

SOUTH AFRICA / JUDGMENT

# Nel N.O and Others v Bank of Baroda (11602/14) [2016]

## ZAKZDHC 19 (12 May 2016)

[2016] ZAKZDHC 19

## COURT

Kwazulu-Natal High Court, Durban

## BEFORE

Koen

## CASE / FILE NUMBER

11602/14

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IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 11602/14

DATE: 12 MAY 2016

In the matter between:

EUGENE NEL N.O.....First Plaintiff

KURT ROBERT KNOOP N.O.....Second Plaintiff

JUSTI STROH N.O.....Third Plaintiff

And

THE BANK OF BARODA.....Defendant

Coram: Koen J

Heard: 4 May 2016.

Delivered: 12 May 2016.

## O R D E R

The Plaintiffs' application for leave to amend their Particulars of Claim in the manner contemplated by the Plaintiff's Notice in terms of Rule 28(1) dated 21 July 2015, contained in the Notice of Motion dated 18 August 2015, is dismissed with costs.

## J U D G M E N T

KOEN J:

[1] This is an application in which the Plaintiffs, the joint liquidators of Ludba Investments CC (hereinafter referred to as 'Ludba')

seek leave to amend their Particulars of Claim. The Defendant opposes the proposed amendment on the basis that the Plaintiffs' claim is for the setting aside of a disposition in terms of the Insolvency Act 1936,[1] that the proposed amended Particulars of Claim do not plead any facts from which it may be inferred or concluded that any asset of the insolvent was disposed of, alternatively any disposition was made by the insolvent Ludba to the Defendant, alternatively do not plead any particulars from which it may be concluded or inferred that any disposition has been made involving the Defendant which might be set aside in terms of the Insolvency Act, and accordingly that the amendment seeks to introduce pleadings which are excipiable on the basis that they disclose no cause of action, alternatively are vague and embarrassing.

[2] It is well established in our law that, as a matter of pleading, a Plaintiff must allege all the relevant facts in his/her Particulars of Claim. Conclusions of law should not be pleaded. The requirements for proper pleading are explained succinctly by the learned authors in Herbstein & Van Winsen[2] as follows:

## 'IV PARTICULARITY

Subrules 18(4) and (5) provide as follows:

18(4) Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto.

(5)...

The requisites of good pleading are said to be "that it should contain a statement of (1) fact, now law, (2) material facts only,

(3) facts, not evidence, and (4) facts stated in a summary form" and that "material facts" are all facts which must be proved in order to establish the ground of claim or defence.

Every pleading must contain a clear and concise statement of the material facts, preferably in chronological order, upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply to it. The necessity to plead material facts is in accordance with the general requirement of the common law. If a party relies on a fact, and will fail in the claim or defence unless at the trial that fact is proved, that fact will be a "material fact"

...

A pleading must allege the facts that are required in order to disclose a cause of action or defence. A pleading that states

conclusions and opinions instead of material facts, or that draws a conclusion without alleging the material facts which, if proved,

would warrant that conclusion, is defective.’

Buchner and another v Johannesburg Consolidated Investment Co. Ltd<sup>[3]</sup> contains a useful summary of what pleadings should contain:

‘Court Rule 18(4) lays down:

”Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto.”

I emphasise the words ”shall contain a clear and concise statement of the material facts.”

The necessity to plead material facts does not have its origin in this Rule. It is fundamental to the judicial process that the facts have to be established. The Court, on the established facts, then applies the rules of law and draws conclusions as regards the rights and obligations of the parties and gives judgment. A summons which propounds the plaintiff's own conclusions and opinions instead of the material facts is defective. Such a summons does not set out a cause of action. It would be wrong if a Court were to endorse a plaintiff's opinion by elevating it to a judgment without first scrutinising the facts upon which the opinion is based.’

I am however also mindful of the caution expressed by Tebbut AJ (as he then was) in Crawford-Brunt v Kavnat and Another 1967 (4) SA 308 (C) at 310G that:

‘If the pleading would appear to be possibly open to exception or even if the Court is of opinion that the question of whether or not the pleading is excipiable is arguable, it would seem to be the more correct course to allow the amendment.’

[3] The material amendments to the Particulars of Claim sought to be introduced by the Plaintiffs are as follows:

#### ‘DATE OF LIQUIDATION

6. On 1 February 2013 Ludba was provisionally wound up. The provisional winding-up order was confirmed on 14 March 2013.
7. Copies of the provisional and final winding-up orders are annexed hereto marked “POC2” and “POC3” respectively.
8. The winding-up of Ludba is deemed to have commenced on 16 July 2010 in terms of the provisions of section 348 of the Companies Act, No. 61 of 1973 as read with item 9 of Schedule 5 and Schedule 3 of the Companies Act, No. 71 of 2008.

9. At all material times hereto:

9.1 Lubda was the registered owner of Portion 1 of Erf 1231 New Germany, Registration Division FT, Province of KwaZulu-Natal, in extent 1,8349 hectares ("the property");

9.2 Lubda disposed of the property to Bexstar Investments (Pty) Ltd for the sum of R20 million, with registration of transfer being effected on 22 September 2010.

10. On or about 22 December 2009, Bexstar, either directly or through the agency of Crown Wheels CC, caused the sum of R1 600 000.00

to be paid to the liquidators of Gharafori Enterprises CC (in liquidation).

11. On or about 23 December 2009 the liquidators of Gharafori Enterprises CC (in liquidation) paid the sum of R1 600 000.00 to the defendant.

12. The sum of R1 600 000.00 aforesaid was due by Bexstar to Ludba as part of the purchase price of the property.

13. The disposition of the sum of R1 600 000.00 to the defendant constitutes a disposition as defined in section 2 of the Insolvency Act, No. 24 of 1936 ("the Act").

## DISPOSITION

### WITHOUT VALUE

14. The disposition of the sum of R1 600 000.00 was not made for value and was made within two years of the winding-up of Ludba.

15. In the premises the disposition to the defendant is liable to be set aside in terms of section 26 of the Act.

16. In the alternative and in the event of it being found that the defendant was a creditor of Ludba, the plaintiffs plead as set out hereunder.

### VOIDABLE OR UNDUE PREFERENCE

17. At the time of the disposition of the sum of R1 600 000.00 to the defendant, the liabilities of Ludba exceeded the value of its assets.

18. The disposition to the defendant had the effect of, alternatively was made with the intention of, preferring one of its creditors above another and in fact had the effect of such preference.

19. In the premises, the disposition to the defendant is liable to be set aside in terms of section 29, alternatively 30(1) of the Act, which section is applicable by virtue of the provisions of section 340(1) of the Companies Act, No. 61 of 1973, as read with section 66 of the Close Corporations Act, 1984 and item 7 of Schedule 3 of the Companies Act, No. 71 of 2008.

## COLLUSIVE

## DISPOSITION

20. The disposition of the sum of R1 600 000.00 was made to the defendant in collusion with one MOHAMED RAFIEK AHMED GHARAFORY, the former sole member of Ludba.

21. The disposition aforesaid had the effect of prejudicing the creditors of Ludba.

22. In the premises the disposition is liable to be set aside in terms of section 31 of the Act and the defendant:

22.1 is to pay the sum of R1 600 000.00 to the plaintiffs; and

22.2 pay by way of penalty to the plaintiffs such sum as the court may adjudge, not exceeding the amount by which the defendant would have benefitted by such dealing if it had not been set aside; and

22.3 insofar as the defendant may be a creditor of Ludba, to forfeit its claim against the estate.'

[4] Whether the proposed amendments would indeed be excipiable is best determined by identifying the relevant material events emerging from the averments in the proposed amendments in their correct chronological sequence:

(a) At all material times Ludba was the registered owner of the property;

(b) On or about 22 December 2009 Bexstar Investments (Pty) Ltd directly or indirectly caused the sum of R1 600 000.00 to be paid to the liquidators of Gharafory Enterprises CC (in liquidation);

(c) On or about 23 December 2009 the liquidators of Gharafory Enterprises CC (in liquidation) paid the sum of R1 600 000.00 to the Defendant ;

(d) On 16 July 2010 an application was launched for the winding up of Ludba;

(e) On 22 September 2010 registration of transfer of ownership of the property passed from Ludba to Bexstar;[4]

(f) On 1 February 2013 Ludba was provisionally wound up which winding up order was confirmed on the 14 March 2013. The effect thereof was retrospectively to deem the winding up of Ludba to have commenced on 16 July 2010.

[5] Central to the various alternative grounds upon which the Plaintiffs' claim is based, whether as a disposition without value, avoidable preference, an undue preference, or a collusive disposition, is the need to allege (and at the trial, based on such averments, establish) a 'disposition'. In each instance the prayer for relief is then also for an order 'setting aside of the disposition of the sum of R1 600 000.00 by Ludba Investments CC (in liquidation) to the defendant.'[5]

[6] 'Disposition' is defined in s 2 of the Insolvency Act to mean:

‘any transfer or abandonment of rights to property and includes a sale, lease, mortgage, pledge, delivery, payment, release, compromise,

donation or any contract therefore but does not include a disposition in compliance with an order of the court.

The word ‘property’ is defined as:

‘movable or immovable property wherever situate within the Republic, and includes contingent interests in property other than the contingent interest of a fidei commissary heir or legatee.’

[7] Meskin,[6] in dealing with the ‘meaning of disposition’ points out that in any case seeking to impeach a transaction on the grounds averred by the plaintiffs ‘it is fundamental that the transaction should have involved a disposition by the insolvent of his or, in the case of a company or of a corporation, of its property’. The definition of ‘disposition’ is not exhaustive. [7] A wide meaning must be given to the word ‘disposition’, for very good reasons. It covers not only ‘any

conceivable means of disposing of property’ but ‘also the conclusion of ‘any contract therefore’ i.e. a contract involving payment, delivery or transfer, for whatever reason, of property.[8] Thus a contract of sale of immovable property is a disposition on the date of the conclusion of such contract,[9] and the transfer of immovable property is a disposition by the transferor. But the repudiation of an inheritance by an heir or

legatee is not a disposition,[10] nor is a refusal to accept a benefit under an insurance policy, since the insolvent’s competence to accept the benefit in terms of a will or insurance policy is not a ‘right’ which vests in an insolvent’s trustee until such benefit is accepted by the insolvent. There is no disposition by an insolvent where it is effected by another without the insolvent’s authorisation or ratification.[11] In a banker customer relationship, the customer’s right of disposal in respect of the amounts standing to his credit in the account is ‘property’ within the meaning of the Insolvency Act and when the customer ‘issues a cheque drawn on his account he transfers or abandons in favour of the other party his right of

disposal over the claim to that part of the amount in his account as was represented by the amount of the cheque’; hence it is ‘a disposition’ of ‘property’.[12]

[8] In short, ‘a disposition of property includes every act by which an insolvent parts with an asset in his estate, whether such asset is a corpus, a sum of money or a right of action.[13] In order to found an action against a particular Defendant though, the disposition must have been made to the Defendant or reached the Defendant, in the sense of being received or the benefit thereof accruing to the Defendant. Thus Mars[14] continues that:

‘Where A instructs or requests his debtor B to pay the amount of that debt directly to C, and B does so, there is a disposition of A’s property to C . . . It is also a disposition if, by arrangement, a loan to the insolvent is paid into the bank account of another person to channel the funds to a creditor of the insolvent.’

It is significant that in both the aforesaid examples referred to by Mars the disposition is preceded by an instruction or an agreement,

in terms whereof the disposition is made or intended to be made by the insolvent to C or the bank account of the other person.

- [9] It is with that brief recount of some of the relevant legal principles that I then return to the pleadings in this matter. Ex facie paragraphs 10 and 11 of the proposed Particulars of Claim, the successive payments of the amount of R1 600 000.00 first by Bexstar, whether directly or through the agency of Crown Wheels CC, to Gharafori Enterprises CC (in liquidation) on 22 December 2009, and by the payment of a similar amount on the following day, 23 December 2009, from the liquidators of Gharafori Enterprises CC (in liquidation) to the Defendant are separate, independent and distinct payments which on the pleadings share nothing in common<sup>[15]</sup> other than the amount of the payment. There is no allegation that the payment to the liquidators of Gharafori Enterprises CC (in liquidation) was made on the condition or for the purpose of the latter paying that amount to the defendant.
- [10] More significantly also on what has been pleaded, and assuming in favour of the Plaintiffs that transfer of the property was to occur *pari passu* with payment, no payment of R1 600 000.00 'as part of the purchase price of the property' was as on 23 December 2009 'due by Bexstar to Ludba'. The transfer of that property, pursuant to whatever causa<sup>[16]</sup>, occurred almost nine months later. If there was any other factual basis on which that part of the purchase price was by then already as an asset to Ludba then that should be pleaded. No right or right of action had, on what is pleaded, accrued to Ludba as property in respect of which an actionable disposition could exist against the Defendant at that point in time.
- [11] It might be that there was a 'contract therefore' (in the words of the definition of 'disposition') in favour of Ludba in December 2009 which would entitle Ludba once an agreement of sale or an agreement establishing any other cause leading to the transfer and hence the right to payment of the sum of R1 600 000.00 or a right of action to such payment, came into existence, but then the facts giving rise thereto should be pleaded. The Plaintiffs have contended that paragraph 13 of the particulars of claim averring that the disposition of the sum of R1 600 000.00 to the Defendant 'constitutes a disposition as defined in section 2 of the Insolvency Act', is sufficient, because if proved that it was a 'disposition' to the Defendant, the claim should succeed. Paragraph 13 however pleads a conclusion of law. The Defendant is entitled to be fully apprised of the factual basis on which the payment, or any right of action to claim payment, of the sum of R1 600 000.00 not by Ludba, but by Gharafori Enterprises CC (in liquidation) to the Defendant could be said to be a disposition or the exact same amount as subsequently became due by Bexstar to Ludba as part of the purchase price of the property in September 2010 upon transfer.
- [12] There simply was no disposition of the sum of R1 600 000.00 to the Defendant. To the extent that the sum of R1 600.00 became due by Bexstar to Ludba as part of the purchase price of the property upon transfer on 22 September 2010, Ludba would have a claim against Bexstar

but not against the Defendant. In conclusion the Plaintiffs submitted that the disposition lay in the right of Ludba to recover the sum of R1 600 000.00 against Bexstar. That right however is a right of recovery against Bexstar. It is not a right of recovery as against the Defendant unless (possibly) the successive payments of an amount of R1 600 000 through Crown Wheels, Gharafori Enterprises CC (in liquidation) to the Defendant was in terms of a 'contract' in terms whereof Ludba's entitlement to the sum of R1 600 000.00 due by Bexstar was transferred or abandoned to the Defendant. But absent such factual allegations the conclusion pleaded in paragraph 13 is not justified and the proposed amendment, certainly in so far as they relate to a disposition without value or a voidable or undue preference lack averments necessary to sustain a valid cause of action against the Defendant.

- [13] All that remains to be considered is whether the averments relating to a collusive disposition suffer a similar fate. Common with the primary and earlier alternative causes of action the proposed amendment in this regard also relies on a 'disposition of the sum of R1 600 000.00' made to the Defendant. The Plaintiffs however pointed out correctly that section 31(1) provides that:

'(1) After the sequestration of a debtor's estate the court may set aside any transaction entered into by the debtor before the sequestration, whereby he, in collusion with another person, disposed of property belonging to him in a manner which had the effect of prejudicing his creditors or of preferring one of his creditors above another.'

- [14] Section 31(1) does not require 'a disposition' but merely 'any transaction'. It was also argued by the Plaintiffs with reference to section 31(2) providing for 'making good any loss' and/or a 'penalty' only from 'any person who was a party to such collusive disposition' that section 31(1) seemingly also does not require that the Defendant be a party to such collusive disposition. I am not persuaded that the remedy of 'making good' or recovering a 'penalty' from 'any person who was a party to such collusive dealings'

would mean that a valid claim for impeaching a disposition to a Defendant will lie where the Defendant was not a party to the collusive transaction. It is however not necessary to decide that issue and I accordingly refrain from considering those issues any further.

- [15] The Plaintiffs aver that the 'disposition' or transaction relating to the payment of the sum of R1 600 000.00 was made to the defendant in collusion with one 'Mohamed Rafiek Ahmed Gharafori, the former sole member of Ludba'. The averment is not that the transaction was in collusion with Ludba duly represented by Mohamed Gharafori. The way it is pleaded the primary party to the collusion was Gharafori who incidentally happened to be 'the former sole member of Ludba'.

Whether he was the sole member at the relevant time is unclear.

- [16] However, even assuming that the reference to Gharafori being the former sole member of Ludba necessarily implies that the collusion

was with Ludba represented by Mohamed Gharafor, and even accepting that it is not necessary to prove that the Defendant was party to any collusion, collusion necessarily implies the involvement of at least two parties namely Ludba and another. No averments have been made in this regard, specifically whether such collusion was with Bexstar, Crown Wheels CC, the liquidators of Gharafor Enterprises CC (in liquidation) and possibly the Defendant, or any combination of them.

[17] Again even accepting contrary to the wording of the averment in paragraph 20 that proof of a 'disposition' is not

necessary and that proof of 'any transaction' would suffice, the simple averment that such 'disposition of the sum of R1 600 000.00' was 'in collusion with one Mohamed Rafiek Ahmed Gharafor' is a conclusion of law rather than a factual averment which, if proved, would establish collusion, or from which collusion can be inferred. Accordingly, the proposed amendments dealing with a 'collusive disposition' lack particulars necessary to sustain a valid cause of action.

[18] The objections by the Defendant are well founded.

[19] The application for leave to amend their Particulars of Claim in the manner contemplated by the Plaintiff's Notice in terms of Rule 28(1) dated 21 July 2015, contained in the Notice of Motion dated 18 August 2015 is accordingly dismissed with costs.

#### Appearances

Plaintiffs' counsel: Adv. R M Van Rooyen

Plaintiffs' attorneys: Edward Nathan Sonnenbergs Inc

Respondent's counsel: Adv. G D Goddard SC

Respondent's attorneys: Jackson and Ameen.

[1] Read with the relevant provisions of s341(2) of the Companies Act 61 of 1973, as read with item 9 of Schedule 5 and Schedule 3 of the Companies Act 71 of 2008.

[2] A Cilliers et al Herbstein & Van Winsen: The Civil Practise of the High Courts and Supreme Court of Appeal of South Africa 5 Ed (2009) at 565 – 566.

[3] 1995

(1) SA 215 (T) at 216 G – 216 J.

[4] Presumably in terms of some underlying causa such as a sale which preceded the transfer. The particulars of claim are silent on this issue.

- [5] See prayers 1, 2, 3 and 4 to the prayer). Prayer 5 is simply for payment of the sum of R1 600 000.00, prayers 6 and 7 are for a penalty of such amount as the court may adjudge and declaring the Defendant to have forfeited his claim against the estate in so far as it may be a creditor (on the basis of the disposition constituting a collusive disposition), prayer 8 is for interest on the sum of R1 600 000.00 calculated at 9% p.a., being the mora rate from the date of judgment to the date of payment, and prayer 9 claims the costs of suit.
- [6] PM Meskin Insolvency Law and Its Operation in Winding Up at page 5 – 99 in para 5.31.2
- [7] Langeberg Koöperasie Bpk v Inverdoorn Farming and Trading Company Ltd 1965
- (2) SA 597 (A) at 602.
- [8] Estate Jager v Whittaker and Another 1944 AD 246 at 250.
- [9] Sackstein NO v Van der Westhuizen en 'n Ander 1996
- (2) SA 431 (0) at 435 – 436.
- [10] Wessels NO v De Jager en 'n Ander NNO
- [2000] ZASCA 132; 2000
- (4) SA 924 (SCA)
- [11] Wessels NO v De Jager en 'n Ander NNO supra
- [12] Ensor N.O. v Nedbank Ltd 1978
- (3) SA 110 (D) at 113
- [13] Grobelaar v Trustees Estate De Beer 1915 AD 265 at 273 and Ensor N.O. v Nedbank Ltd 1978 (3) SA 110 (D)
- [14] E Bertelsman et al MARS The Law of Insolvency in South Africa 9 Ed para 13.3 at pg 251.
- [15] There is for example no averment that these payment were part of an earlier agreement with or an instruction by Ludba.
- [16] In our legal system subscribing to the abstract theory of ownership (Air-Kel (edms) Bpk h/a Merkel Motors v Bodenstein en 'n Ander 1980 (3) SA 917 (A)) ownership will pass even if an underlying causa is lacking, putative or invalid.

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