



Republic of South Africa

**IN THE HIGH COURT OF SOUTHE AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

Case No: **10998/2011**

In the matter between:

RMB UNIT TRUSTS LIMITED

Applicant

and

DR C F MADIKIZA

Respondent

And

FIRSTRAND BANK LIMITED t/a FIRST NATIONAL BANK

Third Party

JUDGMENT DELIVERED: THURSDAY, 26 APRIL 2012

SABA, AJ

INTRODUCTION

[1] This is an application in terms of Rule 30 of the Uniform Rules of Court. The applicant seeks an order in the following terms:

- 1.1 Condoning the late delivery of applicant's notice in terms of Rule 30; and
- 1.2 Setting aside the respondent's third party notice and third party annexure;
- 1.3
- 1.4 Costs.

The applicant is represented by Mr Joubert and the respondent is represented by Mr Kantor.

THE PARTIES

[2] The applicant is RMB Unit Trusts Limited trading as RMB Asset Management, a public company with limited liability registered and incorporated in terms of the laws of the Republic of South Africa having its principal place of business at 268 West Avenue, Centurion, Gauteng. The respondent is a major female doctor residing at 32 Ayeshire Street, Montana, Western Cape.

[3] The applicant seeks the setting aside of the third party notice on the ground that it is an irregular step, further, that -

3.1 Convenience is not a basis for invoking Rule 13;

3.2 There is no overlap of issues between the applicant's claim against respondent and the respondent's claim against the third party and the facts in the two matters are not similar;

3.3 The respondent has no right to claim indemnity or contribution if his claim is for damages.

[4] It is contended that the delay of two months in delivering a notice in terms of Rule 30 was caused by the applicant's attempt to attack the respondent's pleadings by filing an exception. It is contended further that the withdrawal of the exception was as a result of the following advice the applicant received from the respondent's attorneys in correspondence dated 25 October 2011; '*... the step you have taken is highly irregular as in Cape Town exceptions are not heard in Third Division but must be set down for hearing in the ordinary cause and in the Fourth Division*'.

[5] Respondent opposes the condonation for the late delivery of the notice in terms of Rule 30 on the following grounds:

- 5.1 the applicant is precluded from employing Rule 30 since it had taken a further step by raising an exception to the respondent's third party notice;
- 5.2 the delay in delivering the Rule 30 application has prejudiced her as she would have launched a claim against the third party more than 8 months ago.

On the merits, respondent opposes the application on the basis that the *lis* between RMB and herself and the *lis* between herself and FNB overlap therefore it would be convenient if the claims are heard simultaneously. Furthermore, that a contribution by the third party towards her liability to applicant (if established) is the basis for a third party joinder.

The following facts are in the main common cause

[6] On 7 February 2009 the applicant and the respondent entered into a written agreement in terms of which respondent invested R1 million with the applicant in an investment product called RMB Money Market Unit Trusts. The relevant clause (clause 6 at page 7) of the agreement reads as follows:

"Without prejudice to any other rights which RMBAM may have in terms hereof or at law, the investor agrees that RMBAM shall be entitled to recover from the investor any amount of money paid to the investor, which the investor is not entitled to for whatsoever reason, including interest thereon".

[7] On 19 June 2009 the respondent repurchased her units valued at R290 000-00. Instead of making one single payment of R290 000 to the respondent, two further payments of R290 000-00 and R294 300-00 (R584 300, 00) were paid into respondent's account held by Firstrand Bank Limited t/a First National bank ("third party") in error caused by the applicant's employee.

[8] On being sued by the applicant for the repayment of R584 300-00 which was paid to her in error, the respondent issued out a third party notice and a third party annexure to the third party in terms of Rule 13 of the Uniform Rules of Court, claiming the following:

- "4.1 *An indemnification against, alternatively contribution in respect of, applicant claim against respondent, to the extent established.*
- 4.2 *In the alternative to paragraph 4.1 above payment of the sum of R584 300 and in respect of the other relief for which respondent may be found to be liable to applicant in the application under the above case number, alternatively payment of whatever amount and in respect of other relief in respect of which respondent may be found to be liable to applicant in the application under the above case number.*
- 4.3 *Payment of the sum of R1 100 100, 00 and interest thereon are tempore morae to date of payment.*
- 4.4 *Costs of suit.*
- 4.5 *Further / alternative relief".*

[9] She based her claim on the fact that she, on the advice of one Mooi an employee of the third party who was acting within the course of his employment, had drawn a cheque for R570 000, 00 in favour of FNB attorneys, Randall Titus and Associates who were to pay the money over to the applicant. She also drew other cheques in respect of investments which are not related to this matter. She only realized that she had been defrauded by Mooi on discovering that the monies were never paid over to the intended payees.

[10] On 12 October 2011 applicant filed an exception in terms of Rule 23 of the Uniform Rules of Court based on the fact the respondent's use of Rule 13 was irregular. On 25 October 2011 the applicant withdrew the exception and thereafter brought the present application on 8 December 2011.

[11] The issues for determination are whether the applicant has succeeded in showing a good cause for its delay in filing the notice in terms of Rule 30 and whether the third party procedure amounts to an irregular step in the circumstances of this case.

Legal Position

[12] Van Reenen J in **Gumede v Road Accident Fund** 2007 (b) SA 304 at 307 D said the following:

"Condonation of the non-observance of the court orders and rules is not a mere formality. A party seeking condonation must satisfy the Court that there is sufficient cause for excusing the non-compliance. Whether condonation should be granted or not is a matter of discretion that has to be exercised having regard to all the circumstances of the particular case".

Rule 13 (1) (Uniform Rules of Court) provides:

- (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 be properly determined not only as between parties to the action but also between such parties and the third party or between any of them, such party may issue a notice, hereinafter referred to as a 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.*

Rule 30 (Uniform Rules of Court) provides:

- (1) *A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside.*

- (2) *An application in terms of subrule (i) shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged, and may be made only if-*
- (a) *the applicant has not himself taken a further step in the cause with knowledge of the irregularity;*
 - (b) *the applicant has, within ten days of becoming aware of the step, by written notice afforded his opponent an opportunity of removing the cause of complaint within ten days.*
 - (c) *the application is delivered within fifteen days after the expiry of the second period mentioned in paragraph (b) of subrule (2),*
- (3) *If at the hearing of such application the court is of opinion that the proceeding or step is irregular or improper, it may set it aside in whole or in part, either as against all the parties or against some of them, and grant leave to amend or make any such order as to it seems meet.*
- (4).....

[13] Mr Joubert submitted that the applicant has fully explained the delay for the late delivery of a notice in terms of section 30. He submitted further that the exception which was taken and later withdrawn does not amount to a further step and does not preclude the applicant from relying on Rule 30. He relied for this proposition on a passage in a **Erasmus Superior Court Practice** (commentary on rule 30) at B1-192 ("**Erasmus**"), where the following is stated:

"It has previously been held that a notice of exception amounts to a further step as contemplated in this rule. This approach has been rejected and it has been held¹ that an excipient is concerned merely to make full use of the remedies that the rules provide, for an attack on a defective pleading. Where the grounds for the exception and the rule 30 application were the same, it was held that it could not be said the filling of the exception either (a) advanced the proceedings one step nearer completion or (b) manifested an intention to pursue the cause despite the irregularity".

¹ Jowell v Bramwell-Jones 1998 (1) SA 836 (W) at 904

[14] In **Jowel v Bramwell-Jones and Others** 905 WLD at 604F-H:

"A further step in the proceedings is one which advances the proceedings one stage nearer completion and which, objectively viewed, manifests an intention to pursue the cause despite the irregularity. Seen in that light, the filing of a notice of exception, which contains as an alternative application to set pleadings aside under the provisions of Rule 18(2) read with Rule 30, does not constitute the taking of a further step within the meaning of Rule 30(2). Such an excipient is concerned merely to make full use of the remedies which the Rules provide for an attack on a defective pleading".

[15] Based on the passage from **Erasmus** and the dictum in **Jowell** *supra*, I am persuaded by Mr Joubert's submission that the applicant is not precluded from relying on Rule 30. I am satisfied that the applicant's reason for filing the exception was justified. I find the respondent's contention that it has suffered prejudice as a result of the late delivery of the notice to be misplaced. There was nothing stopping the respondent from instituting a claim against the third party long before the applicant brought a claim against her. In the circumstances, I find that there is sufficient cause for excusing the late filing of the notice in terms of Rule 30. It follows therefore that the application for condonation ought to succeed.

[16] Mr Joubert submitted that the respondent's averment that it would be convenient for the respondent's claim against the third party to be heard together with the claim of the applicant against the respondent, can never be the basis for invoking the third party procedure. He contended that the respondent's claim against the third party is based on the alleged fraud committed by an employee of the third party against her and that is not relevant to the applicant's claim against her. Further that her entitlement to relief do not depend on the same or similar questions of law or fact applicable in applicant's claim against her. He argued that the respondent cannot invoke the provisions of Rule 13 for

a claim based on damages. He relied for this proposition on Erasmus's commentary to rule 13 (1) (a) which is as follows:

"It was held in Eimsco (SA) (Pty) Ltd v P Mattioda's Construction Co (SA) (Pty) Ltd² that a right to indemnity arises only from contract, express or implied, or by statute or where it is implied by law. A party who invokes the rule must, therefore, show that there is a right, arising from a contract or by statute or by law, to an indemnity in respect of, or a contribution towards, the claim of the plaintiff. A claim for the payment of damages cannot be equated with a right to claim indemnity; it is the converse of such right". I agree that Eimsco is authority for the applicant's proposition on this issue.

[17] Mr Kantor submitted that the existence of the current disputes between the parties was caused by the applicant's negligent overpayment of funds into respondent's account with the third party. That this negligence created an opportunity for an employee of the third party to misappropriate the said funds. He submitted further that the resolution of this matter depends on the circumstances surrounding the negligent over-payment to respondent.

Evaluation

[18] It is not clear from the papers on what basis the respondent claims indemnity in respect of or a contribution towards the applicant's claim. Her claim against the third party is based on the fact that FNB is vicariously liable for Mooi's alleged wrongdoing within the scope of his employment. This is a delictual claim, a fact which explains Mr Kantor's reference to factual causation in his submissions. On the other hand, the dictum in Eimsco supra is clear that *'a right of indemnity arises only from contract, express or implied, or by statute or where it is implied by law'*. (emphasis added).

² 1967 (1) SA 326 (N) at 332H-333A

That is not the case with the respondent. I am therefore persuaded by Mr Joubert's submission that the respondent is precluded from relying on section 13.

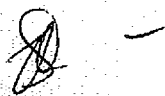
[19] It is my view that respondent has not placed any facts to substantiate his claim that the negligence on the part of the applicant created an opportunity for Mooi to defraud her. It is also not clear how a claim based on fraud involving an employee of the third party, the third party, the attorneys of the third party (Randall and Titus) as well as Delway Clothing CC can be said to overlap with the applicant's claim against her based only on an overpayment of funds. I mention all these names because they form part of the respondent's application in terms of rule 13. It is my view that if the situation (with the third party procedure) would be allowed to stand, that would cause substantial prejudice to the applicant. I am also in full agreement with Mr Joubert's submission that convenience is not a basis for invoking Rule 13, especially in the circumstances of this case.

[20] It is also my view that the respondent's claim for R1 100 000, 00 against the third party is another indication that her claim against the third party does not overlap with applicant's claim against her. It is therefore my judgment that if the situation (with the third party procedure) would be allowed to stand, that would cause substantial prejudice to the applicant. I find that there is merit in the submission that the two claims (applicant against respondent and respondent against the third party) cannot be determined on the same or similar questions of law or fact.

[21] For the reasons stated above, it is my opinion that the respondent's step in issuing a third party notice and a third party annexure was irregular.

[22] In the result, the following order is made:

"The application is granted in terms of prayers 1, 2 and 4 of the notice of motion."

A handwritten signature, possibly "SABA", is written above a horizontal line.

N SABA

(Acting Judge of the High Court)