

SOUTH AFRICA / JUDGMENT

Penquin Airtime (Pty) Ltd v FirstRand Bank Limited t/a First National Bank (20358 / 2020) [2021] ZAGPJHC 776 (4 December 2021)

[2021] ZAGPJHC 776**COURT**

South Gauteng High Court, Johannesburg

BEFORE

N Adam

CASE / FILE NUMBER

20358 / 2020

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, JOHANNESBURG****Case****number: 20358 / 2020****REPORTABLE:**

No

OF

INTEREST TO OTHER JUDGES: No

REVISED:

No

Date:

04 Dec 2021

In

the matter between:

PENQUIN

AIRTIME (PTY)

LTD

Plaintiff I

Respondent

and

FIRSTRAND BANK

LIMITED T/A FIRST NATIONAL BANK

Defendant I Excipient

JUDGMENT

ADAM AJ

Introduction

- [1] This is an exception by the defendant (FNB or the bank) against the plaintiff's (Penguin) claim for damages in the amount of R1 230 500.00.
- [2] The damages are claimed on the basis of the Aquilian remedy of 'pure economic loss' and pertains to payments which Penguin made (by way of EFT) to '...an entity which described itself to be Vital Medical Supplies...' (Vital). The EFT payments were made into Vital's bank account with FNB.
- [3] FNB raised an exception to the particulars of claim on the basis that it failed to disclose a cause of action, for five distinct reasons. The court was informed that FNB intended to rely on the first, second and fourth exception for the purposes of this hearing.

The facts

- [4] The amended particulars of claim can be summarised as follows:
- a. On 20 November 2019, the Department of Health ordered from an entity called Bold T-Twin and Associates (Pty) Ltd, in terms of certain terms of appointment Leep machines.
 - b. Bold contracted with Vital for the purchase of the Leep machines for a purchase price of R253 000.00. Vital would deliver the machines to the Department of Health by no later than 25 November 2019.
 - c. On 25 November 2019, Bold received a further order from the Department of Health for a further 100 Leep machines and purchased these machines for R977 500.00. Vital would deliver the machines to the Department of Health by no later than 27 November 2019.
 - d. On or about 22 November 2019, Penguin and Bold concluded an oral agreement in terms of which Penguin would make payment to Vital for the Leep machines on behalf of Bold. It was a term of such agreement that Bold would only be required to repay Penguin upon receipt by Bold of payment from the Department of Health.
 - e. On 22 and 25 November 2019, upon receipt by Bold of invoices from Vital, Penguin made payment to Vital (by EFT) in the sums of R253 000.00 and R977 500.00. The payments were made by Penguin into an account at FNB operated by M M Hoosain t/a Vital MDC (Hoosain's account).
 - f. Vital failed to deliver the first batch of Leep machines on 25 November 2019 and the second batch on 27 November 2019. In the 'late afternoon' of 27 November 2019, Penguin discovered that Vital did not exist and that it had defrauded Bold.

- g. On 28 November 2019, Penguin's bankers (Standard Bank of SA) informed FNB of the fact that Vital had perpetrated a fraud against Bold. On 4 December 2019 Standard Bank informed Penguin that FNB had advised that the funds had been withdrawn from Hoosain's account on 27 November 2019.
 - h. Prior to the payments being made into Hoosain's account (i.e., 22 November 2019), the balance in Hoosain's account was R50.00. On 23 November 2019, after the first payment of R253 000.00 had been made, R240 000.00 was withdrawn (in various tranches) from the Hoosain account in cash from FNB's tellers at two branches . On 27 November 2019, after the second payment of R977 500.00 had been made, R940 000.00 was withdrawn (in various tranches) from FNB's tellers at various other branches.
 - i. FNB allegedly negligently breached various statutory obligations under FICA, notably in that it failed, inter alia, to '...report the high volumes and unusual activity on the Hoosain bank account to FICA...' and to '...monitor the Hoosain bank account... '
 - j. FNB's tellers were furthermore negligent in '...authorising the withdrawals to take place in circumstances in which those employees should have refused to allow those withdrawals.'
 - k. Had FNB, inter alia, complied with its obligations under FICA, and had its tellers exercised '...the necessary and reasonable care which was required of them...', the withdrawals would not have been made.
 - l. Public policy and the boni mores imposed upon FNB a '...duty of care to ensure that [Penguin] did not suffer loss in consequence of the high volume and unusual activity on the Hoosain account...'
- [5] From the above it is clear that Penguin made the payments to Vital on behalf of Bold in order to discharge Bold's contractual obligation to Vital.
- [6] Once the payments were made by Penguin, Bold established that Vital had defrauded it. Penguin alerted Standard Bank who in turn alerted FNB, but by then the FNB account was depleted.
- [7] Penguin now seeks to recover the losses that it sustained due to the fraud by Vital from FNB as the payments were made by Penguin into Hoosain's bank account with FNB.
- [8] Penguin's case is that, had FNB properly maintained, monitored and conducted due diligence on the Hoosain account, taken cognizance of the high volumes and unusual activity on that account as required by FICA, and ensured that the substantial cash withdrawals did not take place, the withdrawals would not have been made.
- [9] That is the wrongfulness for which Penguin contends.

- [10] In addition, Penguin avers that FNB's employees were negligent in permitting repeated cash withdrawals to take place on the same day in circumstances in which, given the obligations on FNB pleaded in paragraphs 24 and 25 of the particulars of claim, they should not have done so.
- [11] In *Nissan South Africa (Pty) Ltd v Marnitz NO and Others* 2005 (1) SA 441 (SCA), at para 16 – 18, Streicher JA said:
- “[16] I agree with Thirion J that our law would be deficient if it did not provide a remedy for recovery of stolen money directly from the bank which received that money to the credit of the thief's account, for as long as the amount stands to the credit of the thief.*
- ..
- [18] Courts often grant interim interdicts against persons in respect of allegedly stolen money paid into a bank account of the alleged thief and against the bank concerned, pending an action to determine whether the money had been stolen. (See *Lockie Bros Ltd v Pezaro* 1918 WLD 60; and *First National Bank of Southern Africa Ltd v Perry NO and Others* 2001 (3) SA 960 (SCA) in para [18]). The banks usually do not oppose the application for such interdicts but adopt the stance of a stakeholder and await a decision of the court as to whether the money was stolen and as to who is entitled to it”.
- [12] Penguin's case is that on discovery of the fraud its bankers (Standard Bank) had reported that fraud to FNB.
- [13] Had FNB's employees not permitted Hoosain to make the substantial and regular cash withdrawals which are evident from the annexed transaction history, Penguin would have been in a position to interdict that account and to recover its payments from Hoosain (*First National Bank of South Africa Ltd v Perry NO & Others* 2001 (3) SA 960 (SCA) at 968C-D).
- [14] The premise of an exception is that it will only be upheld in the event that, on any construction, and accepting the facts pleaded by Penguin, no cause of action has been made out – *Sanan v Eskom Holdings Ltd* 2010
- (6) SA 638 (GSJ) at para 21. It goes without saying that available evidence at the trial may amplify the allegations contained in the particulars of claim.
- [15] In the context of pleading the Aquilian remedy of pure economic loss Wallis JA said in *Breetzke and Others NNO v Alexander NO and Others* 2020 (6) SA 360 (SCA) at 371C-D:
- “Wrongfulness must be established (and the grounds therefore pleaded) in all cases, although there are some instances where the*

facts

alone illustrate why the conduct is wrongful, of which physical injury to a person or property are the most obvious. In any doubtful case the court must balance identifiable norms to determine whether it is right to hold that liability should follow upon the defendant's fault, whether intentional or negligent".

[16] In *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd*

[2008] ZASCA 134; 2009 (2) SA 150 (SCA) Brandt JA said the following in the context of what is required in the pleading:

"[14] The proposition that plaintiff claiming pure economic loss must allege wrongfulness, and plead the facts relied upon to support that essential allegation, is in principle well founded. In fact, the absence of such allegations may render the particulars of claim excipiable on the basis that no cause of action had been disclosed".

[17] In *Knop v Johannesburg City Council* 1995 (2) SA 1 (A) Botha JA emphasised that the mere allegation of a legal duty is insufficient. He said at 7F-G:

"Nor can the mere allegation in the particulars of claim that the council was under a duty to take steps to prevent loss being caused to the plaintiff carry the day for him. The existence of the legal duty to prevent loss is a conclusion of law depending on a consideration of all of the circumstances of the case. The question is whether the allegations of fact in the particulars of claim, if assumed to be proved, are susceptible in law of sustaining a finding that the council was under a legal duty to the plaintiff, by exercising care, to avoid loss being caused to the plaintiff. If they are not, the plaintiff will be unable at the trial to discharge the onus of proving that the council's conduct was wrongful and the exception would be well founded."

[18] In addition to the above, the court must not lose sight of the fact that it should avoid imposing limitless liability in the context of pure economic loss (*Standard Bank of South Africa Ltd v OK Bazaars* 2000 (4) SA 382 (W) at 392A-C).

[19] Taking the above into account, the first, second and fourth exceptions will be examined to determine whether they sustain a cause of action against FNB based on the allegations of fact contained in the particulars of claim. For an analysis of the exceptions raised, the court must proceed from the premise that the facts pleaded in the particulars of claim are accepted (*Makgae v Sentraboer (Ko-operatief) Bpk* 1981 (4) SA 239 (T) at 245D-E).

The first exception

[20] The first exception deals with the plaintiff's reliance on the Financial Intelligence Centre Act 38 of 2001 (FICA), and in particular FNB's alleged breach of various statutory duties thereunder. It deals with two aspects, namely whether a breach of statutorily imposed duties by FICA is wrongful per se, and whether sufficient allegations have been made to hold FNB liable.

- [221] Penguin denies its reliance on FICA as establishing FNB's allegedly wrongful conduct per se and avers that FNB's statutory obligations in terms of FICA are relevant for purposes of establishing whether it would be reasonable and appropriate to regard FNB's conduct as wrongful, and Penguin's invaded interest as protectable.
- [222] FNB states that FICA does not place an obligation on FNB to make certain reports, exercise customer due diligence or conduct monitoring for purposes of preventing fraud or other conduct of the kind perpetrated against Penguin. All duties imposed by FICA are intended to operate directly in favour of the Financial Intelligence Centre (FIC) and other state institutions. Furthermore, no provision is made in FICA for damages claims flowing from a failure to comply with duties imposed in terms thereof, but administrative sanctions and offences are imposed.
- [223] It is the FIC which determines whether transactions are to proceed (after reporting), not FNB. Neither is there any suggestion in FICA that accountable institutions attract civil liability for breach. To the contrary, they may be fined. The fixing of compensation for monetary loss to third parties who are victims of a crime involving a bank account is not FICA's function or intention.
- [224] FICA was not intended to benefit a particular category of victims of crime. The statute is directed at creating a safer and more secure commercial environment while giving effect to international commitments and a global initiative to combat money laundering.
- [225] Penguin, in its heads of argument and during argument, nevertheless avers that it does not rely on FNB's breach of one or more duties in terms of FICA as being determinative of whether FNB's conduct is wrongful in the circumstances.
- [226] Further, Penguin's particulars of claim makes no reference to the FIC, reporting to it or what steps the FIC may or may not have taken. From a reading of the particulars of claim, the FIC is not relevant to Penguin's cause of action.
- [227] Penguin's cause of action is not founded on a statutory duty of care imposed on FNB by FICA nor do the FIC and its responsibilities (or not) in terms of FICA play any part in that cause of action.
- [228] It is evident that in Penguin's particulars of claim the relevance of the FICA obligations imposed on FNB is in the context of it having to monitor the Hoosain account and having to establish procedures to avoid accounts of that nature being utilised for illegal purposes and in particular for money laundering.
- [229] To repeat what was stated above, Penguin's case is that, had FNB properly maintained, monitored and conducted due diligence on the Hoosain account, taken cognizance of the high volumes and unusual activity on that account as required by FICA, and ensured that the substantial cash withdrawals did not take place, the withdrawals would not have been made
- [30] In the circumstances, the first exception is dismissed.

The second exception

[31] The second exception concerns wrongfulness. FNB submits that, assuming all of the other delictual elements are present, and assuming that the allegations contained in the amended particulars of claim are correct (as one must do in exception proceedings), it is nonetheless not reasonable to impose liability on FNB in the circumstances of the case, i.e. even on Penguin's pleaded version, FNB's conduct cannot be said to be wrongful.

[32] The enquiry into wrongfulness was articulated by the Constitutional Court in *Le Roux and Others v Dey* 2011

(3) SA 274 (CC) at para 122 as follows:

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“In the more recent past our courts have come to recognise, however, that in the context of the law of delict:

(a) the criterion of wrongfulness ultimately depends on a judicial

determination

of whether - assuming all the other elements of delictual liability to be present - it would be reasonable to impose liability on a defendant for the damages flowing from specific conduct; and (b) that the judicial determination of that reasonableness would in turn depend on considerations of public and legal policy in accordance with constitutional norms. Incidentally, to avoid confusion it should be borne in mind that, what is meant by reasonableness in the context of wrongfulness has nothing to do with the reasonableness of the defendant's conduct, but it concerns the reasonableness of imposing liability on the defendant for the harm resulting from that conduct.”

[33] Wrongfulness in the context of pure economic loss depends on the existence of a legal duty. The imposition of a legal duty is a matter of judicial determination involving criteria of public or legal policy consistent with constitutional norms. Conduct causing pure economic loss will only be regarded as wrongful and therefore actionable if public or legal policy considerations require that such conduct, if negligent, should attract legal liability for the resulting damages (*Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* SA 2006

(1) SA 461 (SCA) at para 13- 14).

[34] Relevant considerations which have been followed by the courts in considering the prima facie establishment of a duty of care in the context of an exception are:

a. in *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* [1991] ZASCA 190; 1992 (1) SA 783 (A), Vivier JA said at 797 E-F:

“However at the stage of deciding an exception a final evaluation and balancing of the relevant policy considerations which have been mentioned above should not be undertaken. It is sufficient for present purposes to say, firstly, that lex Aquilia does provide a basis upon which a collecting banker may be held liable in negligence to the true owner of a lost or stolen cheque, and, secondly, that there are considerations of policy and convenience in the present case which prima facie indicate the existence of a legal duty on the part of a collecting banker to prevent loss by negligently dealing with the cheque in question. The prima facie indication may be rebutted by the evidence which the defendant might lead at the trial, duly tested and evaluated in the light of any countervailing evidence which might be led by the plaintiff. It cannot, therefore, at this stage be found that the defendant’s conduct was not unlawful”;

- b. in *Commissioner, South African Revenue Service, and Another v Absa Bank Ltd and Another* 2003 (2) SA 96 (W) at para 30, Van der Nest AJ stated:

“However, when considering the existence of a legal duty on the part of a bank (particularly a novel duty), evidence will ordinarily be necessary to appreciate fully considerations of policy and convenience. Evidence, be it factual or expert in nature, will assist the court in, for example, evaluating the effect on banking procedures that would be caused were the legal duty to be recognised”;

- c. in *Peterson and Another NNO v Absa Bank Ltd* 2011 (5) SA 484 (GNP) Makgoba J considered the following considerations to be relevant at the exception stage:

- i. the statutory duties imposed by FICA to monitor the transactions on a bank account;
- ii. the relevance of monitoring and establishing activity of high value and volume of transactions;
- iii. the prevalence of crime in South Africa, in particular money-laundering, which demands that a bank such as the defendant should not turn a blind eye to the possibility that a customer may be using an account concluded with it for criminal purposes;
- iv. the relevance of evidence to determine how great a burden recognition of the legal duties contended for by the plaintiff would place upon banks.

[35] In this instance, FNB states that Bold (and by extension Penguin) could and should have protected itself against the alleged fraud when it concluded contractual arrangements or in making the payment.

[36] Further, FNB states that on the pleaded facts Penguin is also blame for its loss in as much as it could easily have taken steps to protect itself.

[37] FNB states that a legal duty cannot be imposed on FNB in the circumstances of this matter as Penguin “was grossly negligent in making the payments in the circumstances in which it did”. Several grounds of negligence on the part of Penguin are postulated in paragraphs 15.5 and include, inter alia, failing to conduct a due diligence; variations on the Vital invoices which “should have aroused the plaintiff’s suspicion”; the absence of a VAT registration number for Vital.

[38] However, the obligations and, in particular, the necessary care incumbent on FNB in opening the Hoosain account have received judicial approval. In *KwaMashu Bakery Ltd v Standard Bank of South Africa Ltd* 1995 (1) SA 377 (D) at 395H-396A, Combrinck J said:

“I turn now to deal with the standard of care and in particular what steps the defendant ought to have taken to discharge the duty of care. The question is what reasonable, practical and affordable measures would the reasonable, prudent collecting banker have taken in order to have prevented the harm which resulted to the plaintiff ... In order to succeed in obtaining the proceeds of his theft of a cheque the thief has to open a bank account with the collecting banker ... As a first step towards protection of the true owner, I think it could be expected of a reasonable banker to not only satisfy himself of the identity of a new client but also gather sufficient information regarding such client to enable him to establish whether the person is the person or entity which he, she or it purports to be”.

[39] In the circumstances, FNB’s submission that Penguin was “grossly negligent” and the grounds of such negligence as pleaded by FNB can be raised at the trial. FNB is free to raise whatever defence it intends to raise in its plea.

[40] With regard to the allegation by FNB that Penguin has failed to allege that the duty of care for which it contends was negligently breached.

[41] This does not take into account the reference to the negligent breaches in the particulars of claim by FNB and/or its employees in paragraphs 26, 27, 29 and the concluding paragraph 32 of the particulars of claim.

[42] Lastly, the submissions in paragraphs 15.6 to 15.11 of the exception do not sustain an exception to the entirety of the plaintiff’s claim. An exception cannot be taken to portions of a pleading that are not self-contained (*Barclays National Bank Ltd v Thompson* 1989 (1) SA 547 (A) at 554D – 555F).

[43] In the circumstances, the second exception cannot be upheld.

The fourth exception

[44] The fourth exception concerns Penguin’s further failure to plead sufficient facts to establish its claim.

[45] FNB submits that Penguin in its amended particulars of claim has failed to plead sufficient facts to establish the claim, by virtue of, inter alia, the following:

- a. had FNB refused to allow withdrawals on Hoosain's account, as Penguin alleges FNB should have done, and enquired of Hoosain and Penguin (via Penguin's bankers) as to whether the payments received from Penguin were valid, both Hoosain and Penguin would have confirmed that the payments were validly made in terms of the sale agreement, allaying any suspicions FNB may have had, and causing FNB to allow the further withdrawals to be made;

- b. as already mentioned, no allegation is made by Penguin that, upon receipt of a report submitted to the FLC by FNB, the FIC would have taken any action, or would have taken action timeously so as to prevent Penguin's loss, and no basis exists upon which such an allegation could be made by Penguin.

[46] This exception by FNB does not take into account paragraph 28 and 29 of the particulars of claim which reads as follows:

“28. Had the Defendant complied with its obligations in terms of FICA, and had the Defendant taken all necessary steps to ensure that the withdrawals could not be made from the Hoosain account by means of consecutive, suspicious cash transactions in a limited period of time, the withdrawals would not have been made.

29. In addition, had the Defendant's employees exercised the necessary and reasonable care which was required of them, the withdrawals would not have been made.” (my emphasis)

[47] Assuming as we must (at the exception stage) that the withdrawals would not have been made, the fourth exception is without merit and is dismissed.

Costs

[48] There is no reason why costs should not follow the result.

[49] Penguin requested costs on a punitive scale as it is alleged by them that it is self-evident from the “grounds of complaint” that they are spurious and have been introduced simply to delay the process – which is a clear abuse of this court’s process.

[50] I do not agree with Penguin’s contention in this regard. FNB raised relevant concerns and the initial exception resulted in an amendment to the particulars of claim. There is no reason to award a punitive cost order against FNB.

Order

[51] In the circumstances the following order is made:

- a. The first, second and fourth exception in the defendant’s notice of exception dated 2 February 2021 is dismissed.
- b. The defendant is to pay the costs occasioned by the exception, such costs to include the costs of two counsel.

N ADAM

Acting Judge of the High Court of South Africa

Gauteng Division, Johannesburg

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