

SOUTH AFRICA / JUDGMENT

Parker v Standard Bank (AR218/15)

[2016] ZAKZDHC 7 (10 February 2016)

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COURT

Kwazulu-Natal High Court, Durban

BEFORE

D Pillay, Koen, Booyens

CASE / FILE NUMBER

AR218/15

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IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION,

PIETERMARITZBURG

CASE NO: AR218/15

DATE: 10 FEBRUARY 2016

In the matter between:

J

PARKER.....APPE

LLANT

Vs

STANDARD

BANK.....RESPONDENT

JUDGMENT

Date of hearing: 03 February 2016

D. Pillay J (Koen J et Booyens AJ concurring)

- [1] This appeal against the judgment of Steyn J is before us by leave of the Supreme Court of Appeal. The appellant is a customer of the respondent's private bank division. She authorised her erstwhile 'cultural husband' Mr Valodia to operate her account with the respondent. At some point she realised that he was unscrupulous. She wanted to restrict his authority to transact on her account.

[2] In a telephonic conversation held on 5 February 2008 with Ms Gugu Nene an employee of the respondent the appellant issued an instruction the gist of which was recorded by Ms Nene in the following terms :

‘Jasmeen [the appellant] phoned to say that everything that Mohammed [Mr Valodia] asks us to do we must always confirm with her.’

[3] Ms Nene uploaded this instruction as a history note onto the respondent’s computerised records. Notwithstanding the instruction the respondent paid out on cheques from the account to the total value of R531 380.00. The appellant claims reimbursement of those payments with mora interest. Her cause of action is based on the breach of the telephonic instruction always to confirm with her everything that Mr Valodia asked the respondent to do.

[4] In the trial court the appellant relied on four telephonic discussions with the respondent’s employees. In this appeal Mr Tobias for the appellant helpfully narrowed down the evidence to the interpretation of the single instruction cited above. The concession by counsel for the respondent Mr V Naidoo SC that the instruction amounted to a limitation or restriction of Mr Valodia’s powers narrows the issues further. His concession however did not go so far as to accept that the limitation was on the powers of Mr Valodia to operate the account. Nevertheless he was unable to state what the practical effect of the limitation was if not a limitation on Mr Valodia’s power to transact on the appellants’ account.

[5] Instead Mr Naidoo sought to persuade the court that it should consider:

- i. the context in which the appellant issued the instruction;
- ii. whether there was a meeting of minds between the appellant and the respondent’s employees sufficient to form a contract that imposed obligations on the respondent;
- iii. Mr Valodia’s authority to operate the account was given in writing by the appellant, which rendered the respondent vulnerable to possible claims by Mr Valodia unless the appellant gave the respondent a written instruction to terminate his mandate.

[6] Mr Naidoo conceded that the respondent would act on telephonic instructions to limit transactions on the account but persisted that

such instructions would not apply to cheques that Mr Valodia issued against the account for as long as his authority to operate the account remained in force.

[7] I agree with Mr Naidoo that context matters. But the starting point of any interpretation must be the text itself. The words ‘everything’

and ‘always’ leave no doubt that the limitation was in the broadest terms. The instruction was to ‘confirm’ with the appellant. By no stretch of any linguistic gymnastics can ‘confirm’ be synonymous with ‘monitor’ as suggested by the respondent. The plain meaning of the text did not go so far as terminate Mr Valodia’s authority to operate the account. When the appellant issued the instruction she did not want to terminate his authority. She was content to allow certain expenses like the levy for their building to be paid from the account if first confirmed by her.

[8] The undisputed context in which the appellant issued the instructions was that the account was overdrawn to the tune of R200 000.00; Mr Valodia was applying for an extension of the overdraft; the appellant saw no reason for the extension because she was expecting to receive funds into the account; Mr Valodia was unscrupulous; the appellant did not want Mr Valodia to transact her account without her prior confirmation.

[9] Mr Naidoo cited the appellant’s evidence to establish the full terms of the instruction in his heads of argument as follows;

i. ‘From now on I want to confirm everything Mr. Valodia wants with regard to that account.’

ii. ‘He will tell you that he has power of attorney but you need to tell him that we are not taking any instructions from you anymore. Anything and everything you need from the account you need to get your wife to call in and confirm with us.’

iii. ‘When he calls in and needs information you will phone and confirm with me first. I will give you the go ahead whether you need to supply that information or not.’

[10] This uncontested evidence of the applicant clarifies and fortifies the wide ambit of her instruction. On any basis Ms Nene could not have been in any doubt that the respondent’s employees had to call the appellant for everything that Mr Valodia wanted in respect of the account. As Ms Nene formulated the history note it was her understanding of the instruction. The clarity

of her text would also have left other employees of the respondent in no doubt as to what the instruction meant.

[11] Mr Naidoo conceded that none of the respondent’s employees called the appellant until 27 February 2008 when Ms Nene advised her that over R500 000.00 had been withdrawn from her account. None of them informed her of the receipt of R689 162.69 into her account on 20 February 2008 as she had requested. None alerted her to Mr Valodia syphoning out the total of R531 380.00 by issuing six cheques on the account between 21 and 25 February 2008. None informed her when she communicated the restriction on Mr Valodia’s powers to the respondent that the respondent would not act on her telephonic instruction unless she confirmed it in writing.

[12] Mr Valodia’s authority under the written mandate to the respondent when she opened the account on 3 October 2006 enabled him to

‘deposit and withdraw funds, apply for a cheque books, obtain bank statements, stop payment of cheques and close or transfer the account(s) subject however to the following restrictions.’

The mandate form had no restrictions.

[13] It was common cause that the respondent would act on oral instructions. It was also common cause that the respondent stopped payment of the cheque drawn by Mr Valodia for R156 000 on 27 February 2008 on the oral instruction of the appellant. After the fact insistence that the oral instruction had to be confirmed in writing in order to terminate Mr Valodia’s authority was technically also complied with when Ms Nene reduced the instruction to writing by uploading it onto the respondent’s computerised systems.

[14] I find that the appellant’s instruction unequivocally created an obligation on the respondent to always confirm every act that Mr Valodia sought to perform under her mandate to the respondent. This included issuing the cheques for which she seeks reimbursement.

The respondent breached this obligation. In doing so it also failed in its written undertaking to the appellant when she opened the account that it would ‘always strive to serve and protect her best interests’ and assist her with her financial

requirements ‘in a professional manner.’

[15] The appellant’s case was always based on the breach of the instruction which on acceptance amounted to a binding contract. Any doubt about her cause of action was eliminated after the respondent, having ventilated its objection to the particulars of claim before Gorven J, withdrew its objection. The appellant reiterated during the trial that its claim was not in delict for damages but for reimbursement or a reversal of the unauthorised debits. The trial court erred in finding that the appellant had not established any breach of contract.

[16] As the appellant’s claim is in contract and for the reversal of the unauthorised debits she seeks to be restored to her status ante quo. Therefore her claim for mora interest is inappropriate. She is entitled to the interest raised on each unauthorised debit from the dates they were made at the various rates payable from time to time to the date of payment.

[17] As for the costs reserved before Gorven J, Mr Naidoo correctly conceded that they should be awarded to the appellant in view of the respondent withdrawing its objection. Costs of the appeal must follow the result.

[18] The appeal succeeds with costs. The order of the trial court is set aside and replaced with the following order:

‘The respondent shall pay the appellant the following:

- a. R289 820.00
- b. R42 000.00
- c. R100 000.00

- d. R450.00
- e. R46 841.00
- f. R52 269.00
- g. interest on each unauthorised debit in a-f above from the dates they were made at the various rates payable from time to time to the date of final payment.
- h. The costs reserved by Gorven J.
- i. Costs of suit.'

D. Pillay J

Koen J

Booyens AJ

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