
SOUTH AFRICA / JUDGMENT

Flusk v Absa Bank Limited (2014/2678) [2017] ZAGPJHC 310 (25 October 2017)

[2017] ZAGPJHC 310

COURT

South Gauteng High Court, Johannesburg

BEFORE

Cambanis

CASE / FILE NUMBER

2014/2678

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 2014 / 2678

Not reportable

Not of interest to other judges

Revised.

25/10/2017

CHANTEL FLUSK PLAINTIFF

And

ABSA BANK LIMITED RESPONDENT

JUDGMENT

CAMBANIS AJ

INTRODUCTION

- [1] This is a claim for delictual damages. The plaintiff is an ex-employee of the defendant, ABSA, and claims R12 million in damages.

- [2] The history of this matter is essential. The plaintiff was employed by the defendant for a period of 14 years without any negative incidents. This productive employment relationship between the parties broke down in 2012.
- [3] This breakdown has resulted in two separate processes, the one process, a labour dispute, which was brought before the CCMA and the other process, is the matter presently before court. The CCMA's process was concluded on the 25 October 2013 when the parties agreed to part ways and an agreement, referred to as the separation agreement, was reached in terms of which an ex gratia termination payment was made by the bank to the plaintiff. Significantly the settlement agreement included a "full and final" clause in that their separation agreement contained a clause stating that the terms of the said agreement was in relation to the dispute between the parties. If it is found that the effect of the 'full and final' clause referred to in the said agreement deals with all the same issues before me, that finding disposes of the matter before this court.
- [4] The defendant raises this term of the agreement as a complete defence to plaintiff's claim and must accordingly be dealt with first.
- [5] Notwithstanding the settlement agreement, plaintiff now pursues a delictual claim for damages she claims she suffered arising out the unlawful actions of the defendant employees who injured her feelings, impaired her dignitas, made her feel degraded and humiliated, invaded her privacy, importantly accessed her private bank account and hacked her computer, infringed her personality and abused her emotionally. She testified that these unlawful actions occurred during approximately the last year of her employment with the bank
- [6] The issue to be decided here is whether the plaintiff has alleged and proved her cause of action.

ARBITRATION

- [7] In September 2012 plaintiff filed a written notification of grievances with defendant. Eventually she took her matter to the CCMA. She was represented by her union representative who assisted her in reaching a settlement with the employer/defendant. The settlement was reduced to writing in a document called a separation agreement which plaintiff signed at her attorney's office on 25 October 2013.
- [8] In terms of clause 3 of the agreement the parties agreed to termination of the employee's employment contract by way of mutual agreement following from CCMA case no. GAJB 13089/13. At paragraph 5.1, it was agreed that the employee shall receive an ex gratia payment equivalent to her 6 months remuneration as termination payment. The termination date was recorded as 31 October 2013. Paragraph 11 thereof documents that this agreement is in full and final settlement of her claims before ABSA Limited.

THE LEGAL POSITION IN RESPECT OF A FULL AND FINAL SETTLEMENT.

[9] Counsel for the bank referred to an SCA case in support of her argument, namely, *Be Bop A Lula manufacturing and Printing CC Kingtex Marketing (Pty) Ltd 2008*

(3) SA 327 (SCA) in which it was stated at page 332 paragraph 10:

“Although, generally, a contract is founded on consensus, a contractual liability can also be incurred in circumstances where there is no real agreement between the parties but one of them is reasonably entitled to assume from the words and conduct of the other one that they were in agreement.”

[10] Counsel for the defendant argues that this is what happened in the present case because the bank is reasonably entitled to assume that when plaintiff signed the agreement indicating that she accepted an ex gratia payment equivalent to her six months remuneration as termination payment (my emphasis) she also accepted that such acceptance extinguished her delictual claims, if any.

[11] The terms of paragraph 11 sets out the contents of the full and final settlement as follows.

“ 11.1 The employee accepts the terms of this agreement in full and final settlement of all claims which she has or might have against the company or any Group Company (or any of the officers or employees of any Group Company) following from:

1.1.1 Her contract of employment;

11.2 Without limitation to the generality of the clause 11.1 above, the

employee waives any rights which she may have to bring any claim for an unfair labour practise or unfair dismissal or any other claim under the Labour Relations Act 66 of 1995, as amended or any other Labour related legislation following form CCMA Case No GAJB13089/13.....”

[12] The wording of the above full and final settlement paragraph clearly and repeatedly refers to claims arising out of the employment

relationship. If, for example, she were to suffer a physical injury during the course of her employment with the bank, her remedy would not lie within the parameters of Labour related legislation whose jurisdiction surely does not include adjudicating injury claims. In such instance she would it would be reasonable of her to believe that she would be entitled to pursue a delictual claim for damages, even in a situation where she had already signed a settlement agreement pertinent to labour relations.

[13] I cannot agree that the bank is entitled to reasonably assume that plaintiff supposed that all her claims of whatsoever nature were extinguished by this clause. It is impossible to ascertain that the allegations in the labour dispute are the same as those in the present matter because the matter never ran and has not been adjudicated upon. I find that for these reasons the full and final clause of the settlement agreement is not a complete defence to the plaintiff's claim now before me. The plaintiff is entitled to have the merits of her delictual claim adjudicated on.

THE PLEADINGS AND LEGAL REPRESENTATION

- [14] This is a matter in which plaintiff issued summons against her former employer, Absa Bank Limited for delictual damages in the sum of R12 million. The plaintiff was employed by ABSA Bank Limited from 1 September 1997 until 31 October 2013 in various capacities.
- [15] Plaintiff did not have legal representation at the hearing of this matter. I set out a brief history of this matter for reasons which will become apparent later in this judgment. Plaintiff originally instructed Herman Potgieter Attorneys who issued a summons on her behalf in February 2014. These attorneys withdrew as her attorneys of record in March 2017 and the notice of withdrawal was served on 22 March 2017.
- [16] Her second set of attorneys, Nemabhulani Attorneys, served their notice of appointment as attorneys of record on the 21 April 2017. They served a notice of intention to amend the particulars of claim on 28 June 2017 and filed the amended particulars of claim in July 2017.
- [17] These attorneys attended a pre-trial meeting held on the 13 July 2017. At paragraph 10 of the pre-trial minutes the defendant raised for discussion the possibility of separating out the issue that the claim had been compromised by the full and final agreement alluded to in the defendants plea. If this issue was decided against the plaintiff, it would save the costs of the trial. These attorneys in turn served their notice of withdrawal on the 3 August 2017.
- [18] The defendant filed their response to the plaintiffs pre-trial inquiries on 14 August 2017. Plaintiff did not file her response to the pre-trial questions, including a response to the suggestion of separation of issues. As the plaintiff was representing herself at this hearing, this matter was not pursued by the defendant.

EXCEPTIONS

- [19] The defendant twice gave notice in terms of rule 23(1) of the Rules of court. The first of these were served on plaintiffs' attorney 13 March 2014. There were numerous areas of complaint. In response, the plaintiff filed her notice to amend her particulars of claim. On 15 April 2014, defendant received a notice that plaintiff would withdraw her intention to amend the particulars of claim and tendered the wasted costs occasioned by it. She has subsequently paid the taxed Bill of Costs in the amount of approximately R44,000.00
- [20] Some 17 months later, in September 2015, the same attorneys served a second notice of intention to amend her particulars of claim. The defendant then filed its second notice of exception largely on similar grounds as set out in its first exception.

Notice of set down for hearing on Monday 28 August 2017 was served on defendant on the 13 March 2017. A third notice of intention to amend particulars of claim was served on 19 May 2017. A fourth notice of intention to amend in terms of rule 28 is served on the defendant by plaintiff's new attorneys on 28 June 2017. The amended particulars of claim dated 25 July 2017 are particulars of claim now before court.

AMENDED PARTICULARS OF CLAIM

[21] While it is true that the plaintiff represented herself at the hearing, it is also true, that the plaintiff was legally represented

at the time that the pleadings were drafted. The record will show, that I repeatedly explained to her that she had to prove the allegations contained in the particulars of claim which included evidence in corroboration of the allegations. It still becomes an impossible task for any plaintiff to succeed in her claim where she has failed to make the averments necessary to sustain the claim in the pleadings.

[22] Counsel for the defendant argues that in the currently amended particulars of claim, the same difficulty as presented itself in the two previous sets of particulars of claim is evident, in that there is no allegation that ABSA is vicariously liable for the complained conduct of ABSA employees in the payment screening department as set out in 6.1.1 to 6.1.12 of the particulars of claim. This clearly appears from the pleadings and the absence of this essential component by which the bank can be found liable for the actions of its employees is determinative of the matter and her action must be dismissed on this ground

EVIDENCE

[23] In any event, the plaintiff failed to prove her case in terms of the evidence she gave at the hearing, The plaintiff became very emotional at times while giving her evidence. In the main she was hostile and did not always answer the questions put to her. Her evidence was that the staff plotted to get rid of her. Much of her evidence was in the nature of conspiracy and collusion between the employees with the purpose of getting rid of her.

[24] She locates the beginning of her troubles with the purchase of her new BMW in January 2011. Her version is that some employees questioned the affordability of the vehicle. She was informed that some of co-workers were unlawfully accessing her bank account to investigate the payments on the vehicle. She did not trust anyone in her department and sought help outside the department by requesting a spin report from a colleague at an Absa branch. A spin report is a more detailed version of a bank statement and reveals additional information of who exactly accessed her bank account and the purpose for which they accessed it.

[25] Her further evidence was that the ABSA employees had also hacked her Blackberry cell phone as well as her Telkom home line. She admitted that she refused to hand over her phone for purposes of investigating her claims. No evidence was led to corroborate either of these claims.

[26] She testified that her computer had been hacked but would not accept the evidence of a forensic investigation done in London that proved that this accusation was not true.

[27] She also testified about victimization at work, again without corroboration. Against her evidence is the evidence of her line

manager who gave evidence as to the manner in which each of her complaints, as they were brought to her attention were dealt with in terms of the bank's procedures. This evidence was largely uncontested. The plaintiff was simply not satisfied with the outcomes of the investigations into her complaints. I find that her evidence of victimization and being the subject of a conspiracy by the bank employees unreliable and I do not accept her evidence.

[28] It was also argued that while the plaintiff previously pleaded defamation in express terms this course of action is no longer

contained in the pleadings before me. I was referred to the fact that plaintiff had pleaded complaints as follows, injury to her feelings invasion of her privacy, impairing her dignity, causing her to feel degraded and humiliated and infringing on her personality.

[29] The defendants employees who are the persons alleged to have committed these unlawful acts are not joined as co-defendants in this action. Nowhere is it alleged that the employees acted within the course and scope of the employment with ABSA while performing the alleged unlawful acts.

[30] Annexed to the plaintiff's particulars of claim was the report of her psychologist who states in her report that the plaintiff is currently involved in a law suit against ABSA bank for unfair labour practice defamation of character committed against her. Clearly she meant to say defamation of character. I assume that counsel for the defendant refers to this in argument out of excessive caution should the court find that there is a complaint of defamation that must be answered.

[31] However I cannot get past the fact that the plaintiff has failed to allege that ABSA is vicariously liable. In her evidence, she said that everything happened under the roof of ABSA and that was the reason she had brought the bank to court. This is not what was said in the particulars of claim. Accordingly I find that she has failed to prove her cause of action against the bank.

[32] It is trite that the plaintiff must prove the following elements in the delict of defamation, the terms of the statement must be wrongful, the statement must be published, the reference must be to the plaintiff, the defamatory nature of the statement and the plaintiff may claim damages generally for her injured reputation or for the actual patrimonial loss.

[33] Given what I have already found in relation to the particulars of claim failing to sustain her cause of action, I do not think it necessary to deal extensively with the evidence given by the plaintiff and her two witnesses. Both the witnesses had no

experience within the IT field and were therefore not in a position to assist the court in giving expert evidence in respect of accessing her bank account or hacking her computer. The long and short of it is that the Plaintiff failed to tender any evidence in corroboration of her oral evidence whether in the form of taper recordings or transcripts of evidence of employees wrong doing which she claimed to have.

[34] Plainly put she has failed to establish the requirements for defamation as correctly argued by counsel for the defendant. There is no evidence that ABSA staff made defamatory statements about her, nor is there evidence that they

unlawfully accessed her bank account nor that they hacked the plaintiff cell phone or Telkom line nor that they hacked her computer

it goes without saying that the onus is on the plaintiff to prove her cause of action and I have no choice but to conclude that she has failed to do so. Her claim against the bank simply cannot succeed.

COSTS

[35] Counsel for the defendant argued that this is one of those rare instances in which attorney and client costs are sought by the defendant adding that this was not done lightly. The bank, she argued, has been put to the expense of running a trial on fanciful

allegations made recklessly by the plaintiff and that it would be unfair for the bank to be out of pocket in respect of its costs

should the plaintiff's claims be dismissed. She argued that the plaintiff cannot hide behind the fact that she did not have legal representation as from 3 August 2013 just about 3 weeks before the hearing of this matter.

[36] I cannot agree with counsel. It seems to me that the plaintiff has been let down by the fact that the pleadings do not disclose any cause of action. It is self-evident that when a litigant engages the services of an attorney, she or he is entitled to expect such a professional will properly advise her and act with due diligence.

[37] I do make any finding regarding the competence or negligence of plaintiff's former attorneys because I do not have sufficient

facts before me. In any event I am not called upon to make such a finding.

[38] I do however find that the plaintiff's unsuccessful litigation is in some part due to poor workmanship carried out by her legal representatives for the reasons set out above.

[39] I cannot find a reason on these facts to visit a punitive costs order on the plaintiff.

In the result I make the following order:

1. The plaintiff's action is dismissed with costs on a party and party scale

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

JOHANNESBURG

Counsel for the Applicant: Advocate L. Grenfell

Instructed by

Lowndes Dlamini Attorneys

Respondent:

Appeared in person

Date of Hearing:

28 August 2017

Date of Judgment:

22 September 2017

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Prepared on 9 October 2026 · Esheria