


REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT  
(JOHANNESBURG)

CASE NO: 10563/02

|  |                                  |
|--|----------------------------------|
| (1)  | REPORTABLE: NO                   |
| (2)  | OF INTEREST TO OTHER JUDGES: YES |
| (3)  | REVISED.                         |
|  |                                  |
| 8 MARCH 2013   | FHD VAN OOSTEN                   |

In the matter between

**ABSA BANK LIMITED**

**PLAINTIFF**

and

**SOUTH AFRICAN COMMERCIAL  
CATERING AND ALLIED WORKERS  
UNION NATIONAL PROVIDENT FUND**  
(under curatorship)

**FIRST DEFENDANT**

**SASFIN BANK LIMITED**

**SECOND DEFENDANT**

**SUNLYN INVESTMENTS (PTY) LIMITED**

**THIRD DEFENDANT**

*Practice - application in terms of Uniform Rule of Court 13(3)(b) for leave to serve, after the close of pleadings, a third party notice on the second and third defendants to join them as defendants in the action - joinder sought on basis of an indemnity given by the second and third defendants in an agreement of settlement - interpretation of settlement agreement - discretion of court in terms of rule - nature of - applicant must furnish a satisfactory explanation for his or her failure to issue the third party notice before the*

*close of pleadings and show a prima facie case on the merits against the third party - both requirements satisfied - application granted.*

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## J U D G M E N T

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**VAN OOSTEN J:**

[1] This is an application in terms of Uniform Rule of Court 13(3)(b) for leave to serve, after the close of pleadings, a third party notice on the second and third defendants. In terms of the third party notice the plaintiff in the action, seeks to join the first and second defendants in the action as third parties to the action. The basis for the joinder, as set out in the annexure to the third party notice, is the plaintiff's claim for an indemnity by the second and third defendants, arising from an agreement of settlement to which I shall revert, in respect of any amounts the plaintiff may be ordered to pay to the first defendant, in terms of the first defendant's pending counterclaim. The application is opposed by the second and third defendants on essentially two grounds to which I shall presently revert.

[2] The action between the parties commenced in June 2002 when summons was issued by the plaintiff against the first, second and third defendants. The plaintiff's claims against the first defendant, as cessionary of the rights of lessors under the agreements (the second and third defendants), was for payment of arrear amounts allegedly due in terms of fifteen agreements for the hire of office equipment, and, against the second and third defendants conditionally should the plaintiff not succeed against the first defendant. The first defendant filed a plea in which it *inter alia* disputed the authority of the person allegedly having acted on its behalf in concluding the rental agreements (the authority issue). The first defendant simultaneously instituted a counterclaim in which it seeks payment from the bank in the aggregate amount of R556 350.04, based on enrichment, it being alleged that payment of those amounts were made to the plaintiff in the *bona fide* and reasonable belief that the rental agreements were validly concluded. The second and third defendants likewise filed a single plea in which liability for payment is denied. The plaintiff replicated to the first defendant's plea in respect of the authority issue and filed a plea to the first defendant's

counterclaim. The first defendant replicated to the plaintiff's plea to its counterclaim (as amended). The first defendant filed a rejoinder in respect of the plaintiff's replication to the first defendant's plea concerning the authority issue. I should mention that a number of amendments were effected to the pleadings the details of which are not of any relevance to the present application.

[3] This brings me to the settlement agreement I have already referred to, which lies at the heart of the present application. It was concluded on 20 July 2005 between the plaintiff, on the one hand, and the second and third defendants, on the other. In essence, in terms of the settlement the plaintiff agreed to withdraw its action against the second and third defendants immediately upon payment of an amount of R4,5m, the second defendant agreed to purchase the rights to the proceeds of the plaintiff's claim against the first defendant in the action, the second defendant would thereafter be entitled to "direct" the further prosecution and conduct of the plaintiff's action against the first defendant at its sole costs, the second defendant would be entitled to the proceeds of the plaintiff's claim and further be entitled to compromise or settle the plaintiff's action in its sole and unfettered discretion. The provisions of the settlement agreement were duly implemented: the plaintiff withdrew its action against the second and third defendants and they took over the reins in the litigation, in appointing their own attorney and counsel to represent the plaintiff in the litigation.

[4] The trial of the action came up for hearing before Bashall AJ. The parties agreed on a stated case on the authority issue. The learned judge decided the authority issue in favour of the first defendant and the matter subsequently went on appeal to the Supreme Court of Appeal. The appeal was dismissed with costs (see *Absa Bank v SACCAWU National Provident Fund (under curatorship)* 2012 (3) SA 585 (SCA)).

[5] The judgment of the Supreme Court of Appeal, although dealing only with the authority issue, effectively disposes of the plaintiff's claim against the first defendant. The first defendant's counterclaim, however, is still alive. The defendant demanded payment of its counterclaim and this prompted the plaintiff to launch the third party proceedings. The plaintiff, as I have alluded to, claims for an indemnification by the second and third defendants in respect of the first defendant's counterclaim as the basis

for joining them to the action as third parties. The indemnification claimed is based on “a proper interpretation” of the settlement agreement alternatively a rectification thereof. The plaintiff contends that on a proper construction and interpretation of the settlement agreement (alternatively the settlement agreement as rectified), the second defendant, alternatively the second and third defendants, assumed responsibility and liability for the first defendant’s counterclaim and/or undertook to indemnify the plaintiff in respect of any finding in favour of the first defendant in respect of its counterclaim. The rectification sought is to the effect that it was at all times the common intention of the parties to the settlement agreement, *inter alia*, that the second and/or third defendant would assume liability on behalf of the plaintiff, or that they undertook to indemnify the plaintiff “in respect of any finding in favour of the first defendant in respect of its counterclaim”.

[6] The second and third defendants’ opposition to the present application is twofold: firstly, a denial that of the existence of the indemnity and secondly, that they have abandoned their rights to the proceeds of the plaintiff’s claim against the first defendant resulting in the plaintiff having re-asserted control of the litigation. It is the second ground of opposition which has been argued before me and to which I now turn.

[7] The defendant’s contention is solely based on the provisions of clause 4.4 of the settlement agreement, which reads as follows:

‘In the event that the second defendant determines that it wishes to abandon its right to the proceeds of the claim, the second defendant shall inform the plaintiff of its intention and the plaintiff shall be entitled to re-assert full control of the litigation. In that event the plaintiff shall be solely responsible for all claims and costs from the matter and shall have no further recourse whatsoever to the second and third defendants, either jointly or individually.’

It is the defendants’ case that they have brought themselves squarely within the ambit of this clause and that they accordingly, have been released from further involvement in the litigation. This they attempted to achieve in the following manner: in a letter by the second and third defendants’ attorneys, addressed to the plaintiff’s attorneys, dated 11 September 2012, notice is given of the second defendant’s “intention to abandon” its right to the proceeds of the plaintiff’s claim against the first defendant, that the plaintiff “is entitled to re-assert full control of the litigation” and that the plaintiff will be solely

responsible for all claims and costs arising from the matter. In the penultimate paragraph of the letter it is stated: "In the light of the foregoing notification, you are invited to withdraw your application" *ie* the present application. No response was received from the plaintiff, except that it is contended by the plaintiff in the replying affidavit that the purported abandonment is of no force and effect as the first defendant, at the time thereof, was no longer possessed of the rights to the proceeds of the plaintiff's claim pursuant to the judgment of the Supreme Court of Appeal I have referred to.

[8] In argument before me counsel for the second and third defendants submitted that the second defendant, as it was entitled to do, divested itself of the right to the proceeds of the plaintiff's claim and that the plaintiff, had it not wanted to receive the right back, would be at liberty to similarly abandon it. There is no substance in the contention and it is rejected. It overlooks the provisions of clause 4.4 of the settlement agreement which specifically provide that upon abandonment "the plaintiff *shall be entitled* to re-assert full control of the litigation" [emphasis added]. The meaning thereof is clear: a right is given to the plaintiff to either accept or reject the abandonment. In the event of the plaintiff's acceptance of the abandonment the remainder of the clause resulting in the plaintiff again taking control of the action, becomes effective. The clause does not and cannot be constructed as to mean that upon unilateral abandonment the right will automatically revert back to the plaintiff, as the defendants would have it. The plaintiff, as is apparent from the papers, did not accept the abandonment. For these reasons the second defendant's abandonment is of no contractual force and effect. It follows that the only real ground of objection raised by the second and third defendants must fail.

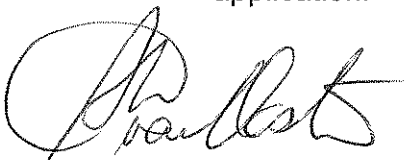
[9] Leave of the court in terms of Rule 13(3)(b) in fact amounts to an indulgence. The granting of leave is not a mere formality and the court is endowed with a wide discretion in deciding whether to grant it. In general the applicant seeking such leave must, firstly, furnish a satisfactory explanation for his or her failure to issue the notice before the close of pleadings and, secondly, show a *prima facie* case on the merits against the third party. I am satisfied that a reasonable explanation for the delay exists and no arguments to the contrary were advanced. As for the plaintiff's cause of action against the second and third defendants, much, if not all, will eventually depend on the merits of

the proposed rectification of the settlement agreement. Although by no means free from uncertainty, this is not the appropriate time to determine the merits of the rectification. The trial court will in due course do so (see *Mercantile Bank Ltd v Carlisle and another* 2002 (4) SA 886 (W) 891F-G). The third party notice, in my view, does disclose a cause of action against the second and third defendants, which cannot be said to be unfounded. The matter accordingly ought to proceed to trial.

[10] It remains to deal with the costs of this application. The plaintiff in the notice of motion seeks an order that costs of the application, if not opposed, be costs in the action. The second and third defendants' opposition to the application, in my view, was not reasonable. It follows that the normal rule of costs following the event, must apply.

[11] In the result I make the following order:

1. Leave is granted to the plaintiff to deliver to the second and third defendants a Notice to Third Parties with annexure thereto, in accordance with annexure "FA2" to the founding affidavit in this application.
2. The second and third defendants are ordered to pay the costs of this application.



**FHD VAN OOSTEN**  
**JUDGE OF THE HIGH COURT**

**COUNSEL FOR PLAINTIFF**

**PLAINTIFF'S ATTORNEYS**

**ADV GW AMM**

**LOWNDES DLAMINI**

**COUNSEL FOR SECOND AND  
THIRD DEFENDANTS**

**ADV SJ BEKKER SC**

**SECOND AND THIRD  
DEFENDANTS' ATTORNEYS**

**SALANT ATTORNEYS**

*DATE OF HEARING*  
*DATE OF JUDGMENT*

*6 MARCH 2013*  
*8 MARCH 2013*