

**IN THE HIGH COURT OF
GAUTENG DIVISION,**



**SOUTH AFRICA
JOHANNESBURG**

CASE NO: 2021-42435

1. Reportable: No
2. Of interest to other judges: No
3. Revised

Wright J
4 September 2023

In the matter between:

CLIENTELE LIFE ASSURANCE COMPANY LTD

FIRST APPLICANT

CLIENTELE GENERAL INSURANCE LIMITED

SECOND APPLICANT

and

THE PAYMENT ASSOCIATION OF SOUTH AFRICA

RESPONDENT

JUDGMENT

WRIGHT J

1. The first applicant, Clientele Life is a long term insurer underwriting life insurance. The second applicant, Clientele General is a short term insurer. I shall refer to them as Clientele.
2. The respondent, PASA is the Payments Association of South Africa. It is the only body recognized by the South African Reserve Bank as a payment system management body as contemplated by section 3(1) of the National Payment System Act 78 of 1998. PASA has many banks as its members. A list of member banks appears in Annex AA1 to PASA's answering affidavit.
3. When Clientele contracts with a new client it gets the client to provide a debit order in favour of Clientele. Each month, the insured persons pay the premium on a policy by way of debit order. The insured client's account with its bank is debited and Clientele's account with its bank is credited.
4. Clientele has many clients. Over time, Clientele has become ever more concerned at the increasing rate of debit orders going through but then being reversed.
5. The Rules issued by PASA regarding payment and the ability of insured persons to reverse payment are the focus of this application. PASA has issued EFT Clearing Rules, NAEDO Clearing Rules and AC Clearing Rules. It is not necessary to set out these Rules in detail. At the commencement of the present hearing, it was common cause that the NAEDO Rules have fallen by the wayside and play no further part in the matter.

6. PASA's Rules contain what is referred to by the parties as the Immediate Reversal Rule. Broadly, an insured person who does not want to pay or perhaps can't afford a monthly payment tells his or her bank not to honour the debit order with the consequence that if payment has gone through to Clientele the credit in Clientele's account with its bank is reversed. Clientele does not have the opportunity to contest the reversal by, for example, providing the paying bank with a written debit order mandate signed by the insured person.
7. Clientele seeks effectively to set aside the Rules of PASA to the extent necessary to curb this practice. In short, Clientele seeks a Rule change to allow Clientele an opportunity to provide proof of a valid mandate before reversal takes place.
8. Clientele's main cause of action is that the money reversed from its account with its bank is its property under section 25 of the Constitution of which it may not be deprived except under a law of general application and no law may permit arbitrary deprivation of property. It argues that the Rules are a law as contemplated in section 25. Clientele says that this deprivation of its property is arbitrary procedurally and substantively.
9. Both sides seem to have approached this question on the assumption that Clientele's account with its bank is in credit when the reversal takes place. Given my order below, it is not necessary to go into the question of whether or not the amount of the reversal, the effect of which would be to increase Clientele's overdraft, if it has such a facility, amounts to property or its deprivation under section 25 of the Constitution.

10. As an alternative cause of action, Clientele seeks judicial review of PASA's decision to make the Rules. This review is sought under the Promotion of Administrative Justice Act 3 of 2000, alternatively under the principle of legality. Mr Cockrell SC, for Clientele argued that I should find for Clientele on both the main and alternative causes of action.
11. PASA resists. It says, by way of preliminary objection that the Reserve Bank and PASA's member banks should have been joined in the application but have not.
12. Under section 10(1)(c)(1) of the South African Reserve Bank Act 90 of 1989 the Reserve Bank may "perform such functions, implement such rules and procedures and, in general, take such steps as may be necessary to establish, conduct, monitor, regulate and supervise payment, clearing or settlement systems "
13. Under section 3(2)(c) of the National Payment System Act " The Reserve Bank may recognise a payment system management body as contemplated in subsection (1) if the Reserve Bank is satisfied that— the payment system management body will enable the Reserve Bank to adequately oversee the affairs of the payment system management body and its members and will assist the Reserve Bank in the discharge of the Reserve Bank's responsibilities, specified in section 10(1)(c)(i) of the South African Reserve Bank Act, regarding the monitoring, regulation and supervision of payment, clearing and settlement systems."

14. Under section 3(2A) (a) “The Reserve Bank may, if it is no longer satisfied that the payment system management body complies with the requirements specified in subsection (2) and after it has consulted with the members of the payment system management body, withdraw its recognition of the payment system management body.”
15. Under section 3(2A) (b) “Such withdrawal of recognition will in no way affect any arrangements made, including rules and agreements, or authorisations given by the payment system management body prior to such withdrawal, unless otherwise determined by the Reserve Bank.”
16. In my view, these provisions give the Reserve Bank a direct, substantial and legal interest in the outcome of this application which may be affected prejudicially by its non-joinder. The purpose of the application is to change the Rules. PASA does not oversee the Reserve Bank. It is the other way round.
17. Regarding the non-joinder of PASA’s member banks, PASA says that it represents the interests of its member banks in the Payment System Management Body but that PASA is not entitled to represent them in legal proceedings. PASA makes the point that a change in its Rules will impact how its member banks operate and will result in significant expenditure for them.

18. Under clause 10.1 of PASA's constitution, its member banks shall, among other things, participate in the National Payment System in such manner as to enable PASA to execute its mandate to minimise risk in the National Payment System and PASA's members shall participate in the National Payment System with due skill, care and diligence. PASA's member banks too, have a direct, substantial and legal interest in the outcome of this case. It is not necessary for me to decide now whether or not a valid Rule change could allow a drop in banking standards.

19. The prayers in the notice of motion make provision for this court effectively to promulgate, at least during a period of suspension, Rules regarding payment. This highlights the need for the Reserve Bank and PASA's member banks to be joined.

20. In the replying affidavit of Clientele, the bald statements are made that "*I understand that PASA has provided all its members with a copy of Clientele's founding affidavit*" and "*Clientele has also informed the SARB of the proceedings.*" In my view, this is too little too late. A proper opportunity to oppose the relief sought is required in the absence of clear waiver which can only be made with a full appreciation of the right waived.

21. I make no finding on any issue other than non-joinder.

ORDER

1. The application is postponed sine die, with the question of costs reserved.

2. In the absence of waiver of their rights under this order by the Reserve Bank and the PASA member banks listed in Annex AA1 to the answering affidavit, the applicants are, by 30 September 2023 to serve on the Reserve Bank and the banks listed in Annex AA1 to the answering affidavit copies of all the papers in the matter to date, including both sides' heads of argument and this judgment and order. Service need not be by Sheriff. Service by electronic means is allowed provided it is effective.
3. If the Reserve Bank or any of the other banks wish to oppose the relief sought in the application they must deliver a notice of intention to oppose within 10 court days of receipt of the papers.
4. Thereafter, they may deliver answering affidavits within 15 court days of the notice of intention to oppose on all issues in the papers to date, including the question of remedy.
5. The applicants may then deliver a supplementary replying affidavit within 15 court days of receipt of the answering affidavits, if any.

GC Wright

Judge of the High Court

Gauteng Division, Johannesburg

HEARD : 4 September 2023

DELIVERED : 4 September 2023

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