



Republic of South Africa

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

Case No. 18384/2019

Before: The Hon. Mr Justice Binns-Ward

Date of hearing: 1 September 2022

Date of judgment: 5 September 2022

In the matter between:

**STEER PROPERTY SERVICES CC t/a STEER & CO** Plaintiff/ Fifth Respondent

and

**RENE BRUCH N.O.** First Defendant / Respondent

**RALPH BRUCH N.O.** Second Defendant / Respondent

**RENE BRUCH**

**RALPH BRUCH**

and

**CAPRINKLES PROPERTY GROUP (PTY) LTD** Third Party / Excipient

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**JUDGMENT**

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**BINNS-WARD J:**

[1] This judgment pertains to the third party's exception to the annexure to the defendants' third party notice.

[2] In the action, the plaintiff, which is an estate agency, has sued the trustees of the Walter Bruch Testamentary Trust (cited as the first and second defendants) in their capacity as such

and also in their personal capacities (in which they are cited as the third and fourth defendants) for payment of R2 012 500 in respect of commission allegedly due to it by the Trust upon the sale of the Trust's immovable property in Victoria Road, Camps Bay. It is common ground between the plaintiff and the defendants on the pleadings that the plaintiff had been the Trust's letting agent in respect of the lease of the property by the Trust to Café Caprice CC.

[3] Clause 17 of the deed of lease provided:

‘SALE OF PROPERTY

Should the property hereby be sold to the Lessee, any company, trust or close corporation in which the lessee, the lessee's spouse, child or any other member of the lessee's family have a beneficial interest, during the currency of this lease, any continuation thereof or renewal thereof or within six (6) months of the vacation of the property by Lessee, STEER PROPERTY SERVICES CC, shall be entitled to commission calculated at 5% plus VAT, such commission shall be payable by the Lessor.’

[4] It is also common ground between the plaintiffs and the defendants that the property was sold by the Trust during the currency of the lease to the third party, Caprinkles Property Group (Pty) Ltd, represented by Brandon Kerzner and David Raad, for R35 million.

[5] The plaintiff alleged in its particulars of claim that the third party was a purchaser within the meaning of clause 17 of the lease agreement. It also alleged that it was a tacit term of the lease agreement ‘*that should the property be sold to any company, trust or close cooperation in which a member or the members of Café Caprice has or have a beneficial interest, during the currency of the lease agreement, any continuation thereof or renewal thereof or within six months of the vacation of the property by Café Caprice, the plaintiff would be entitled to commission*’ calculated as aforesaid. In support of those allegations, it pleaded that Kerzner and Raad count amongst the members of Café Caprice CC and are also the shareholders and directors of Caprinkles.

[6] The plaintiff also pleaded that the third and fourth defendants were joined in their personal capacities because the Trust had been ‘dissolved’ and the third and fourth respondents, as the erstwhile trustees, had accepted personal liability for the debt, if any, of the Trust to the plaintiff. Those allegations are admitted in the plea (which begs the question why the action was instituted against the erstwhile trustees in their capacities as such, but that is by the by for present purposes).

[7] It follows from the pleaded allegations described above that the Trust is no longer in existence and that the plaintiff's claim, assuming that it is valid (which is contested by the defendants), lies against the third and fourth defendants by reason of their agreement with the plaintiff to assume the Trust's obligations. What the plaintiff has pleaded, and the defendants have admitted, is a classic example of a delegation of debt agreement. Delegation is a species of novation. Its effect is that the old debt is extinguished, and a new debt is created in lieu thereof; see LAWSA Vol 3 (Third Edition), s.v. *Cession*, at para 143.

[8] It appears on the pleadings that clause 15 of the deed of sale in terms of which the third party, Caprinkles, purchased the property from the Trust provided as follows:

‘COMMISSION

It is recorded that there is no brokerage payable to any agent in connection with this transaction. The Purchaser warrants in favour of the Seller that he was not introduced to the Seller or to the property by any agent or broker entitled to claim commission and hereby indemnifies the Seller against any claim by any agent or broker for commission made on the basis that such agent or broker was the effective cause of the sale or introduced the Purchaser to the Seller and/or to the property.’

[9] In the annexure to the third party notice, all four of the cited defendants claim an entitlement from the third party to be indemnified against liability for the plaintiff's claim in the event of the plaintiff's action succeeding. The pleaded basis for such entitlement is clause 15 of the deed of sale, quoted above.

[10] The nub of the third party's exception to the defendants' third party notice is contained in para 3, 9, 10 and 11 thereof, which read as follows:

‘3. The third party notice notifies the third party that “*each of the abovenamed Defendants claim*” an indemnity on the grounds set forth in the annexure thereto.

...

9. The plaintiff's claim against the third and fourth defendants *eo nomine* (sic)<sup>1</sup> is solely asserted on the basis of the pleaded (and admitted) assumption of liability for the debt of the Trust (if any).

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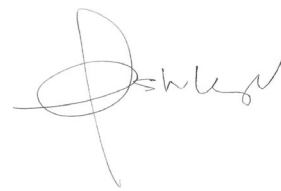
<sup>1</sup> ‘*Eis nominibus*’ is, I think, the expression that should have been used if Latinisms were required.

10. The third party notice is, accordingly, excipiable in that no allegation is made supporting a legal conclusion that the third party has an obligation to indemnify the third and fourth defendants *eo nomine* (sic) in respect of an assumption by them of personal liability for the deaths of the Trust to the plaintiff.
11. In the circumstances the third party notice fails to make allegations necessary to found a claim for an indemnity in favour of the third and fourth defendants *eo nomine* (sic) against the third party.’

[11] Put simply, the objection is that on its face the pleaded indemnity operates only as between the third party and the Trust, and the defendants have not pleaded any basis for a contingent liability by the third party to the third and fourth defendants because of the latter’s assumption of liability to the plaintiff for the Trust’s debt. The contention is that the annexure to the third party notice fails to plead a contractual (or indeed any) basis for the contingent claim advanced by the third and fourth defendants against the third party.

[12] In my judgment, the objection is well taken. Clause 15 of the deed of sale created a contingent obligation by the third party in favour of *the Trust*. The third and fourth defendants could not by means of the delegation of debt agreement they concluded with the plaintiff and the Trust - to which the third party was a stranger - thereby create an obligation to them by the third party.

[13] In the result, the exception to the third party notice claim by the third and fourth defendants is upheld with costs, and the defendants are afforded 15 days within which to amend the annexure to the third party notice if so advised.



**A.G. BINNS-WARD**  
**Judge of the High Court**

**APPEARANCES****Excipient's counsel:****T. Crookes****Excipient's attorneys:****Pepler O'Kennedy****Tyger Valley****Randall Titus & Associates****Cape Town****Respondents' / Defendants' counsel:****N.C. Lawrenson****Respondents' / Defendants' attorneys:****Law Practice of Brian L. Segal****Cape Town**