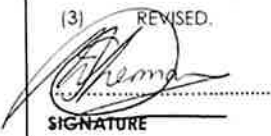


REPUBLIC OF SOUTH AFRICA



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

Case No: 1120/2019

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
 SIGNATURE	30/09/2020 DATE

In the matter between:

SASFIN BANK LIMITED

Plaintiff

(Registration number: 1951/002280/06)

and

ROBERT JAMES AMOILS

First Defendant

DAVID GOODMAN

Second Defendant

NIEL ALUN JONES

Third Defendant

HOWARD FREDERICK LAZARUS

Fourth Defendant

DANIEL NATHAN REICHENBERG

Fifth Defendant

ALLAN BRUCE RUBENSTEIN

Sixth Defendant

GERALD BETRAND RUBENSTEIN

Seventh Defendant

ALAN BERNARD WIT

Eighth Defendant

CORNELIUS BAREND WRIGHT

Ninth Defendant

and

DIONNE HIRSCHOWITZ (born Ellerine)

Third Party

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 10h00 on 30 September 2020.

JUDGMENT

INGRID OPPERMAN J

Introduction

[1] Ms D Hirschowitz (*'the third party'*) has delivered an exception to the defendants' third party notice on the grounds that the annexure fails to disclose a cause of action for an indemnification or contribution by the third party.

[2] The defendants are sued by the plaintiff on the basis that the defendants, as directors of a company, Stuttafords International Fashion Company (Pty) Ltd (*'SIFCO'*) contravened provisions of the Companies Act, 2008 (*'the Act'*) and that by virtue of the provisions of the Act, are liable to compensate the plaintiff for damages allegedly suffered by it consequent upon those breaches.

[3] The defendants deny the plaintiff's allegations and have defended the action. The defendants have, however, delivered a third party notice and annexure (collectively *'the third party notice'*) to the third party who is alleged to have, at all material times, been a co-director, together with the defendants, of SIFCO. The defendants contend that in the event that the plaintiff is successful in its claim against the defendants, then in such event the third party ought to bear a portion of such liability.

[4] The third party raises a number of grounds to her exception¹, all resulting in her contending that the third party notice does not disclose a cause of action as against her, but in the main contends that the third party claim is incompetent in that the plaintiff's claim is a statutory one (i.e. based on the Act) and that the third party does not therefore qualify as a joint wrongdoer for the purposes of a contribution or indemnification.

The nature of the plaintiff's claim against the defendants

[5] The plaintiff, as a cessionary of Brand Capital Retail Management (Pty) Ltd (*'Brand Capital'*) an entity that supplied goods to SIFCO now in business rescue, alleges in its particulars of claim as against the defendants that at all material times each of the defendants was a director of SIFCO which conducted business as a high-end retailer of branded fashion, apparel, footwear, accessories and cosmetics, and together constituted its board.

[6] As from no later than end May 2016, SIFCO's financial position was such that it would be unable to make payment in respect of the summer 2016 stock,² the subject-matter of the claim ceded to the plaintiff; SIFCO was "*financially distressed*" in the sense referred to in the definition of that term in section 128(1)(f)(i) of the Act; and that business rescue proceedings, as opposed to liquidation proceedings, would provide a better return to creditors of SIFCO. Under such circumstances, the defendants, on behalf of SIFCO were obliged to deliver a written notice as provided for in section 129(7) of the Act, failing which they were obliged to adopt a resolution

¹ The exception initially taken was amended after delivery of the defendants' heads of argument whereafter two further sets of heads of argument were filed – all by agreement between the parties and which this court accepted.

² A reference to stock purchased by SIFCO from Brand Capital.

to place SIFCO under voluntary business rescue pursuant to section 129(1) of the Act, or ensure that SIFCO was placed into liquidation.

[7] SIFCO did not deliver any notice as provided for in section 129(7) of the Act. In the circumstances pleaded, each of the defendants were knowing³ parties to conduct that had the following elements: the defendants as directors of SIFCO would not comply with section 129(7) of the Act or adopt a resolution to place SIFCO into voluntary business rescue by at latest May 2016; SIFCO would instead continue to trade while financially distressed in the hope that it would be able to trade out of its financial distress to the point that it was not so distressed; Brand Capital (and other creditors of SIFCO, the identity of which is not presently known) would be approached to procure a deferment of SIFCO's payment obligations so as to ensure that sufficient stock would be delivered for the aforementioned purpose.

[8] SIFCO, represented by the defendants: withheld facts, expressly or impliedly, represented to Brand Capital that payment would be made, albeit late. SIFCO accepted delivery of the summer 2016 stock over the period 11 July 2016 to 23 September 2016. On 28 October 2016 the directors of SIFCO (comprising the defendants) resolved to place SIFCO under business rescue on the basis that SIFCO was financially distressed. By that date (i.e. 28 October 2016) SIFCO had not paid Brand Capital for any of the Summer 2016 stock, which stock (save for that due for delivery in November 2016) was on-sold by SIFCO on dates unknown to Brand Capital and the plaintiff.

[9] The conduct of SIFCO's business in this manner was in contravention of section 22(1) of the Act; and/or was in contravention of section 129(7) or 129(1) of the Act.

³ Whether negligence suffices for purposes of establishing liability is considered under the discussion of the 2nd ground of the exception.

[10] In order for the defendants to have conducted the business of SIFCO lawfully (i.e. not in contravention of the Act) they were obliged, by no later than end May 2016, either to have delivered notice to, *inter alia*, all creditors (including Brand capital) as contemplated by section 129(7) of the Act or to have placed SIFCO into business rescue or liquidation.

[11] Had SIFCO delivered the section 129(7) notice alternatively had SIFCO been placed in business rescue pursuant to a resolution of the defendants, Brand Capital would either not have delivered the summer 2016 stock alternatively would have been paid in full for such summer 2016 stock under the business rescue plan, further alternatively had SIFCO been placed in liquidation the liquidators would have acquired the stock and made payment to Brand Capital under an accepted executory contract.

[12] By virtue of the conduct of SIFCO's business by the defendants, Brand Capital suffered a loss, which forms the subject-matter of its claim in this action. The plaintiff relies upon a contravention of section 22(1) alternatively section 129(7) and 129(1), read with section 218(2) of the Act.

The third party notice

[13] The plaintiff's claim has identified the defendants as having been the directors of SIFCO at the relevant times. The third party is alleged by the defendants to have also been a director of SIFCO at all material times.

[14] For reasons best known to the plaintiff the third party was not joined and cited as a defendant in the action. On the pleaded averments there is no distinction to be drawn between the defendants and the third party in relation to their role as directors of SIFCO at the relevant times.

[15] The third party notice alleges:

"7. In the event however of the plaintiff establishing its claim against the defendants on the grounds pleaded by the plaintiff, then in such event the defendants aver:

7.1 at all material times to the plaintiff's alleged cause of action the third party was a co-director together with the defendants of Stuttards International Fashion Company (Pty) Ltd ("SIFCO"), the third party having resigned as a director of SIFCO on or about 27 September 2016;

7.2 the plaintiff's allegations of misconduct on the part of the defendants apply equally to the third party up until 27 September 2016;

7.3 the third party was in such circumstances a joint wrongdoer together with the defendants in respect of the conduct forming the subject-matter of the plaintiff's claim (i.e. in the event that such conduct is established);

7.4 in such circumstances the third party is liable for such portion of the amount for which this Honourable Court adjudges the defendants liable to the plaintiff as this Court may direct.

8. In the circumstances and in the event and to the extent that the plaintiff is successful in its claim in the action then in such event the defendants seek an order **directing** that the third party pay such portion of the amount for which the defendants are adjudged liable as this Honourable Court may direct together with such costs as the third party may be directed to pay." (emphasis added)

Ground 1

[16] The defendants aver that the plaintiff's allegations of misconduct on the part of the defendants apply equally to the third party up until the date of her resignation on 27 September 2016 and that in the circumstances the third party was a joint

wrongdoer together with the defendants in respect of the conduct forming the subject-matter of the plaintiffs claim.

[17] The third party contends that the plaintiff's claim against the defendants is not delictual in nature and that the defendants are accordingly not entitled to claim a contribution from the third party as a joint wrongdoer in the event that they are adjudged to be liable, as the common law only recognised joint wrongdoers in delict. Mr Levenburg, representing the third party, also argued that section 218(2) of the Act is silent in respect of joint wrongdoers' right of contribution *inter se*. If the legislature had intended to create a right of contribution, so the argument ran, it would have done so expressly. It did not and accordingly no basis arising out of the alleged statutory liability exists for the relief claimed against the third party.

[18] Mr Levenberg argued that the common law only ever entitled joint wrongdoers to claim a contribution in delictual claims, suretyships and in insurance law. He submitted that the rights of so-sureties and so-insurers who claim a contribution are incidences of suretyship and insurance law that are unique to those contractual arrangements. He contends that there is no authority in our law for extending that bundle of rights and obligations into the area of joint statutory liability.

[19] There are two judgments which support the defendants' position being the *Shell*⁴ and *Pickitup*⁵ cases.

[20] Although I am not entirely persuaded by the reasoning⁶ in the *Shell* case, I am not persuaded that the finding was wrong. In that case a third party notice had been issued claiming a contribution or indemnification by fellow directors based on claims

⁴ *Shell Auto Care (Pty) Ltd v Laggar*, 2005 (1) SA 162 (D&CLD) p168I-J

⁵ *Pickitup Johannesburg SOC Ltd v Nair (Maharaj) and Others, Third Party/Excipients*. 2019 (5) SA 540 (GJ).

⁶ At p168 – 169 the learned JP follows the guidance of the English Courts – who have a specific Act dealing with joint wrongdoers which Act South Africa does not have. I find it unnecessary for current purposes to embark on a complete analyses of the case.

against one of the directors in respect of section 226(1) and (4) of the Companies Act 61 of 1973 (*'the Old Act'*). The court concluded that a right to claim a contribution exists in the context of a statutory claim.

[21] In the *Pickitup* case, Leech AJ in a detailed analysis of the relevant authorities concluded that at common law, joint wrongdoers were ordinarily entitled to recover a contribution from their fellow joint wrongdoers.⁷

[22] The *ratio* of the judgment⁸ is that the right of contribution is an equitable remedy and it is precisely because it is an equitable remedy that the entitlement to a contribution can be lost when the wrongdoer claiming such contribution acted with an intent that attracts the '*opprobrium of the court hearing the claim*'.⁹

[23] In *Weinerlien v Goch Buildings Ltd*¹⁰, Kotze JA held:

"Now it is quite true that this Court is a Court of Equity only insofar as it is consistent with the principles of Roman-Dutch law.' This qualification is of importance, for equity cannot and does not override a clear provision of our law. Our common law, based to a great extent on the civil law, contains many an equitable principle; but equity as distinct from and opposed to the law, does not prevail with us. Equitable principles are only a force insofar as they have become authoritatively incorporated and recognised as rules of positive law."

[24] I conclude that I am bound by the *Pickitup* case and that the common law position is that joint wrongdoers were ordinarily entitled to recover a contribution from their fellow joint wrongdoers unless there was deliberate malfeasance.

[25] It becomes unnecessary to interpret section 218(2) of the Act to explore whether it permits of a right of contribution as between joint wrongdoers as a statute

⁷ At paras [58], [59], [67], [68], [78] and [79].

⁸ At para [42]

⁹ At para [43]

¹⁰ 1925 AD 282, 295.

should be construed in conformity with the common law and I have found that Leech AJ correctly found the common law.

[26] Further, section 218(3) expressly provides that:

‘The provisions of this section do not affect the right to any remedy that a person may otherwise have.’

[27] It thus appears that the common law position, as found by Leech AJ in *Pickitup*, has been expressly preserved.

[28] If the third party could be held liable separately by the plaintiff, there appears to be no reason in logic why the defendants should not be entitled to join her as a third party to these proceedings.

[29] I am not persuaded that *Pickitup* is clearly wrong and unless I do, am bound thereby. As Mr Levenberg correctly pointed out, there is authority for the proposition that complex questions of law raised at exception stage, should perhaps be left for consideration at trial, after all the evidence is led and all has been considered.

[30] This ground of exception is accordingly dismissed.

Ground 2

[31] In paragraph 8 of the third party notice, the defendants claim payment of “*such a portion of the amount for which the defendants are adjudged liable as this Honourable Court may direct*”. In short, the defendants claim a direct payment from the third party of such amount as may be determined by the Court.

[32] Insofar as the defendants claim payment of an amount from the third party the third party contends, the defendants’ claim is premature. It was also argued that it is not permissible to claim a monetary amount under Rule 13.¹¹

¹¹ *Hart v Santam Insurance Co Ltd* 1975 (4) SA 275 (E) 277C-278C.

[33] During argument, Mr Subel representing the defendants, conceded that the defendants were not entitled to a money judgment against the third party in the event that the plaintiff is successful in its claim in the action despite having confirmed that interpretation of the third party notice in his supplementary heads of argument¹². The word '*directing*' in paragraph 8 of the third party notice is thus, and as conceded by Mr Subel, to be read as '*declaring*'.

[34] Mr Levenberg also argued that even if the defendants would eventually be entitled to claim a contribution from the third party, the defendants would not be entitled to a contribution until such time as the defendants have paid the full amount of any judgment granted against them and in favour of the plaintiff. Until the defendants have made payment to the plaintiff of the full amount that they are required to pay to the plaintiff, they have no claim for a contribution.

[35] Although the plaintiff has chosen from whom it is claiming, I can see no bar to the court declaring the third party's share at the conclusion of the trial. I do not read rule 13 as holding a bar to a declaratory order at the end of the trial to that effect.

[36] This ground too, accordingly, falls to be dismissed.

Ground 3

[37] The third party contends that an analysis of the plaintiff's claim¹³ reveals that the plaintiff's claim is founded on an alleged intentional false representation by the defendants that SIFCO could "*meet all its debts as and when they fell due*". Intentional joint wrongdoers, so the argument goes, have no right of recourse against each other outside of the Apportionment of Damages Act 34 of 1956 (*the*

¹² Paragraph 17

¹³ Paragraphs 22 - 26, 30 and 38 - 40

Apportionment of Damages Act'). But the Apportionment of Damages Act does not apply here because the plaintiff's claim is a statutory claim and not a delictual claim.

[38] Section 22(1) of the Act provides that:

'A company must not carry on its business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose.'

[39] The third party contends that recklessness and gross negligence are the same.¹⁴ Accordingly, so the argument continues, even if there is some sort of general principle that allows simultaneous statutory infringers to recover contributions from one another, this is not such a case as the law has never recognised the right of wrongdoers of this sort to claim contributions from one another.

[40] What this argument overlooks is that the particulars of claim must be found to be excipiable on any interpretation the document can reasonably bear¹⁵.

[41] If the particulars of claim thus as a whole make out a case for liability arising by virtue of the fact that the directors did not act reasonably, ie a case founded on negligence, this ground of exception should not be upheld.

[42] Section 22(1) of the Act clearly and expressly creates liability for intentional conduct. However, section 129(7) of the Act appears to create liability based potentially on negligence (or perhaps even strict liability). It provides:

'If the board of a company has reasonable grounds to believe that the company is financially distressed, but the board had not adopted a resolution the board must deliver a written notice to each affected person, setting out the criteria

¹⁴ *Philotex (Pty) Ltd and Others v Snyman and Others* 1998 (2) SA 138 (SCA) 143F-H

¹⁵ *Frank v Premier Hangers CC* 2008 (3) SA 594 (C) at para [11]

referred to in section 128(1)(f)¹⁶ that are applicable to the company, and its reasons for not adopting a resolution contemplated in this section.'

[43] This is what the requirements are for liability under the section, will have to be decided in the fullness of time.

[44] For the moment and for purposes of this ground of exception only, and accepting (without deciding) that intentional joint wrongdoers have no right of recourse against each other outside of the Apportionment of Damages Act, I conclude that the particulars of claim as a whole, lends itself to a finding of liability based on negligence which finding is dispositive of this ground of exception.

Ground 4

[45] The defendants' claim to a contribution from the third party is based upon equity. As the defendants seek to invoke an equitable right against the third party, Mr Levenberg argues that the defendants have to make allegations which would justify the invocation of such an equitable right against the third party. The third party notice and annexure contain cursory allegations, he says, none of which support the claim of the defendants to an equitable contribution. He contends that there are no allegations that provide criteria that the Court should use in order to determine the amount of any contribution, nor are there any criteria for determining in what proportions the alleged apportionment should be made. The third party is entitled to know what these criteria are when it pleads. By alleging that the third party was a party to the same wrongdoing as the defendants, the defendants are effectively accusing the third party (albeit in the alternative) of being a party to fraud. Allegations

¹⁶ Information concerning the company's state of financial distress.

of fraud, so the argument goes, must be made in the clearest possible terms.¹⁷ The defendants ought to be required to provide detail in the third party notice of the third party's knowledge and conduct that would allegedly make her a co-statutory infringer. These allegations would include stating precisely what the extent of the third party's knowledge was and when she acquired such knowledge and from whom she acquired it. Without the defendants pleading these facts, the third party cannot properly address them in a plea. Similarly, the failure to allege these facts would make it difficult for the third party to request further particulars for trial to clarify the defendants' case. The defendants should be compelled to plead factual allegations that, if true, would support a claim that the third party acted wrongfully and in breach of the statute. This then the extent of the complaint.

[46] It should be remembered that this matter was certified to be a Commercial Court matter as contemplated in terms of Commercial Court Practice Directive dated 3 October 2018. By agreement between the parties this court agreed to a deviation from the Commercial Court rules by permitting this exception to be heard, for which there is no provision in the Commercial Court rules, as the court understood the exception to be potentially dispositive of the inclusion of the third party in these proceedings.

[47] The third party is now to be a part of these proceedings and thus subject to the Commercial Court rules. The next step in the procedure, subject to submissions relating to the requirements of this particular case, will be the steps set out in paragraphs [3] to [5] of Chapter 4. The first time the third party will be required to do anything, other than file a notice of opposition, will be once the plaintiff and the defendants have provided summaries of the evidence they intend relying on, as well

¹⁷ *Lazarus v Kemp* (1915) 36 NLR 504, *Beck's Theory and Principles of Pleading in Civil Actions*: 6th Ed: p300.

as the essential documents they intend relying on. At that stage, insofar as there might not be sufficient particularly at this juncture (which I do not find), there will be more than sufficient information for the third party to plead to. Indeed, the entire case of the plaintiffs and the defendants would have been laid bare. I accordingly find too, that this ground should not be upheld.


Costs

[48] If the third party's only ground of exception had been the fact that a defendant is not entitled to a money judgment as against a third party, which was expressly sought and confirmed in Mr Subel's heads of argument, I might have been inclined to order costs against the defendants as the concession in this regard was made at the 11th hour. The reliance on this relief was however disavowed during argument. The third party persisted with the main argument, which took up the bulk of the court time and in which the defendants were successful. I accordingly, and by virtue of the fact that the defendants have been substantially successful, see no reason why the costs should not follow the result.

Order

[49] I accordingly grant the following order:

The third party's amended exception is dismissed with costs including the costs of senior counsel where so employed.


T OPPERMAN
Judge of the High Court
Gauteng Local Division, Johannesburg

Counsel for the excipient/third party: Adv PN Levenberg SC

Instructed by: Bowman Gilfillan Inc

Counsel for the respondents/defendants: Adv A Subel SC

Instructed by: Clyde & Co

Counsel for the plaintiff: No appearance

Date of hearing: 2 July 2020

Date of Judgment: 30 September 2020