

SOUTH AFRICA / JUDGMENT

Brandenburg Partners Limited v Honigwachs and Others (14135/2022) [2024] ZAWCHC 279 (25 September 2024) [2024] ZAWCHC 279

COURT

Western Cape High Court, Cape Town

BEFORE

B J Manca

CASE / FILE NUMBER

14135/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

Case

No: 14135/2022

In

the matter between:

BRANDENBURG

PARTNERS LIMITED

Plaintiff

and

FELIX

HONIGWACHS

First

Defendant

RICARDO

PAOLO SPAGNI

Second

Defendant

BLOQTECH

SOLUTIONS (PTY) LIMITED

Third

Defendant

TECHNO

PONIES (PTY) LIMITED

Fourth

Defendant

VISA

INC.
Fifth
Defendant
MASTERCARD
INC.
Sixth
Defendant

Coram: Acting Justice B J Manca
Heard: 11 September 2024
Delivered: 25 September 2024 (by email to the parties’ legal
representatives and by release to SAFLII)

JUDGMENT

MANCA AJ

Introduction

[1 The plaintiff commenced action proceedings in which it cited seven defendants, but only claimed relief from five of them. Those five defendants were Felix Honigwachs (“Honigwachs”), cited as first defendant; Jaclyn Strul (“Strul”), cited as second defendant; Ricardo Paolo Spagni (“Spagni”), cited as

third defendant; Bloqtech Solutions (Pty) Limited (“Bloqtech”), cited as fourth defendant; and Techno Ponies (Pty) Limited (“Techno Ponies”), cited as fifth defendant. The sixth and seventh defendants were Visa Inc. and Mastercard Inc.

- [2] In its original particulars of claim (“the 2022 particulars”), the plaintiff sought payment of the sum of US\$159938.11 from the first to fifth defendants, jointly and severally.
- [3] Those particulars were excepted to in December 2022. When the plaintiff sought to amend the 2022 particulars by delivering a notice of amendment, that amendment was objected to by the first defendant.
- [4] The plaintiff took some time to respond to that objection. It did so by delivering a further notice of intention to amend in December 2023 (“the December 2023 amendment”).
- [5] In the December 2023 amendment, the plaintiff deleted most of the content contained in the 2022 particulars, and effectively sought to replace it with a new set of particulars of claim. The December 2023 amendment sought to remove Struhl as a defendant, and cited a further eight defendants who were not previously cited.
- [6] In parallel with this process, the plaintiff sought to move an edictal citation application in December 2022, but that application was not proceeded with after Honigwachs objected there.

- [7] On 20 March 2024, the plaintiff took two further steps.
- [8] First, it served a notice of application for leave to amend its 2022 particulars on the basis that it be granted leave to amend in accordance with the December 2023 amendment.
- [9] Second, it launched a further edictal citation application (“the edictal citation application”), in terms whereof it sought the court’s leave to serve on the eight new defendants by way of edictal citation for an order joining them as the fifth, sixth, seventh, eighth, ninth and tenth defendants to the action. It annexed the notice of motion in which notice was given that Gooney Payment Technologies Limited (“Gooney”) be joined as the fifth defendant; that Venn Business Solutions Nig Limited (“Venn”) be joined as the sixth defendant; that Coin Ex24 AG (“Coin”) be joined as the seventh defendant; that Fireblocks LLC. (“Fireblocks”) be joined as the eighth defendant; that Altcoin Trader (Pty) Limited (“Altcoin”) be joined as the ninth defendant; that Paywood Trading Limited (“Paywood”) be joined as the tenth defendant; that Nedbank Limited (“Nedbank”) be joined as the eleventh defendant; and that First National Bank Limited (“FNB”) be joined as the twelfth defendant in the main action.
- [10] A draft affidavit in support of such relief was annexed and it sought the court’s leave that the notice of motion and affidavit were to be served on Gooney, Venn, Coin and Fireblocks either by email, alternatively, service by lawyers at the offices of those entities in their respective countries.
- [11] The edictal citation application, although brought ex parte, was served on Honigwachs, Spagni, Bloqtech and Techno Ponies.
- [12] The amendment application and the edictal citation application were set down for hearing on 26 April 2024.
- [13] On that day, and after hearing argument, the amendment application and the edictal citation application were postponed by order of court to 11 September 2024 and all questions of costs were reserved.
- [14] In June of this year, the plaintiff launched a further amendment application, to be set down on 11 September 2024, in which it sought leave to amend the 2022 particulars, on the same basis as the December 2023 particulars, save that all of the defendants who were not cited in the 2022 particulars were removed.
- [15] Those two applications are now before me.
- [16] In addition, there is an application to join Altcoin Trader (Pty) Limited, Nedbank Limited and First National Bank Limited as defendants in the main action. That application is not opposed.

- [17] Before the hearing there were a number of further developments.
- [18] Honigwachs withdrew his opposition to the edictal citation application and tendered to pay the plaintiff's costs occasioned by his opposition thereto on a party and party scale. The plaintiff did not accept that offer. They seek costs again Honigwachs, Spagni and Techno Ponies on a punitive scale.
- [19] Spagni and Techno Ponies gave notice in the heads of argument delivered on their behalf that they no longer oppose the edictal citation.
- [20] Furthermore, shortly prior to the hearing, Edward Nathan Sonnenbergs ("ENS"), gave notice that they had withdrawn as Bloqtech's attorneys and had advised Bloqtech in a notice delivered in accordance with the rules that Bloqtech had ten days within which to appoint new attorneys. Those ten days had not expired as at the date of hearing.
- [21] At the hearing Mr Joubert, who appeared with Mr Pretsch for the plaintiff, was concerned that this may have caused the court to postpone the matter.
- [22] Bloch Tech never opposed the edictal citation application and it does not oppose the joinder application. Although it objected to the 2023 amendment, it did not deliver any heads of argument in relation to the amendment application before me. Honigwachs, who is also represented by ENS, did. Those heads of argument, prepared by Mr Webster and Mr Ibrahim, who also appeared for Honigwachs at the hearing on the instruction of ENS, were comprehensive and dealt with all the objections raised by Honigwachs and Bloqtech in their joint objection to the amendment. The plaintiff also indicated, through Mr Joubert, that it would not seek any costs order against Bloqtech in its absence.
- [23] In the circumstances, I was satisfied that Bloqtech would not be prejudiced, should the matter proceed in its absence, and it accordingly did.
- [24] I now turn to deal with the various applications.

The amendment application

- [25] In their notice of objection to the December 2023 amendment (which stands as their objection to the June 2024 amendment), Honigwachs and Bloqtech raised four grounds of objection.
- [26] First: they contended that it was impermissible to join defendants pursuant to a rule 28 notice. A formal joinder application had to be made.
- [27] Second: it was contended that this court had no jurisdiction to entertain the claim.
- [28] Third: it was contended that the amendment purported to introduce a new cause of action and that this new cause of action had prescribed.

- [29] Fourth: it claimed that the sustainability of the plaintiff's claims was to be determined with reference to foreign law, and that the foreign law had not been properly pleaded. They contended that the second, third and fourth objections were made on the basis that the plaintiff had not pleaded sufficient facts to sustain a cause of action.
- [30] Spagni and Bloqtech also objected to the manner in which the new defendants were being joined to the main action. They also contended that this court had no jurisdiction to entertain the claim, and that the basis for the relief is unclear. They contended that insufficient averments were pleaded to sustain a cause of action to pierce the corporate veil, and that the allegations of fraud against them were insufficiently pleaded. They also contended that insofar as the plaintiff intended to rely on foreign law to prove its claim, no averments were made in regard thereto.
- [31] The June 2024 amendment is substantial, and I do not propose to restate all that is set out therein in this judgment. I shall do so only to the extent that it is necessary in order to understand my reasoning for coming to the conclusion which I have reached.
- [32] In the amendment, plaintiff alleges that this court has jurisdiction as Honigwachs, Spagni, Bloqtech and Techno Ponies are all incola, and that Honigwachs and Spagni were physically present in this court's jurisdiction when they exercised control over the affairs of Bloqtech, Techno Ponies, Gooney, Venn and CX24. In pleading their case, the plaintiff referred to two written agreements that it had concluded. The first was an agreement that it concluded with Gooney in terms whereof Gooney undertook, inter alia, to provide clearing and settlement services in respect of credit card payments made to the plaintiff. It recorded that Gooney was not a bank, but a service provider, i.e. it facilitates the processing of transactions, and that it would provide clearing and settlement services to the plaintiff in respect of credit card payments made to the plaintiff. In essence, Gooney would collect payments on behalf of the plaintiff, deduct its agreed fee, and pay the balance thereof to the plaintiff. The agreement was in writing and the agreement was to be governed by the laws of England and Wales. The plaintiff alleged that, in terms of, or arising from the Gooney agreement, and in performing the settlement function and receiving funds on behalf of the plaintiff, Gooney owed the plaintiff certain duties, which included a duty not to misappropriate funds that it held on behalf of the plaintiff, to account to the plaintiff, to segregate the funds received on behalf of the plaintiff and to pay funds received on behalf of the plaintiff to the plaintiff, and not to third parties. It alleged that Gooney was in breach of the Gooney agreement by, inter alia, misappropriating funds held on behalf of the plaintiff.
- [33] As a consequence of Gooney owing the plaintiff a substantial amount of money, the plaintiff alleges that it, Gooney, and Venn agreed that Venn would process transactions on the plaintiff's behalf at a discounted rate until such time as Gooney, alternatively Venn, had paid an amount of US\$584 237.63 to the plaintiff. This agreement was also reduced to writing ("the Venn agreement").

- [34] The plaintiff alleged similar terms under the Venn agreement as to those found in the Gooney agreement and alleged that the same duties arose therefrom.[1]
- [35] The amount that Venn and Gooney undertook to pay under the Venn agreement was not paid. Subsequent thereto, Gooney undertook in writing to pay the plaintiff. The plaintiff alleges that Gooney has not paid the plaintiff.
- [36] The plaintiff alleged that Honigwachs is a director of Gooney, and that Spagni is Gooney's sole shareholder and the director of Techno Ponies. It also alleged that Honigwachs and Spagni were the directing minds of the conduct complained of in the particulars, and had full control over Bloqtech, Techno Ponies, Gooney, Venn and Coin Ex24. Furthermore, it alleged that Honigwachs and Spagni caused the misappropriation of the funds and expressly directed and caused the execution of a fraudulent scheme against the plaintiff. The fraudulent scheme is alleged in some detail in the December 2023 amendment and the plaintiff concludes that, as a consequence thereof, this constituted a fraud on the plaintiff, alternatively unlawful misappropriation of the plaintiff's funds, and that Honigwachs, Spagni, Gooney, Venn, Techno Ponies, Bloqtech and CS 24 are jointly and severally liable to the payment in the amount of US\$159 9938.11.[2]
- [37] The plaintiff then went on to allege the legal regimes under Irish law, Nigerian law and Swiss law, which would justify holding "a perpetrator liable for abusing offshore earning entities in the furtherance of a fraudulent scheme". In short, the plaintiff contended that under the various statutory regimes which applied to Gooney, Venn and CX24 the corporate controllers thereof would be personally liable.[3]
- [38] In regard to the claim pleaded under claim B, the plaintiff based its claim against the South African defendants on Aquilian liability under South African law, as they allege that the wrongful and unlawful conduct was carried out within the area of this court's jurisdiction.
- [39] In my view, the objections are not sufficient for me to disallow their amendments.
- [39] All four of the present defendants are within this court's jurisdiction, and to the extent that there may be a plea of "forum non convenience", that is a triable issue which I cannot decide when asked to rule on an amendment to a claim.
- [40] Similarly, although it is correct that an amendment may be disallowed if it appears that a claim has prescribed, I am satisfied that there is not sufficient before me to conclude that the plaintiff's claim, as formulated under Claim B has prescribed. Again, it is a triable issue which will be ventilated at trial.
- [41] As regards the objection formulated under the rubric of failure to plead foreign law, I must confess to having some difficulty in understanding the basis of the complaint. The plaintiffs plead certain duties arising out of a contract which is governed by the laws of England and a contract which is governed by the laws of Nigeria. They allege that these duties have been breached. They do not plead foreign law. To determine whether the contracts have been

breached the plaintiffs will be obliged to lead evidence in relation to the manner in which an English and Nigerian court would interpret those contracts. It is not necessary for the plaintiffs, at this stage, to plead a synopsis of such experts' evidence. At this stage, all the defendants are being called upon to plead to is whether those duties arise under English and/or Nigerian law on a proper interpretation of those contracts and whether they were breached.

[42] I was urged by Mr Prinsloo, who appeared for the second and fourth defendants, to follow the decision in *Turkcell*.^[4] In that judgment, the plaintiff originally contended that the first plaintiff had locus standi on the basis that it had acquired all of the second plaintiff's assets, including the claim against the defendants, in an

inter-company transfer during 2004 and 2005. The plaintiffs sought to amend this allegation and pleaded, inter alia, that "the first plaintiff and Eriksson, became, alternatively, remain parties to the Turkcell consortium joint venture agreement by operation of the laws of Switzerland, which govern the Turkcell consortium joint venture and agreement". The amendment was objected to. In dealing with the amendment, the court pointed out that two of the principles governing amendment of pleadings relate to an amendment not rendering it vague and excipiable, and that when a party wishes to rely on foreign law which is a question of fact, that is required to be properly pleaded. In that case, the defendants had objected that the manner in which this allegation was pleaded was objectionable.

[43] In finding that the allegation was insufficient, the court held that more is required than a mere statement that by the operation of the laws of Switzerland, the law of a foreign country is invoked in a case such as where the locus standi of the plaintiffs depend on the acceptance and implementation of that law. It requires that party relying thereon to plead its case with fairness. The court concluded that a responsible pleader must be able to ascertain precisely what part of the law is relied upon, as it has to determine what the principles are, and has to determine if there are any exceptions that may sustain a defence. The fact that the foreign law is a matter of fact does not result that those facts are relevant and should be pleaded with any less particularity than the case in South African law.

[44] It is immediately apparent from the above that, in the *Turkcell* case, plaintiffs were relying on "the operation of Swiss law" to establish their locus standi. The court held that, in such a case, the defendants were entitled to know on what aspects or provisions of Swiss law the plaintiffs relied for that allegation.

[45] In casu, the plaintiffs plead two agreements and the breach thereof. Both agreements are to be interpreted according to foreign law. There is no obligation on the plaintiffs, in their particulars of claim, to allege how a court in England or a court in Nigeria would apply the laws of England and Nigeria in interpreting the two contracts. In this case, the South African court will require that

evidence be led by relevant experts to apprise the South African courts of the English and Nigerian law which would be applicable in order to interpret those two contracts, and by necessary implication, to determine whether there had been a breach thereof. This is not an unusual situation and does not require elucidation by the plaintiff in the particulars of claim of that evidence.

[46] I am accordingly unpersuaded that this so-called shortcoming in the amendment renders the amendment excipiable.

[47] In relation to the piercing of the corporate veil, the plaintiffs have pleaded quite specifically the provisions of Irish, Nigerian and Swiss law on which they rely to hold that Honigwachs and Spagni are to be held personally liable.

[48] Finally, there is no need to deal with the objection in relation to the joinder by way of rule 28. The amendment no longer includes defendants who were not cited in the 2022 particulars.

The edictal citation

[49] The edictal citation application is no longer opposed by any of the defendants.

[50] That being said, it is somewhat outdated in its present form. The form which the intendit should now take was debated in court and I propose to make an order arising out of that debate. It will cater for developments which have taken place subsequent to the original application being issued.

Costs

[51] I am going to allow the June 2024 amendment, and the defendants were in agreement that the costs should follow the result. For the avoidance of any doubt, the costs order which I intend to make in respect of the June 2024 amendment relates to the costs incurred from June 2024 when the application to amend the December 2023 amendment was made. That application was one supported by an affidavit deposed to by the plaintiff's attorney on 19 June 2024.

[52] As regards the costs of the edictal citation, I am going to order that the first, second and fourth defendants are liable for the costs occasioned by their opposition to that application, and that such costs will include the costs incurred on 26 April 2024 when the matter came before Ms Justice Allie and all questions of costs were reserved.

[53] I am not going to order that those costs be paid on a punitive scale. I am not convinced by the plaintiff's argument that the defendants' opposition thereto was unwarranted, and the fact that they have now withdrawn their opposition is not of such a nature that would warrant a punitive costs order to be granted.

[54] I accordingly make the following orders:

1. Plaintiff is granted leave to amend its particulars of claim by the deletion of paragraphs 3 until the final prayer of the particulars of claim, and the substitution of the deletions with the particulars of claim, marked “X”, and which appear at pages 5 to 31 of the amendment application record.
2. The first, second, and fourth defendants are ordered to pay the plaintiff’s costs occasioned by the opposition to the June 2024 amendment application on the scale as between party and party, such costs to include the costs of two counsel where so employed, and which costs are to be taxed according to Scale C.
3. The plaintiffs are granted leave to institute proceedings to join:
 - 3.1 Gooney Payment Technologies Limited as eighth defendant;
 - 3.2 Venn Business Solutions Nig. Limited, as a ninth defendant;
 - 3.3 Coin Ex24 A.G., as a tenth defendant; and
 - 3.4 Fire Blocks LLC., as an eleventh defendant.
4. Those proceedings are to take the form of a notice of motion in which that relief is sought, and that the offshore entities are granted one month within which to enter an appearance to defend and deliver any affidavits in opposition to the joinder application.
5. The costs occasioned by the first, second and fourth defendants opposition to the edictal citation application are to be paid by the first, second and fourth defendants, jointly and severally, on the scale as between party and party, and are to include the costs of two counsel, where so employed, such costs to be taxed on Scale C.
6. Altcoin Trader (Pty) Limited is joined as fifth defendant;
7. Nedbank Limited is joined as sixth defendant; and
8. First National Bank Limited is joined as seventh defendant.

B J MANCA, AJ

Appearances:

Plaintiff’s counsel: Adv F Joubert SC and Adv W Pretsch

Instructed by: Primerio Law Inc.

First and third defendants’ counsel: Adv C Webster SC and Adv M Ebrahim

Instructed by: Edward Nathan Sonnenbergs Inc.

Second and fourth defendants’ counsel: Adv B Prinsloo

Instructed by: Hanekom Attorneys Inc.

[1] The plaintiff referred to these duties as fiduciary duties.

[2] In the detailed allegations contained in the particulars, plaintiff alleges that its funds were paid to Honigwachs, Spagni, Bloqtech,

Techno Ponies and/or CX24.

[3] Gooney is an Irish company; Venn is a Nigerian company and CX24 is a Swiss company.

[4] Turkcell İletişim Hizmetleri A.S. & One Another v MTN Group Limited & Five Others (2013/4462) [2020] ZAGPJHC 244 (6 October 2020).

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