

SOUTH AFRICA / JUDGMENT

Joint Stock Company and Vavarinskowye v ABSA Bank Ltd [2006] ZAGPHC 258; 11778/06 (15 November 2006) [2006] ZAGPHC 258

COURT
High Courts - Gauteng

BEFORE
Willis

CASE / FILE NUMBER
11778/06

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IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISIONS JOHANNESBURG)

CASE NO: 11778/06

DATE: 15 November 2006

Joint Stock Company and VavarinskowyeApplicant

and

ABSA Bank Limited.....Respondent

WILLIS,J:The issue in this application concerns the right of the Applicant to claim the credit balance in a bank account. More particularly, the Applicant seeks to enforce its rights to certain funds, which stood to the credit of a bank account held with the first respondent, in the name of the sixth respondent, prior to the first respondent's appropriation of these funds on 10 December 2005. The dispute between the applicant and the first respondent arrives from the following factual matrix: -

- [1] At all times relevant to this application, the sixth respondent held a banking account (known as the 1313 account) with the first respondent.
- [2] Immediately prior to 14 June 2005 the 1313 account was dormant with a nil balance.
- [3] From June 2005, by arrangement between the applicant and MDM (the main contractor in an engineering contract between the parties), the 1313 account was used to facilitate payment by the applicant to MDM and various subcontractors under the contract.

- [4] In pursuance of the above the Applicant made deposits between June and October 2005 totally approximately R82,7 million into the 1313 account.
- [5] During the same period various payments totalling approximately R54.50 million were made from the 1313 account to MDM and subcontractors.
- [6] On 9 December 2005, there was a balance of R28 244 780,59 standing to the credit of the 1313 account and earmarked for payment to said subcontractors.
- [7] On 10 December 2005 the first respondent appropriated this sum of R28 244 780,59 from the 1313 account and set it off the general

indebtedness of MDM and the sixth respondent to the first respondent.

This application is founded on the contention of the first respondent's actions were unlawful and that the funds standing to the credit of the 1313 account vested in the applicant and that such funds were not available to discharge the obligations of MDM and the sixth respondent to the first respondent.

It is important to emphasise that there exists no contractual nexus between the applicant and the first respondent. This is common cause.

The applicant's claim is not based on contract nor is it based on delict nor is it based on enrichment. The basis of the applicant's claim is as Mr Joubert for the applicant submitted is 'quasi-vindictory'.

The applicant's case, without putting to a fine a point on it, is that the funds standing to the credit of the 1313 account belong to it (i.e. the applicant). It is clear from the papers that the first respondent was aware of the close relationship which existed between the applicant and the sixth respondent.

The first respondent was also aware that payments were made into this 1313 account for certain specific purposes, more particularly the payment to subcontractors. It is also clear from the papers that the first respondent was aware that these funds were closely monitored and indeed controlled by the applicant. The first respondent pertinently denies that the applicant had any interest in the funds once they were deposited into the account, and that even if it did, that the first respondent would have been aware of this fact, notwithstanding the fact, as I have already indicated, that the first respondent was aware of the close relationship between the applicant and the first respondent and between the applicant and the sixth respondent. I do not think I can find that it is a common cause fact that:

[I] the funds, once in the account 1313, remained as a matter of objective fact, the funds of the applicant; and even if I am wrong in this regard that

[ii] The first respondent knew that this was the case.

There is no case law directly in point. -I was referred by Mr Joubert to among others, to the cases of McEwen HO vs Hansa 1968(1) SA 465(A), Dantex investments Holdings Pty Limited vs National Explosives Pty Limited in Liquidation 1990(1) SA 736(A) and the judgment of Maian J in Barnard, Jacobs Mellet Securities Pty Limited vs Matuson 2005 CLR 1(W).

In my view, these cases do not assist the applicant. They deal with the situation where as between the parties, there was an agreement or knowledge that one held the funds on behalf of another. Mr Joubert also referred me to English law cases, viz. Barclays Bank vs Quistciose Investments [1968]3 ALL er 651(HL) and Carreras Rothmans vs Freeman Mathews (1985] ALL ER 155 (Ch. D).

In both of these cases (in the Barclays Bank vs Quistciose case at 656d to h and in the Carreras Rothmans vs Freeman Mathews's case at 164 g) it was emphasised that notice to the bank, in other words notice to a party in the position of the first respondent in this particular case, of the arrangement in question was of critical importance in order to prevent set-off.

I accept as Mr Joubert later argued that this of course is, English authority. Nevertheless, in the absence of clear authority in South African Law, I consider this authority persuasive indeed.

On the basis of the well-known principles in Plascon- Evans case, I cannot find that the disputes that have been raised in these papers are not genuine or real and that the matter can be decided on the papers.

I wish to emphasise that this judgment in no way determines the actual merits of the case and that there is nothing to prevent the applicant subsequent to this order from proceeding by way of trial. I accept that it may well be that the contentions which the applicant has advanced then in these papers ultimately may be proven to be correct.

I have considered whether I should refer the matter to trial, or to oral evidence, but I can see no useful purpose in so doing. There will be no real prejudice to the applicant if it is to proceed afresh way of a trial action I insofar as costs I are concerned, I do not believe that the respondent's attitude in opposing the previous application for a postponement brought by the applicant was so unreasonable that in all the circumstances of this case it should be mulcted in costs.

The respondents had been successful overall and it seems appropriate to me that they should succeed in obtaining an order for all the costs in this particular application. It is clear that this is a very important matter and a difficult one. The use of two counsel on both sides was justified.

The following is the order of the court:

The application is dismissed with costs which costs are to include the costs of two counsel and the costs previously reserved in this matter.

Counsel for the Applicant: ZF Joubert SC (with him, FB Strydom)

Attorneys for the Applicant: Bowman Gilfillian

Counsel for First Respondent: PF Rossouw SC (with him WJ Steyn)

Attorneys for First Respondent: De Vries Inc.

Counsel for Second to Fifth Respondent: DM Bealy SC

Attorneys for Second to Fifth Respondent: Kezenranderee

Counsel for Sixth Respondent: Kolbe

Attorneys for Sixth Respondent: Lamham and Love

Date of hearing: 15 November 2006

Date of Judgment: 15 November 2006

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