**IN THE HIGH COURT OF SOUTH AFRICA**
**(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

**CASE NO: 12645/07**

**In the matter between:**

**FIRSTRAND BANK LIMITED**
**Applicant**

**and**

**CHAUCER PUBLICATIONS (PTY) LIMITED**
**1st Respondent**

**MARTIN SYLVESTER WELZ**
**2nd Respondent**

**JUDGMENT : 29 OCTOBER 2007**

**TRAVERSO, DJP :**

**[1]** The applicant is FirstRand Bank Limited ("*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 FirstRand's former offshore division, Henry Ansbacher Trust Services ("*Ansbacher*").

**[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 "M*ore 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 to 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 section 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 paragraph 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 Section 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.*

***14.2Noseweek'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 Section 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; G.S. George Consultants & Investments v. Datasys Ltd, 1988(3) SA 726 WLD. (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 111 G-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 its clients, e.g. Section 87(2) of the Banks Act, No. 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 & Others v. Bank of Credit and Commercial 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 (Ch D) at 455.) 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 to be 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 Section 38(a) and (c) of the Constitution, which provides:

***"38. 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 Huyssteen v. Minister of Environmental Affairs & Tourism, 1996(1) SA 283 (C); Maluleke v. MEC, Health & 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 Section 38 of the Constitution. In Ferreira v. Levin N.O. & Others; Vryenhoek v. Powell N.O. & Others, 1996(1) SA 984 (CC), 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 section 7(4) of the Constitution …"***

O'Regan, J expressed her agreement. 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 Section 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 Section 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 allegation defamation, this is not a situation where a class action will be apposite. The only reason put forward by the Applicant as to why the individual clients cannot bring an application, is because their identities would then be revealed.

**[26]** In Ngxuza & Others v. Secretary, Department of Welfare, Eastern Cape Provincial Government & Another, 2000(12) BCLR 1322, Froneman, 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;

(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 Provincial Government & Another v. Ngxuza & Others, 2001(10) BCLR 1039 SCA at 1043 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 was dismissed with costs.

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**TRAVERSO, DJP**
**29 October 2007**