

REPUBLIC OF SOUTH AFRICA



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

Case No: 20/4174

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

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SIGNATURE

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DATE

In the matter between:

JORGE ALEXANDRE DA COSTA BONIFACIO

First Applicant

SERGIO RUI DA CAST A BONIFACIO

Second Applicant

and

LOMBARD INSURANCE COMPANY LIMITED

Respondent

In re:

DBT TECHNOLOGIES (PTY) LTD

Applicant

and

LOMBARD INSURANCE COMPANY LIMITED

First Respondent

**TUBULAR CONSTRUCTION PROJECTS
(PTY) LTD**

Second Respondent

and

TUBULAR TECHNICAL CONSTRUCTION (PTY) LTD	First Third Party
TUBULAR ELECTRICAL AND INSTRUMENTATION (PTY) LTD	Second Third Party
TUBULAR PLANT HIRE (PTY) LTD	Third Third Party
TUBULAR PROPERTY INVESTMENTS (PTY) LTD	Fourth Third Party
TUBULAR STRUCTURAL ENGINEERING (PTY) LTD	Fifth Third Party
TUBULAR HOLDINGS (PTY) LTD	Sixth Third Party
JORGE ALEXANDRE DA COSTA BONIFACIO	Seventh Third Party
SERGIO RUI DA CAST A BONIFACIO	Eighth Third Party
CARLOS ALBERTO TEIXEIRA DE MELO	Ninth Third Party
ANTONIO JOSE DA COSTA TRINDADE	Tenth Third Party

JUDGMENT : LEAVE TO APPEAL

STRYDOM J

[1] The applicants, to whom I shall refer to as the Bonifacio brothers, seek leave to appeal against this court's judgment holding them liable to indemnify Lombard Insurance Company Ltd (Lombard) on essentially one ground which is elaborated upon in paragraph 1.3.3 of the application for leave to appeal.

[2] This ground of appeal relates to the procedural rights of the Bonifacio brothers to dispute the liability of Lombard to honour a performance guarantee issued by it in favour of DBT Technologies (Pty) Ltd (DBT). This right according to the Bonifacio Brothers they obtained pursuant to a Rule 13 notice which was served on them by Lombard. In this Rule 13 notice Lombard indicated that it has opposed the application of DBT disputing its liability, but claimed an

indemnification from, *inter alia*, the Bonifacio Brothers to the extent as set out as set out in the Annexure to the Rule 13 notice and on the grounds set forth in the Founding Affidavit annexed to the notice. The notice further stated that if the third parties disputed the First Respondent's claim against them for an indemnification, or if they dispute the claim of the DBT against Lombard the third parties had to give notice of their intention to oppose the notice.

- [3] In the affidavit attached to the notice it was stated that in the event that the Court upholds the claim of DBT, then Lombard alleges that it is entitled to an indemnification from the Third Parties.
- [4] The Bonifacio Brothers initially did not oppose the third party notices as the other third parties did. Later these other third parties withdrew their opposition to the notices. The Bonafacio brothers were relying on Lombard to defend the claim of DBT on the basis that the claim was fraudulently made.
- [5] Before the Bonifacio brothers defended the claim of Lombard, the latter settled its liability towards DBT. A court order was made by this court reflecting the settlement. The Bonifacio brothers were not part of the settlement. Subsequent thereto the Bonifacio brothers then filed an answering affidavit disputing their own liability towards Lombard but also Lombard's liability towards DBT. This court held the Bonifacio brothers liable in terms of the indemnity they signed in favour of Lombard.
- [6] Before this court it was argued in this application for leave to appeal that a settlement between Lombard and DBT did not entitle Lombard to obtain an indemnity in terms of the third party process set out in Rule 13 because the Bonifacio brothers were denied their procedural right of defending the claim of

DBT against Lombard. Moreover the Bonifacio brothers did not consent to or participate in the settlement agreement.

[7] Having regard to Rule 13(6) a third party, can by filing an answering affidavit contest the liability of the party issuing the notice on any ground notwithstanding that such ground has not been raised in the action by such latter party. This would mean that the Bonifacio brothers would have been entitled to contest the liability of Lombard towards DBT once they have become parties in the application.

[8] In essence, the point raised in this application for leave to appeal is that the settlement between Lombard and DBT did not entitle Lombard to obtain an indemnity in terms of the third party process set out in Rule 13 because the Bonifacio brothers were denied their procedural right of defending the claim of DBT against Lombard and the Bonifacio brothers did not consent to or participate in the settlement agreement.

[9] It was argued on behalf of Lombard that this point is bad in law and should be dismissed for various reasons.

9.1 Firstly, the point does not arise from the pleadings. It was raised for the first time in the oral argument of Mr Ferreira after pleadings had closed.

9.2 Secondly, it is not Lombard's case that its entitlement to the indemnity flows from the settlement. Lombard's entitlement to an indemnification flows from the indemnity contract that was concluded between the parties. It was argued that the indemnity required only two things: (i) a claim under the guarantee on Lombard, which demand was made immediately after

DBT made claim against Lombard and (ii) a demand by Lombard on the Bonifacio brothers, which was made immediately thereafter. The third party proceedings only commenced after these events.

9.3 Thirdly, it was argued that it does not assist the Bonifacio brothers to rely on Rule 13 as the basis of their conditional liability as this rule only creates procedural rights. It does not give rise to a substantive bar to liability in circumstances where the liability is already contractually established before the third party proceedings started.

9.4 Fourthly, it was argued that the fact that the Bonifacio brothers did not participate in or consent to the settlement agreement between DBT and Lombard is not material. They agreed to that happening by way of clause 9.4 of the indemnity contract.

[10] Having considered the arguments on behalf of the parties, it becomes clear that the settlement, albeit that it took place before the Bonifacio brothers disputed the liability of Lombard towards DBT on the basis of fraud, had the effect that the liability of Lombard towards DBT was no longer contested whilst the Bonifacio brothers persisted in their averment that no such liability existed.

[11] Ironically, should Lombard not have followed the third party procedure and Lombard settled with DBT, Lombard would have been entitled to claim an indemnity from the Bonafacio brothers with reliance on the indemnity which allowed Lombard to settle with DBT without involving the Bonifacio brother. Once however, after the provisions of Rule 13 has been invoked, certain rights are provided to a third party. The question then arises how a court should deal with such a situation. On the one hand Lombard was entitled to settle with DBT

and claim against the Bonifacio brothers in terms of the indemnity. On the other the Bonifacio brother have lost the opportunity to challenge the liability, or the extent of the liability, of Lombard towards DBT. At least a possibility existed that the Bonifacio brothers could have shown that Lombard was not liable to DBT, or only liable in a substantially lesser amount.

[12] It should be noted that this line of argument with reference to rule 13.6 was not pursued when the main application was considered. The Bonifacio brothers disputed their liability towards Lombard and asked for the dispute between them and Lombard to be referred to trial. It was always the case of the Bonifacio brothers that DBT could not make demand on Lombard for payment of the performance guarantee as such claim would have been fraudulently made.

[13] In my view, the rule 13.6 argument could have been raised as part of an application for leave to appeal despite not previously fully ventilated on the papers or during argument as it is of a legal nature despite the fact that it relates to procedural rights.

[14] In my view another court may conclude that the right to challenge the liability of Lombard towards DBT remained intact and that this court should not have made an order holding the Bonifacio brother liable in terms of the indemnity before they had the opportunity to have challenged the liability of Lombard. Another court may be inclined to refer certain issues to trial for adjudication.

[15] In my view there is also a compelling reason why the appeal should be heard as limited authority, or only authority which is distinguishable from the facts of this matter, exist on this point as to what effect would a settlement between a

debtor and a creditor have on the procedural rights of third parties as envisaged in rule 13.6.

[16] Moreover, in my view it is in the interests of justice that leave to appeal be granted to the Bonifacio brothers who at all relevant times maintained that the demand made by DBT was fraudulent.

[17] The following order is made:

1. Leave to appeal is granted to the First and Second Applicants (Seventh and Eighth third parties) to appeal to the Supreme Court of Appeal against the whole of the judgment of this court.
2. Costs to be costs in the appeal.

**RÉAN STRYDOM
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION
JOHANNESBURG**

Date of Hearing: 13 JANUARY 2023

Date of Judgment: 07 FEBRUARY 2023

APPEARANCES

On behalf of the Applicants:
Instructed by; E. J. Ferreira SC
Raees Chothia Attorneys

On behalf of the 3rd, 7th, 8th, 10th Respondents:
Instructed by: Adv. E.J Ferreira SC
Frese Moll & Partners

