



THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case no 332/08

In the matter between:

ABSA BROKERS (PTY) LTD

Appellant

and

RMB FINANCIAL SERVICES
RMB ASSET MANAGEMENT (PTY) LTD
MOMENTUM DISTRIBUTION SERVICES
MOMENTUM GROUP LTD

First Respondent
Second Respondent
Third Respondent
Fourth Respondent

Neutral citation: *Absa Brokers v RMB Financial Services and others*
(332/08) [2009] ZASCA 83 (20 August 2009)

Coram: NUGENT, MLAMBO, MHLANTLA, JJA, LEACH *et*
BOSIELO AJJA

Heard: 25 May 2009

Delivered: 20 August 2009

Summary: Interpretation of section 2 of the Apportionment of
Damages Act 34 of 1956.

ORDER

On appeal from: High Court, Pretoria (Legodi J sitting as a court of first instance).

(a) Save as set out in paragraph (b) the appeal is dismissed with costs;

(b) The order of the court below is varied by the addition of the following sentence, the date referred to being a reference to the date upon which this order was substituted for the order of the court below:

‘The plaintiff is granted leave to amend its particulars of claim within 21 days of the date of this order.’

JUDGMENT

MHLANTLA JA et NUGENT JA (MLAMBO JA, LEACH et BOSIELO AJJA concurring)

[1] This is an appeal against an order of the High Court, Pretoria (Legodi J) upholding an exception. The issues between the parties will be best understood against the background of the factual issues that follow. An action was brought against the appellant by the Claasen Family Trust (the Trust) for the recovery of damages alleged to have been sustained. The Trust alleged that the appellant’s employee had convinced it to invest an amount of R1 020 000 in an investment product known as ‘RMB Guaranteed Cashflow Investment’ (the product) by representing that the

capital amount invested in the product would be guaranteed and refunded at the end of the investment period. This however was not the case. As it turned out, so it was alleged, the capital was placed at risk and could not be repaid on maturity. The appellant settled the claim by paying the Trust an amount of R585 686.56.

[2] The appellant, having settled the claim, instituted action in the High Court, Pretoria against the four respondents in the proceedings that are the subject of this appeal, alleging that they were joint wrongdoers, and sought to recover a contribution from one or more of the respondents. The appellant pleaded that the first and second respondents had devised, designed and developed the product and had furthermore utilized the services of the third and fourth respondents to promote and market it to members of the public, including its employees. The respondents are alleged to have caused the appellant's employee to make false or incorrect representations about the true nature and characteristics of the product to members of the public.

[3] The respondents excepted to the appellant's particulars of claim on the basis that no cause of action was disclosed. The court below upheld the exception. This appeal is before us with the leave of that court.

[4] The appellant's claim is founded upon s 2(12) read with s 2(6) of the Apportionment of Damages Act 34 of 1956, which permits a joint wrongdoer to recover a contribution from another joint wrongdoer in certain circumstances. This appeal turns on the interpretation of s 2 of the Act and, in particular, it raises the question whether the appellant was obliged to give notice in terms of s 2(2), or obtain leave of the court in terms of s 2(4), as a precondition to instituting action against the

respondents. It is convenient at this stage to set out the relevant provisions of s 2.

[5] Section 2(1) is a guiding principle to have a unitary action. It allows for an action to be instituted against joint wrongdoers in the following terms:

'(1) Where it is alleged that two or more persons are jointly or severally liable in delict to a third person (hereinafter referred to as the plaintiff) for the same damage, such persons (hereinafter referred to as joint wrongdoers) may be sued in the same action'.

Section 2(2) allows for joint wrongdoers who have not been sued in an action to be alerted to their potential liability, whether by the plaintiff or by a defendant, so as to enable them to intervene in the proceedings, in the following terms:

(2) Notice of any action may at any time before the close of pleadings in that action be given –

(a) by the plaintiff;

(b) by any joint wrongdoer who is sued in that action,

to any joint wrongdoer who is not sued in that action, and such joint wrongdoer may thereupon intervene as a defendant in that action'.

[6] The Act recognises the potential prejudice to a joint wrongdoer who is not joined in an action and in this regard s 2(4) provides a sanction if the notice referred to in s 2(2) has not been given to a joint wrongdoer as follows:

(4)(a) If a joint wrongdoer is not sued in an action instituted against another joint wrongdoer and no notice is given to him in terms of paragraph (a) of subsection (2), the plaintiff shall not thereafter sue him except with the leave of the court on good cause shown as to why notice was not given as aforesaid.

(b) If no notice is under paragraph (a) or (b) of subsection (2) given to a joint wrongdoer who is not sued by the plaintiff, no proceedings for a contribution shall be

instituted against him under subsection (6) or (7) by any joint wrongdoer except with the leave of the court on good cause shown as to why notice was not given to him under paragraph (b) of subsection (2)’.

[7] Provision is made for a contribution to be claimed by one joint wrongdoer against another, so far as it is material to this appeal, by s 2(12) read with s 2(6). The relevant portion of s 2(12) provides as follows:

‘(12) If any joint wrongdoer agrees to pay to the plaintiff a sum of money in full settlement of the plaintiff’s claim, the provisions of subsection (6) shall apply *mutatis mutandis* as if judgment had been given by a competent court against such joint wrongdoer ...’.

Section 2(6) in turn, provides as follows:

‘If judgment is in any action given against any joint wrongdoer for the full amount of the damage suffered by the plaintiff, the said joint wrongdoer may, if the judgment debt has been paid in full, subject to the provisions of paragraph (b) of subsection (4), recover from any joint wrongdoer a contribution in respect of his responsibility for such damage of such amount as the court may deem just and equitable having regard to the degree in which that other joint wrongdoer was at fault in relation to the damage suffered by the plaintiff and to the damages awarded: ...’.

[8] As appears from subsection (6), the right that is accorded to one joint wrongdoer to recover a contribution from another is expressly stated to be ‘subject to the provisions of paragraph (b) of subsection (4)’. The essence of the respondents’ exception was that the appellant had not alleged that it had given them as defendants notice of the first action as required by s 2(2) of the Act, nor had it obtained leave of the court in terms of s 2(4), before the proceedings against them were instituted. They thus contended that the appellant was precluded from instituting the action.

[9] Before us counsel for the appellant disputed that construction of the relevant subsections. Directing his argument to the phrase 'where it is alleged' in s 2(1) he contended that the appellant was not obliged to give notice to the respondents of the Trust's action, nor to have the leave of the court, since it had not been alleged in the Trust's action that the respondents were joint wrongdoers. In that regard he relied upon what was said in *Becker v Kellerman*,¹ which held that the phrase 'where it is alleged' in s 2(1) must be interpreted as 'where it is alleged in an action'.

[10] In that case Mashigo, an employee of Becker had caused damage to Kellerman's motor vehicle in a road accident. Kellerman sued Mashigo for damages caused in the collision. Thereafter and without notice or the leave of the court he instituted a claim for a contribution against Becker, who had not caused the accident and was sued on the basis of vicarious liability. Becker raised a special plea that Kellerman could not sue him because he had failed to give him notice in terms of s 2(2) or obtain the leave of the court in terms of s 2(4).

[11] The court dismissed the special plea. Much of the judgment in that case is taken up with the question whether a person who is vicariously liable for the conduct of another is a joint wrongdoer for the purposes of the Act. Having found that such a person is indeed a joint wrongdoer, the court turned to the question

'whether or not all joint wrongdoers who are in fact jointly or severally liable in delict for the same damage, are joint wrongdoers for the purposes of subsections (2) and (4) of section (2)'² (our translation).

It held that Becker was not such a joint wrongdoer, with the result that Kellerman was entitled to sue him without the leave of the court,

¹ 1971 (2) SA 172 (T) at 182H.

² At 182B-C.

notwithstanding that Becker had not been given notice of the earlier action.

[12] The reasoning of the court in *Becker v Kellerman*, as we understand it, was that ‘joint wrongdoers’ as contemplated by the relevant subsections were confined to persons who had been alleged to be joint wrongdoers in the initial action. Absent such an allegation in the course of the initial action, the person who was subsequently sued was not a ‘joint wrongdoer’ and did not fall within the terms of subsection (4)(a). Because there had been no allegation in the action against the employee that Becker was a joint wrongdoer, so the court held, he was not a ‘joint wrongdoer’ as contemplated by subsection 4(a).³

[13] The court below sought to distinguish *Becker v Kellerman* but we do not think this case is materially distinguishable. Quite clearly the circumstances in which the issue arose in that case differ from those of the present case. But if such an allegation is indeed a prerequisite to a person being a ‘joint wrongdoer’ for purposes of subsection 4(a) – as was found in *Becker v Kellerman* – then it seems to us that that must apply as much to subsection 4(b). And if that is so, it is fatal to the respondents’ case, because there is no suggestion that in the action by the Trust against the appellant it was alleged by anyone that the respondents were joint wrongdoers (and the case was argued on the basis that no such allegation had been made).

[14] But we disagree with the construction that was placed upon the Act in that case. In our view the court in *Becker v Kellerman* accorded undue significance to the use of the word ‘alleged’ in s 2(1). To the extent that

³ At 185A-C.

the subsection defines ‘joint wrongdoers’, it defines the term to mean ‘two or more persons [who are] jointly or severally liable in delict to a third person for the same damage’.⁴ We do not think that the phrase ‘where it is alleged’ purports to suggest that the term is confined to persons who have been alleged at some time to be joint wrongdoers. The purpose of the phrase is no more than procedural. Subsection (1) creates a procedural framework for the initiation of the unitary process in which the respective rights and obligations of the plaintiff and all concurrent wrongdoers will be determined. It could hardly have been phrased so as to refer to persons who are joint wrongdoers in fact when the very question to be determined in the proceedings that it authorises is whether or not they are indeed ‘joint wrongdoers’. References to ‘joint wrongdoers’ in the remaining subsections are at times a reference to persons who are alleged to be joint wrongdoers, and at other times a reference to persons who are joint wrongdoers in fact, but that is again dictated by the same procedural reasons.⁵ But we cannot agree that the determination of whether a person is or is not a joint wrongdoer for purposes of those subsections is whether or not an allegation to that effect was made in the original action. That construction seems to us not only to strain the language but, as pointed out by the court below, it would also lead to absurdities when applied to s 2 as a whole.

[15] We agree with the court below that the clear purpose of the Act is to avoid a multiplicity of actions arising from a single loss-causing event. The scheme of the Act contemplates a single determination of liability by multiple wrongdoers and the apportionment of liability amongst them in single proceedings. Thus a plaintiff who alleges that two or more persons

⁴ See McKerron *The Law of Delict in South Africa* 7ed 306.

⁵ *Shield Insurance Co Ltd v Zervoudakis* 1967 (4) SA 735 (ECD) 737H-738A; *South African Railways and Harbours v South African Stevedore Services Co Ltd* 1983 (1) 1066 (A) at 1089H-1090A; *Wapnick v Durban City Garage* 1984 (2) SA 414 (D) at 421D-422F.

are liable for the damage that is in issue then he or she is permitted by s 2(1) to sue them all in the same action. A defendant who alleges that another person is also liable to the plaintiff is capable of joining him or her in the proceedings under Rule 13 of the Uniform Rules. And if the plaintiff and the defendant choose not to join that person in the action, then that person must at least be given the opportunity to intervene by being notified of the action. The clear purpose of subsections 4(a) and (b) is to encourage the resolution of all claims in single proceedings by barring further proceedings against parties who have not been given such notice (except with the leave of the court).

[16] That seems to us to be the plain meaning of the language of the various subsections. The language is also consistent with the manner in which it was applied in *South African Railways and Harbours v South African Stevedore Services*,⁶ where the phrase ‘joint wrongdoers’ was used within the context of the Act in different senses, and in *Wapnick v Durban City Garage*,⁷ as well as in *Lincoln v Ramsaran*.⁸ Both the latter cases dealt with applications to the court for leave to institute action for a contribution in terms of s 2(4) of the Act as no notice of the original action had been given to the persons subsequently alleged to be joint wrongdoers. No allegation in either matter had been made that the person from whom the apportionment was sought was a joint wrongdoer. The merits of each application were considered and the court held that leave of the court had to be obtained before such wrongdoers could be sued regardless of the fact that no allegation had been made in the original action that they were joint wrongdoers. In the *Lincoln* case the

⁶ At 1089.

⁷ 1984 (2) SA 414 (D).

⁸ 1962 (3) SA 374 (N).

application was granted, whilst in *Wapnick* leave was refused as the applicant had failed to show good cause.

[17] In our view the finding in *Becker v Kellerman* that the provisions of subsection 4 apply only to a person who has been alleged in the original proceedings to be a joint wrongdoer, is inconsistent with the scheme of the Act and undermines the object and purpose thereof. The conclusion is illogical and was in our respectful view erroneous. It follows therefore that the reliance by the appellant on *Becker v Kellerman* is misplaced. In the absence of notification to the respondents of the earlier action, as required by subsection 2, and without the leave of the court, the appellant was precluded by subsection 4(b) from instituting the present action. In those circumstances the exception was correctly upheld.

[18] In so far as the form of the order issued by the court below is concerned, it was accepted by counsel for all the parties that the appellant ought to have been permitted to amend its particulars of claim to remedy the defect if it is capable of doing so. The order will be amended accordingly.

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

- (a) Save as set out in paragraph (b) the appeal is dismissed with costs.
- (b) The order of the court below is varied by the addition of the following sentence, the date referred to being a reference to the date upon which this order was substituted for the order of the court below:

'The plaintiff is granted leave to amend its particulars of claim within 21 days of the date of this order.'

N Z MHLANTLA
JUDGE OF APPEAL

R. W. NUGENT
JUDGE OF APPEAL

Appearances:

For Appellant

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For First and Second
Respondents

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Respondents

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