

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1)	REPORTABLE: Yes
(2)	OF INTEREST TO OTHER JUDGES: Yes
_____	_____

CASE NO: 9915/2020

In the matter between:

GAVIN ANTON BROADHURST

Plaintiff/Applicant

and

GEARHOUSE SPLITBEAM (PTY) LIMITED

First Defendant/Respondent

D P HUSSEY

Second Defendant/Respondent

JUDGMENT

This judgment is deemed to be handed down upon uploading by the Registrar to the electronic court file.

Gilbert AJ:

1. The Apportionment of Damages Act, 1956 [“the Act”] provides that where a plaintiff fails to give notice of an action to a joint wrongdoer who is not sued in that action, that joint wrongdoer cannot be sued thereafter by the plaintiff except with the leave of the court on good cause shown as to why notice was not given.
2. This application in terms of section 2(4)(a) of the Act concerns:
 - 2.1. whether such leave of the court on good cause shown can be sought after the action in respect of which such notice is required has already been instituted. This issue appears to be *res nova*;
 - 2.2. if such leave can be sought after the event, whether the applicant in this instance has shown good cause for such leave to be granted.
3. The applicant, who I shall refer to as the plaintiff, was a patron who attended a musical production at a well-known local theatre. While he was at the show, a mirror ball, which had been suspended from the ceiling, fell on his head and injured him and which is alleged to have caused various brain injuries.
4. Some two and a half years later, during January 2020, the plaintiff instituted action against three defendants, being the owner of the theatre, the event management company responsible for the production of the show and the company that the plaintiff contended was the rigger

of the equipment for the show. That is the first action instituted by the plaintiff.

5. During the exchange of pleadings in that first action in March 2020, two further parties were joined by the defendants in that first action by way of third-party notices. Those two joined third parties are the theatre equipment specialist company and the civil and structural consulting engineer who attended to the erection of the mirror ball. They are also the two defendants in the present action. All these defendants are potentially joint wrongdoers.
6. The second defendant (being the civil and structural consulting engineer) opposes the present proceedings. For ease of reference I refer to him as Mr Hussey.
7. It was only during the exchange of pleadings in the first action in March 2020 that the plaintiff came to learn of the present defendants, and in particular Mr Hussey, as potential joint wrongdoers.
8. For reasons unexplained, the plaintiff's then legal representatives elected not to join Mr Hussey to the first action by way of third party proceedings, such as under Uniform Rule 13, but instead instituted a second action by the plaintiff against the present defendants, and in particular Mr Hussey. That second action was instituted on 24 March 2020.

9. This resulted in the plaintiff having instituted two actions against two sets of alleged joint wrongdoers arising out of the same incident and for the recovery of the same damages in delict – the first action in January 2020 and the second action in March 2020.
10. Section 2(1) of the Act provides that:

“Where it is alleged that two or more persons are jointly or severally liable in delict to a third person (hereinafter referred to as the plaintiff) for the same damage, such persons (hereinafter referred to as joint wrongdoers) may be sued in the same action.”¹

11. There is no dispute in the present matter that section 2(1) of the Act applies and that the present plaintiff has instituted action against joint wrongdoers for the same damage. Although section 2(1) provides that the plaintiff could have proceeded against the present defendants in the same action (being the first action), he did not do so.
12. The plaintiff explains that he did not institute action initially against all the alleged wrongdoers, including the present defendants, in a single action as he did not know of the identity of these defendants at the time of instituting the first action and that they may be joint wrongdoers. It is therefore understandable why the plaintiff did not institute action against the present defendants initially.
13. Section 2(2) of the Act provides that:

¹ My emphasis.

“2(2) Notice of any action may at any time before the close of pleadings in that action be given –

(a) by the plaintiff;

(b) by any joint wrongdoer who is sued in that action,

to any joint wrongdoer who is not sued in that action, and such wrongdoer may thereupon intervene as a defendant in that action.”²

14. It is common cause that the plaintiff did not give such notice to Mr Hussey, whether before the close of pleadings or otherwise. It is not disputed that the pleadings in respect of the first action had not closed by the time the plaintiff came to know of the existence and the identity of Mr Hussey as a joint wrongdoer, and so that it was possible for the plaintiff to give such notice.

15. Section 2(4)(a) of the Act provides that:

“2(4)(a) If a joint wrongdoer is not sued in an action instituted against another joint wrongdoer and no notice is given to him in terms of paragraph (a) of subsection 2, the plaintiff shall not thereafter sue him except with the leave of the court on good cause shown as to why notice was not given as aforesaid.”³

16. As the plaintiff had launched this second action on 24 March 2020 against the present defendants who are joint wrongdoers without having

² My emphasis.

³ My emphasis.

given the notice required by section 2(2) of the Act, he fell foul of section 2(4)(a).

17. Mr Hussey, as one of the defendants who had not been given notice before being sued in this second action, raised this failure of the plaintiff to give the notice required in terms of section 2(2) of the Act by way of a special plea on 8 June 2020, and so that the plaintiff was precluded in terms of section 2(4)(a) from instituting the present proceedings. Mr Hussey pleads that in the circumstances the institution of the present proceedings are 'unlawful and thus a nullity', and so are to be dismissed with costs.
18. Nothing much appears to have happened in the actions until some eighteen months later, in November 2021, when the applicant appointed his current attorneys of record and launched an application for the consolidation of the two actions. Mr Hussey opposed the consolidation action *inter alia* on the basis that the actions cannot be consolidated as the second action had been launched without complying with sections 2(2) and (4) of the Act.
19. This precipitated the plaintiff some nine months later, in September 2022, launching this application seeking the leave of the court in terms of section 2(4)(a) of the Act to proceed with the second action.
20. Mr Hussey opposes the application on the basis that the leave of the court cannot be sought after the action had already been instituted, the institution of the action being a nullity and which nullity cannot be cured

after the event by leave now being sought and granted in terms of section 2(4)(a). The plaintiff on the other hand contends that the leave of the court need not be sought before the institution of the action.

21. This then is the first issue to be decided.
22. The second issue to be decided, if such leave can be granted after the event, is whether the plaintiff has shown good cause why leave should be granted in terms of section 2(4)(a) of the Act.

CAN LEAVE IN TERMS OF SECTION 2(4)(a) OF THE APPORTIONMENT OF DAMAGES ACT BE GRANTED AFTER THE INSTITUTION OF THE FURTHER ACTION IN WHICH THAT JOINT WRONGDOER HAS BEEN SUED?

23. As stated, it appears that this issue is *res nova*. Neither parties' counsel was able to refer to any authorities that have considered this issue nor have I been able to find any authorities.
24. Although from a cursory reading of *ABSA Brokers (Pty) Limited v RMB Financial Services and Others* 2009 (6) SA 549 (SCA) it may appear that the Supreme Court of Appeal found that the leave of the court had to be obtained before further joint wrongdoers could be sued,⁴ a closer reading of the judgment shows that this was not an issue before the appeal court and was not an issue that was decided by the appeal court.

⁴ At 554H, which reads "[t]he merits of each application were considered and the court held that the leave of the court had to be obtained before such wrongdoers could be sued regardless of the fact that no allegation had been made in the original action that they were joint wrongdoers."

25. What was before the Supreme Court of Appeal was the correctness of the decision of *Becker v Kellerman* 1971 (2) SA 172 (2) where the court had found that the phrase “*where it is alleged*” in section 2(1) had to be interpreted as “*where it is alleged in an action*”, so that the phrase “*joint wrongdoers*”, as contemplated by the relevant subsections, applied only to persons who had been alleged in the initial action to be joint wrongdoers. The court in *Becker* had found that if such persons had not been alleged in the initial action to be joint wrongdoers, then the person who was subsequently sued was not a “*joint wrongdoer*” as envisaged in section 2(4)(a) and therefore proceedings could be initiated against that person without notice having to be given in terms of section 2(2) and without obtaining the leave of the court in terms of section 2(4)(a).⁵ The Supreme Court of Appeal disagreed and held that the requirement of notice applied to all joint wrongdoers and not only those that happened to be alleged, i.e. mentioned, in the initial action.⁶
26. Although during the course of its judgment the appeal court referred to *Lincoln v Ramsaran and Others* 1962 (3) SA 374 (N) and *Wapnick and Another v Durban City Garage and Others* 1984 (2) SA 414 (D) as apparent authority for the proposition that leave of the court had to be obtained before such joint wrongdoers could be sued,⁷ when read in context, as stated, that was not an issue to be decided by the court and

⁵ At 185A-C, as explained in *ABSA Brokers* in para 12.

⁶ At para 14 and 17.

⁷ At 554G to 555A.

in any event neither *Lincoln* nor *Wapnick* dealt at all with whether leave in terms of section 2(4)(a) could be sought after the event.

27. The issue whether leave can be sought in terms of section 2(4)(a) is to be determined by the application of the usual principles applicable to statutory interpretation.
28. Approaching the statutory interpretative exercise on the now well-trodden path of *Natal Joint Municipal Pension Fund v Endumeni Municipality*:⁸

“Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and

⁸ 2012 (4) SA 593 (SCA) para 18.

legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The ‘inevitable point of departure is the language of the provision itself’, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.”

29. Starting as a point of departure with the language of section 2(4) itself, and bearing in mind that “*in the interpretation exercise the point of departure is the language of the document in question... [w]ithout the written text there will be no interpretative exercise*”,⁹ the wording of section 2(4) is ambiguous.
30. Without doing any violence to the wording of section 2(4)(a), it permits both an interpretation that the leave of the court is to be sought before the joint wrongdoer is sued, as contended for by Mr Hussey, and an interpretation that leave can also be sought after the institution of the further action, as contended for by the plaintiff.
31. Section 2(4)(a) provides that “*the plaintiff shall not thereafter sue him except with the leave of the court on good cause shown ...*”. The ‘thereafter’ is a reference to the period after the point in time where the plaintiff failed to give notice before the close of pleadings in terms of section 2(2)(a). It is not the determinative of whether that leave must be sought before the further action is instituted. What section 2(4)(a) provides is that unless the plaintiff obtains the leave of the court on good cause shown, the plaintiff cannot, after having failed to give the requisite

⁹*Tshwane City v Blair Atholl Homeowners Association* 2019 (3) SA 398 (SCA) at para 63.

notice in terms of section 2(2)(a) before close of pleadings, sue the joint wrongdoer but without necessarily providing that such leave to sue must be obtained before the joint wrongdoer is so sued.

32. While section 2(4) does not expressly provide that the plaintiff can seek the leave after he has already instituted action against the joint wrongdoer to whom he did not give notice, the section also does not expressly state that he cannot do so.
33. Moving beyond the text itself, to the apparent purpose to which the subsection is directed in the context of the section as a whole, the Supreme Court of Appeal in *ABSA Brokers* stated:

“[15] We agree with the court below that the clear purpose of the Act is to avoid a multiplicity of actions arising from a single loss-causing event. The scheme of the Act contemplates a single determination of liability by multiple wrongdoers and the apportionment of liability amongst them in single proceedings. Thus a plaintiff who alleges that two or more persons are liable for the damage that is in issue is permitted by s 2(1) to sue them all in the same action. A defendant who alleges that another person is also liable to the plaintiff is capable of joining him or her in the proceedings under rule 13 of the Uniform Rules. And if the plaintiff and the defendant choose not to join that person in the action, then that person must at least be given the opportunity to intervene by being notified of the action. The clear purpose of ss (4)(a) and (b) is to encourage the resolution of all claims in single proceedings by barring further proceedings against parties who have not been given such notice (except with the leave of the court).”

34. The Supreme Court of Appeal in *ABSA Brokers* considered the structure of section 2. Section 2(1) “*is the guiding principle to have a unitary action*” in that an action is to be instituted against joint wrongdoers in the same action.¹⁰ Should the plaintiff not so sue all the joint wrongdoers in a single action, then those joint wrongdoers should at least be given notice so that they may intervene as defendants in the action should they choose. This is achieved by section 2(2).¹¹
35. Apart from the difficulties that would flow from a multiplicity of actions resulting in potentially divergent decisions being made in respect of the same loss-causing event, “*the Act recognises the potential prejudice to a joint wrongdoer who is not joined in an action*”.¹² To address that potential prejudice, section 2(2) provides that notice should be given to the joint wrongdoer to enable him or her to intervene as a defendant in the action.
36. To enforce the requirement that notice be given by the plaintiff to the joint wrongdoer in terms of section 2(2), section 2(4) provides for the sanction that if the notice is not given, then “*the plaintiff shall not thereafter sue [the joint wrongdoer] him except with the leave of the*

¹⁰ *ABSA Brokers supra* para 5.

¹¹ *ABSA Brokers supra* para 5.

¹² *ABSA Brokers supra* paras 5 and 6.

*court on good cause shown as to why notice was not given as aforesaid”.*¹³

37. Self-evidently an interpretation of section 2(4) which requires the leave of the court in terms of that subsection to be sought before a second action is instituted would more forcefully advance the guiding unitary principle of the section than an interpretation that such leave can be sought after the event. If the former interpretation is correct, the circumstances under which leave can be permissibly sought are considerably narrowed (as leave must be obtained in advance of the institution of the further action, rather than also afterwards) and so the incentive for the plaintiff to give notice in terms of section 2(2) before the close of pleadings is increased so as to avoid having to seek the leave of the court in such narrowed circumstances.
38. But, in my view, such an interpretation would be too blunt a means to advance the unitary principle. Sufficient fidelity to the unitary principle is achieved by requiring of the plaintiff to motivate why the leave of the court should be granted on good cause shown, even if after the event.
39. In permitting the plaintiff to seek leave after the event, the purpose of the section is not emasculated in that the plaintiff is still required to make out good cause for why notice was not given timeously, and in showing that good cause why notice was not given, the plaintiff should be required to explain why such leave is only being sought after the institution of the further action rather than before.

¹³ *ABSA Brokers* para 6.

40. This is a more balanced approach to the application of section 2(4) as to when the necessary leave can be sought, than adopting an approach that limits when leave can be sought to a specific period.
41. If section 2(4) is interpreted to require leave to be sought before proceedings are instituted, that may deny a plaintiff who may otherwise have a good claim against the joint wrongdoer from pursuing that claim because that plaintiff failed to give notice and only sought leave after the event. It is not difficult to envisage circumstances in which for one reason or another a plaintiff may be necessitated to institute proceedings without first obtaining the leave of the court, such as if prescription is looming. The furnishing of the section 2(2) notice itself, which in any event could only have been done before the close of pleadings, would not interrupt prescription as it does not constitute the service of process.¹⁴
42. Counsel for Mr Hussey submitted that this is a fate brought by a plaintiff upon himself if he waits so long before instituting proceedings (whether the initial action or an application in terms of section 2(4) of the Act), but the reality is that such a situation is easily envisaged.
43. Rather than an interpretation of section 2(4) that circumscribes the constitutional right to access to courts in terms of section 34 of the Constitution, I incline towards an interpretation of section 2(4) that advances that right.¹⁵

¹⁴ Section 15(1) as read with 15(6) of the Prescription Act, 1969.

44. An interpretation that the leave can be sought after the event can be reasonably ascribed to section 2(4) based on the wording of the section, does not render nugatory the unitary principle as is the purpose of section 2 and advances the constitutional right of access to the courts.
45. Both counsel advanced argument as to whether non-compliance with section 2(4) should be visited with nullity. Counsel for Mr Hussey, understandably, submitted that if leave is not obtained in advance, then the institution of proceedings would be a nullity, and so cannot be subsequently remedied by seeking and obtaining the leave of the court in terms of section 2(4) after the action has already been instituted. Plaintiff's counsel on the other hand submitted that non-compliance should not be visited with nullity, with reference to the factors described in *Palm Fifteen (Pty) Ltd v Cotton Tail Homes (Pty) Ltd* 1978 (2) SA 872 (A).¹⁶
46. In my view, it is not necessary to advance the purpose of section 2 that non-compliance must and should be visited with nullity. That section 2(4) itself contemplates that the leave of the court can be obtained on good cause shown militates against an interpretation that a failure to give notice before action is instituted is so grave that the further action must constitute a nullity. Further, although section 2(4) uses "shall", the preceding subsections, particularly sections 2(1) and 2(3), use more permissive (i.e. less peremptory) language in the form of "may". I am

¹⁵ *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors and Others* 2001 (1) SA 545 (CC) at paras 23 to 26.

¹⁶ At 885E-G.

conscious that the use of these verbs can be nebulous in the context of statutory interpretation. Nonetheless it is a factor to be taken into account when considering whether the failure of a party to comply with a section must be visited with nullity.

47. In my view the prejudice that is sought to be addressed by section 2, which is to avoid a multiplicity of actions and the further joint wrongdoer being prejudiced thereby, is not such that an action instituted without prior leave must be a nullity. Rather, I find that on the construction of the section, it was not the intention of the Legislature to make a nullity an action that had been instituted without the necessary leave in terms of section 2(4) having been obtained in advance. And so leave can be sought after the event.
48. This is consistent with what was said by Nicholas AJA in *Neugarten and Others v Standard Bank of South Africa Ltd* 1989 (1) SA 797 (AD) at 802F-G:

“It is not the rule that in all cases where the consent of some person is a prerequisite (whether at common law or by virtue of a statutory provision) to the validity of a transaction, it must be a prior consent. A statute may indeed so provide. So, in Incorporated Law Society of Natal v Van Aardt 1930 NPD 69, a by-law provided for a consent 'previously had and obtained'. It was held that these words clearly meant that the consent must be obtained beforehand (see at 76). Generally speaking, however, consent may be given ex post facto by subsequent ratification.”

49. Of course, that leave is obtained after rather than before the further action is initiated does detract from the joint wrongdoer's protection against a multiplicity of actions. As demonstrated in this matter, Mr Hussey is already a party in the first action, having been joined as third party to that action by the defendants in that initial action. If the second action is not a nullity, as I have found, then Mr Hussey as the further joint wrongdoer is obliged to participate in this second action too, as he has already done by *inter alia* raising a special plea of non-compliance with section 2(4). Mr Hussey is therefore obliged to participate in two actions. In my view, that potential prejudice is a factor that can be considered when determining whether good cause has been shown that leave should be granted, and to the extent that prejudice is exacerbated by the timing of the application in terms of section 2(4), that too is something that can be taken into account in that determination.
50. That leave in terms of section 2(4) is sought after rather than before the initiation of the further action is a factor which can be taken into account in assessing whether good cause has been made out rather than being a prohibition against that leave being granted at all.

HAS THE PLAINTIFF SHOWN GOOD CAUSE AS TO WHY NOTICE WAS NOT GIVEN TO MR HUSSEY AS A JOINT WRONGDOER BEFORE THE CLOSE OF PLEADINGS?

51. Unlike the first issue, what is required for purposes of showing good cause under section 4(2) of the Act has received judicial attention.

52. In *Lincoln*¹⁷ the court held that the subsection confers upon the court a discretion to grant or refuse leave and that this would require, in any application for such leave, that the applicant must:

52.1. establish that the person whom he desires to sue is *prima facie* a joint wrongdoer;

52.2. that *prima facie* the applicant has a cause of action against him; and

52.3. a consideration as to why notice was not given before the pleadings in the action closed.

53. In that matter, where the plaintiff sought leave to institute a subsequent separate action against a joint wrongdoer after judgment had already been given in the first action, the court found that good cause had been shown because the plaintiff could not have known before pleadings had closed in the first action of the existence of the further joint wrongdoer as that only unfolded during the course of the trial itself in the first action.¹⁸

54. In *Wapnick*¹⁹ the applicant sought both leave in terms of section 2(4) as and for leave in terms of Uniform Rule 13(3), which requires that a notice given by a party in an action against any other person who is not a party to the action must be served before the close of pleadings and failing which such notice may be served only with the leave of the court.

¹⁷ Above at para 376A to C.

¹⁸ At 376C.

¹⁹ Above.

55. In considering what is required for leave under section 2(4) of the Act, the court held that the requirement of good cause in section 2(4) “*clearly refers only to the explanation for the failure to give notice timeously*” and “[*it is thus not a provision in which that phrase is to be interpreted as requiring an applicant to furnish an explanation for a delay and to make out a prima facie case*”.²⁰ The court nonetheless continued, in relation to it being unnecessary for a *prima facie* case to be made out, that “[*it seems to me though that it does not follow that the applicant does not have to show that the party he wishes to sue is prima facie a joint wrongdoer*”.²¹ The court reasoned the application can be brought only against a person who is alleged to be a joint wrongdoer and that at the very least the applicant would have to make the necessary allegations which, if proven at trial, would show that the person is a joint wrongdoer as alleged, i.e. allegations that show that the person is jointly or severally liable in delict to the plaintiff for the same damages as the defendant in the earlier action.²² The court referred to and adopted the position in *Lincoln* that the plaintiff must show that the person is *prima facie* a joint wrongdoer.

56. The court in *Wapnick* also pointed out that in contrast to leave that may be granted in terms of Uniform Rule 13(3)(b) merely on good cause shown and without the sub-rule indicating a basis upon which a court

²⁰ At 422H.

²¹ At 422H-423A.

²² At paras 422H to 423C.

should exercise its discretion,²³ section 2(4) specifically refers to good cause shown as to why notice was not given.²⁴ As was the position in *Lincoln*, there must be a satisfactory explanation why notice was not given.

57. In the present instance, there is no difficulty that Mr Hussey is *prima facie* a joint wrongdoer and that sufficient averments have been made out which if proved at trial would demonstrate that he is a joint wrongdoer. In the present instance, the plaintiff has pleaded in his particulars of claim in the second action why Mr Hussey would be a joint wrongdoer in respect of the loss-causing event of the mirror ball falling from the ceiling and striking the plaintiff's head. Mr Hussey is described as the civil and structural consulting engineer whose duty it was, *inter alia*, to take the necessary precautions to ensure that the mirror ball was safely erected. That Mr Hussey is *prima facie* a joint wrongdoer is also evidenced by the defendants in the first action having issued third party notices in that action against Mr Hussey as well as the first defendant in the second action likewise doing so.

58. Although there is a suggestion in *Wapnick*, a decision of a different Division to this Gauteng Division, that in seeking leave under section 2(4) a plaintiff might not have to furnish an explanation for a delay,²⁵ in my view that was *obiter* as the court found that the plaintiff had not shown on good cause why leave should be granted on the basis that he

²³ At 423D.

²⁴ At 422D.

²⁵ See 422H, as cited above,

had not made the necessary averments that if proven at trial would show the further party to be a joint wrongdoer,²⁶ and not because of a failure to explain the delay. As explained earlier in this judgment, the delay in asking for the leave after the further action had already been instituted, rather than before, and any prejudice that it may cause the joint wrongdoer, is a factor to be taken into account.

59. I now turn to the plaintiff's explanation as to why notice was not given in the first instance in terms of section 2(2), and then why there was a delay in bringing this application seeking leave in terms of section 2(4) until after the institution of the further action.
60. As appears earlier in this judgment, the plaintiff knew of Mr Hussey before the close of pleadings in the first action as the first defendant had joined Mr Hussey by way of a third-party notice on 6 March 2020. As submitted by Mr Hussey's counsel, the giving of notice is not onerous. For example, it need not be served by Sheriff and there are no formalities. In this instance, the giving of notice should have posed no difficulty as Mr Hussey had already been identified in the third party-notices and other pleadings filed in the first action and was not skulking away.
61. Instead of giving the requisite notice in terms of section 2(2) of the Act (or a third-party notice in terms of Uniform Rule 13(1) although pleadings had not yet closed), the plaintiff's legal representatives proceeded with the issue of a second summons at the instance of the plaintiff on

²⁶ AR 425D.

24 March 2020. In doing so, they created the multiplicity of actions that both section 2 of the Act and Uniform Rule 13 seek to avoid, together with the attendant prejudice thereon.

62. The only answer that is advanced by the plaintiff as to why he did not give notice to Mr Hussey in terms of the Act is that his then attorneys lacked familiarity with the provisions of the Act, which provisions the plaintiff contends constitute a departure from the normal procedural provisions of the Uniform Rules in relation to causes of action and joinder of defendants.
63. I have some difficulty in appreciating this reasoning because the plaintiff in any event did not make use of the normal procedural provisions of the Uniform Rules to join Mr Hussey to the first action, such as by way of a third-party notice in terms of Uniform Rule 13, but instead proceeded against Mr Hussey by way of a second summons.
64. Although the plaintiff explains why he proceeded with some haste in March 2020 with the issue of the second summons, being that the Sheriff's offices would soon close with the commencement of the 'hard lockdown' on 27 March 2020 consequent upon regulations to combat the Covid-19 pandemic, this is no explanation why notice was not and could not be given. The plaintiff's case is not that he decided not to give notice because he was pressed for time. In any event, as Mr Hussey's counsel persuasively argued, the plaintiff was not pressed for time as he had only just discovered the identity of Mr Hussey as a joint wrongdoer,

and so there was no danger of imminent prescription of the plaintiff's claim against Mr Hussey.

65. Upon a closer reading of the founding affidavit, it appears that the plaintiff's erstwhile attorneys only became aware of the requirement in the Act to give notice when Mr Hussey raised the special plea in June 2020 that section 2(4) of the Act had not been complied with, and that is why notice was not given. Simply put, the plaintiff's failure to give notice was a matter of ignorance of the relevant provisions.
66. Although there does appear to be some attempt by the plaintiff to withdraw from the position adopted in his founding affidavit that his failure to give notice was because of his then attorney's lack of familiarity with the provisions of the Act, when this was pointed out during argument the plaintiff's counsel made it clear, understandably as there was no other reason advanced in the founding affidavit, that the plaintiff stood by his previous attorney's lack of familiarity as the reason notice was not given. I therefore proceed on the basis that this was the reason the notice was not given.
67. Although it would have been expected of the plaintiff shortly after coming to learn in June 2020 of the requirement that leave was required in terms of section 2(4) to take the necessary steps to remedy the situation, it would only be over two years later, in September 2022, that this application would be launched. The explanation given by the plaintiff in his affidavits is that his erstwhile legal practitioners were of the view

that the relevant provisions of section 2 had become abrogated by disuse and that there was therefore no need to seek such leave. Upon the plaintiff appointing new attorneys of record in November 2021, and having launched an application for consolidation and Mr Hussey persisting in his position that leave needed to be obtained, the plaintiff decided in September 2022 to launch these proceedings.

68. The explanation that his previous attorneys were of the view that the relevant provisions of the Act had been abrogated by disuse is unpersuasive. For instance, those sections have been considered and applied by the Supreme Court of Appeal in 2009 in *ABSA Brokers*.
69. Accordingly, the plaintiff's explanation is the same for both his failure to give notice in terms of section 2(2) and for not bringing this application earlier, namely the deficiency of the advice that he received from his erstwhile attorneys. Unsurprisingly Mr Hussey's counsel submitted that this was an instance where the plaintiff could not distance himself from the conduct of his previous legal representatives and that as adequate explanations had not been given, good cause had not been shown as to why notice was not given.
70. Van Zyl J in *Pitsiladi and Others v ABSA Bank and others* 2007 (4) SA 478 (SE) described an application for leave to serve a third-party notice in terms of Uniform Rule 13(3)(b) after the close of pleadings, "*of the same genus as applicants for rescission of a default judgment, removal of bar, leave to defend and application for extension of time for the filing*

of pleadings” and reiterated that in deciding whether good cause has been shown, the court has a wide discretion, which is to be exercised judicially upon the consideration of all the facts, which included the explanation advanced by the applicant for his failure to give notice before the close of pleadings, whether the applicant has made out a *prima facie* case on the merits against the third party, the prejudice which any of the parties may suffer by the grant or refusal of the application, and the administration of justice with reference to the purpose of the relevant rule or provision (which would be the avoidance of a multiplicity of actions and to consolidate, in specified circumstances, a multiplicity of issues between a number of litigants all in a single action).²⁷

71. To the same effect in relation to an application in terms of Rule 13(3)(b), in this Division, is *Mercantile Bank Limited v Carlisle and Another* 2002 (4) SA 886 (W), and where the court stated that a lenient approach is called for.²⁸
72. The court similarly has a wide discretion whether to grant leave in terms of section 2(4) of the Act.²⁹ And the considerations that apply in relation to an application for leave in terms of Rule 13(3)(b) will apply in considering whether leave is to be granted in terms of section 2(4) of the

²⁷ Para 9.

²⁸ At para 889G.

²⁹ *Padongelukkesfonds v Van den Berg en 'n ander* 1999 (2) SA 876 (O) at 886B.

Act, save that specific consideration must be given as to why the notice was not given in terms of section 2(2).³⁰

73. In the present instance, for the reasons set out above, the plaintiff's explanation as to why he could not give notice in the first instance and why he delayed in bringing this application, which is to attribute the fault to his previous legal representatives, is not persuasive. On the other hand, Mr Hussey is clearly a joint wrongdoer and it is both appropriate and convenient that his liability be determined, not only as between him and those defendants who had already joined him in the first action as long ago as March 2020 but also as between him and the plaintiff, in terms of the second action also launched in March 2020. The present position can be contrasted to that where a joint wrongdoer is only sued a long time down the line and after the trial has significantly progressed (such as in *Lincoln* where the joint wrongdoer was only sued after the judgment had already been given in the first action, and the court was nevertheless still prepared to grant leave). In the present instance, and as emphasised by the plaintiff's counsel, Mr Hussey has been part of the overall fray since early in the litigation, and so his prejudice in being drawn into the second action is less pronounced.

74. Should leave not be granted, there would be no *lis* between the plaintiff and Mr Hussey but only as between Hussey and those defendants who joined him as a third party in the first action. As Mr Hussey in any event would have to participate and defend himself in relation to those who

³⁰ *Wapnick* at 422D.

have joined him as third parties in the first action, it would not be overly prejudicial to him to simultaneously defend his position as against the plaintiff in the second action.

75. The plaintiff has brought proceedings to consolidate the two actions, which would then address the prejudice caused by two separate actions. Although this multiplicity of actions could have been avoided had the plaintiff given the statutory notice in the first place, or served a third-party notice in terms of Uniform Rule 13(1) on Mr Hussey, that is now being addressed by the consolidation application. That Mr Hussey has had to participate in two actions in the meanwhile when that could have been avoided can be addressed by appropriate costs orders in his favour.
76. In contrast, should leave be refused, the plaintiff would be left largely remediless as against Mr Hussey. That a plaintiff would be left remediless is a strong persuasive factor as to why leave should be granted. In *Padongelukkefonds v Van den Berg*³¹ the court found that although the applicant's application for leave in terms of both section 2(4) of the Act and Uniform Rule 13(3)(b) was seriously lacking in various respects, in its wide discretion it could not refuse leave and likely leave the applicant remediless.
77. In the present instance, if leave is not granted, the plaintiff would still be able to pursue his claims as against the other joint wrongdoers and so in that respect it cannot be said that the plaintiff would be entirely

³¹ *Supra*, at 887B.

remediless. Nonetheless, the fact that the plaintiff would be remediless against Mr Hussey is something that weighs in favour of granting leave.

78. Although the explanation for the delay in launching these proceedings is not persuasive, as set out above, I do take into account that little has happened since the special plea in the second action was delivered by Mr Hussey in June 2020. Why this redounds in favour of granting leave is that this is not a case where the plaintiff has waited until the steps of court before seeking such leave. Notwithstanding the delay in seeking the leave, not much has taken place in the actions and, other than the passage of time, the parties will not be greatly inconvenienced in the further prosecution of the second action should leave now be granted. The granting of leave would open the way to the progression of consolidated action consequent upon the plaintiff's pending consolidation application.
79. In the circumstances the granting of leave will result in an expeditious determination of liability between all the joint wrongdoers in what may transpire to be consolidated actions.
80. I also adopt an approach that has a measure of flexibility where, such as in applications for rescission of judgment,³² a weakness in relation to one requirement for a successful application can be made up by the strength of the other requirements. Accordingly, the weakness of the plaintiff's explanation as to why no notice was given in the first place and

³² *Zealand v Milborough* 1991 (4) SA 836 (SE) at 838D/E; *Carolus and another v Saambou Bank Ltd* 2002 (6) SA 346 (SE) at 349D-E

then the delay in launching these proceedings is counter-balanced by the clear position of Mr Hussey as a joint wrongdoer, that Mr Hussey is already compelled to participate in the litigation by way of his joinder thereto by the other defendants as far back as March 2020, and the plaintiff being left largely remediless against Mr Hussey if leave is not granted.

81. I therefore exercise my wide discretion in finding that the plaintiff has shown good cause and so should be granted leave in terms of section 2(4) of the Act to proceed with the present action.
82. The plaintiff sought such leave both as against the first and second defendants as respondents in these proceedings. The first defendant as the first respondent did not oppose the relief, and so no order of costs need be made in relation to the first defendant.
83. The plaintiff as the applicant in seeking leave is seeking an indulgence from the court. This is especially so where on the facts of the present matter the plaintiff could have given notice, had ample time to do so and has advanced no reason why he did not do so other than the ignorance of his then attorneys of the statutory requirement that such notice must be given. This is compounded by the plaintiff's then legal representatives advising the plaintiff not to bring the application because in their view the relevant sections had fallen into disuse. I have, as appears above, adopted a particularly lenient position in the exercise of my wide discretion. In my view it is appropriate that Mr Hussey as the

opposing respondent should have his costs. Apart from the court being indulgent towards the plaintiff, Mr Hussey's opposition has been reasonable³³ and particularly where the issue as to whether leave could be sought after the event is *res nova* and where the exercise of my discretion was not an easy matter. Further, the award of costs to Mr Hussey would also constitute some salve for his having been obliged to deal with two actions in circumstances where had the plaintiff complied with section 2(2) and/or had joined Mr Hussey by way of a third-party notice in terms of section 13(1), there may have been no need for Mr Hussey to do so.

84. An order is granted as follows:

84.1. The plaintiff is granted leave to persist with his action under this case number 9915/2020 against the first and second defendants in terms of section 2(4)(a) of the Apportionment of Damages Act, 1956.

84.2. The plaintiff as the applicant is to pay the costs of the application, which include the costs of the second defendant as the second respondent.

³³ See *Van den Berg* above, at 887D where the applicant for leave under section 2(4) in seeking an indulgence was ordered to pay the respondent's costs as the opposition was reasonable.

Gilbert AJ

Date of hearing: 9 May 2023

Date of judgment: 6 July 2023

Counsel for the plaintiff (applicant): I Miltz SC and C Bekker

Instructed by: CN Sweetnam Attorneys

Counsel for the second defendant

(second respondent): A Govender

Instructed by: Clyde & Co