

IN THE HIGH COURT OF SOUTH AFRICA (SOUTH GAUTENG HIGH COURT, JOHANNESBURG)

CASE NO: 37151/2013

In the matter between.

SPARAX TRADING

Applicant

And

ABSA BANK

Respondent

JUDGMENT

MATTHEE AJ:

[1] In this matter the Applicant seeks Leave to Appeal, to the full bench of the South Gauteng High Court, against paragraph one of the order of my judgment, handed down on the 27th February 2014.

[2] Having considered the arguments of the Applicant, I am unpersuaded that the Applicant has a reasonable prospect of success on appeal.

[3] Accordingly, the application is dismissed with costs.

KEITH MATTHEE

ACTING JUDGE OF THE HIGH
COURT

(Africa Transcriptions (Pty) Limited

IN THE HIGH COURT OF SOUTH AFRICA

(SOUTH GAUTENG HIGH COURT. JOHANNESBURG)

CASE NO: 37151-13

DATE: 27-02-2014

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In the matter between

SPARAX TRADING

Applicant

and

ABSA BANK

Respondent

J U D G M E N T

MATTHEE J: This is an ex tempore judgment. In this application the applicant seeks an order that the respondent, within two days of service 20 of this order upon It, credit the applicant's attorney's trust account with the sum of R2.716625.00. from the account held at the respondent's East Rand Branch under account number 4068021652. The applicant also then seeks the costs of the application.

At the hearing of the matter it became apparent that the amount now sought by the applicant is R809 866.12. as a result of the respondent having already paid the balance of the said sum back to the applicant. Briefly the history of the matter is as follows;

The applicant and the respondent, along with Mr Daniel Jacobus Zletsman, the latter in his capacity as a surety, during March 2007 entered into an agreement In terms of which the respondent opened a cheque account on behalf of the applicant, with the account number 4068021652. Part and parcel of that transaction was that the respondent, which is a bank, extended overdraft facilities to the applicant, In accordance with the agreement between the parties.

10It is the respondent's case that as of November 2012 the said cheque account was overdrawn in the sum of R857 256.30 and as a result of that, the respondent issued summons against the applicant, and against the said Mr Zietsman in his capacity as a surety, for the amount, during January 2013.

The applicant filed a notice of intention to defend in that matter, whereupon the respondent applied for summary judgment. The summary Judgment was dismissed by the court. Thereafter, on 11 June 2013, the applicant filed its plea and after this there was an exchange which has given rise to the present application. The exchange involved 20 an amount of money, namely the figure that was first claimed In the notice of motion, which was deposited by a client of the applicant Into the said bank account. This occurred a few months after the particulars of claim and the plea in June 2013 had been filed with the High Court.

As a result of this deposit Into the bank account, the respondent bank took the following view of what should transpire: This view is contained in a letter from the respondent's attorney dated 30 September 2013 and I quote:

"Our instructions are that the deposit of R2, 716,625.00 was made into the overdue account number 4068021652 (hereinafter referred to as "the account") on 19 September 2013 which has resulted in a credit balance in the account in the amount of R1, 826,758 88. As the account has a legal hold on it. as a result of the pending legal proceedings instituted against your client, your client will not be able to access any credit balance on the account. We therefore request you to ascertain from your client into which account these credit funds must be transferred. Our client will further deduct interest and legal fees from the credit balance on the account as per the agreements between our clients. In light of what has transpired, we suggest without prejudice to any of our client's rights, that your client tenders our client's costs to 20 date on the attorney and own client scale, whereafter the matter will be settled."

In response to the allegation in the particulars of claim, the plea reads as follows:

I quote from the particulars of claim first.

"The first defendants cheque account Is overdrawn..."

.the first defendant there being the applicant in the present matter,"...and the balance owing as at of 13 November 2012 was R857 256.30 plus interest at the rate of 19.25% per annum, capitalised monthly from 14 November 2012 to date of payment, both days inclusive."

The response by the applicant in Its capacity as first defendant in that matter is as follows:

"Each and every allegation is denied as If 10 specifically traversed and the plaintiff is pul to the proof thereof."

The gist of the respondent's case is that of set off, that the applicant owes it money and this money is in this bank account and it is entitled to retain It pending the trial that has been set down for May, when it will be decided whether or not this money is in fact owed.

In seeking to support its case, at page 01 of the record, paragraph 33 we read the following by the respondent:

"I am advised that it is uncontroversial that the respondent's entitlement to apply set off does not depend on whether the applicant admits such indebtedness, but whether such indebtedness is clear and easily ascertainable or calculable."

In support of this. Mr Botha, who appeared on behalf of the respondent, furnished me with case law. The essence of which was to support this contention contained in the answering affidavit of the respondent. The problem the respondent has in the present matter, is the court is faced with a denial by the applicant that it owes any money.

So when it says where such indebtedness is clear and easily ascertainable or calculable, that simply does not apply in the present matter. There was a suggestion at one stage, although as I understood Mr Botha, he did not persist with that with any great vigour, that the certificate of balance which forms part of the papers, should be sufficient for the court to decide what amount is owed and therefore that set off can apply. If in fact set off can apply in these circumstances, and in that regard for purposes of the present Judgment I find no need to make any ruling, the problem the respondent has, is that the issue of the reliability of the certificate of balance is going to be resisted by the second defendant when it comes to the trial.

But even if it is found that the certificate is in order that has no bearing on the present applicant. It is common cause that the contract between the applicant and the respondent was an old contract. And there was no reference in it to a certificate of balance being prima facie proof of the amount that is outstanding.

All the court has before it as regards an amount, is what is contained in the plea at this stage. And the plea says it denies the allegation that any amount is outstanding. (Given the plea the reliance of respondent on the reference only to interest in the Summary Judgment is not persuasive.) Accordingly, even accepting certain things as I have done for the respondent in the present matter, set off simply

cannot apply Which then leaves the situation that money has been deposited into this account, which belongs to the applicant, via a third party and as things stand now, there is nothing before me to support retention of that money by the bank.

Obviously when the trial comes around, and evidence is led, a very different conclusion might be reached. But at this stage I simply do not have anything before me other than what is stated in the plea and to the extent that Mr Botha was able to persuade me to rely on the summary judgment affidavit and on the replying affidavit.

At the end of the day, the plea is very clear that it denies liability. 10 It denies that the account is overdrawn and that any money is owed. Accordingly, I find no basis for what the respondent seeks to convince me of at this stage, viz. that the bank is entitled to retain the money which is in the bank account. Accordingly, I find that the applicant is entitled to the relief It seeks with proviso that the amount It seeks is adjusted to accommodate the amount of money which has already been paid back by the respondent to the applicant.

Which then leaves the issue of costs. The applicant in addition to asking for an order that the bank be directed to release that money to It also asked for costs of this application. I am of the view, and here I 20 agree with Mr Botha, that this is an issue that should be reserved for determination by the trial court.

As if it does emerge at the trial, that in fact there was no defence and that this simple denial that there was money owing, or that they were overdrawn is not true, and absent any tender by the applicant to at least pay back the money that the respondent says It owes, then quite clearly In my opinion the trial court would attend such conduct with the appropriate costs award which would include the costs of this application.

Accordingly I would make the following order.

ORDER

- 1) The respondent is ordered, within five days of this order being served upon it, to pay to the credit of the applicant's attorney's trust account

held under the name of Larry Marks Attorneys Trust Account, held at
First National Bank, Balfourpark Branch,
10 Johannesburg. Branch code 2....., under account number
6....., the sum of R809 866.12.
2) The costs of the application be reserved for determination by the trial
court.

APPEARANCE FOR THE APPLICANT: ADV BOTHA

APPEARANCE FOR THE REvSPONDENT: ADV COHEN

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I the undersigned, hereby certify that. In as far as It Is audible, the
aforegoing is a VERBATIM transcription of the proceedings as was
ordored to be transcribed by iAfrica Transcriptions and which had been
recorded by. Digital Court Recording Services by moans of a digital
recorder in the matter of:

SPARAX

TRADING
Applican

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10 and

ABSA BANK

Respondent

CASE NO.

37151*13

RECORDED AT:

Court: Johannesburg

CERTIFICATE OF VERACITY

Court Nr: Unknown

Stenographer: Unknown DATE OF HEARING:

27 February 2014

20 ORDER TO TRANSCRIBE.

Transcribe audio CD as ordered

ORDER COMPLETED ON:

28 March 2014.

NO OF CD's:

Dropbox

NUMBER OF PAGES:

0

PLEASE NOTE

The following problems were encountered during transcription of the audio record:

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1. Where no clear annotations were furnished, names were transcribed phonetically.