

SOUTH AFRICA / JUDGMENT

Pillay v Mercantile Bank (10310/2022) [2024] ZAGPJHC 1284 (13 December 2024)

[2024] ZAGPJHC 1284

COURT

South Gauteng High Court, Johannesburg

BEFORE

Kekana ND

CASE / FILE NUMBER

10310/2022

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IN

THE HIGH COURT OF SOUTH AFRICA,
GAUTENG
LOCAL DIVISION, JOHANNESBURG.

CASE

NO: 10310/2022

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

13

December 2024

In

the matter between: PILLAY;
 PATHMANATHAN MADEVARAJAN
 (Identity
 Number: 7[...])
 Excipient/Applicant
 and
 MERCANTILE
 BANK
 Respondent

JUDGMENT

KEKANA AJ:

Introduction

[1] This is an application for exception launched by the excipient (the applicant) on the manner in which the plaintiff (the respondent) has pleaded its case, and in particular, its locus standi, to institute legal proceedings.

Background

[2] The applicant’s grounds for raising exception are that the respondent pleads at paragraph 1 of its Particulars of Claim that Mercantile Bank is a division of Capitec Bank Limited, a public company with registration number:1[...]. The contract annexed to the Particulars of Claim cites the lender as Mercantile Bank Limited, with registration number: 1[...].[1] The respondent alleges at clauses 1.4 and 1.5 of its Particulars of Claim that as of 01 December 2020, it acquired the entire business of Mercantile Bank Limited (registration number: 1[...]) in terms of section 54 of the Banks Act; also that as from 01 December 2020 it became vested with all assets and liabilities that were formerly vested in Mercantile Bank Limited, including but not limited to all contracts, claims and securities formerly held by Mercantile Bank limited, including the claim (s) forming the subject matter of the present proceedings.
[2]

Issues

[3] The crisp issue for determination is whether the respondent (plaintiff) has pleaded with sufficient particularity to establish the necessary locus standi consequently whether the respondent (plaintiff) particulars of claim are vague and embarrassing to such an extent that the second defendant (now applicant) is unable to plead thereto.

Submissions

and contentions by the parties

- [4] According to the applicant, the respondent formulates its locus standi to institute action on the basis of an alleged contract between itself and Mercantile Bank but fails to plead all the terms of the said contract between itself and Mercantile Bank. That by virtue of the respondent's failure to properly plead as aforesaid, the respondent's pleadings are vague and embarrassing, and the applicant is not able to properly plead thereto, to admit or deny the respondent's locus standi in this matter. Also, that the respondent fails to properly set out a cause of action, to which the applicant can properly plead. Lastly that the respondent's pleadings do not comply with Rule 18(6) of the Uniform Rules of the above Honourable Court.[3]
- [5] In retort the respondent raises a preliminary issue of non-compliance with the peremptory time period prescribed by Rule 23(1)(a) in that the applicant gave notice to except 53 days later.[4] As regards the exception the respondent contends that there is no flaw in the cause of action pleaded, the pleadings are not vague.

That the respondent has sufficiently pleaded the link between itself and Mercantile bank with whom the loan agreement was concluded.

The preliminary issue

- [6] The respondent raises a preliminary issue claiming the applicant's non-compliance with the peremptory Rule 23(1)(a)[5] in that it served the notice of intention to except 50 days after the particulars of claim were served. In retort the applicant contends that the notice of bar constitute a pleading and it filed and served the notice of intention to except timeously, the fifth day immediately after it was served with the notice of bar.
- [7] The summons and particulars of claim were served on the applicant on 25 April 2022, accordingly the applicant had to give notice of his intention to except on 10 May 2022. The respondent then served notice of bar on the applicant on 4 July 2022. In reply the applicant served the notice of intention to except on 11 July 2022.
- [8] Rule 23(1)(a) states that:

where a party intends to take an exception that a pleading is vague and embarrassing such party shall, by notice, within 10 days of receipt of the pleading, afford the party delivering the pleading, an opportunity to remove the cause of complaint within 15 days of such notice.

- [9] There have been conflicting judgments as regard to whether a notice of intention to except in terms of Rule 23(1) of the High Court Rules is an appropriate response to a notice of bar. In the case of McNally NO and Others v Codron and Others[6], the Western Cape High Court held that a party is precluded from delivering a notice of intention to except on the basis that the

pleading is vague and embarrassing upon receipt of a notice of bar. In Felix and Another v Nortier NO and Others[7], the Eastern Cape High Court held that the filing of a notice of intention to except is permissible in response to a notice of bar.

- [10] I 'am guided by the position of the Gauteng division that a notice of intention to except in terms of Rule 23(1), constituted a pleading for the purposes of Rule 26 or at least "the next procedural step in the proceedings" and therefore constituted a valid response to a notice of bar. It for this reason that I 'am of the view that the applicant [is] entitled to serve the notice of intention to except within the period set out in the notice of bar.[8] The bar occurs only upon lapse of the notice of bar, i.e. within five days of its receipt. If within the five - day period a pleading which the party is entitled to file, is filed, there is no bar.
- [11] Having found that the notice of bar is a pleading, and that the applicant was entitled to serve the notice of intention to except within the period set out in the notice of bar and that it was served within the time limit, the preliminary issue raised by the respondent has no merit, cannot succeed and is henceforth disposed.

Legal principle and analysis

- [12] In dealing with the substance of the application before me I will lump together the exception raised by the applicant that the respondent's pleadings are vague and embarrassing and its subservient submission that the respondent failed to comply with Rule 18(6) as the two are interwoven. I 'am of the view that had the respondent attached the said contract to its particulars of claim the exception would not have been raised, and failure to attach the said contract triggers non-compliance with Rule 18(6). Rule 18(6)[9] states that:

"A party who in his pleading relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading."

Vague and embarrassing

- [13] The Rule[10] dictate that:

"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."

- [14] It is therefore strong that "minor blemishes in, and unradical embarrassments caused by, a pleading" could be cured by further particulars.[11] An exception to a pleading on the ground that it is vague, and embarrassing involves a two-fold consideration. The first is whether the pleading lacks particularity to the extent that it is vague. The second is whether the vagueness causes embarrassment of such a nature that the excipient is prejudiced.[12]
- [15] The applicant submits that absent the copy of contract between Mercantile bank and Capitec bank detailing the rights and obligations transferred to Capitec during its acquisition of Mercantile bank, it is difficult for it to admit or deny the respondent's locus standi in this matter. That it is only upon a copy of that contract being made available that it will be able to ascertain the respondent's locus standi and its cause of action.

- [16] While I agree with the respondent that an excipient who alleges that a summons does not disclose a cause of action must establish that upon any construction of the particulars of claim, no cause of action is disclosed[13] I however, believe that this is a completely different case in that the cause of action alleged to not have been disclosed has to do with a very paramount aspect in any litigation process, that of locus standi. Absent locus standi a litigant has no basis to institute an action. It is my view that the issue of locus standi cannot be said to be “a minor blemish”, the rights or specific rights acquired by the respondent during the section 54 acquisition need to be clearly stated so the applicant can properly plead thereto.
- [17] What is alleged by the respondent in its particulars of claim and heads of argument is that it acquired all assets and liabilities of Mercantile bank, with this being so, this is not enough, I agree with the applicant that it is still not clear whether reference to all assets include the contract or the class of contracts (loans) similar to that between the applicant and Mercantile bank. It is not clear if these class of contracts or loans similar to that of the applicant may have been securitised or sold to other third parties prior to the alleged acquisition by the respondent. The cession of such loan agreements to third parties is something common within the commercial space. If those loan agreements have been ceded to third parties, the applicant may at a later stage have to face this third party. It cannot be correct to expect the applicant to plead to the respondent now and hope for the rest of its life that there will be no third party who will later claim right arising out of the same loan agreement. If this is permitted it will amount to nothing but prejudice on the part of the applicant.
- [18] It is important for the applicant to ascertain if there has been a cession or acquisition of rights, including the rights to pursue and enforce rights emanating from the loan agreement between the applicant and Mercantile bank. The answer to all these questions can be found in the said contract between Mercantile bank and Capitec bank. It is only when this is established that there is certainty as regards the respondent’s locus standi and its cause of action.
- [19] As regards the respondent’s non-compliance with Rule 18(6) I find that the applicant does not have a loan agreement with the respondent but with Mercantile bank and if the respondent relies on its acquisition of Mercantile bank as the basis to institute an action against the applicant, at least it needs to provide the said contract as evidence to show that it has acquired the rights previously held by Mercantile bank on the loan agreement. It is for this reason that I conclude that the respondent has not complied with Rule 18(6) of the Uniform Rule of the Court.

Conclusion

[20] For reasons already advanced above in paragraphs 9 to 11 above, the preliminary issue raised by the respondent is disposed. As regards the exception, I find that the respondent's particulars of claim are vague, and embarrassing do not disclose a cause of action (*locus standi*). That the applicant will be prejudiced in pleading thereto. I'm persuaded to agree with the applicant on the grounds raised in the exception.

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

21.1 That the preliminary issue raised by the respondent is disposed.

21.2 That the exception is upheld with costs.

21.3 The respondent to incur the costs of this application on scale B.

21.4 The respondent is granted leave to amend its particulars of claim and attach the said contract within a period of 15 days from date hereof.

Kekana ND

Acting Judge of the High Court.

Gauteng Division, Johannesburg.

Counsel for the Plaintiff: I. Oschman Instructed by: Bouwer & Olivier Inc. Counsel (Attorney) for the Excipient: R. Zimmerman Instructed by: Taitz & Skikne Attorneys Date of hearing: 21 October 2024 Date of judgment: 13 December 2024

[1] Para 3 of the applicant's Heads of Argument.

[2] Para 4 of the applicant's Heads of Argument.

[3] Para 10 of the Applicant Heads of Argument.

[4] Paras 8 to 13 of the Respondents Heads of Argument.

[5] Uniform Rules of the Court.

[6] *McNally NO and Others v Codron and Others* (20406/11) [2012] ZAWCHC 17 (9 March 2012).

[7] *Felix and Another v Nortier NO and Others* 1994 (4) SA 502 (SE).

[8] *Tuffsan Investments 1088 (Pty) Ltd v Sethole and Another* (22826/2015) [2016] ZAGPPHC 653 (4 August 2016).

[9] Uniform Rules of the Court.

[10] Rule 18(4) of the Uniform Rules of the Court.

[11] *Purdon v Muller* 1961(2) SA at 215F.

[12] *Trope v South African Reserve Bank* 1992(3) SA 208 (T) at 211B.

[13] Para 8 (d) of the Respondent's Head of Argument.

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