



**IN THE HIGH COURT OF SOUTH AFRICA,  
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

**Case No:3963/2021**

In the matter between:

**HIGHPOINT MANUFACTURING (PTY) LIMITED**

Applicant

and

**EMERSON ASSETS HOLDINGS (PTY) LTD**

1<sup>st</sup> Respondent

**ERMELO TRUCK AND TRACTOR CENTRE (PTY) LTD**

2<sup>nd</sup> Respondent

**UD TRUCKS SOUTH AFRICA (PTY) LTD**

3<sup>rd</sup> Respondent

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**HEARD ON:** 17 NOVEMBER 2022

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**JUDGMENT BY:** MHLAMBI, J

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**DELIVERED ON:** This judgment was handed down electronically by circulation to the parties' legal representatives by email and released to SAFLI. The date and time for the hand-down are deemed to be 8h30 on 6 February 2023.

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**Introduction**

[1] The applicant seeks leave of the court to serve and file a third-party notice on the third respondent in terms of Uniform Rule 13(3)(b) which provides that after

the close of pleadings, a third party may only be served with the leave of the court. The third respondent is the only party that opposes the application.

[2] The claim against the third respondent (who is also the second third party) stems from the plaintiff's (the first respondent in this application) action against the applicant (the defendant in the main action) for damages arising from the sale of a truck, a new white ED Trucks E26 CWE 6x4 Rigid F/C Quester with external throttle control model E26001 425, engine number GH11447871 and chassis number (VIN) JPCZM30D2JS806492 fitted by the third respondent with an HPVR-1000 10 000 litre combination jetting and vacuum body.

[3] The thrust of the annexure to the third party notice reads as follows:

*"If it is held that:*

- (a) The chassis and/or cab was not manufactured with reasonable skill and care; alternatively*
- (b) Was not fit for the purpose it was designed and manufactured for; and/or*
- (c) That the gearbox or any other part of the chassis and cab provided by the First Third Party, as negotiated and agreed with the plaintiff, received by the Defendant for the manufacturing and fitment of the HPVR-1000 10 000 liter combination jetting and vacuum body on the specific instance and request of the Plaintiff, is and/or was defective, then the Defendant:*
  - (i) Received a defective chassis and cab from the First Third Party; and/or alternatively*
  - (ii) That the Second Third Party warranted against defectiveness of the chassis and cab supplied and is thus liable for the damages and repairs.*
  - (iii) Having regard to the terms of and indemnity as detailed in the warranty against defectiveness by the Second Third Party on supply of a new chassis and cab, and if the Defendant is held liable to the Plaintiff in terms of the plaintiff's claim as set out in the particulars of claim attached hereto, then the Defendant is entitled to and prays for an order against the Second Third Party in the following terms:*
    - (a) A full indemnity of any amount (including interest) for which the Defendant is held liable to the Plaintiff, in accordance with the Plaintiff's claim against the defendant;*
    - (b) Cost of suit, including the cost of the Defendant in defending the action against the Plaintiff."*

- [4] The essence of the third respondent's opposition is based on the following:
- 4.1 the application is an indulgence that is sought belatedly from this court, with no good cause or reasonable explanation for the extensive delay in bringing the application.
  - 4.2 It is without merit, since the alleged claim against UD Trucks has prescribed and the joinder of UD Trucks to the main action would therefore be a futile exercise in causing further delay and distraction in the main action, in addition to being a waste of this court's resources.
  - 4.3 It is without merit and appears to be predicated on an alleged warranty that does not find application in the present instance.
  - 4.4 It is an attempt to join UD Trucks on the basis of a third-party notice that is excipiable when the test as set out by case law precedent is applied to the third-party notice.
  - 4.5 It does not make out a *prima facie* case against UD Trucks.

### Background

- [5] On 2 August 2018, the second respondent delivered a truck to the applicant who effected an alteration to the truck by modifying and fitting it with a 10 000 litre combination jetting and vacuum body. The alteration was fitted to the cab and chassis of the truck. The third respondent manufactured the cab and chassis of the truck. The applicant delivered the modified truck to the first respondent on 27 May 2019.
- [6] At the instance of the first respondent, a letter of demand was dispatched to the third respondent, stating that the truck's gearbox was materially defective and legal remedies would be pursued against the third respondent in relation to the truck.<sup>1</sup> The third respondent was required to replace the truck of the same model with a different gearbox, in good working order and condition which was

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<sup>1</sup> Page 187 of the indexed papers.

subject to a minimum two-year warranty by 26 March 2021.<sup>2</sup> It was stated in this letter that a letter of demand was also dispatched to the applicant.<sup>3</sup>

- [7] The third respondent replied to the first respondent's letter of demand on 1 April 2021 and indicated that it had investigated the history and nature of the repairs to the truck and the parts to be replaced and had found that the damage caused had been as a result of driver conduct. The first two repairs were warrantable due to a factory fault. However, the subsequent five failures of the truck's gearbox or any other component were not materially defective or defective in any manner that would necessitate continuous further repairs.<sup>4</sup>
- [8] The first respondent issued a summons against the applicant on 27 August 2021, alleging amongst others, that the truck was not manufactured with reasonable skill and care, alternatively, had a defective gearbox on delivery to the applicant, subsequently to the Standard Bank<sup>5</sup> and the first respondent.<sup>6</sup> The applicant filed its Plea in the action together with a third party notice against the second respondent. The applicant pleaded that it did not manufacture the cab and chassis, which included the engine and gearbox, nor was it the underwriter of the manufacturer's warranty as accepted by the first respondent.<sup>7</sup> The cab and chassis, including the engine and gearbox, were supplied as a new vehicle subject to the manufacturer's warranty by the second respondent as per the respective agreements between the first respondent and the second respondent and the first respondent and the applicant as pleaded.<sup>8</sup>
- [9] Pleadings closed on 23 December 2021.<sup>9</sup> The first respondent filed its discovery affidavit on 25 February 2022. The applicant's attorneys inspected the discovered documents on 28 March 2022.<sup>10</sup> In both written and oral arguments, the applicant submitted that the application should succeed as the claim against the third respondent had not prescribed as:

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<sup>2</sup> Page 188 of the indexed papers.

<sup>3</sup> Page 190 of the indexed papers.

<sup>4</sup> Page 184 of the indexed papers.

<sup>5</sup> The financier.

<sup>6</sup> Paragraph 6 of the Particulars of Claim.

<sup>7</sup> Paragraph 4.2 of the defendant's Plea.

<sup>8</sup> Paragraph 4.3 of the defendant's Plea.

<sup>9</sup> Paragraph 6.6 of the Founding Affidavit.

<sup>10</sup> Paragraph 6.7 of the Founding Affidavit.

- 9.1 A claim for indemnification, as sought by the applicant in terms of Rule 13, does not constitute a debt for the purposes of the Prescription Act;
- 9.2 The third respondent wilfully prevented the applicant from coming to know of the existence of the admitted factory faults to the cab and chassis of the truck, specifically in relation to the gearbox;
- 9.3 The applicant only became aware of and obtained knowledge of the admitted factory fault on 28 March 2022, which gave rise to the first respondent's claim against the applicant.
- 9.4 The third respondent had attended to at least two of the "warrantable" remedial repairs and five repairs under the warranty. The third respondent relied on the terms of the warranty to exclude further repairs.<sup>11</sup>

### The Legal position

[10] Rule 13 (1) and (2) of the Uniform Rules of Court (which regulates the third-party party procedure) provide as follows:

*"(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 a contribution or indemnification 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 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, and any relief or remedy claimed. 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.*

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<sup>11</sup> The applicant's Heads of Argument.

[11] The test to be applied in applications of this nature was stated as follows in *Wapnick and Another v Durban City Garage and Others*<sup>12</sup>:

*“It seems to me that an application for leave to give a third party notice is also one of the same genus. Although good cause is not in terms required to be shown the Court would obviously not grant leave if it should appear that the applicant's claim is patently unfounded. Whilst I am not prepared to say that it is a sine qua non to the success of the application that the applicant should make out a prima facie case on the merits, I do believe it correct to state that it is in general required of such an applicant to furnish a satisfactory explanation for his failure to give the notice before close of pleadings and to make out a prima facie case against the person he seeks to sue by alleging facts which, if established at the trial, would entitle him to succeed.”*

[12] In *Mercantile Bank LTD v Carlisle and Another*,<sup>13</sup> the court's approach was that, it should be a sine qua non to the success of such an application that the applicant should make out a prima facie case on the merits, in the sense of alleging facts, which if established at the trial, would entitle it to succeed. If no prima facie case is made out in the claim as set out in the notice and annexure, it would be excipiable in that it would not disclose a cause of action and inconceivable that a court would permit the third party joinder. It was stated further that:

*“The prima facie case, or absence of excipiability, must of course be weighed in the light of the totality of the available facts. The applicant may, for instance, present a technically correct pleading, whereas the common cause facts as they emerge from the affidavits may make it clear that the case against the third party, if pleaded according to those facts, could never succeed. To that extent, the prima facie case, or absence of excipiability, must be qualified by having regard to the totality of the facts. In this exercise, it must be borne in mind that the purpose of the Rule is to prevent a multiplicity of actions (*MCC Contracts (Pty) Ltd v Coertzen and Others 1998 (4) SA 1046 (SCA) at 1049J - 1050A*), the Court is given a wide discretion (*Wapnick v Durban City Garage (supra at 423E)*), and a lenient approach is called for. Accordingly, if on the totality of the facts, the case against the third party is totally unfounded, the joinder would be refused. It must be a clear case, for it is the function of the trial Court to decide disputes, and joinders should in my view not be refused save in the clearest of cases.”*

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<sup>12</sup> 1984 (2) SA 414 (D) at 424 B-C.

<sup>13</sup> 2002 (4) SA 886 (W)

[13] In *Padongelukkefonds v Van den Berg*<sup>14</sup> the court held that although the applicant had clearly failed to make out a *prima facie* case, it would in the circumstances of the case not be a proper exercise of the Court's discretion to slam the door in the applicant's face, particularly in view thereof that such a step would in all probability leave him without any remedy against the second respondent. The application was granted. In *Pitsiladi and Others v Absa Bank and Others*,<sup>15</sup> contrary to *Mercantile Bank Ltd*,<sup>16</sup> the view was expressed that a draft third party notice annexed to an application under subrule (3) is not a pleading, at least not until such time as the applicant has been granted leave as envisaged by the said subrule. The purpose thereof is to satisfy the Court that the applicant has a *prima facie* case *vis-à-vis* the third party and not that it constitutes a legally valid pleading. To dismiss the application on the basis that the draft third party notice is excipiable would deny the applicant the opportunity to amend the notice and remove the cause of complaint, as he may otherwise have been able to do if an exception was delivered in terms of Rule 23. This may leave the applicant remediless against the third party or may result in a multiplicity of actions, exactly what Rule 13 is intended to avoid.<sup>17</sup>

[14] The court<sup>18</sup> stated that to establish a *prima facie* case for purposes of Rule 13(3)(b) means that the applicant's case on the merits must not be totally unfounded, and should be based on facts mentioned in outline, which, if proved, would constitute a claim. Unless the Court is satisfied on a conspectus of all the facts that the applicant's case is clearly without merit, factual and legal issues raised by an application in terms of subrule (3) are rather to be determined at the trial or left to be addressed in the pleadings which the third party is entitled to file in terms of Rule 13.

[15] Having considered the above, it is evident that an applicant must, firstly, furnish a satisfactory explanation for his/her failure to issue the notice before the close of pleadings and, secondly, the applicant's case on the merits must not be

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<sup>14</sup> 1999(2) SA 876 (O).

<sup>15</sup> 2007 (4) SA 478 SE para 12.

<sup>16</sup> *Supra*.

<sup>17</sup> Paragraph 13.

<sup>18</sup> *Pitsiladi, supra*.

totally unfounded, and should be based on facts mentioned in outline, which, if proved, would constitute a claim. The court should be satisfied on a conspectus of all the facts that the applicant's case is clearly without merit before rejecting it.

*The parties' submissions*

[16] It was submitted in the applicant's written heads of argument that the test was "*merely to provide a satisfactory explanation*"<sup>19</sup> as to why the notice was not served before 23 December 2021. The summary of the explanation, it was contended, was that the applicant only became aware of the admitted factory fault on 28 March 2022 on perusal of the discovered documents.<sup>20</sup> The third respondent contended that the applicant's version under oath was clearly and blatantly belied and contradicted by the papers and correspondence before the court. Any information that the applicant was desirous of obtaining at any point prior to the close of pleadings, was within reach of its fingertips as it was aware of the third respondent's involvement as a manufacturer of the original cab and chassis.<sup>21</sup>

[17] The third respondent argued that the applicant and its attorneys had this knowledge throughout the main action proceedings, and it was set out in the correspondence<sup>22</sup> addressed to the applicant by the first respondent's attorneys on 22 July 2022. In its answering affidavit,<sup>23</sup> the third respondent stated that:

"71. *In particular, and on or about 22 July 2022, the attorneys acting on behalf of the first respondent addressed correspondence to the applicant's attorneys, wherein the first respondent emphasised that the intended cost order was unfounded and without lawful basis since, inter alia:*

*71.1 The applicant had already been aware since 12 March 2021 that the first respondent had dispatched its letter of demand to UD Trucks, which date was before the main action had even commenced.*

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<sup>19</sup> Paragraph 4.40 of the Applicant's Heads of Argument.

<sup>20</sup> Paragraph 4.41 of the Applicant's Heads of argument.

<sup>21</sup> Paragraphs 26 and 27 of the Third Respondent's Heads of argument.

<sup>22</sup> Annexure "AA1" Pages 380-382 of the indexed papers.

<sup>23</sup> Paragraph 71.



- 71.2 *The applicant should have pleaded misjoinder in the main application, but instead elected to delay and is only now attempting to advance a claim for indemnification against UD Trucks at this late stage.*
- 71.3 *The applicant has been “well aware” of UD Trucks’ involvement since even before the action was instituted and is therefore seeking an indulgence with the present application.*
- 71.4 *The applicant is not entitled to any costs in this application, even if it were opposed by any party, unless the opposition was unreasonable.*
- 71.5 *This letter is annexed hereto as “AA1”.*

[18] This letter to the applicant by the first respondent was prompted when the applicant sought a cost order against the former but not against the second and third respondents in the application for the joinder of the third respondent. The first respondent indicated its opposition to the application solely on the basis of the envisaged cost order against it as it viewed it as unfounded and without a lawful basis. The applicant capitulated and an agreement was reached with the first respondent that the applicant would not persist in seeking a cost order against the first respondent in which event the first respondent would not oppose the application.<sup>24</sup> The attorneys of the third respondent, in reaction to the third party notice served on it, addressed a letter to the applicant’s attorneys on 2 August 2022 and informed them that:

- “73.1 Any claim against UD Trucks on the basis of the manufacturing of the cab and chassis has already prescribed.*
- 73.2 Any claim which may have arisen under the warranty is similarly time-barred, prescribed and of no force and effect.*
- 73.3 The application does not make out a prima facie case against UD Trucks.*
- 73.4 The joinder of UD Trucks will be a fruitless exercise and a waste of this Court’s resources.*
- 73.5 This letter is annexed hereto as annexure “AA2”.<sup>25</sup>*

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<sup>24</sup> Paragraph 70 of the Answering Affidavit.

<sup>25</sup> Paragraph 73 of the Answering Affidavit.

- [19] In response, the applicant encouraged the third respondent to oppose the application and to deliver its answering affidavit.<sup>26</sup>
- [20] In support of its argument that the claim had prescribed, the third respondent relied on *Duet and Magnum Financial Services CC (in liquidation) v Koster*<sup>27</sup> where it was held that while a debt for purposes of the Prescription Act entailed both a right and a corresponding obligation, the converse of a right would be better described by the word 'liability' because at times the exercise of a right calls for no action on the part of the 'debtor', but only for the 'debtor' to submit himself or herself to the exercise of the right.<sup>28</sup> The third respondent's debt or liability to the applicant was extinguished by prescription as the debt or the third respondent's liability towards the applicant started to run on 2 August 2018 when the latter accepted the delivery of the truck to effect repairs to it being fully aware that the third respondent had manufactured the truck's cab and chassis. Since February 2018, the applicant was already aware that it would be required to fit its alteration to the cab and chassis of the truck as manufactured by the third respondent.<sup>29</sup>
- [21] The applicant contended that the claim had not prescribed as section 12(2) of the Prescription Act provides that if the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt. Although the applicant was aware who the manufacturer of the cab and chassis was at the time of the delivery of the truck to the applicant, it could not have reasonably been aware that the third respondent admitted the defectiveness of the truck as indicated in the discovered documents. The third respondent wilfully prevented the applicant and the first respondent from coming to know of the factory fault and consequently, of the claim against the third respondent.<sup>30</sup>
- [22] It was stated as follows in the Replying Affidavit:

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<sup>26</sup> Paragraph 74 of the Answering Affidavit.

<sup>27</sup> 2010 (4) SA 499 (SCA).

<sup>28</sup> Paragraph 24 of the judgment.

<sup>29</sup> Paragraphs 5.4-5.7 of the Founding affidavit.

<sup>30</sup> Paragraphs 2.4-2.6 of the Founding Affidavit.

*"Having taken reasonable care in the matter, and when the problems experienced by Emerson was brought under attention of the Applicant, numerous discussions and meetings were held between the Applicant, having been represented by myself, and Awie Pistorius, an employee of UD Trucks, the Third Respondent, being the manufacturer of the cab and chassis, including the gearbox.*

*It was at all times Awie Pistorius expressed the opinion to myself that the cause of the problems was rooted in the driver's technique, further alleging that the vehicle itself had been inspected by the Third Respondent and/or representatives thereof, finding it in good order.*

*The opinion and advice of Awie Pistorius were at all times accepted by the Applicant, myself included, to such an extent that an assessment of the usual driver of the vehicle was arranged at the premises of the Applicant on 19 March 2021.<sup>31</sup>*

*The only conclusion is that UD Trucks, the Third Respondent, wilfully withheld the information from the Applicant, furthermore wilfully prevented the Applicant from coming to know thereof and deliberately attempted to mislead the Applicant, and Emerson, as to the true cause of the issues."<sup>32</sup>*

[23] In its Heads of Argument and oral address, the applicant submitted that the indemnification sought by it in terms of the provisions of Rule 13, did not fall within the definition of a debt and had thus not prescribed. A debt contemplated in the Prescription Act did not cover the indemnification sought by the Applicant and the provisions of the Act did not therefore apply. Relying on the narrow interpretation of a debt as suggested in *Makate v Vodacom (Pty) Ltd*,<sup>33</sup> the applicant submitted that the indemnification sought was not a debt and there was no corresponding debt or liability until the court, at trial, found that the applicant was liable to the first respondent and subsequent thereto, that the third respondent must indemnify the applicant against such liability.

[24] The applicant stated that it first became aware of the repairs that the truck and specifically the gearbox required repairs on 10 September 2019.<sup>34</sup> Although it was aware that the third respondent was the manufacturer of the cab and chassis as at the date of the delivery thereof to the applicant, it could not reasonably have been aware of the fact that the third respondent admitted the

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<sup>31</sup> Paragraphs 2.9-2.11 of the Replying Affidavit.

<sup>32</sup> Paragraph 4.8 of the Replying Affidavit.

<sup>33</sup> 2016(4) SA 121 (CC)

<sup>34</sup> Paragraph 2.2.3 of the Replying Affidavit.

defectiveness thereof.<sup>35</sup> When the problems experienced by the first respondent were brought to its attention, numerous discussions and meetings were held between the applicant and the third respondent.<sup>36</sup> When the truck was delivered to the applicant on 02 August 2018 nor at the time of the subsequent delivery to the first respondent on 27 May 2019, nor at the time of the first repairs on 10 September 2019, nor for the period thereafter, the warranty had not expired.<sup>37</sup> The warranty was therefore in full force and effect during the period that the cause of action arose.<sup>38</sup>

[25] The applicant does not deny that when a letter of demand was dispatched to the third respondent, it also received one. It is therefore evident that the applicant was well aware of the action envisaged by the first respondent before litigation started. The third respondent stated that the warranty was only valid for the period of twelve (12) months, including an additional period of twelve (12) months for a driveline warranty following the delivery of the cab and chassis. This time period had already expired for purposes of enforcing the warranty.<sup>39</sup> The applicant was therefore time-barred from attempting to enforce the warranty due to it having prescribed as calculated from the date of delivery of the cab and chassis by the third respondent.<sup>40</sup> The joinder of the third respondent as a second third party to the main action proceedings would be a fruitless and wasteful exercise as the warranty did not apply to any of the parties and even if it did, any of the parties would have been time-barred from relying on it.<sup>41</sup>

*Has the applicant furnished a satisfactory explanation?*

[26] The first question that arises is whether the applicant has furnished a satisfactory explanation for its failure to issue the notice before the close of pleadings? In its heads of argument, the applicant admitted that it ought to have reasonably been aware that the third respondent was the manufacturer of

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<sup>35</sup> Paragraph 2.6 of the Replying Affidavit.

<sup>36</sup> Paragraph 2.9 of the Replying Affidavit.

<sup>37</sup> Paragraph 12.2 of the Replying Affidavit.

<sup>38</sup> Paragraph 12.3 of the Replying Affidavit.

<sup>39</sup> Paragraph 24 of the Answering Affidavit.

<sup>40</sup> Paragraph 26 of the Answering Affidavit.

<sup>41</sup> Paragraph 27 of the Answering Affidavit.

the cab and chassis and was aware since 12 March 2021 of the letter of demand that was dispatched to the third respondent by the first respondent prior to the summons being issued against itself.<sup>42</sup> In the letter, the replacement of the truck with a new engine and a warranty of two years was demanded. The applicant does not deny that a letter of demand was at the same time dispatched to itself by the first respondent. During March 2021, after the problems experienced by the first respondent came to its attention, it had meetings on two occasions with the third respondent. The particulars of claim mention specifically that the engine was defective. If the applicant ignored the contents of the letter of demand, surely the contents of the summons should have flickered red lights pointing in the direction of the third respondent.

[27] Beside the various meetings it had with the third respondent pertaining to the allegedly defective truck, the applicant first became aware on 10 September 2019 that the truck, and specifically the gearbox, required repairs.<sup>43</sup> This makes the applicant's version that it only became aware of the factory faults to the cab and chassis after the discovery of documents on 28 March 2022 after the third respondent had deliberately and wilfully withheld and prevented the applicant to coming to know thereof, to be contradictory and false. The explanation for the late filing of the third party notice is not satisfactory at all.

*Do the facts alleged entitle the applicant to succeed at the trial?*

[28] The applicant seeks a full indemnity of any amount for which it is held liable to the first respondent, having regard to the terms of and indemnity as detailed in the warranty against defectiveness by the third respondent on the supply of a new chassis and cab, and if the applicant is held liable to the first respondent in terms of the first respondent's claim as set out in the particulars of claim. The warranty (styled the UD Trucks Warranty) covered defects in material and faulty workmanship existing at the time of delivery or coming into existence during the warranty period. The warranty period was for a period of two years<sup>44</sup> and lapsed on 2 August 2020.<sup>45</sup> The applicant's version is that the third respondent

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<sup>42</sup> Paragraphs 4.42 and 4.43 of the Applicant's Heads of Argument.

<sup>43</sup> Paragraph 2.2.3 of the Replying Affidavit.

<sup>44</sup> Page 173 of the indexed papers.

<sup>45</sup> Paragraph 6.3.1 of the Applicant's Heads of Argument.

attended to certain repairs under the warranty and that at the time of the discovery of the defects the warranty was still valid.

[29] The applicant stated in its written heads of argument<sup>46</sup> that the third respondent relied on the terms of the warranty to exclude further repairs. The point is that the applicant also relied on the warranty for the success of its claim against the third respondent as *“the warranty relied upon is applicable as: The warranty provides that the Third Respondent undertook to remedy free of charge, those established defects in material or faulty workmanship existing at the time of delivery or coming into existence during the warranty period;”*<sup>47</sup> The applicant conceded that the warranty lapsed on 2 August 2020.

[30] The authorities state that the courts have a wide discretion and that a lenient approach is called for so that joinders are not refused save in the clearest of cases. In *Padogelukkefonds*,<sup>48</sup> the court granted the application because it discovered an affidavit deposed to by the second respondent that was filed in the original action during its preparation for the case. The court was of the opinion that the allegations contained therein might be relevant to the adjudication of the case as they had a bearing on the negligence of the second respondent. The counsel for the second respondent argued unsuccessfully that it was trite that an applicant in motion proceedings was confined to the allegations in its founding papers and that the Court was accordingly barred from taking any notice of the allegations in the affidavit. This case is distinguishable from the current one.

[31] In *Pitsiladi*,<sup>49</sup> it was stated that where the applicant's case against the third party is undoubtedly without any merit, the granting of leave to join the third party would be pointless and be prejudicial to the plaintiff, whose claims would be unnecessarily delayed, and to the proposed third party, who would unnecessarily become a party to the proceedings and incur costs.

### Conclusion

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<sup>46</sup> Paragraph 6.3.5.

<sup>47</sup> Paragraph 3.2 of the Applicant's Heads of Argument.

<sup>48</sup> Supra.

<sup>49</sup> Supra; *Melane vs Santam Insurance Co. Ltd* 1962 (4) SA 531 (A)

[32] I have come to the conclusion that the applicant has failed to furnish a satisfactory explanation for its failure to issue the notice before the close of pleadings and on a conspectus of all the evidence and facts that the applicant's case is clearly without merit. The application can therefore not succeed. In the result I make the following order:

**Order:**

The application is dismissed with costs.

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**MHLAMBI, J**

On behalf of the plaintiff: Ms M Thessner

Instructed by: Rossouws Incorporated  
119 President Reitz Avenue  
Westdene  
Bloemfontein

On behalf of the respondent: Adv. M Scheepers

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