

SOUTH AFRICA / JUDGMENT

Nedbank Ltd v Chlorcape (Pty) Ltd (2022-056297) [2024] ZAGPJHC 218 (4 March 2024) [2024] ZAGPJHC 218

COURT

South Gauteng High Court, Johannesburg

BEFORE

Moorcroft

CASE / FILE NUMBER

2022-056297

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IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2022 - 056297

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

In the application by

NEDBANK LTD Excipient

And

CHLORCAPE (PTY) LTD Respondent

In re

CHLORCAPE (PTY) LTD Plaintiff

NEDBANK LTD First

Defendant

QUENTAIVER MEI TRADING (PTY) LTD

Second Defendant

PILLAY, TAREN Third

Defendant

JUDGMENT

MOORCROFT AJ:

Summary

Exception to particulars of claim – rule 23 – two basis in the alternative – that particulars do not disclose a cause of action, alternatively that particulars are vague and embarrassing

Three grounds of exception upheld – particulars do not disclose a cause of action – plaintiff granted leave to amend

Three grounds dismissed – excipient not allowed to introduce evidence in exception

Order

[1] In this matter I make the following order:

1. The first, second and sixth exceptions are upheld;
2. The third, fourth and fifth exceptions are dismissed;
3. The plaintiff's claim as against the first defendant as contained in paragraphs 18 to 25, 31 to 34, and 40 to 44, and the prayers as against the first defendant are struck out;
4. The plaintiff is granted leave to file amended particulars of claim within fourteen days of the date of this order;
5. The parties shall each pay their own costs.

[2] The reasons for the order follow below.

Introduction

[3] The excipient (referred to as “the bank”) takes an exception[1] to the respondent's particulars of claim in the pending action between the respondent (referred to as “the plaintiff”) and the bank as first defendant. The plaintiff is a private company and the bank is a South African bank trading as such. The second and third defendants in the action play no role in these interlocutory proceedings.

[4] Notice of the intention to except was initially given on the basis that the particulars of claim lack averments necessary to sustain a course of action, alternatively that the particulars are vague and embarrassing. The notice of exception itself does not state on which of these two grounds the exception is being brought but the parties argued the matter on the basis that the bank was relying on both grounds in the alternative.

[5] Makgoka J in *Living Hands (Pty) Ltd and Another v Ditz and Others*

[2] and *Maier-Frawley J in Merb (Pty) Ltd v Matthews*

- [3] summarised the principles applicable to exceptions. An overly technical approach must be avoided but at the same time a case must be pleaded in such a way that the opponent can react thereto. The exception is therefore a legal objection to the pleading and it complains of a defect inherent in the pleading in the sense that even if all the allegations in the pleading were proven, the pleading does not disclose a cause of action or a defence, or that it is so vague and embarrassing that it cannot be responded to meaningfully.
- [6] The court will look only at the pleading concerned and will not take into account extraneous evidence or allegations of fact relied upon by the excipient. It is therefore impermissible to plead facts in a notice of exception, as the bank attempts to do.
- [7] The objective is to dispose of a case or a portion of the case, or to protect a party against embarrassment in presenting its own case. It provides a useful mechanism for weeding out cases without legal merit.
- [8] The plaintiff sets out three claims in the particulars of claim. All three claims relate to payments made by the plaintiff into the account of the second defendant with the bank and the same allegations are made in respect of the conduct of the bank in respect of all three claims.
- [9] The plaintiff's claim against the bank is based inter alia on an alleged failure to comply with the provisions of the Financial Intelligence Centre Act 38 of 2001 as well as the regulations made under the Act when it opened a bank account for the second defendant. It is alleged that -

9.1 the application by the second defendant to open its account with the bank was not accompanied by the documents required in terms of the Financial Intelligence Centre Act 38 of 2001,

9.2 the bank failed to confirm and verify the details and correctness of the bank account into which the amounts totalling R600,000 were paid,

9.3 the bank failed to adhere to general banking practice by crediting the bank account,

9.4 the bank failed to freeze the second defendant's bank account and conduct a due diligence investigation into the receipt of the money,

9.5 the bank failed to report the transaction when there were reasonable grounds to suspect that the transaction was unlawful or related to an offence,

9.6 the bank failed to perform its obligations in accordance with the South African Reserve Bank directions regarding suspicious transactions or unusual transactions,

9.7 the bank failed to perform its obligations without negligence and in a professional manner in accordance with the prescribed functions, processes and safeguards in according with the South African Reserve Bank rules and procedures, the code of banking practice, general banking practice and procedure, and failed to comply with its own internal rules and procedures.

[10] The general banking practice, the provisions of the code of banking practice, and the rules and procedures of the Reserve Bank relied upon are not identified. The reasonable grounds that should have alerted the bank that fraud was being committed are also not identified. No facts are pleaded justifying the averment that the code of banking practice is applicable to the matter, this being a claim in delict.

[11] The question whether the failure of the bank to comply with the provisions of the Financial Centre Intelligence Act gives rise to delictual liability on the part of the bank need not and indeed should not be decided in this exception. The question was not argued and not specifically dealt with by the legal teams. It may very well be that it is question not suitable to be finally disposed of on exception at all.

It has been held that a failure to comply with statutory duties imposed by related legislation, namely the Proceeds of Crime Act 76 of 1996 did not clothe the plaintiff with any rights and that consequently any breach of the statutory duty did not amount to a wrongfulness. A failure to comply with a statutory duty may be relevant in determining wrongfulness but does not provide a basis for civil delictual liability.[4] It may be therefore that a failure to comply with the Financial Centre Intelligence Act does not give rise to delictual liability on the part of the bank but may be taken into account by a court in determining wrongfulness, but I expressly refrain from expressing a view on this issue.

[12] It is alleged[5]

12.1 that the bank as the collecting banker was aware or should have been aware that the second defendant was not entitled to payment of the proceeds of a transaction that gave rise to the plaintiff's claim, and

12.2 the bank as collecting banker owed a legal duty to the plaintiff to avoid causing a loss to the plaintiff by dealing negligently with the payment. It is then alleged that the plaintiff suffered damages in the amount of R600,000.

[13] There are a number of problems with these allegations.

The allegation that the bank acted as a collecting bank make no sense in the context of the whole of the claim against the bank. It is common cause on the pleadings and between counsel in court that no cheque was ever deposited that gave rise to duties as a collecting bank on the part of the bank.[6]

The function of a collecting bank is to act on behalf of its client by collecting the proceeds of a cheque from the drawee bank. The collecting bank might then upon proof of wrongful and negligent conduct, incur delictual liability to the owner of the cheque.[7]

A bank receiving payment into a client's cheque account is not in the same position as a bank collecting on a cheque. The distinction is not merely a semantic one. The collecting bank takes positive steps to present the cheque and collect payment on behalf of its client; a bank receiving payment (for instance by way of electronic fund transfer that have largely replaced the use of cheques) plays a more passive role. It merely provides the receptacle into which the money is placed by the payer.

The allegation that the bank as a collecting bank owed a legal duty to the plaintiff is therefore devoid of substance. It is not alleged that it ever acted as a collecting bank. The plaintiff paid money into the second defendant's account with the bank.

No facts are pleaded in support of the contention that the bank was aware or ought to have been aware of fraud committed by the second defendant.

It is not clear how the bank 'dealt negligently' with the payment after receiving it.

[14] What the plaintiff seems to rely on but does not plead is that the bank owed a duty of care to the public who interact with the bank's clients and that because of the alleged negligent and wrongful failure of the bank to verify the identity of its client the plaintiff suffered a loss by paying money into a bank account at the bank held by a client of the bank who or that was acting fraudulently.

[15] The bank raises six exceptions and I deal with them individually below.

First exception: The material facts relating to the banks alleged knowledge of fraud are not pleaded

[16] The plaintiff pleads that the bank was aware or should have been aware that the second defendant was not entitled to payment of money deposited into the second defendant's account. No facts are pleaded in substantiation of this averment and the exception must be upheld. It must be noted that the three deposits were made by or on behalf of the plaintiff, and it must be inferred that when making the three payments the plaintiff was not aware of anything untoward and that the plaintiff intended to pay money into the bank account.

The plaintiff nevertheless expects the bank to have been aware of shortcomings that the plaintiff itself was unaware of, without saying why the bank should have been so aware.

Second exception: the basis of the legal duty allegedly owed to the plaintiff is not pleaded

[17] I have dealt with the basis of the legal duty above. The plaintiff cannot rely on the collecting bank line of cases and no allegations are made to the effect that the bank owed a duty of care to the plaintiff as a member of the public who was not a client of the bank.

This does not mean that such a duty may not exist, only that it was not pleaded.

[18] The second exception must be upheld.

Third exception: the second defendant has no account with the bank

- [19] The bank impermissibly pleads facts in support of this exception and the exception must be dismissed. If the second defendant is not the holder of the account into which the plaintiff paid money the necessary facts will have to be pleaded by the bank in a plea.

Fourth exception: Vicarious and direct liability conflated

- [20] The bank is a company. It can only act through the agency of people. It is represented at all times and at all levels by its officers, employees, and agents. These range from the chief executive officer, the board of directors, senior staff, junior staff, and others.
- [21] The plaintiff alleges in the particulars of claim that persons to the plaintiff unknown but acting within the course and scope of their employment took the actions for which the bank is now sought to be held liable.

The question of conflation of vicarious and direct liability does not arise and the exception is dismissed.

Fifth exception: it is not clear how the alleged fraudulent tender relate to the holder of the Nedbank account and the second defendant

- [22] Reading the particulars of claim as a whole and with the intention to understand the pleading it would appear that the plaintiff's claim against the bank is not based on a fraudulent tender but based on the fact that the bank permitted an alleged fraudster to open and operate an account with the bank. The plaintiff then to its detriment paid money into the bank account in the mistaken belief that the second defendant was a bona fide business.
- [23] The crucial causal link between the plaintiff's loss and the bank's actions is not a fraudulent tender but the alleged failures in opening the account.
- [24] The plaintiff's averments are not elegantly pleaded and the fifth exception would become academic if averments relating to a duty of care involving both the elements of negligence and wrongfulness were properly pleaded together with facts to establish the causal connection between the loss and the bank's conduct.

The exception is dismissed.

Sixth exception: the relief claimed is incompetent as the plaintiff claims the same amount twice

- [25] The plaintiff alleges that it suffered a loss of R600,000 and claims this amount from the bank. It claims the same amount from the 2nd to 4th defendants, jointly and severally the one paying the other to be absolved. If all these parties pay the amounts claimed then R1,200,000 will be paid to the plaintiff in terms of a R600,000 claim.
- [26] The exception is upheld.

Costs

[27] The bank achieved substantial success in that three of the six exceptions are being upheld. I am nevertheless of the view that each party should bear its own costs in this matter. The three exceptions that are being dismissed have no merit whatsoever and can be described as frivolous.

Conclusion

[28] For all the reasons as set out above I make the order in paragraph 1.

J MOORCROFT

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 4 MARCH 2024

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ATTORNEYS

DATE OF ARGUMENT: 20

FEBRUARY 2024

DATE OF JUDGMENT: 4

MARCH 2024

[1] In terms of rule 23 of the uniform rules of court.

[2] Living Hands (Pty) Ltd and Another v Ditz and Others 2013 (2) SA 368 (GSJ) para 15.

[3] Merb (Pty) Ltd v Matthews 2021 JDR 2889 (GJ), [2021] JOL 51706 (GJ).

[4] Commissioner, South African Revenue Service and Another v ABSA Bank Ltd and Another 2003 (2) SA 96 (W) paras 21 and 53 to 64.

[5] Paragraph 24.2 to 25 of the particulars of claim. Similar allegations are made in respect of the second and third

claim in paragraphs 33.2, 33.3, 33.4, 34, 42.2, 42.3, 43, and 44 of the particulars of claim.

[6] It is alleged in respect of the first claim that the plaintiff paid over a total amount of R240,000 to the account of the second defendant held with the bank. In respect of the second and third claims the plaintiff alleges that it paid the second defendant's invoices and it attaches notifications of payments by the plaintiff's banker. (Paras 16, 30, and 39 of the particulars of claim.)

[7] Rhostar (Pvt) Ltd v Netherlands bank of Rhodesia Ltd 1972 (2) SA 703 (R) 715B; Indac Electronics (Pty) Ltd v Volkskas Bank Ltd [1991] ZASCA 190; 1992

(1) SA 783 (A).

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