

SOUTH AFRICA / JUDGMENT

Spar Group Limited v Absa Bank Limited (06584/2011) [2014]

ZAGPJHC 365 (5 December 2014)

[2014] ZAGPJHC 365

COURT

South Gauteng High Court, Johannesburg

BEFORE

C H Nicholls

CASE / FILE NUMBER

06584/2011

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

Case

number: 06584/2011

Not

reportable

Not

of interest to other judges

In the matter

between:

THE

SPAR GROUP

LIMITED.....Plaintiff/Excipient

and

ABSA BANK

LIMITED.....Defendant/Respondent

JUDGMENT

NICHOLLS J:

[1] The plaintiff, a public company, has brought a delictual claim against the defendant, a commercial bank, for payment of R2 464 856. Its cause of action is based on a debit order instruction sent to it by a company known as Trifecta Trading (Pty) Ltd (“Trifecta”).

At the time, Trifecta was carrying on business under the trading name of Atterbury SuperSpar. The plaintiff was selling goods to Trifecta on credit. The claim arises out of the reversal of certain debit order payments made to the plaintiff.

[2] The payments in terms of the debit order instruction were made from Trifecta’s bank account with the defendant into the plaintiff’s bank account with First National Bank (“FNB”). The case is concerned with electronic banking and in particular the electronic funds transfer (“EFT”) payment system.

[3] The amount claimed by the plaintiff is made up of nine separate amounts paid into the plaintiff’s bank account in terms of the debit order instruction over the period 25 May 2009 to 3 July 2009. The defendant over the period 1 to 8 July 2009, and without giving notice to the plaintiff or obtaining its consent, reversed these payments and credited Trifecta’s bank account with the defendant.

[4] The debit order instruction on which the plaintiff’s case is based was signed by Trifecta on 24 August 2005. It provides as follows:

4.1 the plaintiff is authorised to draw against Trifecta’s account with the defendant “variable amounts for payments of weekly purchases...”;

4.2 the withdrawals would “be processed by computer through a “Payments Collections System known as PACS” and the details would be printed on Trifecta’s bank statement;

4.3 “this authority may be cancelled by” Trifecta giving the plaintiff “thirty days’ notice, in writing, sent by prepaid registered post.”

4.4 that Trifecta would “not be entitled to any refund of amounts legally owing” to the plaintiff which the plaintiff had “withdrawn while this authority was in force.”

4.5 that “receipt of this instruction” by the plaintiff “shall be regarded as receipt” by the defendant.

[5] In paragraph 15A of the amended particulars of claim, the plaintiff alleges that the defendant’s conduct amounted to the unlawful appropriation of the plaintiff’s rights to the reversed amounts. In paragraph 17 it is alleged that the defendant owed to the plaintiff, who is not its customer, and “who is the beneficiary/payee of an EFT payment, a duty of care to avoid economic loss” to the plaintiff by the “negligent reversal” of the EFT payment. In paragraph 18 it is alleged that the defendant wrongfully breached this duty of care. Details of

the aspects in which the duty was breached are set out in paragraph 19.

- [6] The computations of the damages claimed by the plaintiff are set out in a schedule attached to the particulars of claim.
- [7] In summary the plaintiff's case is that a banker in the position of the defendant owes a person who is not its customer but who is a beneficiary/payee of an EFT payment, a duty of care to avoid economic loss by the negligent reversal of the payment. The defendant's conduct in reversing the nine payments or failing to give notice of the intended reversals and placing the disputed amounts in a suspense account was wrongful in that it breached its duty of care to the plaintiff. Moreover the defendant was negligent in various respects as it should have been aware of the debit order instruction and the terms thereof.
- [8] In its amended plea the defendant admits the reversal of the debit orders and proceeds to detail the grounds upon which it is entitled to act as it did. In particular the defendant denies that by acting as it did, it unlawfully appropriated the plaintiff's money. The defendant puts in issue the duty of care relied upon and proceeds to deny the acts of negligence alleged by the plaintiff. It denies liability for any damages that the plaintiff may prove that it suffered. This is the core of the defendant's plea.
- [9] The defendant further pleads that Trifecta declared a dispute and instructed the defendant to reverse the payments. It states that it was FNB and not the defendant who actually reversed the debit orders – it merely requested FNB to do so. The defendant pleads that it is under an obligation in terms of rules governing the clearing of debit and electronic funds transfer of PASA (Payments Association of South Africa) to request FNB to debit the plaintiff's account with the reversals. In terms of the debit order instruction Trifecta had authorised the plaintiff to issue instructions through the interbank payment system to the defendant to process debits against its account, but Trifecta could withdraw this authority at any time.
- [10] What I am required to decide upon are the eight grounds on which the plaintiff has taken exception to the defendant's amended plea. On my understanding of the exceptions none of them attack the core issues referred to above, namely that of the duty of care; that the reversal amounted to unlawful appropriation; or the defendant's alleged negligence.
- [11] In deciding those issues a trial court will have to do so against the background and understanding of the 'Payment Clearing House Agreement for the Clearing of EFT Debit Payment instructions', a 73-page document annexed to the amended plea; the PASA rules governing the clearing of EFT, a 26-page document attached to the amended plea; the management system and User Manual of FNB, a 49-page document attached to the amended plea and to the Payment and Collection System (PACS) referred to in paragraph 8 of the amended particulars of claim. All these are part and parcel of the computerised system of banking that has revolutionised and radically transformed the face of banking, nationally and internationally.

[12] In deciding the exceptions it suffices to say the following regarding the computerised banking system (as pleaded). The EFT system is a service provided by participating banks, including FNB and the defendant. It “enables companies ... to process payments entirely by computerised means. The service can be used both for collecting payments from clients (debits) and for making payments (credits)... The User can lodge payments and collections through their Sponsoring Bank to all Homing Banks”. [1] The user is “a person, persons, a body, bodies (including a bank) that submits transactions directly or indirectly via a participant to the PCH

System Operator for processing”. The homing bank is “the bank which holds the account to which a payment instruction is processed.” [2] The user “must obtain an authority from a customer before transactions for that customer may be processed through the EFT Service. This is an authority between the User and their customer”. [3]

[13] Whereas previously the banks would act in terms of the PACS system referred to in the debit order instruction, this has been replaced with the EFT PCH Debit Pull Agreement and EFT rules which now govern the relationship between banks. Both FNB and the defendant are parties to these agreements as members of PASA. In this matter FNB acted as the plaintiff’s intermediary or sponsoring bank in terms of EFT rules, to enable the debit order transaction payment instructions relating to Trifecta’s account with the defendant to be transmitted. In terms of the EFT PCH Debit Pull Agreement, FNB and the defendant were “participants” who bound themselves bilaterally; the defendant was a “paying participant”; Trifecta was a “payer”; FNB was a “collecting participant”; and the plaintiff was a “beneficiary”.

[14] I now turn to deal with the plaintiff’s eight exceptions in the context of it being permissible to take exception to part of a pleading which is self-contained and sets out a separate defence. This is because a decision on such part may avoid the leading of unnecessary evidence. [4] The exception is directed at the self-contained defence that the defendant was entitled and obliged to reverse the payments by virtue of having received valid instructions from Trifecta and because the dictates of the rules governing interbank systems entitle it to disregard the terms of the debit order. The essence of the exceptions, as I understand them, are set out hereunder.

1st and 3rd Grounds of Exception

[15] As counsel for the plaintiff conveyed, these two exceptions are interlinked and constitute the nub of the exception. The defendant

pleads at paragraph 4.6 of the amended plea that it had no sight or possession of the debit order instruction and at paragraph 4.7 that it had no obligation to the plaintiff arising out of the debit order instruction. The plaintiff’s first complaint is that the defendant does not plead that there was compliance with the debit order instruction but says that it acted in terms of PASA rules which entitled it to ignore the debit order instruction. The plaintiff contends that it is not open to the defendant, having acted previously in terms of the debit order instruction to make payment, to now state that it owes the plaintiff no obligation arising therefrom. Therefore this portion of

the plea is vague and embarrassing.

- [16] Interrelated to this is the third ground of exception. The defendant pleads that it could withdraw the debit order authority given to the plaintiff as a matter of law, and without notice. The defendant does not identify the law on which it relies. Furthermore, this is contradicted by terms of the debit order instruction itself which states that written cancellation is required. Instead it pleads at paragraph 7.2 and 7.3 that Trifecta “conveyed” to the plaintiff that the debit order transactions were disputed and accordingly the plaintiff was no longer authorised to act in terms of the debit order instruction in terms of the FNB user manual and the CAMS agreement.
- [17] The defendant argues that paragraphs 4.6 and 4.7 of the amended plea viewed in the context of the plea as a whole are not excipiable. As a matter of fact the defendant did not have sight of the debit order instruction. It acted not in terms of the debit order instruction in making the payments but rather in terms of the contractual relationship it has with FNB with regard to the EFT banking system.

This relationship permitted the defendant to reverse debits if its client, Trifecta, disputed the debit order authorities on their

accounts with the defendant.

- [18] The defendant correctly argues that the specific law on which the plaintiff relies does not have to be specifically pleaded. Nor does a party’s entitlement to withdraw authority given to a representative have to be elucidated. These allegations are relevant to the overall EFT banking system in which the plaintiff agreed to participate.
- [19] There seems to be merit in the defendant’s argument. Read in the context of the pleading as a whole it is not clear to me what it is that the plaintiff cannot replicate to. If regard is had to the overall plea, what is conveyed is that the essential defence is that any dispute that exists is between FNB and the defendant in terms of the EFT banking system; it is not between FNB’s client, the plaintiff, and the defendant. Any dispute regarding the termination of the debit order authority is a matter for Trifecta and the plaintiff, not their respective banks.
- [20] Both the first and second ground of exceptions operate from the incorrect premise that the termination of the debit order instruction in terms of which Trifecta gave the plaintiff authority to act on its behalf and the revocation of Trifecta’s authority given in terms of the debit order instruction are the same legal concepts.[5] They are in fact distinct legal concepts. The purpose of the payment is agreed upon by the drawer (in the case of a cheque) and the payee, not by the paying bank and the payee. The bank effecting payment does not represent its customer. The bank is a neutral payment functionary and does not even know why payment is being made.[6]
- [21] What is clear is that once Trifecta revoked the plaintiff’s authority, the defendant could no longer act on instructions

emanating from the plaintiff in relation to Trifecta's bank account. Whether Trifecta was entitled to do so is a matter for

resolution between it and the plaintiff, and does not involve the defendant. The relationship between Trifecta and the defendant is that of a customer and banker and the defendant is obliged to give effect to the countermand of any payment instruction. It is not for the bank to question why certain payments are made, or reversed. That is a question solely for the parties. It may be that the plaintiff has an action for damages against Trifecta as a result of the reversals but that is a decision for another forum. If a customer terminates the authority of a party to draw against its account, the validity of such termination is irrelevant for the bank's purpose. Whether the agreement is irrevocable is a different concept altogether. If authority is revoked this takes effect immediately. If such action is in breach of a mandate this is irrelevant to the question of revocation of authority.

2nd Ground of Exception

[22] The defendant pleads in paragraphs 4.8; 5.3 and 6.1.1 of its amended plea that "in terms of the debit order instruction" and "arising from debit order payment transactions", the plaintiff was authorised to issue instructions through the interbank payment system to the defendant to process debits against Trifecta's account with the defendant for the credit of FNB, the plaintiff's bank. The plaintiff's complaint is that these averments are not borne out by the express terms of the debit order instruction and therefore the plea is contradictory in these respects. If it alleged that the source of the plaintiff's authority is something else, then the defendant was obliged to plead that.

[23] This is an issue which should be dealt with in evidence or by way of a replication and not by way of exception. There is no embarrassment and the plaintiff can properly plead to it. This exception falls to be dismissed.

4th Ground of Exception

[24] The plaintiff submits that in various paragraphs the defendant pleads evidence, argument and conclusions in disregard of Rule 18 which provides that every pleading must be clear and concise. It pleads *facta probantia* instead of *facta probanda*. The defendant's

response is that it pleaded facts which the plaintiff can deny if it so wishes. This is correct. The existence of the various EFT banking agreements is a *factum probans*. The terms thereof and that they applied to the nine reversals is relevant *facta probanda* and has been pleaded. There is no embarrassment to the plaintiff.

5th Ground of Exception

[25] It is complained that in various paragraphs the defendant pleads allegations pertaining to the CAMS agreement and EFT user manual which are irrelevant to the plaintiff's claims and superfluous to the defences. The plaintiff argues that the claim is a delictual one and the contractual relationship between the plaintiff and its own bank is irrelevant. It is correct that pleadings should not contain irrelevant matter. However, in light of the defendant's reliance on its contractual relationship with FNB, these averments are pertinent to its case.

6th and 7th Ground of Exception

[26] These two exceptions relate to EFT agreements annexed to the papers. The plaintiff's first complaint is that Paragraph 5.5 of the amended plea refers to the EFT PCH Debit Pull Agreement and annexes it as 'DP1'. This agreement upon which the defendant relies in various paragraphs in its plea, states that it shall bind the parties upon signature. However, the annexure is not signed by the plaintiff and the defendant. Secondly, "DP2" is a copy of the EFT rules on which the defendant relies. The rules annexed have an effective date of 1 August 2010 but the debit order instruction was signed on 24 August 2005 and the reversal instructions were received in June/July 2009 so 'DP2' was not in force at the time.

[27] The relevant rules have been made available to the defendant's legal representatives. Nonetheless the plaintiff can replicate that the clauses upon which the defendant relies do not accord with rules at the relevant time. In respect of the unsigned agreement, it is always open to the plaintiff to replicate that no such agreement was concluded. Once again there is no embarrassment to the plaintiff.

8th Ground of Exception

[28] In paragraph 11.4 of the amended plea the defendant alleges that "participants" in the EFT banking system participate in various capacities in the various interbank payment, clearing and settlement systems. In paragraph 11.5 reference is made to various bilateral and multilateral agreements. However the defendant fails to identify the

bilateral and multilateral agreements and to provide sufficient particularity on the banking practice relied on. They fail to attach

a copy of the agreements which they are obliged to do if they want to rely on same. In paragraph 11.6 of the plea it is alleged it is a "vital component" of banking payment systems that participant banks do not become involved in their customers' disputes and do not owe participant

banks duty of care. The defendant fails to identify the source of the alleged "vital component", or provide sufficient particularity for the plaintiff to plead thereto.

[29] The source of the vital component is an issue that should be addressed in evidence. To the extent that factual averments are

lacking in particularity, then the plaintiff's remedy is not an exception but, to ask for further particulars for the purposes of trial or even the inspection of documents discovery.[7]

Conclusion

[30] It seems to me that the exceptions are misplaced. That the plea is overly long can brook no doubt but this does not render it automatically excipiable. In its heads of argument defendant's counsel conceded that it had over-pleaded its case by dealing too comprehensively with the issues. In that respect he is correct. A large part of the plea contains a detailed exposition of the working of computerised banking systems, more suited to a lecture on the topic. This form of pleading is in part responsible for some of the exceptions that have been taken. On the other hand it will no doubt greatly assist the trial court when it hears the matter.

[31] The purpose of an exception is to prevent the leading of unnecessary evidence and to dispose of the case in whole or in part and to protect a party against an embarrassment so serious that it would be "seriously prejudiced" if the offending pleadings are not expunged.

[8] The pleadings must be read as a whole and no paragraph should be read in isolation.[9]

[32] Our courts have adopted a benevolent interpretation when deciding exceptions, especially whether a cause of action is disclosed. The onus is on the excipient to show that no possible evidence can be lead on the pleadings which could disclose a cause of action.[10] To be excipiable on the basis that it is vague and embarrassing, the excipient must persuade the court that the pleading

is excipiable on every possible construction and interpretation that can be reasonably attached thereto. [11]

[33] The real test in this matter is whether on all possible interpretations the plea as amended discloses a cause of action. The

answer to that must be in the affirmative when the particular paragraphs are read in context of the pleading as a whole. Further,

there is no embarrassment to the plaintiff in that there is no instance where the plaintiff would be unable to replicate. None of the exceptions will have the desired effect of disposing of any portion of the case in an expeditious manner.

[34] As cumbersome as the plea may be in its present format, it is not in my view, excipiable.

In the result I make the following order:

The exception is dismissed with costs.

____C. H. NICHOLLSJUDGE OF THE HIGH COURT OF SOUTH AFRICAGAUTENG LOCAL DIVISIONJOHANNESBURG

Appearances

Counsel for the applicants : Adv. Z F Joubert SC

Adv. F P Strydom

Instructing Attorneys : Moss Marsh & Georgiev

Counsel for the respondent: Adv. F G Barrie SC

Adv. H C Bothma

Instructing Attorneys : Edward Nathan Sonnenbergs

Date of hearing : 08 October 2014

Date of judgment: 05 December 2014

[1] FNB Online EFT User Manual, section 2.

[2] FNB Online EFT User Manual, definitions.

[3] FNB Online EFT User Manual, section 3.4.

[4] International Combustion Africa v Billy's Transport 1981

(1) SA 599 (W) at 600- 601.

[5] Kotsopoulos v Bilardi 1970

(2) SA 391 (C) at 398; Lawsa (3rd Ed) Vol1 para 148 and 149.

[6] B H Engineering v First National Bank of South Africa Ltd

[1995] 1 All SA 545 (A).

[7] Jowell v Bramwell-Jones and Others 1998 (1) SA 836 (W).

[8] Nel and Others NNO v McArthur and Others 2003

(4) SA 142 (T); Levitan v Newhaven Holiday Enterprises CC 1991

(2) SA 297 (C); Sharp v Francis and Others 2004

(3) SA 230 (C).

[9] First National Bank of Southern Africa Ltd v Perry NO & Others 2001 (3) SA 960 (SCA); Nel and Others NNO v McArthur and Others 2003 (4) SA 142 (T).

[10] SA Defence and Aid Fund v Minister of Justice 1967

(1) SA 31 (C); South African National Parks v Ras 2002 (2) SA 537 (C).

[11] Vermeulen v Goose Valley Investments (Pty) Ltd 2001

(3) SA 986 (SCA); Stewart and Botha

[2008] ZASCA 84; 2008 (6) SA 310 (SCA).

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Prepared on 9 October 2026 · Esheria