

SOUTH AFRICA / JUDGMENT

Kukard N.O and Others v ABSA Bank Limited and Others (115284/2023) [2024] ZAGPPHC 1089 (23 October 2024) [2024] ZAGPPHC 1089

COURT
North Gauteng High Court, Pretoria

BEFORE
N.P. Mali

CASE / FILE NUMBER
115284/2023

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REPUBLIC OF SOUTH
AFRICA
IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG DIVISION
PRETORIA

CASE NO: 115284/2023

DOH: 2 SEPTEMBER

2024

(1)

REPORTABLE: YES / NO

(2) OF

INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED.

SIGNATURE

DATE: 23/10/2024

COLLEEN MICHELLE

KUKARD N.O.

First Applicant

HILLBROW INN (PTY)

LTD

Second Applicant

JOUBERT PARK MAXIME

HOTEL (PTY) LTD

Third Applicant
MAXIME HOTEL (PTY)
LTD
Fourth Applicant
NEW WORLD HOTELS (PTY)
LTD
Fifth Applicant
JESHCO (PTY)
LTD
Sixth Applicant
DREAM WEAVER TRADING
139 (PTY) LTD
Seventh Applicant
WARWICK PAUL VAN DEN
BERG N.O.
Eighth Applicant
DARRYL HURWITZ
N.O.
Nineth Applicant
-and-
ABSA BANK
LIMITED
First Respondent
ACCESS BANK OF SOUTH
AFRICA LIMITED
Second Respondent
STANDARD BANK OF SOUTH
AFRICA LIMITED
Third
Respondent
In

re: COLLEEN
MICHELLE KUKARD N.O.
First Plaintiff
HILLBROW
INN (PTY) LTD
Second Plaintiff
JOUBERT
PARK MAXIME HOTEL (PTY) LTD
Third Plaintiff
MAXIME
HOTEL (PTY) LTD
Fourth Plaintiff
NEW
WORLD HOTELS (PTY) LTD
Fifth Plaintiff

JESHCO
(PTY)
LTD
Sixth Plaintiff
DREAM
WEAVER TRADING 139 (PTY) LTD
Seventh Plaintiff
WARWICK
PAUL VAN DEN BERG N.O.
Eighth Plaintiff
DARRYL
HURWITZ N.O.
Nineth Plaintiff
JEFF
PILLAY
First Defendant
ABSA
BANK LIMITED
Second Defendant
ACCESS
BANK OF SOUTH AFRICA LIMITED
Third Defendant
STANDARD
BANK OF SOUTH AFRICA LIMITED
Fourth Defendant
REGISTRAR
OF DEEDS, POLOKWANE
Fifth Defendant
REGISTRAR
OF DEEDS, JOHANNESBURG
Sixth Defendant
REGISTRAR
OF DEEDS, CAPE TOWN
Seventh Defendant

This

Judgment was handed down electronically and by circulation to the parties' legal representatives' by way of email

and shall

be uploaded on caselines. The date for hand down is deemed to be on 23 October 2024.

JUDGEMENT

MALI J

1. There are two interlocutory applications involved herein, the applicants who are the plaintiffs in the action brought application for early discovery in terms of Rule 35 (1) of the Uniform Rules of Court. Rule 35 (1) application is only against the first and the third respondent.

2. Rule 35 (1) of the Uniform Rules of Court provides that:

“Any party to any action may require any other party thereto, by notice in writing, to make discovery on oath within 20 days of all documents and tape recordings relating to any matter in question in such action (whether such matter is one arising between the party requiring discovery and the party required to make discovery or not) which are or have at any time been in the possession or control of such other party. Such notice shall not, save with the leave of a judge, be given before the close of pleadings.”

3. The first respondent is not opposing the application, whereas the third respondent is opposing it. The applicant seeks early discovery in order for the applicant to amend her particulars of claim. In the event Rule 35 (1) is granted the applicant seeks postponement in order to allow her time to file the amendment of her particulars of claim.

4. The second application pertains to the exception to the plaintiffs’

particulars of claim in terms of Rule 23 of the Uniform Rules of Court and has been brought by the 2nd and 3rd respondents, who are third and fourth defendants in the action. The 2nd and 3rd respondents will be referred as Access Bank and Standard Bank respectively.

5. Access Bank and Standard Bank are the banking institutions which granted the loans to some of the plaintiffs, allegedly at the instance of the first defendant (“Mr. Pillay”) in the main action. Mr. Pillay was employed as the plaintiffs’ Financial and Human Resource Director and Chief Accountant. In these proceedings the applicant does not seek any order against Mr. Pillay, however his name features prominently.
6. As the facts are intertwined, I allowed both applications to be ventilated fully without giving the ruling on postponement. The highlight of the applicant’s argument and the concession made on her behalf is that in the event exceptions are found to be good, it would not be necessary to grant the Rule 35 (1) as the outcome will achieve the same purposes, viz. allowing the applicant to amend the particulars of claim. I therefore commence with exceptions.
7. Rule 23 of the Uniform Rules of court provides that:

“(1) Where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence as the case may be, the period allowed for filing any subsequent pleadings delivers an exception therefore and may set it down for hearing in terms of paragraph (f) of Sub rule (5) of Rule

(6). *Provided that where the party intends to take exception that a pleading is vague and embarrassing he shall within the period allowed aforesaid by notice afford his opponent an opportunity of removing the cause of complaint within 15 days, provided further that the party exception shall within 10 days from the date on which a reply to much notice is reserved or from the date on which such reply is due, deliver his exception.*”

8. The court should be persuaded that upon every interpretation which the pleading in question can reasonable bear, no cause of action arises.[1] Furthermore, an exception must go to the root of the claim or defence.[2] In suitable cases, legitimate inferences may be drawn regarding the meaning of the particulars in the court’s endeavour to look benevolently at pleading instead of over-critically, care must be taken to not push such benevolence to the length by altering the language of a pleading, by reading in what is not there, by ignoring what is and such make out a cause of action for the plaintiff which is not apparent from the pleadings.[3]
9. The courts must adopt a sensible and not overly technical approach in assessing pleadings to which exceptions have been raised. The court went on to borrow from the imagery of Miller J in Davenport Corner Tea Room (Pty) Ltd v Joubert 1962

- (2) SA 709(D) 715 H [4], the court stated:

“Furthermore, an exception must go to the root of the claim or defence.[5] In suitable cases legitimate inferences may be drawn regarding the meaning of the particulars in the Court’s endeavour to look benevolently at pleading instead of over –critically, care must be taken to not push such benevolence to the length by altering the language of a pleading, by reading in what is not there, by ignoring what is and such make out a cause of action for the plaintiff which is not apparent from the pleadings.”[6]

ACCESS BANK’S EXCEPTION

10. Access Bank takes an exception to the plaintiff’s particulars of claim firstly, that there is no pleaded connection between the loans and alleged theft by Mr Pillay. The plaintiffs seek contractual damages from Access Bank in claim C. At paragraph 5.1 of the particulars of claim, the plaintiffs plead that during March 2010, Jeshco (the sixth plaintiff) and the Group 5 Property Trust (not cited in the action) concluded an oral agreement with Access Bank in terms of which Jeshco and the Group 5 Property Trust opened banking accounts at Access Bank (“the oral agreement”).
11. At paragraph 5.5 the plaintiffs allege that it was a tacit term of the oral agreement that Access Bank would, without negligence, exercise the general level of skill, care and diligence possessed and exercised by a banker and financial services provider during the management and administration of their bank accounts. The plaintiffs allege that the first defendant, Mr Pillay, was employed as the plaintiffs’ “financial and human resources director and chief accountant”. At paragraphs 3.3 to 3.6 and 3.8 to 3.11, the plaintiffs allege that Mr Pillay falsely represented to Access Bank that he had the required authority and mandate to represent Jeshco and the Group 5 Property Trust.

12. At paragraph 5.6, the plaintiffs allege that “between 5 May 2013 and 13 August 2021”, Mr. Pillay, acting pursuant to this alleged false misrepresentation, applied for and concluded loan agreements in the name of Jeshco and Group 5 Property Trust (“the loan agreements”). At paragraph 5.8 the plaintiffs plead that Access Bank breached the alleged oral agreement, inter alia, by allegedly failing to make proper enquiries to determine Mr Pillay’s authority to represent Jeshco and Group 5 Property Trust. At paragraph 3.5, the plaintiffs plead that the loans were used to “pay for the running expenses” of the plaintiffs’ businesses. The plaintiffs further allege, at paragraph 3.5, that Mr Pillay

subsequently “misappropriated and stole” from the plaintiffs’ “cash income” derived from the operation of their businesses. The plaintiffs admit that they used the loans to their benefit, to fund the “running expenses”

of their businesses.

13. From the above it is not clear how Access bank acted with negligence, failed to exercise the general level of skill, care and diligence possessed and exercised by a banker and financial services provider during the management and administration of the plaintiffs’ bank accounts. The plaintiffs do not allege that Mr Pillay stole the funds advanced to the plaintiffs in terms of the loan agreements. There is therefore no connection on the pleadings between (i) the conclusion of the loan agreements; (ii) Access Bank’s alleged breach of contract; and (iii) Mr Pillay’s alleged theft of funds from the plaintiffs’ “cash income”. There is no allegation that Mr. Pillay was not authorized by the plaintiffs.
14. On the plaintiffs’ version the funds were utilized in running the businesses of the plaintiff. As to how and whether the money was stolen by Mr. Pillay raises no connection with Access Bank. I conclude that the particulars of claim lack averments necessary to sustain a cause of action. Access Bank is prejudiced in formulating its plea, as there is no clarity to the case it is required to meet.
15. The second ground raised is the claim for special damages allegedly arising from the same allegations as above. The applicant states “Any alleged losses sustained by the plaintiffs as a result of Mr Pillay’s alleged thefts are “special damages”.
16. The plaintiffs do not allege that such damages were or ought reasonably to have been within the contemplation of the parties at the time the oral agreement was allegedly concluded. It is not clear how Access Bank would have control over the funds which were already in one of the plaintiffs’ accounts. There is no legal basis put forward by the plaintiffs that the Bank or lender must exercise control over the funds it has deposited to the borrower’s account. The applicant says if it was not for Access bank having approved the loans there would not have been any money for Mr Pillay to steal. There is no allegation against Access Bank pertaining to reckless or untoward landing to the 6th plaintiff.
17. In the result the particulars of claim are bad in law and lack averments necessary to sustain a cause of action, alternatively, are vague and embarrassing.

18. The third ground advanced by Access Bank is that the oral agreements and loan agreements are unrelated. The plaintiffs' claim is founded in an alleged breach of an alleged oral agreement concluded during the opening of current accounts in 2010.
19. The alleged breach occurred in the conclusion of subsequent and separate loan agreements between Access Bank with Jeshco and Group 5 Property Trust, individually. It is not apparent from the particulars of claim, nor is it alleged, how the subsequent loan agreements are related to the alleged oral agreement. On the facts alleged in the particulars of claim, the loan agreements are, ex facie, entirely separate and unrelated to the oral agreement with the result that there is no legal basis for the plaintiffs' claim against Access Bank.
20. Having regard to the above, the particulars of claim are bad in law and lack averments necessary to sustain a cause of action, alternatively, are vague and embarrassing.
21. The fourth ground is that the particulars of claim allege the calculation of damages. At paragraph 5.10 of the particulars of claim, the plaintiffs allege that as a result of Access Bank's breach of contract, they have suffered contractual damages in the amount of: (i) R5 309 383.00 in respect of Jeshco; comprising loans of R1 628 124.00 and R3 681 258.00 granted by Access Bank to Jeshco; and R12 428 77.00 in respect of Group 5 Property Trust; comprising loans of R1 856 562.00 and R10 572 210.00 granted by Access Bank to Group 5 Property Trust.
22. It is not apparent from the particulars of claim how the claimed damages were sustained by the plaintiffs; the claimed damages have been calculated by the plaintiffs and that the damages flow from Mr. Pillay's alleged theft of the plaintiffs' "cash income".
23. The role of Group 5 Property Trust has not been alleged at all. Group 5 Property Trust is mentioned in relation to the first plaintiff as follows:

"... Kukard claims in this action in her capacities, duly appointed by the Master of the High Court, Johannesburg, as trustee for the time being of:

1.1.2.1 the Group 5 Property Trust (IT2380/2009); and

1.1.2.2 the Group 5 Commercial Property Trust (IT2381/2009);"

24. The calculation of damages claimed from the Access Bank does not sustain a cause of action. Therefore, the particulars of claim fall to be struck.
25. Lastly the pleading on the cancellation of mortgage bonds is linked with the averments made in the first ground of exception. At paragraph 5.11 of the particulars of claim, the plaintiffs allege that Access Bank is "obliged" to "cause the cancellation" of the bonds registered in favour of Access Bank. The plaintiffs do not plead any right of cancellation, sourced in contract or otherwise. Moreover, the plaintiffs do not plead that they have returned the loan amounts advanced to them or that restoration is impossible, nor do the plaintiffs tender return of the loan amounts to Access Bank.

26. For the same reasons advanced in upholding the first exception, that there is no connection between the loans advanced by Access Bank and the allegations of theft against Mr. Pillay. It is concluded that the particulars of claim are bad in law and lack averments necessary to sustain a cause of action.

STANDARD BANK 'S EXCEPTION

27. Firstly, the relevant plaintiffs' claim against the fourth defendant as described in paragraph 6 of the particulars claim (i.e. Claim D) is based upon an alleged breach of an oral agreement concluded between the second to fifth plaintiffs and the Group 5 Property Trust, and the fourth defendant as appears inter alia from paragraphs 6.1, 6.8, 6.11 6.12 and 6.13 of the particulars of claim.
28. The relevant plaintiffs plead in paragraph 6.12 of the particulars of claim that as a direct consequence of the breach of contract, the fourth defendant approved the loans applied for by the first defendant ("Mr Pillay") and that, as pleaded in paragraph 6.13 of the particulars of claim, such breach of contract resulted in the second to fifth plaintiffs and the Group 5 Property Trust suffering damages.
29. No averments are made in the particulars of claim as to anything that was done or occurred pursuant to the approval of the loans applied for by Mr. Pillay (whether unauthorised or not by the second to fifth plaintiffs and the Group 5 Property Trust) that would have resulted in any damages having been suffered.
30. For example, no averment is made that any monies were advanced to and/or received by the second to fifth plaintiffs and the Group 5 Property Trust pursuant to the loans so approved. In any event, even if monies had been advanced by the fourth defendant to the second to fifth plaintiffs and the Group 5 Property Trust, a fact which has not been alleged, no averments are made in the particulars of claim as to why that would have resulted in the second to fifth plaintiffs and the Group 5 Property Trust suffering any damages.
31. The allegation that Mr Pillay may have applied for loans and which loans may have approved by the fourth defendant does not in and of itself give rise to damages. In the circumstances, the particulars of claim lack averments to sustain an action against the fourth defendant for damages.
32. The second complaint by fourth defendant is that the relevant plaintiffs plead in paragraph 6.12 of the particulars of claim that a consequence of the alleged breach of contract is that the fourth defendant caused the registration of the mortgage bond annexed as annexure "E1" to the particulars of claim.
33. Annexure "E1" is a mortgage bond registered at the instance of the trustees for the time being of the Group 5 Property Trust in favour of the fourth defendant on 26 February 2010 and pursuant to a power of attorney granted on 10 November 2009, a copy of which power of attorney is annexed to the mortgage bond "E1".

34. The alleged breach by the fourth defendant as is pleaded in paragraph 6.11 of the particulars of claim as arising in the granting of the loans by the relevant plaintiffs in paragraph 6.9 of the particulars of claim to have applied for by Mr. Pillay between 5 May 2013 and 13 August 2021.
35. The mortgage bond “E1” was registered before that period (i.e. before 5 May 2013), more particularly on 26 February 2010 and pursuant to a power of attorney on 10 November 2009. The impugned conduct and breach described in the particulars of claim only occurred after the registration of the mortgage bond “E1”.
36. In the circumstances, the particulars claim lack averments necessary to sustain an action against the fourth defendant for the cancellation of the mortgage bond annexed as “E1” in the particulars of claim.
37. Lastly the mortgage bond annexed as “E2” to the particulars of claim is a mortgage bond registered at the instance of the trustees of the Group 5 Commercial Property Trust in favour of the fourth defendant.
38. The relevant plaintiffs plead that as a direct consequence of the breach of contract pleaded in paragraph 6 of the particulars of claim that inter alia the fourth defendant caused the registration of the mortgage bond “E2” and so the first, eighth and ninth plaintiffs seek in prayer 4.6 that such mortgage bond be cancelled.
39. No averments are set out in paragraph 6 or elsewhere in the particulars of claim which relate to any breach of contract by the fourth defendant insofar as the Group 5 Commercial Property Trust is concerned, i.e. such averments as are made in paragraph 6 of the particulars of claim relate to the second to fifth plaintiffs and to the Group 5 Property Trust, as distinct from the Group 5 Commercial Property Trust. One cannot find a cause of action pleaded in relation to the cancellation of the mortgage bond “E2”. In result the particulars of claim lack averments necessary to sustain an action against for the fourth defendant for such relief.
40. Having regard to above, the application for exceptions by the third and the fourth defendants must succeed. In the result it is not necessary to deal with Rule 35 (1) application. In the result the following order ensues:

ORDER

- 1 The plaintiffs’ postponement application is dismissed.
- 2 The third and fourth defendant’s exceptions are upheld.
- 3 The plaintiffs are granted 15 court days from the date of this order to amend their particulars of claim.

4 Should the plaintiffs fail to deliver a notice of amendment in respect of the aforementioned exception within 15 court days from the granting of this order, or should the notice of amendment fail to remove the causes of complaint referred to in the third and fourth defendant's notice of exception, then the third and fourth defendant shall be entitled to set the matter down on notice to the plaintiffs, on the same papers, duly supplemented, to seek an order striking out the plaintiffs' claim and dismissing the action with costs.

5 The plaintiffs are jointly and severally liable for the costs of the third defendant of the postponement application and the exception, including the costs of two counsel, on scale C in terms of Uniform Rules 67A(3) and 69.

6. In respect of the fourth defendant the costs of counsel on scale C, to be paid by the first to fifth plaintiffs and the eighth and ninth plaintiffs, jointly and severally.

N.P. MALI

JUDGE OF THE HIGH COURT

APPEARANCES:

Third Defendant's Counsel: Adv. C McConnachie chris@chrismcconnachie.com Adv. Z Raqowa raqowaz@gmail.com Instructed by: Lawtons Inc. p/a Lawtons Africa Veronica.vurgarellis@lawtonsafrica.com Tebogo.maunye@lawtonsafrica.com Fourth Defendant's Counsel: Adv. B M Gilbert bmgilbert@group621.co.za Instructed by: Claassen Inc nicoc@claassinc.co.za Counsel for the Plaintiffs: Adv. H. Jacobs SC fcl@clubadvocates.co.za Adv. F. Lambrecht fcl@clubadvocates.co.za Instructed by: Riekert Terblanche Attorneys terblanche@prok.co.za c/o Wiese & Wiese Attorneys

[1] Pets-Warehousing and Sales cc v Dowsink Investment CC 2000 (3) 833 AT 839 G-H

[2] Vermeulen v Goose Valley Investments (pty) Ltd [2001] 3 ALL SA 350 (A).

[3] Van Zyl v Crause 1945 OPD 168 at 170.

[4] Telematrix v Advertising Standards Authority [2006] ALL SA 6 (SCA) at paragraph 3.

[5] Above (2)

[6] Above (3)

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