PA2

REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2013/10592

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

6-12-2013
DATE

SIGNATURE

In the matter between -

CHIPKIN, BERNARD ROBERT (In his capacity as trustee of the Bernard Chipkin Family Trust)	1ST APPLICANT
BERMAN, PHILIP DAVID (In his capacity as trustee of the Bernard Chipkin Family Trust)	2ND APPLICANT
PAMENSKY, JOSEPH LEON (In his capacity as trustee of the Bernard Chipkin Family Trust)	3RD APPLICANT
and	
MAYBORN INVESTMENTS 24 (PTY) LTD	1ST RESPONDENT
JONES, BRADLEY TRENT	2ND RESPONDENT
ADELSON, PETER FRANK	3RD RESPONDENT

JUDGMENT

BORUCHOWITZ J:

[1] The applicants, who are the trustees of the Bernard Chipkin Family Trust (the Trust), apply for an order directing the first respondent (Mayborn) to pay to

AZ

the Trust the amount of R5 152 596.15, together with interest thereon at the prime rate charged by Investec Bank Limited from time to time, calculated on the basis of a 365-day year, to be compounded monthly in arrear from 20 February 2013 until date of payment. An order is also sought directing the second and third respondents (Jones and Adelson) to pay the Trust an amount of R1 million, together with interest thereon at the aforesaid rate, as well as a further amount of R40 968.30. The orders are to operate jointly and severally against the respondents.

[2] The relevant facts are largely common cause or incapable of dispute. In terms of a written loan agreement entered into on 11 October 2011 between Investec and Mayborn, Investec lent and advanced an amount of R5 057 000 (the principal debt) to Mayborn, which was to be repaid on or before 21 October 2012. The principal debt was to bear interest on the basis mentioned above, calculated in accordance with clause 7 of the loan agreement, read together with clauses 1.1.3 and 1.1.4 of the standard terms and conditions annexed thereto. These agreements are annexed to the founding affidavit.

[3] As was required in terms of the loan agreement, the Trust, Jones and Adelson, each executed limited continuing deeds of suretyship, in terms whereof they bound themselves in favour of Investec as sureties for and co-principal debtors *in solidum*, jointly and severally, with Mayborn for the due and punctual payment of any moneys which then or in the future were owed to

Investec from whatever cause. The liability of each surety was limited to R1 million.

[4] Mayborn failed to repay the principal debt by 1 October 2012, or at all.

[5] On 24 February 2013, Investec and the Trust concluded a written agreement of sale and assignment (the sale agreement) in terms whereof Investec sold to the Trust all its right, title and interest in and to the loan agreement and to the suretyships effected by Jones and Adelson, for a purchase price of R5 152 596.15.

[6] The Trust paid the purchase price of R5 152 596.15 to Investec on 20 February 2013. In consequence, the applicants allege that with effect from that date the Trust acquired Investec's rights under the loan agreement and the deeds of suretyship executed by Jones and Adelson.

[7] Accordingly, the applicants claim that Mayborn is liable to pay the Trust the amount of R5 152 596.15, together with interest thereon calculated at Investec's prime rate which, at that date of issue of the notice of motion, was 8.5% *per annum*. They also contend that by virtue of their suretyship obligations Jones and Adelson are liable to pay an amount of R1 million each.

[8] The respondents deny liability. The principal defence raised is that the payment made by the Trust to Investec on 20 February 2013 occurred before the execution of the sale agreement, and accordingly the principal debt was

extinguished. This resulted in the discharge of the sureties. Reliance is placed on *Kilroe-Daley v Barclays National Bank Limited* 1984 (4) 609 (A) at 622I-623 I and *Leipsig v Bankorp Limited* 1994 (2) SA 128 (A) at 132I, and cases there cited. I will hereafter refer to this as the "discharge defence".

[9] The second defence raised is that the principal debt was extinguished on the grounds of merger or *confusio*. It was submitted that when the Trust, which was allegedly a debtor of Investec, paid the purchase price and took cession of Investec's claim against Mayborn there was a merger of "debtor" and "creditor", resulting in the principal debt being extinguished. This operated to discharge the sureties. In support of this proposition reliance is placed on *Grootchwaing Salt Works Limited v Van Tonder* 1920 AD 492 at 497. I will hereafter refer to this as the "merger defence".

THE JOINDER

[10] The respondents have also purported to join a third party, Mr Marc Chipkin (Chipkin) as a co-respondent to the application, and to this end have served a third party notice in terms of Rule 13. Broadly stated, the basis for the joinder is that Chipkin had allegedly misled the respondents as to the circumstances regarding the necessity for concluding the loan agreement. The respondents state that the loan from Investec was to provide capital for expansion, but in actual fact increased the amount owed by Mayborn and was to its detriment. In support of this assertion, they refer to a number of false representations allegedly made by Chipkin to the respondents. The

respondents claim that they are entitled to be indemnified in respect of any judgment or order that may be granted against them in the present proceedings.

[11] The pertinent question that arises is whether a valid joinder has taken place.

[12] The relevant parts of Rule 13 read as follows:

> " (1) Where a party in any action claims –
>
> (a) as against any other person not a party to the action (in this rule called a 'third party') that such party is entitled, in respect of any relief claimed against him, to a contribution or indemnification from such third party, or
>
> (b) any question or issue in the action is substantially the same as a question or issue which has arisen or will arise between such party and the third party, and should properly be determined not only as between any parties to the action but also as between such parties and the third party or between any of them, such party may issue a notice, hereinafter referred to as the third party notice, as near as may be in accordance with Form 7 of the First Schedule, which notice shall be served by the sheriff.
>
> ...

(4) If the third party intends to contest the claim set out in the third party notice he shall deliver notice of intention to defend, as if to a summons. Immediately upon receipt of such notice, the party who issued the third party notice shall inform all other parties accordingly.

(5) The third party shall, after service upon him of a third party notice, be a party to the action and, if he delivers notice of intention to defend, shall be served with all documents and given notice of all matters as a party.

(6) The third party may plead or except to the third party notice as if he were a defendant to the action. He may also, by filing a plea or other proper pleading contest the liability of the party issuing the notice on any ground notwithstanding that such ground had not been raised in the action by such latter party: Provided however that the third party shall not be entitled to claim in reconvention against any person other than the party issuing the notice save to the extent that he would be entitled to do so in terms of rule 24."

[13] Counsel for the respondents, relying on the provisions of Rule 13(5), submitted that the joinder had been effected when the third party notice was served, and that the Court could no longer inquire into the validity of the joinder. I do not agree with that contention. Rule 13 is applicable to motion proceedings by virtue of Rule 6(14), which provides that Rule 13 shall, among the other rules specified, apply *mutatis mutandis* to all applications. Rule 13(6)

permits a third party to except to a third party notice. As there is no exception procedure in motion proceedings, any exception or objection must be raised in the affidavits. It is open, in my view, to a party served with a third party notice to object to the irregular use of such proceedings and/or to except thereto.

[14] Sub-rule 13(1) provides for two alternative bases upon which a litigant can join a third party. Sub-rule (1)(a) provides for joinder where a contribution or indemnification from the third party is sought. Sub-rule (1)(b) provides for joinder where any question or issue in the main action is substantially the same as a question or issue as between the third party and the litigant who seeks to join such third party. The respondents rely on the provisions of sub-rule (1)(a) in that they claim to be entitled to an indemnification by Chipkin.

[15] It is trite law that a right of indemnity arises only from contract, statute or where it is implied by law. It has been held that a claim for the payment of damages cannot be equated with a right to claim an indemnity (see *Eimco (SA) (Pty) Limited v P Mattioda's Construction Co (SA) (Pty) Limited* 1967 (1) SA 326 (N) which was approved in *Dodd v Estate Cloete* 1971 (1) SA 376 (E). It was held in *Eimco* that a party who invokes Rule 13(1)(a) must establish or assert a right to indemnification arising from either contract, statute or a right which is implied by law. In the present proceedings the respondents do not assert such right. What they contend for is a right to claim damages flowing from the false representations allegedly made by Chipkin.

[16] Counsel for the respondents submitted that the courts have allowed the procedure provided by Rule 13 to be used in claims for damages for enrichment against third parties and in respect of claims for damages resulting from fraud. Support for these propositions is said to be found in *Soar h/a Rebuilds for Africa v JC Motors* 1992 (4) SA 127 (A)), and *IFP Nominees* 2002 (5) SA 101 (W) at 113).

[17] Neither of the cases relied on is authority for the propositions contended for and are distinguishable. In *Soar*, the purchaser of a motor vehicle sought to be indemnified against a claim for damages on the basis of a breach by the seller of the legally implied warranty against eviction. The indemnity arose from an agreement of sale and it is for that reason that the use of third party proceedings was considered appropriate.

[18] In *IPF Nominees* the court was concerned with an action for damages brought by the true owner of a cheque against a collecting banker. The banker's case against the third party who was alleged to be a joint wrongdoer was brought on the basis of Rule 13(1)(b), and not 13(1)(a), as is the position in the present case. The use of the third party procedure was considered appropriate as the issues in dispute between the plaintiff and the bank were substantially the same as those that would arise as between the bank and the third party.

[19] The respondents' claim against Chipkin, if at all, is a claim for damages flowing from the allegedly false representations made and not a claim for an indemnification as envisaged in Rule 13(1)(a). The purported joinder of Chipkin is therefore irregular and falls to be set aside.

THE DISCHARGE DEFENCE

[20] As set out above, the respondents contend that since the amount of R5 152 596.15 was paid by the Trust to Investec on 20 February 2013, before the date of the execution of the sale agreement, such payment effectively discharged the principal debt and the obligations of the sureties.

[21] Whether the payment made on 20 February 2013 had the legal effect contended for by the respondents would depend upon the intention with which such payment was made. It is trite that payment of a debt is a bilateral juristic act requiring consensus between the creditor and debtor (*Nedperm Bank Limited v Lavarack & Others* 1996 (4) SA 30 (A); *Saambou-Nationale Bouvereniging v Friedman* 1979 (3) SA 978 (A) at 992H-993E; *Volkskas Bank Bpk v Bankorp Trust (h/a Trust Bank) en 'n Ander* 1991 (3) SA 605 (A) at 612C-E.

[22] The intention with which a payment is made is a question of fact (see *Harris v Pieters*) 1920 AD 644 at 649). A payment can only be made with one intention. The Trust could not, on the one hand, have intended to purchase

Investec's rights with a view to enforcement of the principal debt and the claims against the sureties and, on the other, to discharge the principal debt (see *Burg Trailers SA (Pty) Limited and Another v Absa Bank Limited and Others* 2004 (1) SA 284 (SCA) para [9]).

[23] It is necessary, therefore, to determine the intention with which the payment was made on 20 February 2013.

[24] The admissible evidence overwhelmingly establishes that the payment was made with the intention of effecting payment of the purchase price under the sale agreement. Such intention is, in the first instance, to be derived from the terms of the sale agreement. Although executed several days after the effective date it deals with the consensus of the parties in regard to the payment. The terms of the sale agreement are a clear manifestation of the intention between the Trust and Investec when the payment was made.

[25] Although the sale agreement was executed on 24 February 2013, it is clear from its terms that it was to have retrospective effect to 20 February 2013.

[26] The following terms of the sale agreement are relevant for present purposes. Clause 3 provided that -

> " With effect from the Effective Date (and against receipt of the Purchase Price), Investec hereby sells to the Purchaser, and the Purchaser hereby

purchases from Investec, the Transfer Claims as one indivisible sale on the terms and subject to the conditions of this Agreement."

[27] The effective date was 20 February 2013 (clause 1.2.8).

[28] The "*Transfer Claims*" were defined in clause 1.2.30 as follows:

"1.2.30.1 Investec's right, title and interest in and to the Loan Agreement and any and all claims thereunder, and –

1.2.30.2 Investec's right, title and interest in and to the Shareholders' Documents and any and all claims thereunder."

[29] The "*Shareholders' Documents*" were defined in clause 1.2.24 as follows:

"1.2.24.1 the Bradley Jones Suretyship;
1.2.24.2 the Marc Chipkin Suretyship;
1.2.24.3 the Peter Adelson Suretyship; and
1.2.24.4 the Subordination Agreement,

and 'Shareholders' Document' means any one of them as the context requires;"

[30] The date and manner in which the purchase price was to be paid was set out in clause 4, which provided:

"As consideration for the sale of the Transfer Claims pursuant to clause 3, the Purchaser shall pay to Investec the Purchase Price on the Effective Date. Such payment of the Purchase Price on the Effective Date shall be effected by means of a payment, in an amount equal to the Purchase Price, by the Purchaser by paying the Purchase Price to Investec's into a bank account nominated in writing by Investec."

[31] Delivery and registration of transfer is dealt with in clause 5, which reads:

"5.1 With effect from the Effective Date (and against receipt of the Purchase Price), Investec hereby:

5.1.1 cedes and transfers, as an out and out cession and transfer, the Transfer Claims to the Purchaser; and

5.1.2 delegates to the Purchaser all of Investec's obligations under the Transaction Documents,

without recourse to Investec.

5.2 The Purchaser hereby accepts:

5.2.1. the cession and transfer (as an out and out cession and transfer) of the Transfer Claims to the Purchaser pursuant to clause 5.1.1; and

5.2.2. the delegation to the Purchaser of all of Investec's obligations under the Transaction Documents, which obligations the Purchaser hereby assumes,

without recourse to Investec."

[32] Clause 6 reads as follows:

> "With effect from the Effective Date (and against receipt of the Purchase Price), Investec hereby:
>
> 6.1 releases and agrees to release, all of its right, title and interest in and to the Relevant Agreements;
>
> 6.2 releases each of the Purchaser and the Borrower from all of its obligations under the applicable Relevant Agreements to which it is a party; and
>
> 6.3 agrees that it shall not have any further rights, claims or obligations against any of the Purchaser and the Borrower arising out of or in connection with or the entry into, implementation of or termination of the Relevant Agreements to which it is a party."

[33] In the applicants' replying affidavit reference is made to the negotiations which took place between the parties and an oral agreement that had been reached concerning the underlying *causa* of the payment. In argument the question arose whether such evidence militates against the integration or parol evidence rule. This rule, which has received universal recognition by our courts, was recently reaffirmed in *KPMG v Securefin Limited* 2009 (4) SA 399 (SCA) at paragraph [39] as follows:

> "First, the integration (or parol evidence) rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial courts. If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning (*Johnston v Leal* 1980 (3) SA 927A at 943B)." (Per Harms JA)

[34] In my view, the evidence contained in the replying affidavit does not infringe the parol evidence rule as the purpose for the leading of such evidence is not to contradict, add to or modify the terms of the sale agreement, but rather to establish the purpose of and intention with which the payment was made. That purpose is consistent with the express terms of the sale agreement to which I have referred. As was stated by Corbett JA in *Johnston v Leal* (*supra*, at 943B-C), the effect of the rule –

> " ... is to prevent a party to a contract which has been integrated into single and complete written memorial from seeking to contradict, add to or modify the writing by reference to extrinsic evidence and in that way to redefine the terms of the contract ..."

[36] The following facts emerge in the replying affidavit. Between 7 February 2013 and 19 February 2013, negotiations took place between the attorneys representing the Trust and Investec with a view to concluding an agreement between the Trust and Investec whereby the latter would purchase Investec's claims against the Trust and the respondents. These negotiations were conducted telephonically and by an exchange of correspondence which is

attached to the papers. On 18 February 2013, an oral agreement had been reached and the parties had agreed upon the terms of a final draft of the sale agreement. It was accordingly agreed that the Trust would, on 20 February 2013, pay the amount stipulated in the final draft of the sale agreement. This evidence has not been disputed by the respondents. No attempt was made by the respondents to file a fourth set or to challenge these allegations. Nor would the respondents have been in a position to challenge these allegations as they were not party to the negotiations.

[37] On the basis of the admissible evidence to which I have referred, the applicants have established that the underlying *causa* and purpose of the payment was to enable the Trust to acquire the Transfer Claims as defined in the agreement. The intention and purpose of the payment was not, as is contended by the respondents, to discharge the principal debt. In the circumstances, the "discharge defence" cannot succeed.

THE MERGER DEFENCE

[38] As stated above, the respondents contend that the purchase by the Trust of Investec's claim had the effect that there was a merger of debtor and creditor, resulting in the principal debt and the obligations of the sureties being extinguished.

[39] A debt is extinguished by merger or *confusio* where the claim of the creditor becomes vested in the debtor, that is, where there is a concurrence of the debtor and creditor in the same person in respect of the same obligation. This would discharge a surety for the debt (see *Grootshwaing* (*supra*) at 497). Where, however, there is a merger between the creditor and the surety, the principal obligation remains unaffected. The principal debt remains intact and the erstwhile surety may institute proceedings for the enforcement of such debt (see *Wessels* paras 2624, 4368, and *Voet* 46.3.21; see also Forsyth and Pretorius, "*Caney's The Law of Suretyship*" (6 ed) p 200.

[40] What occurred in the present case is that the Trust, which was a surety, acquired Investec's claim and right of action against the respondents. The Trust did not become Investec's creditor and Investec did not become a debtor of the Trust. There was accordingly no merger or concurrence of debtor and creditor in the same person, which could have resulted in the extinguishment of the principal debt.

[41] For these reasons, there is in my view no merit in the merger defence, and the applicants are entitled to enforce the rights of action against the respondents that they had acquired from Investec under the sale agreement.

[43] In the result, the applicants are entitled to judgment as claimed in the notice of motion. In terms of the loan agreement and deeds of suretyship, the

applicants are entitled to claim costs on the scale as between attorney and own client.

[44] The following order is granted:

1. Judgment is granted against the respondents, jointly and severally, the one paying, the other to be absolved, as follows:

   (a) The first respondent is directed to pay the amount of R5 152 596.15 (five million one hundred and fifty-two thousand five hundred and ninety-six rand and fifteen cents) to the applicants;

   (b) The first respondent is directed to make payment of interest on the amount of R5 152 596.15 at the prime rate charged by Investec Bank Limited from time to time (currently 8.5% *per annum*) calculated on the basis of a 365-day year, to be compounded monthly in arrear, from 20 February 2013 until date of payment to the applicants;

   (c) The second respondent is directed to pay the amount of R1 000 000 (one million rand) to the applicants;

   (d) The third respondent is directed to pay the amount of R1 000 000 (one million rand) to the applicants;

(e) Each of the second and third respondents are directed to make payment of interest on the amount of R1 million at the prime rate charged by Investec Bank Limited from time to time (currently 8.5% *per annum*) calculated on the basis of a 365-day year, to be compounded monthly in arrears from 22 March 2013 to date of payment to the applicants.

(f) Each of the second and third respondents are directed to make payment of the amount of R40 968.30 to the applicants;

2. It is declared that the third party notice issued by the respondents is irregular and is set aside.

3. The respondents are directed to pay the costs of this application on the scale as between attorney and own client.

BORUCHOWITZ J
JUDGE OF THE HIGH COURT

DATE OF JUDGMENT	:	06 DECEMBER 2013
ON BEHALF OF APPLICANTS	:	FLUXMANS INCORPORATED
Ref: Mr J Antunes/C124/110520	:	Tel: 011 328 1700
ON BEHALF OF RESPONDENTS:		ROBBETZE-STEYN ATTORNEYS
Ref: Mr L BLUMENTHAL	:	Tel: 011 053 9055

/11/06122013