
SOUTH AFRICA / JUDGMENT

Oberholzer v Glocell (Pty) Ltd and Another (20338/2015) [2017] ZAGPPHC 415 (26 July 2017)

[2017] ZAGPPHC 415

COURT

North Gauteng High Court, Pretoria

BEFORE

E.M Kubushi

CASE / FILE NUMBER

20338/2015

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

26

July 2017

Case

No. 20338/2015

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

REVISED

In

the matter between: CARLA
OBERHOLZERPlaintiff/Respondent
CARLA
OBERHOLZER
Plaintiff/Respondent
SEVENTY
TWO TELECOMMUNICATIONSSecond
Defendant/Excipient
SEVENTY
TWO TELECOMMUNICATIONS
Second
Defendant/Excipient
GLOCELL
(PTY)
LTDFirst
Defendant/Excipient
GLOCELL
(PTY)
LTD
First
Defendant/Excipient

JUDGMENT

KUBUSHI J

- [1] The defendants are excepting to the plaintiff's amended particulars of claim on the basis that the particulars of claim do not divulge a cause of action against the defendants.
- [2] The defendants had initially filed a notice in terms of uniform rule 23 (1) requesting the plaintiff to remove the cause of complaint. When no response was received from the plaintiff, the defendants filed the notice of exception which resulted in the plaintiff amending her particulars of claim. It is against the amended particulars of claim that the defendants are now excepting.
- [3] The plaintiff's claim against the defendants is for payment of commission allegedly owing to her by virtue of a contract of

employment entered into by the plaintiff and the second defendant. The copy of the agreement is annexed to the particulars of claim as annexure "A". Annexure "A" appears, from the face of it, to be a Letter of Offer of Employment. Clause 32.1 of the Letter of Offer of Employment stipulates that the plaintiff should acknowledge acceptance of the offer of employment by signing and dating the attached copy of the letter and returning it to the second defendant not later than 19 June 2014, failing which, the offer will lapse. The Letter of Offer of Employment is signed at the end thereof by two persons representing the second defendant. There is no signature by the plaintiff on the Letter of Offer of Employment. On the face of it, it cannot be ascertained from the letter whether the plaintiff did accept the offer of employment or not, hence, the exception by the

defendants.

[4] The defendants' exception is based on the following grounds:

FIRST GROUND OF EXCEPTION

1. The plaintiff's alleged cause of action arises from an alleged written agreement of employment concluded between the plaintiff and the second defendant (see paragraph 4 of the Plaintiff's Particulars of Claim).
2. A copy of the alleged agreement of employment is annexed to the Plaintiff's Particulars of Claim, marked annexure "A".
3. Annexure "A" as aforesaid in fact constitutes an offer of employment by a firm trading under the name and style of Seventy Two made to the Plaintiff and which was capable of having been accepted by the Plaintiff in writing by no later than 19 June 2014 and which offer was not accepted as aforesaid (see clause 32.1 of annexure "A" read with the last page of annexure "A").
4. Annexure "A" to the Plaintiff's Particulars of claim, accordingly does not constitute a written agreement of employment as alleged.
5. As a result of the aforesaid, the Plaintiff's Particulars of Claim does not contain any averments to sustain a cause of action against the Defendants which renders the Plaintiff's Particulars of Claim excipiable.

SECOND GROUND OF EXCEPTION (IN THE ALTERNATIVE TO THE FIRST GROUND OF EXCEPTION)

6. The Plaintiff's alleged cause of action arises from an alleged written agreement of employment concluded between the Plaintiff and the Second Defendant (se paragraph 4 of the Plaintiff's Particulars of Claim).
7. The Plaintiff has failed to allege any relevant facts to establish a nexus between herself and the First Defendant entitling her to payment of remuneration and/or commission by the First Defendant.
8. As a result the Plaintiff's Particulars of Claim does not contain any averments to sustain a cause of action against the First Defendant, which renders the Plaintiff's Particulars of Claim exceptiable."

[5] The two grounds of exceptions are pleaded in the alternative and I shall deal with the second ground only if I do not find for the defendants on the first exception.

AD FIRST GROUND OF EXCEPTION

[6] In argument before me the defendants' counsel contended in the first ground of exception that where there is a suspensive condition in an agreement it must be alleged in the pleadings. Failure to allege such condition in the pleadings cannot be cured later on by

evidence. Generally speaking, the plaintiff is allowed to plead a conclusion of law but where there is a suspensive condition in an agreement, the pleading must show that the suspensive condition was complied with otherwise the pleading is exceptiable, so it was argued. In this regard counsel for the defendants, in support of his argument, referred me to the judgments in: *Resisto Diary (Pty) Ltd v Auto Protection Insurance Co Ltd*[1] and *Kadels Hope Game Farm (Pty) Ltd v Terblanchehoek Game Farm (Pty) Ltd*. [2]

- [6] In argument before me the defendants' counsel contended in the first ground of exception that where there is a suspensive condition in an agreement it must be alleged in the pleadings. Failure to allege such condition in the pleadings cannot be cured later on by evidence. Generally speaking, the plaintiff is allowed to plead a conclusion of law but where there is a suspensive condition in an agreement, the pleading must show that the suspensive condition was complied with otherwise the pleading is exceptiable, so it was argued. In this regard counsel for the defendants, in support of his argument, referred me to the judgments in:

Resisto Diary (Pty) Ltd v Auto Protection Insurance

Kadels Hope Game

Farm (Pty) Ltd v Terblanchehoek Game Farm (Pty) Ltd.

- [7] In opposition to the exception raised by the defendants, the plaintiff's counsel when arguing the matter before me submitted that for the purposes of an exception the facts pleaded by the plaintiff in the particulars of claim must be accepted as the truth. It is not necessary to plead a suspensive condition because the plaintiff has already pleaded that the employment agreement was concluded. This has to be taken as the truth. Counsel also referred me to Uniform Rule 18

- (6) and to a judgment in *ABSA Bank Ltd v Zalvest 20 (Pty) Ltd*. [3]

- [7] In opposition to the exception raised by the defendants, the plaintiff's counsel when arguing the matter before me submitted that for the purposes of an exception the facts pleaded by the plaintiff in the particulars of claim must be accepted as the truth. It is not necessary to plead a suspensive condition because the plaintiff has already pleaded that the employment agreement was concluded. This has to be taken as the truth. Counsel also referred me to Uniform Rule 18

- (6) and to a judgment in

ABSA Bank Ltd v Zalvest 20 (Pty) Ltd.

- [8] A condition precedent or suspensive condition is an agreement to suspend the operation of the contract until the fulfilment of the condition. Thus, it is a trite principle of our law that the fulfilment of a suspensive condition must be pleaded and proved by the party seeking to enforce the agreement. [4]

- [8] A condition precedent or suspensive condition is an agreement to suspend the operation of the contract until the fulfilment of the condition. Thus, it is a trite principle of our law that the fulfilment of a suspensive condition must be pleaded and proved by the party seeking to enforce the agreement.
- [9] I am, however, in agreement with the plaintiff's counsel that, in the circumstances of this instance, it was not necessary for the plaintiff to plead a suspensive condition in her particulars of claim.
- [10] The defendants' exception, which requires the plaintiff to have pleaded a fulfilment of a suspensive condition, presumes that the cause of action is premised on an offer which should have been accepted, and the acceptance of which required to be proved. A claim based on an offer of employment presupposes that there is no employment in place, but, what would be in place is an offer which would result in an entitlement of employment, if accepted. The Letter of Offer of Employment, in this instance, requires acceptance of the offer under certain conditions. If the plaintiff's claim was based on the offer she would have been obligated to plead the fulfilment of the suspensive conditions (the conditions in clause 32.1 of the letter) in her particulars of claim. This in my view is not the plaintiff's case.
- [11] To the contrary, the plaintiff's claim is based on an agreement of employment. The allegations in the plaintiff's particulars of claim presupposes that the employment agreement was already concluded at the time the claim was launched. A claim based on an employment agreement is different from a claim based on an offer of employment. A claim based on an employment agreement presupposes that there was already an employment in place. Such employment would be based on certain legal obligations which are implicit. In this instance, one of such implicit obligations would be the signing of the employment agreement by the plaintiff.
- [12] It is common cause that the Letter of Offer of Employment annexed to the particulars of claim is not signed by the plaintiff. On my reading of the particulars of claim as they stand together with annexure "A" it appears to me that the failure by the plaintiff to annex a signed copy of the Letter of Offer of Employment may be cured by evidence led at the trial.
- [13] It has already been decided by our courts that if it is impossible for the plaintiff to produce a written contract or a copy thereof, the law allows her/him to prove the execution and terms of the written agreement by other evidence. A rule of procedure, that is, Uniform rule 18 (6), which requires a litigant to annex a document she/he relies upon, cannot deprive that litigant of her/his cause of action or her/his right to adduce secondary evidence of such a document.[5]

- [13] It has already been decided by our courts that if it is impossible for the plaintiff to produce a written contract or a copy thereof, the law allows her/him to prove the execution and terms of the written agreement by other evidence. A rule of procedure, that is, Uniform rule 18 (6), which requires a litigant to annex a document she/he relies upon, cannot deprive that litigant of her/his cause of action or her/his right to adduce secondary evidence of such a document.
- [14] I have to hold, therefore, that the plaintiff's particulars of claim do disclose a cause of action and are not exceptible on this ground.

AD THE SECOND GROUND OF EXCEPTION

- [15] I am of the view that as regards this ground I seem to be in agreement with the defendants' counsel that the plaintiff has not been able to establish *vinculum iuris* between the first defendant and herself, mainly because there is no employment agreement between the first defendant and the plaintiff and also because each company in a group of companies is by law regarded as a separate legal entity.

vinculum iuris

- [16] It is common cause that the employment agreement is between the plaintiff and the second defendant.
- [17] The plaintiff has specifically pleaded that she does not know the exact relationship between the first and second defendants. She, however, seeks to hold the first defendant liable as a department of the second defendant liable to pay the salary and/or commission on the instruction and request of the second defendant. The plaintiff relies on this averment mainly because her salary and commission were previously paid to her by the first defendant as the defendants share the same Human Resource Department. In the alternative she holds the first defendant liable as a holding company and/or a subsidiary of the second defendant and/or because the defendants are part of a group of companies and further alternatively because the first defendant is a cost centre for the second defendant.
- [18] It is evident from the allegations that the plaintiff's reliance on the two companies, that is, the first and second defendants, is based on them being companies in the same group. The question is whether under such circumstances is the first defendant liable for the debts, if any, incurred by the second defendant.
- [19] The term 'a group of companies' is said to cover a variety of situations. It may be applied to companies linked together as holding and subsidiary companies, or it may also be applied to companies joined together by other factors, eg, they have the same directors or the same secretary, or are controlled by the same individual.[6] In this instance, the allegation is that the connection is through the first defendant being a department of the second defendant

alternatively as a holding and/or subsidiary and further alternatively that the first defendant is a cost centre of the second

defendant.

[19] The term 'a group of companies' is said to cover a variety of situations. It may be applied to companies linked together as holding and subsidiary companies, or it may also be applied to companies joined together by other factors, eg, they have the same directors or the same secretary, or are controlled by the same individual.

In this instance, the allegation is that the connection is through the first defendant being a department of the second defendant

alternatively as a holding and/or subsidiary and further alternatively that the first defendant is a cost centre of the second

defendant.

[20] As a general rule, companies in a group of companies are regarded as separate legal entities. In *Ritz Hotel Ltd v Charles of the Ritz Ltd*, [7] it was held that a group of companies that forms a single economic unit should be treated as a single company. However, in *Macadamia Finance Ltd v De wet*, [8] it was held that the fact that a group of companies constitutes a single economic unit (even where it consists of a holding company and wholly owned subsidiary) does not in itself justify the treatment of the group as a single company and, therefore does not render a parent company liable for its subsidiaries.

[20] As a general rule, companies in a group of companies are regarded as separate legal entities. In

Ritz Hotel Ltd v Charles of the Ritz Ltd,

it was held that a group of companies that forms a single economic unit should be treated as a single company. However, in

Macadamia Finance Ltd v De wet,

it was held that the fact that a group of companies constitutes a single economic unit (even where it consists of a holding company and wholly owned subsidiary) does not in itself justify the treatment of the group as a single company and, therefore does not render a parent company liable for its subsidiaries.

[21] Similarly, therefore, the fact that the first defendant is a department of the first defendant which is or was responsible, by instruction of the second defendant, to pay the salary and/or commission of the plaintiff is not enough to establish *avinculum iuris* between the plaintiff and the first defendant.

vinculum iuris

[22] I am satisfied, as such, that the particulars of claim lacks the necessary averments to sustain a cause of action against the first defendant. The exception should, on this ground, be upheld. The plaintiff should be given ten (10) within which to amend her particulars of claim.

[23] The parties have equally succeeded and I intend not to make an order as to costs.

[24] In the result the following order is made:

1. The first ground of exception is dismissed.
2. The second ground of exception is upheld.
3. The plaintiff is given leave, if so advised, to further amend the particulars of claim pertaining to the second ground of exception, within ten (10) days of this order. Failing any amendment, the defendants are given leave to apply to strike out the claim against the first defendant, or for similar relief.
4. I make no order as to costs.

E.M KUBUSHI

JUDGE OF THE HIGH COURT

Appearance:

Date of hearing

: 13 June 2017

Date of judgment

: 27 July 2017

Plaintiff's Counsel

: Adv M. Bouwer

Plaintiff's Attorneys

: Dawid Pietersen Attorneys

First & Second Defendants' Counsel : Adv J. H. Wildenboer

Third Respondent's Attorneys : Du Randt Du Toit Pelser Attorneys

[1]1963 (1) SA 632(A) at 644G.

1963 (1) SA 632(A) at 644G.

1963 (1) SA 632

[2]1998 (1) SA 235(SCA) at 241C - D.

1998 (1) SA 235(SCA) at 241C - D.

1998 (1) SA 235

[3]2014 (2) SA 119(WCC) at 122D - F; 123C - 127D and 127H - 128A.

2014 (2) SA 119(WCC) at 122D - F; 123C - 127D and 127H - 128A.

2014 (2) SA 119

[4]See *Resisto Diary (Pty) Ltd v Auto Protection Insurance Co Ltd*, above.

Resisto Diary (Pty) Ltd v Auto Protection Insurance Co Ltd,
above.

[5]See *ABSA Bank Ltd v Zalvest 20 (Pty) Ltd*.

See *ABSA Bank Ltd v Zalvest 20 (Pty) Ltd*.

[6]See *Hahlo's South African Company Law* through cases 6ed at p428

See *Hahlo's South African Company Law* through cases 6ed at p428

[7]1988 (3) SA 290(A) at 314 - 316

1988 (3) SA 290(A) at 314 - 316

1988 (3) SA 290

[8][1993] ZASCA 21;1993 (2) SA 743(A) at 748

[1993] ZASCA 21;1993 (2) SA 743(A) at 748

[1993] ZASCA 21

1993 (2) SA 743

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPPHC/2017/415.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/oberholzer-v-glocell-pty-ltd-and-others-unknown-topic-agpphc-2017>

Prepared on 13 October 2026 · Esheria