

REPUBLIC OF SOUTH AFRICA



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

Case Number: 10839/2019

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

..... June 2022..... ..

DATE

SIGNATURE

In the matter between:

PRIME TRADE FINANCE (RF) (PTY) LTD

Plaintiff

And

DELPOR, GERHARDUS MARTHINUS PETRUS

Defendant

SCOTT JASON GUSH

Third Party

JUDGMENT

SIWENDU J

Introduction

[1] The court is asked to adjudicate three interlocutory applications arising from action proceedings instituted by the plaintiff against the defendant.

- [2] The plaintiff, Prime Trade Finance (RF) (Pty) Ltd, (Prime Trade), operates as a trade financier. Its business is to provide loan finances to clients who require trade finance for their business operations. It operates from 1678 Taunton Crescent, Dainfern, Johannesburg.
- [3] The defendant is Gerhardus Marthinus Petrus Delport, (Delport). Prime Trade alleges that it appointed Delport as its director in April 2018. Simultaneously with the directorship, it employed Delport as a commissioned agent in terms of a partly written and partly oral agreement. The terms of the appointment agreement were to be reviewed after a period of 6 (six) months.
- [4] Prime Trade seeks to recover a payment of R4 369 630.22 plus interest on R4 369 630.22, *a tempore morae*, to date of final payment from Delport. The particulars of claim state that the claim arose from a trade finance transaction and funding made by Prime Trade to CC Trade 262 (Pty) Ltd t/a Alpine Butchery (Alpine), a client introduced by Delport to Prime Trade.
- [5] The sequence of the prosecution of the action has relevance.
- [6] Prime Trade pleaded its cause of action in two particulars of claim. In the original particulars, issued in March 2019, it based its claim against Delport on a breach of the appointment agreement. Delport defended the action and filed his notice of intention to defend in April 2019.
- [7] On 14 May 2019, Delport through his former attorneys of record, Hajibey-Bhyat Inc, called for discovery of the agreement relied on in terms of Rule 35(12) of the Uniform Rules of Court. On 11 July 2019, he delivered a notice of exception in terms of rule 23(1) of the Uniform Rules. On 13 August 2019 he delivered an exception to the claim against him. Nothing transpired in the litigation for approximately 10 months.
- [8] In the intervening period, Prime Trade appointed new attorneys, RHK Attorneys, who are the current attorneys of record. On 4 June 2020, they delivered a notice of substitution on Delport's then attorneys of record together with a Notice of intention to amend the particulars of claim. On 29 June 2020, Delport's attorney of record withdrew. He appointed new

attorneys; Hajibey-Bhyat Inc were substituted by Douglas Smart Attorneys on 1 July 2020 who are the current attorneys of record.

- [9] Prime Trade's amended particulars of claim are dated 10 July 2020. On 14 August 2020, Prime Trade delivered a second Notice of Intention to amend its particulars of claim on Delpport's new attorneys. Delpport does not oppose the amendment.
- [11] On 15 September 2020, Delpport's new attorneys called for discovery in terms of Rule 35(11)(12) and (14) once more. He delivered his plea to the amended particulars on 10 March 2021. Pleadings closed in the main action on 2 April 2021. On 10 June 2021, Delpport served a Third Party Notice (the Notice) on Mr Scott Jason Gush (Gush), a director at Prime Trade. Gush objects to the late filing of the Notice. In addition to objecting to the Notice, Gush in turn delivered an exception to the Annexure attached to the Notice by Delpport.
- [12] On 6 September 2021, Delpport delivered his application for leave of the court to serve the Third Party Notice. On 10 September 2021, he delivered an amendment to the annexure to the Third Party Notice. Even though he delivered the opposition to the Notice on 23 September 2021, Gush delivered his answering affidavit out of time, on 2 November 2021, two months after close of pleadings. Gush, as the prospective third party, seeks condonation for the late delivery.
- [13] To provide context to the interlocutory issues arising, I first deal with the cause of action against Delpport.

The cause of action and Delpport's Duties

- [14] The amended particulars of claim, details the material, alternatively, tacit terms of the agreement allegedly breached as well as the duties assigned to Delpport. Prime Trade's cause of action against Delpport is premised on a breach of common law and statutory duties it alleges were owed to it.
- [15] Prime Trade asserts that Delpport, as a commissioned agent, (1) owed a duty of care to it (2) had to exercise professional care (3) had to discharge his functions with due care, skill and diligence expected of a commissioned agent in the financial sector; (4) had to discharge his functions honestly and in good

faith; (5) had to not act negligently in the performance of his obligations; and (6) had avoid any conflict of interests in the exercise of his functions.

[16] It claims that in his capacity as its representative, Delpont was required, *inter alia*, to:

[16.1] Source potential clients for Prime Trade for the purposes of concluding trade finance loan agreements with them;

[16.2] Raise funds from potential clients to invest in Prime Trade;

[16.3] Upon the successful conclusion of any trade finance loan agreement, Delpont would share in the net revenue derived from the trade finance loan agreement on an equal basis with Prime Trade after the deduction of all costs and expenses associated with the trade finance loan agreement;

[17] In sourcing potential clients, Delpont would be obliged to perform a vetting process and conduct a due diligence investigation into any potential client to be introduced, which would involve, *inter alia*:

[17.1] Meeting with, and explaining the plaintiff's business to potential clients;

[17.2] Conducting background checks and credit worthiness assessments of potential clients;

[17.3] Conducting a comprehensive review of the potential client's business operations including, *inter alia*, considering any security that could be provided by the client for any finance provided;

[18] Any due diligence investigation was to be carried out prior to:

[18.1] Prime Trade concluding any trade finance agreement with a proposed client;

[18.2] Delpont advising Prime Trade to conclude any trade finance agreement with a proposed client;

[18.3] Delpont advising Prime trade to advance funds in terms of any trade finance agreement with a proposed client;

- [18.4] After a due diligence investigation had been conducted, Delpport would present a valid and binding written trade finance agreement to Prime Trade for conclusion with the potential client;
- [19] Prime Trade alleges that Delpport was grossly negligent in the performance of his duties as a director and his duties as a commissioned agent, in one or more of the following respects:
- [19.1] He failed to conduct a proper risk assessment in respect of a company known as CC Trade 262 (Pty) Ltd t/a Alpine Butchery ("Alpine") before recommending it as a client to whom the plaintiff would lend and advance financing;
- [19.2] He advised Prime Trade that Alpine had secured a considerable capital investment from Mr John Bayly in order to fund capital expansion, when in fact it had not;
- [19.3] He also misrepresented certain facts.
- [20] Prime Trade claims it would not have:
- [20.1] lent and advanced the sum of R4 168 745.57 to Alpine;
- [20.2] paid a commission to Bayly in the sum of R82 554.85;
- [20.3] paid commissions to Delpport in respect of his "services" in connection with Alpine in the sum of R115 047.46; and
- [20.4] incurred legal costs in trying to secure the capital sum and the repayment thereof from Alpine, presently in the amount of R32 886.30.
- [21] It alleges that by virtue of his appointment as a director of Prime Trade, Delpport owed Prime Trade statutory duties as contemplated in sections 76(2)(a)(ii), s 76(3)(a), (b), (c) and s 76(5) of the Companies Act 71 of 2008 ('the Act').
- [22] As a further alternative to the claim of a breach of statutory duties, Prime Trade sues Delpport based on a delictual liability based on a misrepresentation. Prime Trade also, as Claim D, seeks to have Delpport declared a delinquent director under the Act.

- [23] Delport does not deny the existence of the appointment agreement but alleges that the parties recorded and supplemented the appointment agreement with a written agreement dated 10 May 2018. He denies that he was at any time “in fact a director” at Prime Trade as defined in section 1 of the Act, even though he was registered as such with the Companies and Intellectual Property’s Commission (CIPC).
- [24] Delport says he referred Alpine to Prime Trade without making any recommendations. He presented Prime Trade with information to show that Alpine was trading at a loss and was experiencing cash flow problems. I need not deal with all the defences raised at this stage.
- [25] Importantly, Delport seeks to join Gush as a third party. He seeks a contribution and/or an indemnity from Gush, as such, in the event that he is held liable to Prime Trade. This is, based on the fact that Gush represented Prime Trade in respect of the agreements forming the subject of the action against him. He asserts that the obligations placed on him were assumed by Gush.
- [26] I understand, from the papers, that at some point, on or about 12 September 2021, Gush fled the country because of alleged threats to his life. Certain of his business dealings soured. He could not commission his answering affidavit which was due on 5 October 2021. He filed a commissioned answer on 2 November 2021.
- [27] Part of the controversy is that Delport complains that Gush’s answering affidavit refers to correspondence dated 7 December 2020, between Prime Trade’s attorneys, and his (Delport’s) attorneys. As a result, on 16 November 2021, simultaneously with the delivery of his replying affidavit, Delport launched an application to strike out the inclusion of the email on the basis that it is “*without prejudice*” correspondence, and is inadmissible. He seeks to strike out all further references to the email in Gush’s answering affidavit.

Interlocutory Applications

- [28] I have considered the application for condonation in respect of the late filing of the authenticated answering affidavit. Good cause is shown and I can see no

prejudice to Delport as a result because the unauthenticated affidavit was delivered as required. In addition, Delport does not oppose the condonation application (condonation application).

[29] In summary, what remains are the following interlocutory applications:

[29.1] Delport's application for the court's leave to deliver the Notice as amended by the third-party notice dated 10 September 2021 in terms of Rule 13(3)(b) (the Rule 13(3)(b) application).

[29.2] Delport's application to strike out certain evidential material from the answering affidavit by Gush. (the striking out application).

[29.3] Gush's Exception to Delport's Notice (the exception application).

It seems prudent to deal with the striking out application first before dealing with the Rule 13(3)(b) application. It influences the determination of whether to grant leave or not.

Striking out application

[30] It is common cause that between December 2020 and January 2021, the parties unsuccessfully explored a settlement of the dispute. Delport says the letter dated 7 December 2020 relates to the "*without prejudice*" correspondence in respect of the settlement discussions between the parties. It was addressed by his attorneys to Prime Trade's attorneys who now happened to represent Gush.

[31] As I understand the argument, the reason Gush included this letter in his answering affidavit is to show that Delport, (who now applies for leave of the court to permit the late delivery of the Notice in terms of the Rule 13(3)(b) application) has not been fully candid with the court, and is not truthful and *bona fide*. It is said that if Delport's explanation is incomplete, misleading, or otherwise *mala fide*, then the court will have reason to refuse the Rule 13(3)(b) application.

[32] It is said that on 7 December 2020, some three months prior to when Delport says he was first advised to consider joining Gush as a third party, his

attorneys explicitly made a threat to join Gush as a third party to the litigation. The argument is that the contents show that Delport's attorneys:

[32.1] had already been instructed to institute third party proceedings against Gush.

[32.2] had already been appraised of his procedural right, and

[32.3] had already then discussed the issue of joining Gush as a third party.

[33] A curious point advanced by Ms Larney (for Delport) is that even though Gush acted as a representative of Prime Trade both in respect of the agreement(s) in dispute and the ensuing litigation, Gush as a "third-party" to the communication cannot use correspondence which was not addressed to him (either directly or through his/her agent). He cannot give evidence, or rely on its contents for his own benefit. Delport has not waived the privilege.

[34] Mr Fasser (for Prime Trade and Gush) accepts the general rule which is based on public policy considerations that: communication made in the course of *bona fide* settlement negotiations is privileged and cannot be admitted as evidence without the consent of both parties. The point of departure in Mr Fasser's argument is premised on the court's decision in *Naidoo v Marine & Trade Insurance Co Ltd*¹ where the court clarifies and points out that:

"...the purpose for which a party desires to adduce "*without prejudice*" communication is all important, for in exceptional circumstances, it may well be admitted in evidence despite the general rule in order to prove, for example, that it contains a threat, an act of insolvency or possibly other matters that would be contrary to public policy to protect from being admissible."

[35] Mr Fasser argues that even if it was a *bona fide* attempt to settle the litigation, the letter contains a threat of litigation and thus falls within the ambit of the exceptional circumstances alluded to in *Naidoo* above. South African law accepts the proposition that if '*without prejudice*' correspondence contains a threat of legal action should an offer contained within it be refused, the

¹ 1978 (3) SA 666 (A) 681B – C.

correspondence can be admitted into evidence for the limited purpose of proving the threat.²

[36] This threat of litigation against the third party is highly relevant since it forms part of a central issue presently before the court, namely, (i) the issue of Delpport's *bona fides*, and (ii) whether he has provided a candid explanation of his default in delivering the third party Notice sufficient to justify the exercise of the court's discretion in his favour.

[37] Ms Larney based her contention on the view that the rights to the correspondence vests in the parties to the litigation only. She contends that a third party who overhears a "*without prejudice*" conversation cannot give evidence of its contents. Gush is not entitled to waive a prejudice which did not attach to him. On a close discernment, the submission is not entirely correct.

[38] It is evident that Gush represented Prime Trade throughout the litigation. He is the business mind of Prime Trade. Ms Larney accepts this much. It follows that Gush would have been privy to the letter in that capacity. The distinguishing feature however is that the contents of the letter reached beyond the parties to a threat of the litigation against Gush in his personal capacity. It is clear that its aim was to induce Gush to cause Prime Trade to settle, failing which, he would be embroiled in the litigation *personally*. The threat was directed at him, as an unconnected third party. I agree with Mr Fasser that it was a threat of further (additional) civil litigation, directed against a person who was, at that stage, not yet a party to the dispute — this brings it within the ambit of the exception to the general rule.

[39] The letter is admissible for this reason and the application to strike it out, fails.

Rule 13(3)(b) application

[40] As already alluded to in this application, Delpport seeks leave to serve the third-party Notice, alternatively, for the court to permit him to rely on the third party Notice dated 10 June 2021 which was served after the close of pleadings. The close of pleadings occurred on or about 1 April 2021.

² *Hoffend v Elgetti* 1949 (3) SA 91 (A).

- [41] Rule 13(3)(a) requires that a third party Notice be served on the third party before the close of pleadings in the action in connection with which it was issued. Rule 13(3)(b) requires that if a third party notice is delivered after the close of pleadings, that may only be done with leave of the court. I agree that like all rules of court, the granting of leave is not a mere formality.
- [42] Delport submits that the delay is not significant and there is no prejudice to the third-party who is closely associated with the plaintiff and represented by the same attorneys. He states that where his attorneys filed the notice without first making application in terms of Uniform Rule 13(3)(b), this was regrettable, but not unreasonable.
- [43] He claims that he was advised that parties, more often than not, do not consider pleadings immediately closed upon the date which the replication becomes due. The reason for this position is that parties often effect amendments and join issues after this date and the courts are alive to such fact. This is also provided for in the various situations listed in Uniform Rule 29(1).
- [44] He states that on 15 March 2021, his attorneys suggested joining Gush as a third party:
- “This was the first time the suggestion was made to me, and I was invited to consider it. I had not had an opportunity to fully consider the possibility of pursuing the third-party procedure afforded in rule 13”.
- [44] Due to the intervening holiday period, he only consulted with his attorneys on 14 April 2021, at which time it was decided that the third-party notice would be filed. Counsel provided his comments and amendments to the third-party Notice on 17 May 2021. His attorneys effected further amendments to the third- party Notice the following day, 18 May 2021, and forwarded same to him on 19 May 2021, for consideration and comments;
- [45] However, his wife, and mother-in-law (who currently lives with them), contracted Covid-19 on about 10 May 2021, and their health only improved around 21 May 2021. During this period, he was looking after them and managing the household. In addition, his business partner also contracted

Covid-19 in May 2021. The obligations placed him under immense pressure and stress from trying to look after his family and at the same time, attend to business matters.

- [45] On 4 June 2021, he suffered a heart attack and was admitted to hospital.
- [46] Delpont complains that Gush has failed to substantiate his reasoning for objecting to the late delivery without leave, or how (if at all) the delay has caused him prejudice, resulting in the objection. Delpont states in his affidavit that he is advised that a clear case of prejudice is paramount in these circumstances. Even if the court were to find his explanation for the delay insufficient, Gush has not stated what adverse effect his delay has had on his ability to address the Notice. He claims that Gush has evidently had time to apply himself to the merits of the Notice and to deliver two exceptions thereto.
- [47] A criticism levelled against Delpont is that he has failed to (1) provide a satisfactory explanation for his failure, and (2) has not made out a *prima facie* case against Gush. Ms Larney agrees that this would be the basis for considering the application. However, Mr Fasser adds that a *prima facie* by implication means a non-excusable case. I agree.
- [48] Mr Fasser argues that Delpont seeks an indulgence from the court, and this indulgence can be earned only if there is complete, forthright and honest disclosure on his part. The contention about prejudice, to the contrary, is incorrect as a matter of law. For this, he relies on the court's decision in *Wapnick and Another v Durban City Garage and Others*³ where the approach is thus:

“Whilst I am not prepared to say that it is a *sine qua non* to the success of the application that the applicant should make out a prima facie case on the merits, I do believe it correct to state that it is in general required of such an applicant to furnish a satisfactory explanation for his failure to give notice before close of pleadings and to make out a prima facie case against the person he seeks to sue by alleging facts which if established at trial would entitle him to succeed.”

³ 1984 (2) SA 414 (D) at 424B – C.

- [49] The first point raised by Delport is that he required time to be informed of the nature of the case by Prime Trade against him and the discovery process contributed to the delay. He says Gush's complaint of the delay of 2 (two) months in which he filed the third-party Notice, which required research and proper consideration, must be seen in light of his own dilatory conduct, which is evident from, *inter alia*, his inordinate delay in responding to something as simple as a Rule 35 notice.
- [50] I have considered the full record of the proceedings. Delport delivered two discovery notices. The first one was in May 2019, after the service of the original summons. The second call for discovery was in September 2020, after the delivery of the amended particulars of claim.
- [51] A close inspection of the discovery notices reveals that the requests pertained to (1) the written portion of the agreement allegedly concluded between the plaintiff and the defendant in and during March 2018, and (2) the documents relating to the quantum and payments allegedly made by Prime Trade. Prime Trade responded in September 2020.
- [52] When the above is considered against the plea and Annexure A, which forms the basis of the Notice for which he seeks leave, Delport did not attach any documents to indicate evidence of the interactions with Gush, other than the appointment contract and what appears to be a referral email.
- [53] A close scrutiny of both pleadings reveals that the nature of his defence (which is essentially a denial that he made representations and recommendations regarding Alpine). The basis of the Notice being the personal interactions he had with Gush. It is clear that regardless of the form or version of liability against him, the nature of the defence is not one substantially dependent on the discovered documents.
- [54] The second area involves the calamities that befell him when Covid-19 allegedly struck close members of his family, followed by his heart attack. The court does not take these claims which are made under oath lightly, however, regrettably, none of the facts are confirmed or independently verified.

[55] Lastly, when this is viewed together with the letter dated 7 December 2020 referred to above, and the contention that he had “*lied*” to the court, the explanation offered is wholly inadequate and falls far short of the requirements. Delpport had, from 25 August 2020 until 10 March 2021, to consider the plaintiff's particulars of claim, file a plea and the Notice. The events raised occurred after this time. I find that he has misled the court on the facts and has not fully accounted for the period of delay. The application must fail.

Has he made out a *prima facie* case? Is the Notice excipiable?

[56] This brings me to the question whether Delpport had made out a *prima facie* case against Gush for the purposes of the Rule 13(3)(b) application. Whether or not Delpport has made out a *prima facie* case overlaps with whether the Notice is excipiable. Generally, an excipient bears the burden of persuading the court that upon every interpretation which the particulars of claim and any agreement on which they rely can reasonably bear, no cause of action is disclosed.

[57] Delpport's notice is premised on a claim for a contribution and/or an indemnity from Gush. He says by virtue of the agreement and as a director of Prime Trade, Gush owed Delpport a duty of care to, amongst others, conduct a due diligence on Alpine.

[58] A perusal of the May 2018 agreement relied on by Delpport does not make a reference to the indemnity claimed. In her heads of argument, Ms Larney states that Gush owed the duty of care to Prime Trade and to Delpport. The difficulty is that Delpport does not state how he is connected with Prime Trade so as to take up the cudgels on its behalf. Furthermore, the basis of the alleged duty of care Gush owed to Delpport is not clear or substantiated.

[59] As Mr Fasser points out, the court in *Eimco SA Pty Ltd v P Mattiodas Construction Co SA Pty Ltd*⁴ had this to say:

⁴ 1967 (1) PH A23 (NPD) 79 – 82 at page 82.

“...there must be a right, arising from contract or by statute or from the law, to an indemnity in respect of or a contribution towards, the claim of the plaintiff”

[60] Delport also premises the Notice on a claim for a contribution on account that Gush is jointly and several liable with him as a co-director of Prime Trade in terms of the provisions of the Companies Act 71 of 2008. Ms Larney also based her argument on the court’s decision in *Sasfin Bank Limited v Amoils*.⁵ In that case the defendants were sued by the plaintiff as directors of Stuttafords International Fashion Company (Pty) Ltd.

[61] What is striking is that Delport denies that he was “*in fact a director*” at Prime Trade. This issue permeates the Notice and contradicts his plea. As matters stand, I am unable to discern the basis or foundation for the contribution or indemnity claimed – contractual, statutory or otherwise. The facts in *Sasfin Bank* are distinguishable because of Delport’s denial of his directorship, in my view.

[62] Another basis for the Notice is premised on section 2(1)⁶ read with section 2(6) (a)⁷ of the Apportionment of Damages Act 34 of 1956 (“the Apportionment Act”). It is indeed so that the Apportionment of Damages Act is aimed at preventing a single event resulting in loss from leading to a multiplicity of actions. As the court held in *Gross v Commercial Union*

⁵ 2020 JDR 2087 (GJ).

⁶ 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.

⁷ If judgment is in any action given against any joint wrongdoer for the full amount of the damage suffered by the plaintiff, the said joint wrongdoer may, if the judgment debt has been paid in full, subject to the provisions of paragraph (b) of subsection (4), recover from any other joint wrongdoer a

contribution in respect of his responsibility for such damage of such an amount as the court may deem

just and equitable having regard to the degree in which that other joint wrongdoer was at fault in relation to the damage suffered by the plaintiff, and to the damages awarded: Provided further that if

the court, in determining the full amount of the damage suffered by the plaintiff referred to in subsection (1B), deducts from the estimated value of the support of which the plaintiff has been deprived by reason of the death of any person, the value of any benefit which the plaintiff has acquired

from the estate of such deceased person no contribution which the said joint wrongdoer may so recover from the estate of the said deceased person shall deprive the plaintiff of the said benefit or any portion thereof.

Assurance and Another, Rule 13 is complementary to the provisions of section 2 of the Apportionment Act, which contemplates the procedure regulated by the Rule.⁸

[63] Firstly, Mr Fasser makes a procedural objection to this and contends that it is impermissible for him to issue such a Notice without leave of the court. The notice contemplated in section 2 of the Apportionment Act can be issued at any time before the close of pleadings. Where such a notice has not been issued, leave of the court is required on good cause shown. Delpont does not escape the difficulties he confronts under Rule 13 already alluded to above.

[63] Another important consideration is that the section 2(2) notice does not create a *lis* between the defendants but is a necessary preliminary step to an action for a contribution in terms of section 2(6)(a) of the Act.⁹ Furthermore, the form of relief that a party can seek under the Apportionment Act and the Rule differs. As *Erasmus* points out, under s 2(6)(a) of the Apportionment Act, a wrongdoer sued in an action can seek relief in the form of a judgment for the payment of an amount of money determined by the court. Under the Rule, all that can be sought by one alleged wrongdoer against another is an apportionment of fault in the form of a declaratory order.¹⁰ The conflation and short comings are evident from below.

[64] Firstly, Delpont does not seek the court's leave to institute proceedings against a joint wrongdoer in terms of s 2(4)(b) of the Apportionment Act. Rather, he seeks an order (1) *fixing* the amount which Gush is liable to pay to him in respect of his liability to Prime Trade; and (2) that Gush *be ordered* to pay him any amount that he is liable to pay to the plaintiff. The appropriateness of this relief falls into the short coming above.

[65] Ms Larney concedes that although there may be merit in the objection that Delpont has not specifically pleaded section 2(2)(b) or section 2(4)(b) of the Apportionment Act, it does not follow that the claim is excipiable on this

⁸ *Gross v Commercial Union Assurance and Another* 1974 (1) SA 630 (A) at 634E.

⁹ *Snyman v RAF* [2005] JOL 14448 (E).

¹⁰ *Erasmus* Superior Court Practice D1-145.

ground. On the strength of the court's decision in *Absa Brokers (Pty) Ltd v RMB Financial Services & Others*,¹¹ I decline the relief sought.

[66] Even if, as Delpport claims, the purpose of the procedure afforded in Rule 13 is to avoid a multiplicity of actions unnecessarily burdening the courts, it is not the only mechanism available under the rules. The door was never closed on him. A separate action and an application for a consolidation was equally available to him under the Uniform Rules. Notwithstanding, as the current Notice stands, I am persuaded that the exception is well- taken.

[67] Accordingly I make the following order:

- a. The Third Party's application for condonation application is granted.
- b. The application to strike out is dismissed with costs.
- c. The application for leave to file a Third Party Notice is dismissed with costs.
- d. The exception raised by the Third Party against Annexure A is upheld.
- e. The defendant is ordered to pay the costs occasioned by the upholding of the exception.

T SIWENDU

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on June 2022.

Heard On:

¹¹ 2009 (6) SA 549 (SCA) para 15-17.

Delivered On:

Counsel for Plaintiff and Third Party:

Mr E Fasser

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