FIRSTRAND BANK LTD v CHAUCER PUBLICATIONS (PTY) LTD 2008 (2) SA 592 (C)

Citation	2008 (2) SA 592 (C)
Case No	12645/2007
Court	Cape Provincial Division
Judge	Traverso DJP
Heard	September 19, 2007
Judgment	October 29, 2007
Counsel	NGD Maritz SC (with BH Swart SC) for the applicant. TD Potgieter SC for the first respondent. The second respondent in person.
Annotations	Link to Case Annotations

Flynote : Sleutelwoorde

Constitutional practice - Class action - Class action in terms of s 38 of Constitution - Procedural requirements needing to be formulated - Leave to be sought from High Court to embark on representative basis before action instituted - Determination of common interest sufficient to justify class action to take place prior to institution of proceedings - Representing party to give sufficient notice to all affected parties to enable them to associate or disassociate themselves with proposed litigation - Such procedures not yet regularised - In meantime procedures set out to be followed.

Banker - Relationship between banker and client - Confidentiality - Considerations of public policy requiring relationship to be confidential - Duty not to disclose that of bank, corresponding privilege that of client - Mere identification by magazine of person as client of bank not impinging on bank's right to privacy - Bank accordingly lacking locus standi to apply for interdict prohibiting magazine from publishing in defamatory article names of bank's clients - Bank also lacking locus standi at common law to in- stitute class action on behalf of its clients - Since individual clients of bank would have recourse to interdict publication of defamatory material and clients not given opportunity to 'opt out' of application for interdict, bank lacking locus standi to institute class action in terms of s 38*(a)* and *(c)* of Constitution.

Headnote : Kopnota

In *Ngxuza and Others v Secretary, Department of Welfare, Eastern Cape, and Another* 2001 (2) SA 609 (E) (2000 (12) BCLR 1322) it was suggested that proced- ural requirements be formulated to deal, inter alia, with the following mat- ters in connection with class actions in terms s 38*(a)* and *(c)* of the Consti- tution, 1996: *(a)* that leave must be sought from the High Court to embark on a representative basis prior to actually embarking on that road; *(b)* that the determination of a common interest sufficient to justify a class action takes place prior to the institution of the proceedings; *(c)* that it be a requirement that the representing party give sufficient notice to all the affected parties so that they may associate or disassociate themselves from the proposed litigation. These procedures have not been regularised, but in the meantime the procedure stipulated above should be followed. (Paragraph [26] at 599H - 600C.)

Arising out of a series of articles in a magazine published by the first respondent, and of which the (see case name at A above) was the editor, which the applicant claimed were defamatory of it and some of its clients, the most recent of which articles having stated that it would publish in a later issue 'a choice selection' of the names of the applicant's 'clients and the names of their local and offshore trusts', the applicant applied in a Provincial Division for an order that the 'respondents be interdicted, pending the final determination of an action to be instituted by the applicant against the respondents for a permanent interdict, from publishing the identities of clients of the applicant and the names of their trusts stated in the client lists referred to' in the said article. In the application the applicant averred that it had brought the 'application in its own interest as well as in the interests of a class of persons, being the applicant's clients and their trusts who are identified in the lists referred to in para 2 of the notice of

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motion'. The applicant further averred that the applicant and its clients had a real and substantial interest in the relief sought, that at common law it had the necessary locus standi to bring the application and that the applicant, insofar as the application was aimed at protecting the constitutional right to privacy, 'relie(d) on the provisions of s 38*(a) and (c)* of the Constitution of the Republic of South Africa, 1996'. The respondents opposed the application on the ground, inter alia, that the applicant was not entitled to bring the application on behalf of its clients in the form of a class action.

Held, that for considerations of public policy the relationship between a bank and its client must be of a confidential nature. Although the duty not to disclose rested with the bank, the privilege not to have the details of its dealings with the bank disclosed belonged with the client. It was therefore the client alone who could invoke this privilege and insist that the bank keep the information about its dealings with the client confidential. (Paragraph [20] at 598B - D.)

Held, further, that insofar as it might be argued that the mere publication of the names of the clients might impinge on the bank's right to privacy or its confidential relationship with its clients, the mere publication of the fact that a person was a client of the applicant could not impinge on the applicant's privacy. The applicant was merely seeking an interdict to prevent the identities of its clients and their trusts from being published. (Paragraph [20] at 598E.)

Held, further, that the common law did not recognise class actions and prior to 1994 a class action was foreign to our law. The applicant had accordingly not shown that it had locus standi at common law. (Paragraph [20] at 598E - F.)

Held, further, as to the bank's reliance on s 38(a) and (c) of the Constitution as conferring locus standi on it to institute a class action, that what the bank was trying to do was to prevent its clients from being defamed, but the publication of the fact that a person was a client of a specific bank could never infringe the right of privacy of either the bank or the client, as envisaged in s 14 of the Constitution. (Paragraph [24] at 599E.)

Held, further, that, because each individual client would have recourse to interdict the publication of defamatory material or to claim a solatium for the alleged defamation, this was not a situation where a class action would be apposite. (Paragraph [25] at 599G - H.)

Held, further, that the application had been brought on behalf of the bank's clients without any indication that they had been given an opportunity to 'opt out' of the proceedings.

(Paragraph [28] at 600G.)

Held, accordingly, that the bank had also failed to establish its locus standi on this ground. (Paragraph [29] at 600H.) Application dismissed.

Cases Considered

Annotations

Reported cases

Southern African cases

Abrahams v Burns 1914 CPD 452: applied

Densam (Pty) Ltd v Cywilnat (Pty) Ltd 1991 (1) SA 100 (A): referred to

Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others 1996 (1) SA 984 (CC) (1996 (1) BCLR 1): dictum in para [165] applied

GS George Consultants and Investments (Pty) Ltd and Others v Datasys Ltd 1988 (3) SA 726 (W): considered

Ngxuza and Others v Secretary, Department of Welfare, Eastern Cape, and Another 2001 (2) SA 609 (E) (2000 (12) BCLR 1322): applied

Permanent Secretary, Department of Welfare, Eastern Cape, and Another v Ngxuza and Others 2001 (4) SA 1184 (SCA) (2001 (10) BCLR 1039): dictum in para [4] applied

Maluleke v MEC, Health and Welfare, Northern Province 1999 (4) SA 367 (T): applied

Van Huysteen and Others NNO v Minister of Environmental Affairs and Tourism and Others 1996 (1) SA 283 (C) *Maluleke v MEC, Health and Welfare, Northern Province* 1999 (4) SA 367 (T): applied.

Foreign cases

Pharaon and Others v Bank of Credit and Commerce International SA (In Liquidation) (Price Waterhouse (a firm) Intervening); Price Waterhouse (a firm) v Bank of Credit and Commerce International SA (In Liquidation) and Others [1998] 4 All ER 455 (Ch): considered

Tournier v National Provincial & Union Bank of England [1924] 1 KB 461: applied.

Statutes Considered

Statutes

The Constitution of the Republic of South Africa, 1996, s 38: see *Juta's Statutes of South Africa 2006/7* vol 5 at 1-27 to 1-28.

Case Information

Application for an interdict *pendent lite*. The facts appear from the reasons for judgment.

NGD Maritz SC (with *BH Swart SC*) for the applicant.

TD Potgieter SC for the first respondent.

The second respondent in person.

Cur adv vult.

Postea (October 29).

Judgment

Traverso DJP:

[1] The applicant is FirstRand Bank Ltd (FirstRand).

[2] First respondent is the publisher of the *Noseweek Magazine*, and second respondent (Welz) is the editor of *Noseweek* and the sole director of first respondent.

[3] This application stems from a series of articles that appeared in *Noseweek*. In June 2007 the first article appeared under the title 'Voyages of Discovery'. In this article Welz alluded to certain documents of which discovery had been made in pending litigation between FirstRand and one Barry Kuper Spitz, who controls a company known as International Law and Tax Institute (Pty) Ltd (ILTI). The nature of this litigation is not relevant to the issues which I have to decide. Suffice it to say that it emanated from a consultancy service agreement between ILTI and FirstRand which was terminated by FirstRand. This led to animosity which culminated in Spitz instituting an action against FirstRand.

[4] The article states that the discovered documents revealed that FirstRand had made itself party to 'unusual practices', and revealed strong evidence of money laundering by two directors of one of the FirstRand's subsidiaries. It is also pointed out that *ex facie* the documentation there were certain accounting errors and VAT irregularities reflected in the books of FirstRand. These actions all relate to First Rand's former offshore division, Henry Ansbacher Trust Services (Ansbacher).

TRAVERSO DJP

[5] In an editorial in the same edition, FirstRand was referred to as a 'red light bank' and its representatives as 'merchant wankers', insinuating that FirstRand is run in a manner similar to a brothel.

[6] On 5 June 2007 the directors of FirstRand issued a press statement in which they denied the allegations made in *Noseweek*. In the August 2007 edition of *Noseweek*, an article styled 'Updates: FirstRand regrets', reference is made to this press statement, and is followed by the following comments:

> The real issue, it emerges, is who should take the rap for the illegal scheme: the bank, for devising the scheme and offering it to its clients (for a fat fee), or the clients - in this case Messrs Gore and Swartzberg? The two Discovery directors have insisted that since FirstRand got them into the mess, FirstRand must get them out of it. So the statement starts out by confirming that it is not Gore and Swartzberg who 'structured'

their financial affairs in an 'inappropriate' manner.

[7] Certain passages from the press statement were also quoted which were construed by *Noseweek* as an admission that the directors of FirstRand knew that the Ansbacher scheme was unlawful.

[8] In the September 2007 edition of *Noseweek* an article appeared under the title 'FirstRand pirates hit the rocks'. Further references to FirstRand are made in this edition as 'FirstRand pirates of the Caribbean', and records 'More Discovery names linked to Virgin Island tax fraud'.

[9] In this article reference is made to 'an extraordinary file' which was contained amongst the discovered documents. The file was marked 'Duisberg'. This file implicates many of the FirstRand Group's directors and divisions, including RMB Trust Services, Ansbacher South Africa and the Discovery Group, in criminal schemes similar to those which were uncovered in respect of Ansbacher in Ireland. The article then proceeds to set out the history of Duisberg, which I do not believe I need expand on in this judgment. Suffice it to say that the entire article is based upon a premise that the Duisberg structure was an illegal and a fraudulent scheme involving a criminal conspiracy between FirstRand and its clients.

[10] This article ended with a teaser which read as follows:

> In our next issue: FirstRand steals a line from Mozart's librettist: *Cosi fan tutte* - everyone's doing it. Mozart was mocking the standard excuse used by men caught in adultery. Now, in case you should think that only the bank's management have been up to financial hanky-panky, lists of Joburg Ansbacher clients and the names of their local and offshore trusts have been included in the Duisberg file. *noseweek* (*sic*) will publish a choice selection (naturally taking care to omit the names of *Noseweek* subscribers and shareholders - in the unlikely event that any are to be found there - Ed).

[11] It is this teaser which ultimately gave rise to the present application.

[12] The brief discussion of the articles demonstrates, in my view, that the allegations contained therein are, prima facie, defamatory of FirstRand and its representatives. *Noseweek*'s defence is one of truth and public interest. In addition *Noseweek* is challenging FirstRand's entitlement to bring this

application on behalf of its clients in the form of a class action.

[13] In coming to a conclusion in this matter, it is important to have regard to the relief sought by FirstRand. FirstRand applies for an interdict in, inter alia, the following terms:

> 2. That the respondents be interdicted, pending the final determination of an action to be instituted by the applicant against the respondents for a permanent interdict, from publishing the identities of clients of the applicant and the names of their trusts stated in the client lists referred to at the end of the article entitled 'FirstRand Pirates Hit The Rocks', which has been annexed as annexure SF12 to the founding affidavit.

[14] In the body of the affidavit FirstRand, however, states the following:

> 3.1 The applicant in this application seeks to protect *itself* and certain of its clients against unlawful defamation by the respondents, to protect the confidentiality of certain information in which the applicant and its clients have a proprietary interest, and to protect the constitutional right to privacy afforded to the applicant and its clients by s 14 of the Constitution of the Republic of

South Africa, 1996.

3.2 The applicant brings this application in its *own* interest as well as in the interests of a class of persons, being the applicant's clients and their trusts who are identified in the lists referred to in para 2 of the notice of motion. The *applicant* and its clients have a *real and substantial interest* in the relief sought in this application, and I am advised that the applicant accordingly *at common law* has the necessary locus standi to bring this application. The applicant furthermore, insofar as this application is aimed at protecting the constitutional right to privacy, relies on the provisions of s 38*(a)* and *(c)* of the Constitution of the Republic of South Africa, 1996. It is obvious that the applicant's clients in respect of whom protection is sought in this application, cannot join as disclosed co-applicants in this application, as this would defeat the entire purpose of the application which is to protect the confidentiality and privacy of the identity of the applicant's clients and their trusts.

. . .

14.1 The abovementioned allegations in *Noseweek* pertaining to the applicant and its directors and officers are false, scurrilous and defamatory. They were published without the applicant having been furnished with an opportunity to comment thereon, which should have happened. The applicant has considered these allegations and has decided not to seek interdictory relief in respect thereof at this stage, as it believes that the responsible press and the public at large are acutely aware of *Noseweek*'s approach to journalism. The applicant is confident that it will be entirely vindicated when the action under case number 32230/2001 is eventually adjudicated by the court. The applicant's attorneys are actively attempting to obtain a special trial date from the Judge President for the hearing of the matter on the remaining issues, under circumstances where neither Spitz, nor ILTI, nor their legal representatives have taken any steps whatsoever to arrange a date for the hearing.

TRAVERSO DJP

14.2 *Noseweek*'s threats to publish information pertaining to the applicant's clients and their financial affairs could, however, not be left unchallenged by the applicant. It is trite that a special duty of confidentiality is owed by a bank to its clients. Insofar as may be necessary argument in respect of this issue will be adduced at the hearing of the application.

(My emphasis.)

[15] From the above it becomes evident that FirstRand relies on two grounds for its locus standi. It contends that inasmuch as it has a substantial interest in the relief sought it has, at common law, the necessary locus standi to bring this application. Secondly, and insofar as the application is aimed at protecting the constitutional right to privacy, it relies on the provisions of s 38*(a)* and *(c)* of the Constitution.

[16] FirstRand's stance is difficult to understand. On the one hand FirstRand categorically states that it has decided at this stage *not* to seek interdictory relief in respect of the defamatory allegations contained in the articles. On the other hand it repeatedly states that it (and its clients) has a substantial interest (or a 'proprietary interest') in the relief sought and that it seeks to protect *itself* and certain of its clients against unlawful defamation by *Noseweek*. Once FirstRand has decided not to seek interdictory relief against *Noseweek* it cannot, under the guise of a class action, seek to protect itself against further defamation.

[17] The inference is inescapable that the reason why the papers were drafted in this manner was to overcome the difficulty of locus standi.

[18] The 'substantial interest' on which FirstRand relies is based on the confidential nature of the relationship between a bank and its clients. A banker's contractual obligation to preserve the confidentiality has long been recognised in the English law. The leading case

in this regard is *Tournier v National Provincial & Union Bank of England* [1924] 1 KB 461. In this case it was decided that the right of a customer to keep his affairs confidential is a legal right. This is, however, a qualified right, and arises either *ex contractu* or is implied from the relationship between a banker and a customer. Bankes LJ stressed that there may be situations where grounds of justification for the disclosure of client information exist. Atkin LJ confirms this view and states that the duty to disclose goes beyond the state of the account of any particular client and must extend to all transactions that go through an account.

[19] In the South African context, this duty of confidentiality (or secrecy as it is sometimes referred to) was recognised, inter alia, in *Abrahams v Burns* 1914 CPD 452; *GS George Consultants and Investments (Pty) Ltd and Others v Datasys Ltd* 1988 (3) SA 726 (W). (The *ratio* underlying this judgment was overruled by the Appellate Division (as it then was) in *Densam (Pty) Ltd v Cywilnat (Pty) Ltd* 1991 (1) SA 100 (A) at 111G - H, but the court declined to decide the issue of bank secrecy.) The confidential nature of the relationship between a bank and its client has been recognised by several authors and there are also a number of statutory provisions that are based on the assumption that bankers owe

a duty of confidentiality to their clients, for example s 87(2) of the Banks Act 94 of 1990.

[20] But I do not believe that I have to dwell on this aspect for too long. It seems to me that for considerations of public policy the relationship between a bank and its client must be of a confidential nature. Equally - for considerations of public policy - this duty is subject to being overridden by a greater public interest. (See *Pharaon and Others v Bank of Credit and Commerce International SA (In Liquidation) (Price Waterhouse (a firm) Intervening); Price Waterhouse (a firm) v Bank of Credit and Commerce International SA (In Liquidation) and Others* [1998] 4 All ER 455 (Ch).) Although the duty not to disclose rests with the bank, the privilege not to have the details of its dealings with the bank disclosed belongs with the client. It is therefore the client alone who can invoke this privilege and insist that the bank keeps the information about its dealings with the client confidential. In this case it is not the bank who wishes to publish confidential information about its clients. It is a third party who obtained certain documents, and who wishes to publish the information reflected therein. Insofar as it may be argued that the mere publication of the names of the clients may impinge on the bank's right to privacy or its confidential relationship with its clients, the mere publication of the fact that a person is a client of FirstRand cannot, in my view, impinge on FirstRand's privacy. FirstRand is merely seeking an interdict to prevent the identities of its clients and their trusts from being published. The common law did not recognise class actions and, as will appear hereunder, prior to 1994 a class action was foreign to our law. I therefore conclude that FirstRand has not shown that it has locus standi at common law.

[21] I will now deal with FirstRand's reliance on the provisions of s 38*(a)* and *(c)* of the Constitution, which provides:

> Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are -
>
> *(a)* anyone acting in their own interest;

. . .

(c) anyone acting as a member of, or in the interest of, a group or class of persons. . . .

[22] As stated above, prior to 1994 a class action was foreign to the South African law and the courts traditionally adopted an extremely cautious approach to standing. In fact the South African common law does not recognise a class action (*Van Huysteen and Others NNO v Minister of Environmental Affairs and Tourism and Others* 1996 (1) SA 283 (C); *Maluleke v MEC, Health and Welfare, Northern Province* 1999 (4) SA 367 (T)). Traditionally a litigant had to show a personal interest in the case and could not litigate on behalf of other parties not formally joined.

[23] This situation was rectified by s 38 of the Constitution. In *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) (1996 (1) BCLR 1) Chaskalson P, dealing with

the interim Constitution, adopted a broad approach to legal standing, stating that:

> (W)hilst it is important that this Court should not be required to deal with abstract or hypothetical issues, and should devote its scarce resources to issues that are properly before it, I can see no good reason for adopting a narrow approach to the issue of standing on constitutional cases. On the contrary, it is my view that we should rather adopt a broad approach to standing. This would be consistent with the mandate given to this Court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled. Such an approach would also be consistent in my view with the provisions of s 7(4) of the Constitution . . . . * (1)

O'Regan J expressed her agreement. †(2) This is the approach which has subsequently been followed.

[24] As a point of first departure an applicant in a class action must allege that a right enshrined in the Bill of Rights is being threatened. FirstRand is relying on its and its clients' right to privacy in terms of s 14 of the Constitution. But when this is analysed more closely it becomes clear that FirstRand wants to prevent its clients' names being published with reference to their dealings with either Ansbacher or Duisberg. They are of the view that their clients will be defamed if such information is published. What they are trying to do is to prevent their clients from being defamed. As stated above I do not believe that the publication of the fact that a person is a client of a specific bank, can ever infringe the right of privacy of either the bank or the client, as envisaged in s 14 of the Constitution.

[25] At the risk of stating the obvious, the *actio iniuriarum* is the appropriate remedy for the recovery of compensation for the wrongful invasion of an individual's (in this case the clients of FirstRand) *personal* rights. The law of defamation lies at the intersection of two fundamental values, namely freedom of expression, including freedom of the press and the protection of reputation and good name. The right to privacy is also by its very nature a private right. Because each individual client will have recourse to interdict the publication of defamatory material or to claim a *solatium* for the alleged defamation, this is not a situation where a class action will be apposite. The only reason put forward by the respondents, as to why the individual clients cannot bring an application, is because their identities would then be revealed.

[26] In *Ngxuza and Others v Secretary, Department of Welfare, Eastern Cape, and Another* 2001 (2) SA 609 (E) (2000 (12) BCLR 1322) Frone- man J alluded to the various objections that have been raised to class actions. He suggested that procedural requirements be formulated to deal, inter alia, with the following:

(a) That leave must be sought from the High Court to embark on a representative basis prior to actually embarking on that road.

TRAVERSO DJP

(b) The determination of a common interest sufficient to justify a class action takes place prior to the institution of the proceedings.

(c) That it be a requirement that the representing party give sufficient notice to all the affected parties so that they may associate or disassociate themselves from the proposed litigation.

(Nel J made similar suggestions in his report on the affairs of the Masterbond Group. A draft Bill was attached to his report. Unfortunately these procedures have not been regularised, but in the meantime those procedures stipulated in the *Ngxuza* case should, in my view, be followed.) This last feature was earmarked by Cameron JA in the appeal judgment (*Permanent Secretary, Department of Welfare, Eastern Cape, and Another v Ngxuza and Others* 2001 (4) SA 1184 (SCA) (2001 (10) BCLR 1039) para 4 at 1192G - H (SA) and 1043 (BCLR)) as:

> The most important feature of the class action is that other members of the class, although not formally and individually joined, benefit from, and are bound by, the outcome of the litigation unless they invoke prescribed procedures to opt out of it.

For this reason members of the class should be given the opportunity to 'opt in' or 'opt out' of the class proceedings.

[27] In this case it was not done. The highwater mark of FirstRand's case in this regard is the following statement:

> 14.9 . . . I furthermore confirm that numerous Ansbacher clients of the applicant have expressed their concern in regard to the possible disclosure of their identities in relation to their financial dealings with the applicant and have requested the applicant to take appropriate steps to ensure that the confidentiality of their dealings with the applicant is maintained. I do not disclose the names of these Ansbacher clients, as the disclosure of their names in this application as a matter of public record would defeat the object of this application.

[28] What the 'appropriate steps' should be one does not know. In particular, one does not know whether this includes litigation. Furthermore it is clear that only some of the clients made this rather vague request. Yet the application is brought on behalf of all the clients without any indication that they have been given an opportunity to 'opt out'.

[29] In the circumstances I find that also on this ground FirstRand has failed to establish its locus standi.

[30] In view of these findings it is not necessary to consider the merits of this application.

[31] Accordingly the application is dismissed with costs.

Applicant's Attorneys: *Deneys Reitz Inc.*

First Respondent's Attorneys: *McConnachies Inc.*