Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANESBURG

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

29 November 2021

Case No:2020/10390

In the matter between:

TAHILRAM RAJKUMAR Applicant

(IDENTITY NUMBER: [redacted])

and

KAYSER, ANDREW WALTER First Respondent

KAYSER, ANDREW WALTER NO Second Respondent
(in his capacity as a trustee of the Lukamber Trust IT/4085/98)

DEYSEL NO., PATRICIA JANET
(in her capacity as a trustee of the Lukamber Trust IT/4085/98) Third Respondent

RAHIMTULLA NO., EBRAHIM SULIAMAN Fourth Respondent
(in his capacity as a trustee of the Lukamber Trust IT/4085/98)

A AND A DYNAMIC DISTRIBUTORS (PTY) LTD Fifth Respondent

In re:

KAYSER, ANDREW WALTER NO First Plaintiff
(in his capacity as a trustee of the Lukamber Trust IT/4085/98)

DEYSEL NO.O., PATRICIA JANET
(in her capacity as a trustee of the Lukamber Trust IT/4085/98) Second Plaintiff

RAHIMTULLA NO., EBRAHIM SULIAMAN Third Plaintiff
(in his capacity as a trustee of the Lukamber Trust IT/4085/98)

A AND A DYNAMIC DISTRIBUTORS (PTY) LTD Fourth Plaintiff

and

TAHILRAM RAJKUMAR Defendant
(IDENTITY NUMBER: [redacted])

JUDGMENT

SK Hassim AJ

Introduction

[1] Where a defendant wishes to counterclaim, rule 24(1) permits the defendant to deliver with the plea a claim in reconvention. However, the rules of court do not permit a defendant to pursue, by way of a claim in reconvention, a claim against the plaintiff and a person who is not a plaintiff ("***a third person"),*** unless a court has granted leave to the defendant in terms of rule 24(2) of the Uniform Rules of Court ("***the Rules***") to do so. Absent such leave, a defendant may not by way of a claim in reconvention, pursue the claim against such third person. This is an application for such leave.

[2] On or about 20 April 2020, the second to fifth respondents instituted against the applicant an action, in which they claim payment of R1,484,749.76. ("***the action).***

[3] The applicant wishes to pursue by way of a claim in reconvention ("***the proposed claim in reconvention***"), a claim not only against the plaintiffs but also against the first respondent, who is not a party to the action.

[4] For the sake of convenience, the parties will henceforth be referred to as in the action. The first respondent will be referred to as "***Mr Kayser***".

[5] The Lukamber Trust ("***the Trust")*** and the defendant own 70% and 30% respectively, of the shares in the fourth plaintiff ("***the company").*** The defendant is a director of the company.

[6] Mr Kayser is the managing director. He is also one of three trustees of the Lukamber Trust, the majority shareholder in the company. In his capacity as trustee, he is the first plaintiff in the action. The other two trustees are the second and third plaintiffs.

[7] Mr Kayser, in his personal capacity, is not a plaintiff in the action. The defendant wishes however to institute a claim against the plaintiffs and Mr Kayser (in his personal capacity) by way of a claim in reconvention. The primary relief sought by the defendant is:

> "*1. That the First Respondent, Andrew Walter Kayser, be and hereby is joined to the action under case no 2020/10390 as the Fifth Defendant in the Applicant's claim in reconvention;"*

The main action

[8] The plaintiffs aver that since 2014, the shareholders have claimed expenses from the company, have received benefits, and have drawn money. However, the expenses paid, benefits received, and drawings by the defendant from the company have not been proportionate to his shareholding. They aver that the defendant received from the company by way of drawings more than he was entitled to. The amount the defendant

was not entitled to receive from the company, according to the plaintiffs, is R1 484 749.76. They seek to recover this amount under the *condictio indebiti*.

[9] The defendant defended the action and on 28 May 2020, delivered the notice contemplated in rule 23(1) notifying the plaintiffs that he intended raising an exception to the particulars of claim on the basis that they were vague and embarrassing.

[10] On 9 July 2020, the plaintiffs delivered a notice of intention to amend the particulars of claim, and on 24 July 2020 they effected the amendment.

[11] On 6 October 2020, the defendant delivered under rule 24(2) an application for leave to pursue a claim against the plaintiffs and Mr Kayser by way of a claim in reconvention. He also delivered on that day, a plea as well [1] as a counterclaim against the plaintiffs and Mr Kayser. This was done without leave having been obtained to deliver with the plea, a claim in reconvention against the plaintiff and Mr Kayser.

[12] On 20 October 2020, the plaintiffs delivered a replication to the defendant's special plea. They also delivered on the same day, the notice contemplated in rule 23(1) notifying the defendant that they intended raising an exception to the plea and counterclaim on the basis that they were vague and embarrassing. The defendant failed to remove the cause of complaint. On 13 November 2020, the plaintiffs delivered a notice of exception ("***the plaintiffs' exception*")**.

[13] On 18 November 2020, the defendant withdrew his plea and counterclaim. This resulted in the plaintiffs withdrawing the replication to the special plea.

[14] On 24 November 2020, the plaintiffs delivered a notice of bar.

[15] On 30 November 2020, the defendant delivered a notice of exception to the particulars of claim (*"**the defendant's exception**")* on the basis that the particulars of claim lacked averments to sustain a cause of action.

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[1] Embodying a special plea and a plea over.

[16] The plaintiffs in turn delivered on 11 December 2020, the notice envisaged in rule 30(2)(b). The plaintiffs raise two complaints therein. First that the withdrawal of the plea and counterclaim constitutes an irregular step because the admissions therein were withdrawn without the leave of the court. Second that the defendant's notice of exception constitutes an irregular step, because after having fully pleaded to the particulars of claim, the defendant complains that they lack averments to sustain a cause of action. I am not required to determine in this application whether these steps constitute an irregular step.

[17] On 20 January 2021, the plaintiffs delivered an application to set aside the irregular step/s alternatively to set aside the withdrawal of the plea and counterclaim, as well as the defendant's notice of exception ("***the rule 30 application***" **or** ***"the application to set aside the irregular step")***. The defendant delivered an answering affidavit in the rule 30 application on 5 February 2021, and the plaintiffs a replying affidavit on 15 March 2021.

[18] This application was delivered on 6 October 2020. Since the delivery of this application, the plaintiffs and the defendant have busied themselves in interlocutory disputes against each other. The defendant's exception has not yet been decided. Nor has the plaintiffs' rule 30 application to set aside, amongst others, the defendant's exception as an irregular step.

[19] If the plaintiffs' rule 30 application fails, and the defendant's exception to the plaintiffs' particulars of claim is upheld (ultimately resulting in the dismissal of the action) there will be no action in which the defendant can claim in reconvention. If I am to grant the order as sought by the defendant before these other interlocutory matters are disposed of, not only will it upset the sequence in which pleadings and documents are required to be exchanged, but it could create uncertainty. However, I am not persuaded that this is reason enough to refuse the application. To avert uncertainty the order prayed can be appropriately formulated.

Legal principles governing applications in terms of rule 24 (2)

[20] Rule 24 is titled "Claims in Reconvention".

> *24* *Claim in Reconvention*
>
> *(1)* *A defendant who counterclaims shall, together with his plea, deliver a claim in reconvention setting out the material facts thereof in accordance with rules 18 and 20 unless the plaintiff agrees, or if he refuses, the court allows it to be delivered at a later stage. The claim in reconvention shall be set out either in a separate document or in a portion of the document containing the plea, but headed 'Claim in Reconvention'. It shall be unnecessary to repeat therein the names or descriptions of the parties to the proceedings in convention.*
>
> *(2)* *If the defendant is entitled to take action against any other person and the plaintiff, whether jointly, jointly and severally, separately or in the alternative, he may with the leave of the court proceed in such action by way of a claim in reconvention against the plaintiff and such other persons, in such manner and on such terms as the court may direct.*
>
> *(3)* *A defendant who has been given leave to counterclaim as aforesaid, shall add to the title of his plea a further title corresponding with what would be the title of any action instituted against the parties against whom he makes claim in reconvention, and all further pleadings in the action shall bear such title, subject to the proviso to subrule (2) of rule 18.*
>
> *(4)* *A defendant may counterclaim conditionally upon the claim or defence in convention failing.*
>
> *(5)* *If the defendant fails to comply with any of the provisions of this rule, the claim in reconvention shall be deemed to be an irregular step and the other party shall be entitled to act in accordance with rule 30.*

[21] The relief in rule 24(2) is available to a defendant if he is able to establish an entitlement to take action against those mentioned in the rule. Schabort J in Hosch-Fömrdertechnik SA (Pty) Ltd v Brelko CC and Others, [2] discussed the circumstances under which such entitlement would exist and what the court may take into consideration in deciding the application: He found that:

> *"It would be necessary for the purposes of Rule 24(2), …, that the applicant should disclose its locus standi and that of the said persons and that it should in accordance with Rule 10(3)*

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[2] 1990 (1) SA 393 (W).

disclose the cause or causes of action upon which an action against them would be based. These facts together with such further facts as may possibly be material in a particular application in terms of Rule 24(2) (e.g., overriding considerations of justice, equity or convenience) would form the subject matter for the exercising of the Court's discretion."

[22] A defendant is not required to establish a *prima facie* case of potential success in the action against the persons referred to in the rule.[3]

Analysis of the issues

[23] The plaintiffs advance two reasons why the application should not be granted. The first is that no counterclaim is being advanced against the plaintiffs; and (ii) the proposed counterclaim is excipiable.

[24] Rule 24(2) does not prescribe the stage at, or by, which leave must be sought and/or granted. The word "*proceed*", in rule 24(2) can mean proceed to deliver the document[4] embodying the counterclaim or, it could mean proceed to have two separate claims, the plaintiffs' claim and the defendant's claim in reconvention determined in one hearing.

[25] However, reading rule 24(2) with rule 24(3) reveals when leave must be sought. Rule 24(3) speaks of "*add[ing] to the title of the plea a further title corresponding with what would be the title of any action instituted*". The requirement of adding to the title of a plea, another title (i.e., the title of the claim in reconvention) indicates that leave must be obtained before the plea and claim in reconvention are served.

[26] I consequently find that a defendant must obtain leave in terms of rule 24(2) before the service of the plea and the claim in reconvention. There would, however, practical difficulties in achieving this. When the rule was introduced, the motion court

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3 *Ibid.*

4 *Cf. Rule 24(1). The counterclaim may be set out "in a separate* ***document*** *or in the* ***document*** *containing the plea.*

roll was not as congested as it has become. Unfortunately, the congested motion court roll in most divisions of the High Court cannot accommodate the hearing of an application for leave in terms of rule 24(2) before the expiry of the twenty days allowed in rule 22(1) for the delivery of a plea. The inevitable result will be the near impossibility for a defendant to obtain leave to institute a claim in reconvention against the plaintiff and a third person within the time prescribed in the rules. Once the period for the delivery of a plea has expired, a notice of bar will follow which will lead to various applications such as for the removal of the bar and/or for the extension of the period for delivering a plea, and/or condonation or some other application that a fertile legal mind can conjure. The time frames in the Rules may have to be revisited in light of these practical difficulties.

[27] The second basis on which the plaintiffs oppose the application, is that a defendant can only invoke rule 24(2) if relief in reconvention will be claimed against the plaintiff. They assert that the defendant is "*currently*" not advancing a counterclaim against the plaintiffs. I am not clear on what they mean by this.

[28] If they are saying that no claim is being asserted against the plaintiffs in the proposed claim in reconvention, they are wrong. It is evident from the proposed claims in reconvention that they are not limited to Mr Kayser. One needs to look no further than the prayers in the proposed claim in reconvention. I touch on some of the prayers in paragraph [48] below.

[29] Are they perhaps arguing that because a claim in reconvention against the plaintiffs has not been served (which is the consequence of the plea and counter claim being withdrawn), an application under rule 24(2) is incompetent? If so, having found that leave must be obtained before the service of a plea and claim in reconvention, the plaintiffs' argument must fail.

[30] The plaintiffs' counsel argued that the proposed claims in reconvention against the plaintiffs and the defendant are not similar. He argues that different relief is sought

against the different plaintiffs on different causes of action. Relying on the decision in Soundprops 1160 CC and another v Karlshaven Farm Partnership and Others,[5] he argues that only if the plaintiff in convention, is a defendant in reconvention, is it competent to proceed by way of a claim in reconvention against a person who is not a party to the claim in convention. I agree. This is consistent with the following finding by Page J in Soundprops 1160 CC and another v Karlshaven Farm Partnership and Others:

> "*It is apparent on a proper reading of [Rule 24(2)] that it is limited to a claim in reconvention against the plaintiff and the other person and cannot be invoked where there is no claim in reconvention against the plaintiff. It also requires the leave of the Court."*[6]

[31] However, the plaintiffs construe Soundprops as authority for the proposition that the defendant's cause of action in the claim in reconvention against the plaintiff must be the same as, or similar to, the defendant's claim against the third person. I do not understand this to be the import of the finding in Soundprops, nor do I understand rule 24 (2) to so provide. In my view, the extent of the defendant's burden is no greater than meeting the requisites for the joinder of parties to pending proceedings or showing other facts material to the specific applications such as "*overriding considerations of justice, equity or convenience*".[7] It is therefore sufficient if the issues in the claim in convention and those in the claim in reconvention depend upon the determination of substantially the same questions of law and fact, or if overriding considerations of justice, equity or convenience support the discretion of the court being exercised in a defendant's favour.

[32] While a defendant must demonstrate that the claim he wishes to assert in reconvention, is valid in law, he does not have to show that he will *prima facie* succeed in the claim in reconvention, as the plaintiffs argue. The plaintiffs' reliance on Lethimvula

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5 1996 (3) SA 1026 (N).

6 p.1031 D-E.

7 Hosch-Fömrdertechnik SA (Pty) Ltd v Brelko CC and Others at 395G.

Healthcare (Pty) Ltd v Private Label Promotion (Pty) Ltd[8] in this regard is misplaced. Van Oosten J, in that case was dealing with an application under rule 24(1) for leave to introduce against the plaintiff a claim in reconvention after the plea had been delivered. The learned Judge was considering the question whether a defendant seeking leave[9] to introduce a claim in reconvention against the plaintiff, after the delivery of a plea, had to show something more than the entitlement to institute a claim which a defendant in an application under rule 24(2) has to show. Stated differently, the question which Van Oosten J had to tackle was whether the requirement for leave under rule 24(1) is more onerous than the requirement for leave under rule 24(2). In considering this question, the court referred to the judgment in Hosch-Fömrdertechnik SA (Pty) Ltd v Brelko CC and Others. The court there was seized with an application under rule 24(2). Schabort J discussed the requirements of such an application and found that:

> *"The need to establish a prima facie case of potential success in an action against the said persons does not enter the picture. A condition rendering entitlement to take action subject to success in the action seems absurd and would be misplaced in the context of Rule 24(2). Cf Shield Insurance Co Ltd v Zervoudakis 1967 (4) SA 735 (E) at 737G – 738A. I do not think that the condition in Rule 24(2) must be construed in this way."*[10]

[33] Consequently, whether the defendant has established a *prima facie* case of potential success against Mr Kayser is irrelevant. That is, however, not the end of the plaintiffs' opposition.

[34] The plaintiffs argue that the proposed claim in reconvention is excipiable in that it does not disclose a cause of action. For this reason, they argue the application must fail.

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8 2012 (3) SA 143 (GSJ) at 147B-F.

9 Under rule 24(1).

10 At 395H.

[35] As appears from the decisions in Hosch-Fömrdertechnik SA (Pty) Ltd v Brelko CC and Others and Lethimvula Healthcare (Pty) Ltd v Private Label Promotion (Pty) Ltd, the defendant must demonstrate that a cause of action avails him against the parties referred to in rule 24(2). If there is no cause of action cognisable in law against these parties, then a defendant would have failed to establish that he "*is entitled to take action*" against the parties referred to in rule 24(2). However, a pleading that is vague and embarrassing, leading to an inability on the part of for instance a plaintiff to plead, does not mean that the claim advanced therein by the defendant is not valid in law, and is not available to the defendant. An exception on the ground that a pleading is vague and embarrassing strikes at the formulation of the cause of action, and not its legal validity.[11]

[36] The basis on which the plaintiffs contend that the claim in reconvention is excipiable, are found in the notice of exception delivered by the plaintiffs on 13 November 2020 in response to the defendant's plea and counterclaim (which has now been withdrawn). I have considered the plaintiffs' exception and am not persuaded that the proposed claim in reconvention does not disclose a cause of action.

[37] The first ground for the exception to the plea and counterclaim is that the plaintiffs are embarrassed and are therefore unable to plead, alternatively, that the claim in reconvention lacks averments to sustain a claim because leave had not been obtained under rule 24(2). The failure to obtain leave constitutes an irregular step[12], but does not render the counterclaim unsustainable in law.

[38] The second ground for the exception is that the claim in reconvention contains mutually destructive averments rendering it vague and embarrassing.

[39] The third ground for the exception is that the counterclaim is vague and embarrassing, alternatively that it does not disclose a cause of action. Despite the third ground for the exception being formulated in the alternative as lacking averments to

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11 *Cf.* Trope v South African Reserve Bank 1993 SA (3) 264 (A) at 269H-I.

12 Rule 24(5).

sustain a cause of action, in substance the third ground for the exception is confined to the claim in reconvention being vague and embarrassing.

[40] The fourth and fifth basis for excepting to the claim in reconvention, is that the formulation of the claim in reconvention causes embarrassment, is prejudicial and results in an inability to plead to the plea and counterclaim.[13]

[41] None of these grounds, affect the legal validity of the claim in reconvention.

[42] The sixth ground for the exception requires some probing. The attack on the claim in reconvention is that it is "*vague and embarrassing and/or does not set out the facts to sustain a cause of action and the plaintiffs are embarrassed to plead thereto*". (Underlining inserted for emphasis)

[43] The underlined words suggest that the complaint is not that a cause of action is not disclosed, but rather that the lack of averments to sustain a cause of action results in embarrassment and hence the inability to plead. Even if I am wrong in this regard, I am not convinced that the proposed claim in reconvention is excipiable because it lacks averments to sustain a cause of action. The sixth ground of exception is formulated as follows:

> "*6.* ***SIXTH GROUND***
>
> *6.1 As a consequence of the allegations in relation to the scheme employed and enjoyed by the Defendant, it is wholly unclear whether the Defendant concedes that he was not entitled to the gains as received flowing from this 'scheme'.*
>
> *6.2 Evident upon a perusal of the counterclaim is that there exists no tender, whatsoever, by the Defendant to the Fourth Plaintiff in respect of the amounts allegedly paid to it in terms of the scheme.*

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[13] The plaintiffs do not complain the claim in reconvention is vague needing to embarrassment and an inability to plead thereto. Instead, they say that the failure to clean a legal basis, entitling the defendant to require a statement and statement of account is prejudicial to the plaintiffs and they are "embarrassed to plead thereto."

> *6.3 As a consequence, the claim as advanced is vague and embarrassing and/or does not set out the facts to sustain a cause of action and the Plaintiffs are embarrassed to plead thereto.*"

[44] The sixth ground of exception stems from the averment in paragraph 26 of the proposed counterclaim that Mr Kayser devised a scheme for the payment of benefits to himself and the defendant, which amounted to tax evasion and contravened various provisions of the Companies Act, 2008 (*"**the Companies Act")***. On this basis, the defendant seeks to have Mr Kayser declared a delinquent director, alternatively placed under probation, as contemplated in section 162(7) and/or section 163(2)(f)(ii) of the Companies Act. The plaintiffs' attack on the claim in reconvention is that the defendant has not tendered return of the benefits received by him as a consequence of the "scheme". However, the plaintiffs do not disclose the legal basis which obliges the defendant to do so. Nor do they assert that the defendant's failure to tender return of the benefits or tender repayment is an essential averment and that unless return of the benefit or repayment is tendered, the defendant has no claim. As I see it, the true complaint is that the claim in reconvention is vague and embarrassing because "*it is wholly unclear whether the Defendant concedes that he was not entitled to the gains as received flowing from this 'scheme'*".

[45] At the risk of stating the obvious, a claim cannot avail a person unless that person demonstrates *locus standi* to enforce the claim. The proposed claim in reconvention is based on the provisions of s76(2), s76(3)(a), s77(2)(a), s77(3), s161, s162, s163, and s218(2) read with s77(2)(a) of the Companies Act. I am satisfied that as a director and shareholder of the fourth plaintiff, the defendant has the requisite *locus standi* to pursue the claim against the plaintiffs and Mr Kayser. This does not however mean that he is entitled to pursue that claim, in reconvention in the action brought by the plaintiffs against him. He may only do so if there is a sufficient connection between the claim in convention and the proposed claim in reconvention or, if considerations of justice, equity and fairness so dictate. The leave granted in terms of rule 24(2), to pursue a claim

against a person other than the plaintiff, practically amounts to leave to introduce a new party by way of a joinder in terms of rule 10. The requisites for the joinder of persons under rule 10, therefore come to feature in an application under rule 24(2) as was found by Schabort J in Hosch-Fömrdertechnik SA (Pty) Ltd v Brelko CC and Others.

[46] It appears from the papers that the proposed claim in reconvention against the plaintiffs and Mr Kayser, depends upon the determination of substantially the same questions of law and fact as the claim in convention. The plaintiffs' claim as well as the defendant's proposed claim in reconvention, stems from the parties' relationship as shareholders of the company and the defendant and Mr Kayser's directorship.

[47] Even if the issues which arise for determination in the claim in convention and the claim in reconvention, do not depend upon the determination of substantially the same questions of law and fact, the defendant can still succeed in the application if he is able to show either (i) that the plaintiffs have a direct and substantial interest in the subject matter of the defendant's claim against Mr Kayser, and are therefore necessary parties to any claim that the defendant may pursue against him; or (ii) that considerations of convenience, equity, the saving of costs and the avoidance of multiplicity of actions militate in favour of the defendant being permitted to pursue his claim by way of a claim in reconvention against the plaintiffs and Mr Kayser.

[48] The plaintiffs are necessary parties to the proposed claim which the defendant intends pursuing against Mr Kayser by way of a claim in reconvention, and Mr Kayser is a necessary party to the defendant's claim in reconvention against the plaintiffs. The prayers in the proposed claim in reconvention put to rest any uncertainty that may exist in this regard. I briefly examine the main prayers in the proposed claim in reconvention:

(a) In prayer 1, the defendant seeks an order directing the fourth plaintiff, namely the company, to provide audited financial statements. (I accept that it can be argued that this does not affect the Trust and therefore does not affect the Trustees).

(b) Prayer 2 requires the plaintiffs and Mr Kayser to consent to the appointment in terms of section 38 of the Superior Courts Act, Act 10 of 2013, of a referee.

(c) In prayer 5 the defendant seeks from the Trust, and/or the Fourth Plaintiff, and/or Mr Kayser "as the case may be", payment of 30% of the benefit received by Mr Kayser as determined after the statement and debatement of account, sought in prayer 4.

(d) In prayer 6 the defendant seeks an order declaring Mr Kayser a delinquent director.

[49] The relief claimed in at least prayers 2 and 5 is claimed directly against Mr Kayser and the fourth plaintiff, as well as the first, second and third plaintiffs in their capacities as trustees of the Trust, the majority shareholder in the fourth plaintiff, namely the company.

[50] While the relief claimed in prayer 6, is directed at Mr Kayser, it affects the majority shareholder in the company, namely the Trust. It is evident from the papers that Mr Kayser is a director of the company at the behest of the Trust. The Trust and the company accordingly have a legal interest in the subject matter of the claim in reconvention which may be affected prejudicially by an order in terms of prayer 6.

[51] The plaintiffs are intent in pursuing the claim against the defendant. I am not in a position at this stage to conclude that the defendant does not intend pursuing his claim against the plaintiffs and Mr Kayser. A multiplicity of actions, it appears, will inevitably result if the leave sought in terms of rule 24 (2) is refused. A multiplicity of actions is undesirable not only because of the possibility of conflicting decisions, but also because they result in costs which can be avoided if the disputes are ventilated in a single action.

[52] The plaintiffs and Mr Kayser will suffer no prejudice if leave is granted to the defendant to proceed by way of a claim in reconvention against the plaintiffs and Mr Kayser. They will not lose their right to raise an exception to the proposed claim in reconvention. Their procedural and substantive rights will remain intact.

[53] The defendant stands to be prejudiced if the application is refused. The plaintiffs seek to recover from the defendant money which he received by reason of his shareholding in the company. The defendant intends seeking in the proposed claim in reconvention, after the statement and debatement of account, payment of 30% of the benefit received by Mr Kayser from the fourth plaintiff, which payment the defendant asserts is aimed at rectifying the alleged harm caused to him by the fourth plaintiff and/or the Trust and/or Mr Kayser.

[54] If the defendant is granted leave in terms of rule 24(2), and both the claim and the claim in reconvention succeed, the respective claims can be set off. If leave is however refused, the unsuccessful party in whichever action is determined first, will have to satisfy the judgment against him/ them in full and later execute the judgement granted in his/their favour, with the risk that the judgment may not be satisfied.

[55] There is a reasonable, if not strong, likelihood that the plaintiffs' action will be determined before a separate action instituted by the defendant can be determined. This will have the absurd result that the defendant will have to pay his debtor. The absurdity will turn into unfairness and inequity if it turns out that the debt owed to the defendant exceeds the debt owed by him to the plaintiffs. The plaintiffs on the other hand, will not suffer any prejudice that cannot be remedied by an appropriate order for costs at the end of the trial, if leave is granted to the defendant. In fact, if leave is refused, that may be prejudicial to the plaintiffs. The prejudice would arise if the separate action brought by the defendant is decided before the plaintiffs' action. If this happens, the plaintiffs will have to pay their debtor. And it will be particularly unfair and iniquitous if the defendant's claim is found to be less than the plaintiffs' claim.

[56] Apart from the foregoing considerations, granting leave to the defendant will spare all the parties the costs of a separate action and avert the risk of inconsistent findings in separate actions. No harm will ensue from the disputes being ventilated in a single trial.

[57] I accordingly find that considerations of justice, equity, and convenience, dictate that leave should be granted to the defendant in terms of rule 24 (2).

[58] That leaves the question of the form that the order should take. In formulating an appropriate order, I cannot ignore the two pending interlocutory matters. The one, the plaintiffs' application in terms of rule 30. The other, the defendant's exception to the plaintiffs' particulars of claim.

[59] Rule 24 (2) confers upon the court the discretion to grant leave "*in such manner and on such terms as [it] may direct*." The sequence of pleadings provided in the rules of court must be maintained so that the parties are clear on the next procedural step in the action. Granting leave to the defendant to proceed by way of a claim in reconvention against the plaintiffs and Mr Kayser, before the plaintiffs' rule 30 application and the defendant's exception are decided, puts the proverbial horse before the cart. The correct sequence would be for the rule 30 application to be determined, followed by the defendant's exception and both must be decided before the defendant pleads to the particulars of claim.

[60] However, considering the congestion on the roll for motion court, maintaining the aforementioned sequence is not feasible; the time allowed in the rules for the exchange of pleadings is too short to accommodate an application to court, even an unopposed one. I therefore intend making an order which ensures that the claim in reconvention is delivered after the exception has been disposed of or withdrawn by the defendant. I also have to cater for the possibility that the plaintiffs' application to set aside the irregular step will be granted with the result that the defendant's plea and counterclaim dated 5 October 2020 will be "revived"; but the claim in reconvention would remain an irregular step in terms of rule 24(5) because of the absence of the leave required under rule 24 (2). If the plaintiff's application to set aside the irregular step succeeds, the defendant will have to bring an application condoning his failure to have obtained leave in terms of rule

24(2). I need to explore whether such an application can be avoided by an order in this application.

[61] The High Court has always had the inherent jurisdiction to control its process and hence the oft-quoted adage that "the rules are made for the court and not the court for the rules". This in my view entitles a court to adopt a pragmatic and, just and equitable approach that will lead to a speedy and cost-effective resolution of disputes between litigants. Section 173 of the Constitution of the Republic of South Africa, 1996, confirms the High Court's inherent power to protect and regulate its own process taking into account the interests of justice. This in my view empowers a court to make an order on a procedural issue, even though the parties have not raised it. This is of course subject to the proviso that it is in the interest of justice to do so. The order I intend making is aimed at steering through what seems to be a turbulent phase in the exchange of pleadings. The order will not prejudice the parties. To the contrary, it will be advantageous to them and will serve the interest of justice; not only will legal costs be spared, but pleadings can also be exchanged without further delays and the parties can move closer to having their real disputes settled by a court.

[62] I have come to the conclusion that I should exercise my discretion in favour of granting leave to enable the defendant to claim in reconvention against not only the plaintiffs, but also Mr Kayser; and condone the defendant's failure to comply with rule 24(2) should the withdrawal of the defendant's plea and counterclaim be set aside as an irregular step.

Order

In the result it is ordered that:

1. In the event that:

1.1. The plaintiffs' application dated 19 January 2021 to set aside as an irregular step the withdrawal of the defendant's plea and counterclaim is refused, or withdrawn; and

1.2. the exception raised by the defendant, embodied in the notice of exception dated 30 November 2020 is:

1.2.1. either withdrawn or dismissed; and

1.2.2. the defendant remains desirous of instituting a claim/s against the plaintiffs and Mr Kayser, in his personal capacity

then and in that event, the defendant is granted leave to proceed with an action against the plaintiffs and Mr Kayser, in his personal capacity, by way of a claim in reconvention in the action instituted by the plaintiffs against him under case number 2020/10390 and the costs of this application shall be costs in the claim in reconvention, however if the defendant does not proceed by way of a claim in reconvention, then the costs of the application shall be paid by him.

2. If, however, the plaintiffs' application referred to in paragraph 1 above is granted, then the defendant's failure to obtain leave in terms of rule 24(2) prior to the delivery of the counterclaim dated 5 October 2020 is hereby condoned, and the costs of this application shall be costs in the defendant's claim in reconvention.

_____

S K HASSIM AJ
Acting Judge: Gauteng Division, Johanannesbur
(electronic signature appended)
29 November 2021

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties' legal representatives by email and by uploading

it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 29 November 2021.

Date of hearing: 31 May 2021

Date of Judgment: 26 November 2021

Appearances:

For the applicant: Adv CE Thompson

For the fourth respondent: Adv IL Posthumus