

SOUTH AFRICA / JUDGMENT

Firstand Bank Ltd v Singh and Others (4273/2012) [2015] ZAGPJHC 279 (30 October 2015) [2015] ZAGPJHC 279

COURT

South Gauteng High Court, Johannesburg

BEFORE

Chaitram

CASE / FILE NUMBER

4273/2012

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REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA
GAUTENG
LOCAL DIVISION, JOHANNESBURG
CASE
NUMBER: 4273/2012
In

the matter between:

FIRSTRAND
BANK LTD
PLAINTIFF
and
SINGH,
DHARAMPHAL
FIRST DEFENDANT
SINGH,
MUNIAMA VEERASAMY
SECOND DEFENDANT
MAJOR
MINING
CORP
THIRD DEFENDANT

JUDGMENT

CHAITRAM AJ:

INTRODUCTION**AND BACKGROUND:**

[1] The plaintiff had initially instituted these proceedings on Motion in terms of which it had sought and obtained a money judgment against the defendants by default. The judgment was, however, subsequently rescinded on application by the defendants before

Sutherland J. The learned Judge considered it appropriate to also refer the matter to trial. He, accordingly, directed that the plaintiff's notice of motion and founding affidavit stand as a simple summons, the answering affidavit as a notice of intention to oppose, and that the plaintiff was to deliver a declaration. Further pleadings would, accordingly, be exchanged in accordance with the rules of action proceedings. In accordance with this direction, the defendants filed a plea, which they subsequently amended, and the plaintiff filed a replication. Pleadings then closed.

[2] I will refer to the parties as plaintiff and defendants.

[3] The plaintiff's claim against the defendants is based on two deeds of suretyship, one in relation to the first and second

defendants, who are married to each other in community of property, and the second in relation to the third defendant, which was signed by the first defendant in his capacity as member of the third defendant. As both deeds of suretyship read exactly the same, and the issues for adjudication before me are the same in respect of all three defendants, I will simply refer to the deeds of suretyship in the singular.

[4] In terms of the deed of suretyship, the defendants bound themselves as sureties and co-principal debtors with Major Truck & Bus Spares CC (Major Truck), presently in liquidation, in an unlimited amount in favour of the plaintiff in relation to certain credit facilities (the facility) that the plaintiff had extended to Major Truck to enable it to conduct its business.

[5] The plaintiff sued for payment of the outstanding balance due and payable by Major Truck in an amount of R5 207 460-87.

The defendants had pleaded certain defences which are not necessary to address now.

[6] When the trial came before me, the defendants' counsel, Mr Cohen, indicated that he wished to do two things. First, he wished to move a written application in terms of Rule 33(4) for the separation of an issue that he contended would conveniently be able to be addressed separately. The issue was in the nature of an exception in that the cause of action pleaded in the plaintiff's founding affidavit (simple summons) was discrepant from the one pleaded in the declaration.

[7] Secondly, he wished to raise the point orally from the bar that the plaintiff's simple summons, in fact, failed to disclose a cause of action. He contended that as the simple summons had not been properly amended, it did not matter whether the declaration disclosed a cause of action.

[8] If I understood him correctly, then, he required the following

orders:

i). that it would be convenient to separate the issues in terms of Rule 33(4);

ii). that the declaration was excipiable due to the discrepant nature of the cause of action pleaded in it and in the simple summons;

iii). that the simple summons does not disclose a cause of action;

iv). that Sutherland J's directive that the matter proceed to trial be set aside; and

v). that the plaintiff's claim be dismissed with costs, except that the costs, it was conceded, ought to be limited to the date when the defendants ought to have first raised the exception.

[9] Plaintiff's counsel, Mr Smit, initially seemed intent on opposing the application for a separation of issues on the grounds,

if I understood him correctly, that it was not convenient to separate the issue as the trial ought not to be adjudicated in a piece-meal

fashion.

[10] However, due, probably, to the lateness of the hour when the trial was allocated to me on its second day, the first day having already been crowded out, coupled with the fact that, in any event, I had to listen to the arguments about the nature of the exception in order to appreciate whether the separation was merited, and that any finding that a separation was not merited would not put paid to the exception itself, but merely delay its adjudication, it seemed to me that Mr Smit reconciled himself to the fact that the adjudication of the exception, whenever it would occur, was unavoidable. He, accordingly, agreed that I may proceed to consider the merits of the exception.

[11] Similarly, as Mr Cohen's point relating to the simple summons not disclosing a cause of action was inextricably linked, especially to a possible finding in the defendants' favour on the exception, that it would be appropriate for me to rule on that point as well.

[12] I believe that this was a practical and common-sense approach to the matter.

[13] In the circumstances, I have to decide those two main issues.

THE PERTINENT FACTS RELATING TO THE EXCEPTION

[14] In its simple summons, the plaintiff broadly outlines the terms and conditions of the facility that it extended to Major Truck, including the term that the credit extended was repayable on demand, together with the plaintiff's right to terminate the facility upon Major Truck's commission of certain acts that would constitute breaches of the facility agreement.

[15] In particular, it alleges that by virtue of Major Truck having passed a resolution on 03 May 2011 in terms of which it voluntarily

commenced Business Rescue proceedings, as envisaged in Section 129 of the Companies Act 71 of 2008 (the Companies Act), it considered this to be a breach of the facility agreement and promptly terminated the facility.

[16] The plaintiff alleges further that on 11 May 2011 it addressed a letter to Major Truck in terms of which it cancelled Major Truck's overdraft facilities and demanded payment of the outstanding balance due to it in the sum of R5 207 460-87.

[17] It adds that '...this demand in and of itself also caused the full amount outstanding by Major Truck...to become due and payable'.

[18] The simple summons goes on to state that Major Truck was unable to conduct its normal business as, during June 2011, Absa Bank and Standard Bank both obtained court orders for the re-possession of various vehicles of Major Truck that were financed by those banks. Major Truck's inability to conduct its normal business constituted a breach of the facility agreement. Standard bank had, furthermore, sought an order for Major Truck's final winding up.

[19] In its declaration, the plaintiff pleads the terms and conditions of the suretyship agreement, and the facility agreement with greater particularity, and concludes with the following allegation as its basis for terminating the facility:

'Major Truck breached the terms of the...facility agreement in that:

- i) it ceased to conduct business in or about June 2011, and
- ii) it was placed under final winding up'.

[20] The defendants' argument is that in the simple summons the reason for the plaintiff having cancelled Major Truck's

facility was that Major Truck had resolved to undergo Business Rescue, whereas in the declaration it was because Major Truck had

ceased to conduct business in June 2011, and had been placed under final winding up. These discrepant causes of action, according

to the defendants, rendered the plaintiff's declaration in relation to its simple summons excipiable.

THE PERTINENT FACTS RELATING TO THE SIMPLE SUMMONS NOT DISCLOSING A CAUSE OF ACTION

- [21] As the ‘exception’ and the ‘no cause of action’ points are inextricably linked, it will be appropriate to address the facts relating to the latter issue here as well before moving on to assess the merits of these points.
- [22] I propose to highlight the facts by referring to Mr Cohen’s arguments instead of regurgitating the allegations in the simple summons.
- [23] Paragraph 2.4 of the terms and conditions of the facility agreement addresses the repayment terms of the facility, whilst paragraph 4 thereof is the breach clause. The breach clause provides, inter alia, for the plaintiff’s relief in the event of a breach by Major Truck. According to Mr Cohen:
- the election made in the simple summons is a reliance on an alleged breach, and not on the bank’s entitlement to call-in the debt;
 - the bank is bound to its election in this regard;
 - Major Truck’s recourse to Business Rescue is, firstly, not one of the listed grounds of breach in the facility agreement, and, secondly, Business Rescue proceedings constitute a legitimate act in terms of company law, and in terms of Section 133 of the Companies Act there is a general moratorium on legal proceedings against companies undergoing Business Rescue.

Therefore, according to Mr Cohen, Major Truck’s resolution to resort to Business Rescue could not constitute a legitimate basis upon which to cancel the facility.

- [24] In the circumstances, so the argument goes, the plaintiff’s cancellation of Major Truck’s facilities was unlawful, and served to prejudice the sureties, who are consequently released from their obligations in terms of the deed of suretyship.
- [25] Further, as the simple summons, being an affidavit, was not capable of being amended by the declaration, its shortcomings were not rectified by the declaration. It, accordingly, does not matter that the declaration now discloses a cause of action. Mr Cohen submitted that the absence of a cause of action in the simple summons vitiated everything else that followed, and that the matter was, accordingly, not salvageable.

THE COURT’S ASSESSMENT

- [26] It is important to be clear about precisely what the plaintiff’s cause of action is. It is based on a deed of suretyship in terms of which the defendants bound themselves as sureties and co-principle debtors with Major Truck in favour of the plaintiff.

The suretyship is addressed by the defendants to the plaintiff in the first person, some of its salient features being:

‘...hereby bind myself...in your favour as surety in solidum for and co-principal debtor jointly and severally with Major Truck (the debtor)...for the due payment by the debtor of all or any monies which the debtor may now or from time to time hereafter owe to you from whatsoever cause and howsoever arising...’

‘It shall be in your sole discretion to determine the nature, extent, and duration of the facilities to be allowed to the debtor’.

‘Nothing herein contained or implied shall be deemed to create any obligation on your part to enforce or pursue any of your rights against the debtor before being entitled to enforce your rights against me....’

[27] By their very nature, the outstanding amounts of the credit and overdraft facilities extended to Major Truck would have fallen due to the plaintiff from the very moment that they were incurred. The essence of all types of credit, however, is that the date of payment of the debt is merely postponed on certain terms and conditions.

[28] In the present context, the defendants bound themselves, not just as sureties, but as co-principal debtors as well, which means that whereas their liability would ordinarily have arisen only when the principal debtor was in default, their liability now arises at the same time that the principal debt becomes enforceable. See *Millman NO v Masterbond Participation Bond Trust Managers (Pty) Ltd* (under curatorship)

[1997] ALL SA 408 (C).

[29] Their status as co-principal debtors, however, does not entail a ‘separate independent liability as co-principal debtors’.

See CF Forsyth & JT Pretorius, *Caney’s The Law of Suretyship*, 6th ed, p 57. They remain sureties, and will be entitled to raise defences in rem (arising from the obligation) as opposed to defences in personam (due to some personal privilege of the debtor).

[30] The significance of this in the present context is that while the plaintiff would have been entitled to claim the outstanding balance due by Major Truck directly from the sureties upon the occurrence of any event in terms of which the debt became payable, the defendants were still entitled to raise any in rem defences that may have been available to them.

[31] The terms and conditions under which the debt due by Major Truck to the plaintiff was postponed are expressed in various parts of the facility agreement. For instance:

i). Clause 8, which is headed “Change in Circumstances”, entitles the bank to re-assess the facility upon the occurrence of events or circumstances which materially alter the basis upon which the facility was initially extended. In the event of a failure by the parties to agree on new terms, the debt becomes payable in full immediately;

ii). Under its “Review” clause, clause 12, the plaintiff retains the discretion to reduce the credit facilities or even terminate them. Although such steps may only be taken pursuant to a review of the facility, the clause reiterates that the plaintiff may, nevertheless, rely on its entitlement to demand immediate payment of the debt;

iii). Clause 2.4 of the Terms and Conditions portion of the facility agreement is headed “Repayment”, the salient part of which, for present purposes, reads as follows:

‘In terms of normal banking practice, any facility availed of is repayable on demand by the bank to this effect....’;

iv). Clause 4.1 of the same Terms and Conditions is the breach clause in terms of which various possible grounds of breach of the facility by Major Truck are listed. Clause 4.2 sets out the various types of relief that the plaintiff may resort to in the event of the commission of a breach;

v). Clause 4.4 provides that the bank will not be obliged to perform in terms of the facility agreement if Major Truck is in breach of the terms of the facility, or is ‘put into liquidation, placed under judicial management, or being wound up, whether provisionally or finally or being placed under curatorship’.

[32] The recurring theme in the facility agreement is that the plaintiff sought, at every turn, to ensure that it may call-in the account at the first sign of unacceptable risk to its investment in an effort to limit its potential loss.

[33] Against this backdrop, I turn to consider the defendants’ first contention, namely that the cause of action expressed in the simple summons is different from that in the declaration, thereby rendering the declaration excipiable.

[34] It may be helpful to bear in mind that the key elements and accompanying facts that are necessary to be alleged in order to found a cause of action on a deed of suretyship relate to the following:

- i). the conclusion of a valid contract of suretyship;
- ii). that the causa debiti (cause of the debt), which must be described, is one in respect of which the surety undertook liability; and
- iii). the amount due by the principal debtor.

See LTC Harms, Amler’s Precedents of Pleadings, 7th ed, p 367, together with the authorities cited by the learned author.

[35] Although the defendants, in their plea, have disputed that a valid deed of surety was concluded for want of the observance of certain legal formalities, that defence will be for another court to decide. So too with the defendants’ dispute of the capital amount claimed. As far as I can tell, the causa debiti is not in dispute. The causa debiti is the fact that Major

Truck had incurred the debit balance on the facility in the course of its business. For my purposes, therefore, the cause of action, at face value, has been properly and completely pleaded.

[36] The defendants' complaint relates to the legal basis in terms of which the plaintiff declared the debt to be payable. I, accordingly, address the defendants' complaint as follows.

[37] A perusal of the simple summons reveals the following:

i). On 03 May 2011 Major Truck passed a resolution in terms of which it submitted itself to Business Rescue proceedings;

ii). On 10 May 2011 the plaintiff received notice of that fact;

iii). On 11 May 2011 the plaintiff called-in the facility, relying on clause 2.4 (a) of the Terms and Conditions of the facility agreement, namely that the facility was repayable on demand;

iv). The plaintiff's founding affidavit (simple summons) was deposed-to by the plaintiff's representative on 29 December 2011, and the Motion proceedings for its claim against the defendants was issued by the Registrar on 06 February 2012.

[38] The significance of the chronology of the events above is that the court proceedings were not instituted immediately after the plaintiff had called-in the debt, but some nine months later. In that time, new and further grounds had arisen for cancelling the facility.

[39] These have been pleaded in the simple summons, but I will reiterate them briefly as follows:

i). On about 21 June 2011 and 24 June 2011, Absa Bank and Standard Bank had, respectively, successfully sued Major Truck for the return of certain motor vehicles that it used in its business and which were still subject to credit agreements with those banks;

ii). As a result of that action, Major Truck was unable to conduct its normal business. As at the date of the plaintiff's Motion proceedings, Major Truck had ceased trading; and

iii). On 29 June 2011 Standard Bank had applied for an order for Major Truck's final winding up.

[40] Admittedly, the plaintiff had, indeed, tended to conflate its reasons for having initially called-in the debt. On the one hand, the simple summons seems to suggest that Major Truck's resolution to resort to Business Rescue proceedings constituted a breach of the facility agreement, and that the plaintiff was relying on the breach provisions of the agreement. On the other hand, the plaintiff's cancellation letter of 11 May 2011 unequivocally records that the facility was being called-in in terms of the on-demand "Repayment" provisions of clause 2.4(a), clearly precipitated by Major Truck's resolution to resort to Business Rescue.

[41] Upon a proper construction of these circumstances, however, it is clear that the latter position is what the plaintiff had intended to convey.

[42] At the time that the plaintiff had instituted the Motion proceedings, it could have relied upon any further grounds for the cancellation of the facility that had arisen after 11 May 2011. See *Bredenkamp and Others v Standard Bank of South Africa Ltd* 2010 (4) SA 468 at para [63]. Its allegations of the events that had transpired in June 2011 in relation to the other two banks, and the results thereof seem to have been alleged in order to further justify its entitlement to cancel and/or call-in the facility.

The plaintiff, however, again, seems to have conflated whether it was relying on a breach of the agreement by virtue of the latter facts, or whether it was simply calling-in the debt “on demand”. In this regard, the simple summons could certainly have been more clearly expressed.

[43] In my view, however, there is little substance in the distinction. The plaintiff seems to have been covering its bases for good measure. These were not different causes of action, they were merely different grounds for the same cause of action. Either ground would have sufficed as they merely complemented each other, they were not mutually destructive.

[44] Turning to the declaration that eventually followed, the plaintiff relied, essentially, on two grounds of breach by Major Truck namely that it ceased to conduct business in or about June 2011, and that it was placed under final winding up. The learned author, D E van Loggerenberg in *Erasmus Superior Court Practice*, Vol 2, 2nd ed, p D1-249, states that ‘the claim in a declaration must not vary materially from that in the simple summons. A declaration may also not introduce a new and totally different cause of action of which no mention was made in the summons’. The learned author cites appropriate authorities for this statement.

[45] The first of the two grounds relied-upon in the declaration has, clearly, been repeated from the simple summons. The second ground is not a completely divergent ground. It is sufficiently closely connected with the circumstances that prevailed at the time when the plaintiff had launched its Motion proceedings. The plaintiff is, accordingly, entitled to rely on it.

[46] I, accordingly, cannot agree with Mr Cohen’s submission that there necessarily ought to have been an appropriate amendment to the plaintiff’s founding affidavit by way of filing a supplementary affidavit to be in line with the declaration. Without having to comment on the procedure suggested by Mr Cohen, it was, in my view, simply not necessary as the grounds for the cancellation of the facility in the declaration were substantially the same as those in the simple summons. It was the exact same debt that was sought to be enforced. In a slightly different context, but of equal application here, the court in *Standard Bank of SA v Oneanate Investments (In Liquidation)*

[1997] ZASCA 94; 1998 (1) SA 811 SCA at 825I suggested that it would be sufficient if the cause of action in the declaration was ‘foreshadowed or embraced’ in the simple summons. That was more than adequately done in the present matter. There was, therefore, no material variation between the simple summons and the declaration.

- [47] In the circumstances, the two documents are not excipiable in relation to each other.
- [48] By virtue of what I have found above, I believe that it also puts paid to the defendants' second point relating to the lack of a cause of action in the simple summons. However, as some effort was put into arguing the point, I believe that I ought to say a few words about it.
- [49] Mr Cohen submitted that the plaintiff could not have relied upon Major Truck's resolution to resort to Business Rescue as a ground of breach as this was not one of the listed grounds of breach in the facility agreement.
- [50] Business Rescue proceedings were created in Section 128 of the Companies Act which provided, essentially, for a procedure in terms of which a company that is financially distressed may be restored under the supervision of a business rescue practitioner. Importantly, in terms of Section 133 of the Companies Act, a general moratorium was placed on legal proceedings, including enforcement actions, against a company undergoing Business Rescue.
- [51] Mr Cohen was, indeed, correct that Business Rescue, as defined in the Companies Act, could not have been envisaged by the parties at the time that they had concluded the facility agreement in 2010 for the obvious reason that Business Rescue proceedings was born in the Companies Act only on 01 May 2011. Curiously, Major Truck had adopted its resolution to undergo Business Rescue on 03 May 2011, being the very first working day after the Companies Act came into effect, the 1st and 2nd of May 2011 having been public holidays. This was either fortuitous or calculated. What is certain is that had Major

Truck, at any time prior to 01 May 2011, resolved to resort to Judicial Management in terms of Section 427 of the repealed Companies Act 61 of 1973 (the old Companies Act), which had been the substantial equivalent to Business Rescue proceedings, Major Truck would have immediately been in breach of the facility agreement, which would have entitled the plaintiff to cancel the facility.

- [52] The Companies Act repealed the Judicial Management provisions of the old Companies Act and, it would be fair to suggest, effectively,

replaced it with the new Business Rescue proceedings. I, however, fear that Business Rescue will be as effective as Judicial

Management was in saving a company, in other words, hardly at all. The main reason for this is that the mere whiff of a company resorting to Business Rescue signals the proverbial writing on the wall for such a company in the eyes of its creditors and is enough to send them into a frenzied panic in relation to their investment with such a company. The result of the creditors' panic inevitably, and quite ironically, often leads to the demise of the company, as seems to have occurred with Major Truck.

- [53] From a creditor's perspective, the reality of a financially distressed company with which it holds investments is impossible to ignore. To view the matter in context, the first defendant, who was a member of Major Truck, stated the following, inter alia, in an affidavit dated 06 May 2011, which was required to be published to its creditors, in support of the resolution to resort to Business Rescue:
- ‘...[Major Truck] became financially distressed in that it is unable to pay its debts as they fall due and payable and its liabilities exceed its assets, it also appears to be reasonably unlikely that... [Major Truck] will be able to pay all of its debts as they fall due and payable within the immediately ensuing six months’.
- [54] There can be little doubt that a company that is distressed to the point that it needs to resort to Business Rescue will be a major concern for a bank in the position of the plaintiff. The point is, and this is consistent with the recurring theme in the plaintiff's facility agreement that I referred to earlier, the bank's primary concern related to its continued satisfaction that Major Truck remained commercially viable. Judicial Management was specifically regarded as a concern for the plaintiff. Business Rescue, being its substantial equivalent in terms of a bank's perception of risk, must be interpreted to have the same effect as Judicial Management for the purposes of an entitlement to call-in a facility in circumstances such as the present. Therefore, although Business Rescue itself could not have been envisaged by the parties when they had concluded the facility agreement, anything akin to Judicial Management certainly was. The reference in clauses 4.1.6, 4.1.7, and 4.4 of the facility agreement to ‘judicial management’ must, accordingly, be read to include a reference to Business Rescue proceedings.
- [55] In any event, in the present matter, Business Rescue could, arguably, constitute a breach of the facility agreement in terms of clause 4.1.3 which refers to the performance by Major Truck of an act “analogous” to an act of insolvency in terms of the Insolvency Act, 24 of 1936, or an act that justifies the winding up of a company in terms of Section 344 of the old Companies Act, the latter provisions of which were not repealed with the rest of that Act.
- [56] In terms of the Insolvency Act, the act of insolvency that could find application is Section 8(g) which reads: ‘...if he gives notice in writing to any one of his creditors that he is unable to pay any of his debts’.
- [57] In terms of Section 344 of the old Companies Act the provisions of Section 344(f) which read, ‘the company is unable to pay its debts as described in Section 345’ may find application. The qualification in relation to Section 345 does not detract from the essence of the provisions of Section 344(f).
- [58] The breach envisaged in the provisions of clause 4.1.9 of the facility agreement, namely that ‘the client...become[s] unable to conduct its normal course of business for whatever reason’, would certainly apply if the consequences of its Business Rescue proceedings resulted in this.

[59] Mr Cohen's argument that Business Rescue proceedings are a legitimate procedure sanctioned by law in relation to which the Companies Act imposes a general moratorium against legal proceedings against such a company, is without merit in the present

circumstances. The moratorium referred-to in Section 133(1) of the Companies Act is not all-encompassing. In deciding whether the cancellation of an agreement amounted to 'enforcement action' as envisaged in Section 133(1), the court in *Cloete Murray and Another NNO v Firststrand Bank Ltd t/a Wesbank* 2015 (3) SA 438 (SCA) held: 'Linguistically the phrase "enforcement action" in s 133(1) was unable to bear the meaning of the cancellation of an agreement. Contextually it had to be understood to refer to enforcement by way of legal proceedings. The legislature intended to allow a company in distress the necessary breathing space by placing a moratorium on legal proceedings and enforcement action in any forum, but not interfering with the contractual rights and obligations of the parties to an agreement'. (Taken from the headnote).

[60] In the circumstances, the plaintiff was not barred by Section 133(1) from cancelling the facility.

[62] It is noteworthy that the defendants did not contend that the plaintiff was not entitled, generally, to call-in the account, nor do they contend that the plaintiff acted unreasonably in calling-in the account. The "on-demand" feature of the facility agreement meant that the plaintiff did not require any specific reason to call-in the account. The learned author, J Moorcroft in *Banking Law and Practice*, p15-29, correctly state that 'a bank cannot be held to a contractual relationship against its will and is at liberty to cancel the contract unilaterally unless of course the specific contract contains specific contrary provisions relating to cancellation by the bank'.

[63] The defendants' argument that the plaintiff's reasons for originally cancelling the facility were unjustifiable, despite the fact that it did not need to have reasons to do so, is illogical.

[64] In my view, the plaintiff's reliance on Major Truck's resolution to resort to Business Rescue proceedings was, in the context of the facility agreement, a legitimate basis upon which to call-in the account.

[65] Considered as a whole, there is no merit in the argument that the simple summons does not disclose a cause of action.

[66] Both the defendants' points will, accordingly, have to be dismissed.

[67] Regarding costs, the trial had been enrolled for three days, with the first day having been crowded out. The matter could only begin on the afternoon of the second day, and continued on the morning of the third day. There cannot be any debate that the costs of the second and third days ought to follow the result. Both counsel, however, had different views on the wasted costs of the first day. Mr Cohen submitted that there ought to be no order as to costs for the first day, whilst Mr Smit submitted that if the plaintiff was successful, it ought to be awarded its costs for the first day as well. It was submitted that there is a prevailing Bar Council practice in this regard which counsel undertook to look into and revert to the court

about. I have, however, not received any further input on this point from either counsel.

[68] Clearly, it was neither party's fault that the matter could not proceed on the first day. Although I do not believe that it would be appropriate for the plaintiff to be awarded costs for the first day merely because it was successful in this round of the proceedings, I do consider that the party who ultimately succeeds in the action ought to be entitled to recoup the costs of the first wasted day as well.

[69] I, accordingly, make the following order:

- i). The defendants' application that the declaration is excipiable is dismissed;
- ii). The defendants' point in limine that the simple summons does not disclose a cause of action is dismissed;
- iii). The defendants are to pay the costs of the second and third days of the trial, jointly and severally, the one paying the other to be absolved;
- iv). The wasted costs of the first day of the trial will be costs in the cause.

A CHAITRAM

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION

Appearances:

On behalf of the Plaintiff:

Adv. J E Smit

On behalf of the Defendant:

Adv. S S Cohen

Date Heard: 14 October 2015

Date Judgment Delivered: 30 October 2015

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