

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 4883/2002

DATE: 21/09/2010

In the matter between:

AFRIQ MEDICAL DISTRIBUTORS

Plaintiff

And

FIRST NATIONAL BANK

Defendant

JUDGMENT

LEDWABA, J

[1] This matter was initially instituted as motion proceedings. The plaintiff herein was the applicant and the defendant was the respondent in the said proceedings. In the application proceedings, the applicant (plaintiff) sought for an order in terms whereof the defendant (First National Bank) should release to the applicant the funds in account number held at Hatfield branch.

[2] The motion proceedings consisted of the founding affidavit, replying affidavits and further supplementary affidavits.

[3] The application was heard by Goodey AJ and on the 12th July 2004 he ordered that the matter be referred to trial, that the founding affidavit stand as a simple summons, and that the Rules of Court will be further applicable with regard to the delivery of a declaration and the other pleadings that are to be exchanged.

[4] The plaintiff filed a declaration on 2 November 2007 and the defendant filed a plea and a special plea in December 2007. The plaintiff duly delivered a replication to the defendant's special plea on 24 March 2008.

[5] The relief sought by the plaintiff in the declaration is the following:

"1. Betaling van die bedrag van R2 043 075.42;

2. Rente op die bedrag van R2 043 075.42 teen 'n koers van 15,5% a tempora morae te wete 21 Desember 2001 tot datum van betaling alternatiewelik teen sodanige rentekoers of rentekoerse soos wat die Verweerder van tyd-tot-tyd vanaf gemelde datum op kredietbalanse op lopende rekening in terme van die partye se ooreenkoms tot Eiser se rekening moes krediteer.

3. Koste van die geding;

4. Alternatiewe regshulp."

[6] On 13 October 2009 the plaintiff made an application to amend the declaration to read as follows: *"1. Deur die vervanging van die bestaande paragraaf 2 met die volgende:*

"Die Verweerder is first Rand Bank limited h/a Eerste Nasionale Bank, 'nmaatskappy

behoorlik geregistreer en geïnkorporeer kragtens die Wette van die Republiek van Suid-Afrika van 1ste Vloer, merchant Place 4, h/v Fredman Drive en Rivonia weg, Sandton."

2. Deur die wysiging van die bedrag R2, 043,075.42 in paragrawe 4, 6, 7, 7.2 en bedes 1 en 2 daarvan na "R2, 012,593.24"

3. Deur die wysiging van die bestaande paragraaf 5 deur dit te vervang met die volgende: "Die Eiser behoorlik verteenwoordig deur Mnr Braam cilliers van Le Grange prokureurs het op 20 Desember 2001 die bedrag van R2,000,000.00, synde die bedrag gedeponeer op 29 November 2001 in die rekening gehou deur die Eiser by die Verweerder soos vermeld in paragraaf 3 supra opgevra deur die gemelde deposito beskikbaar te stel, soos wat hy in terme van die partye se ooreenkoms geregtig was om te doen, maar desieteenstaande aanvraag en aanmaning weier en/of versuim die Verweerder om gemelde bedrag of enige bedrag aan die Eiser te betaal of beskikbaar te stel."

Defendant did not object and the amendment was granted accordingly,

[7] When the trial commenced the defendant wanted to amend the pleadings by filing a special plea of prescription. Plaintiff objected to the said proposed amendment.

Defendant decided to withdraw the said special plea and the initial special plea that was raised in the pleadings.

[8] The plaintiff adduced evidence of Mr. Hardy. G. Steyn (Mr. Steyn) and closed its case provisionally. Thereafter the defendant closed its case without calling any witnesses.

[9] Mr. Steyn testified that he opened an account with the defendant (FNB) at its Hatfield branch in his personal name trading as Afriq Medical Distributors, after Afriq Medical

Distributors was incorporated, the account was registered in the name of the company, the plaintiff herein. Mr. Steyn was the sole shareholder and director of the plaintiff.

[10] The main issue to be determined is whether there was a fraud or forgery in the documents that were presented in purported compliance with the provisions of the 'letter of credit' (the LC).

[11] I will start with the summary of the background which gave rise to the LC being issued and how the said LC was dealt with by various parties.

[12] Two LC's are involved in this matter. The applicant was Jin Young Trading in Korea a buyer of diamonds. The issuing bank was Kookmin bank in Korea. FNB was the bank appointed as advising bank of Efstral the beneficiary, its client, regarding the credit. The first LC was amended on a number of occasions. The amendments also made FNB to be a confirming bank which was entitled to buy the said LC, see page 67 and 68 of the Index: Pleadings.

[13] The second LC was established when the first LC was transferred. Efstral was the applicant under the transferring LC, FNB performed the function of the issuing bank and Metal & Steel Construction (Pty) Ltd herein after referred to as (MSC) which Mr Steyn was the sole shareholder and director was the second beneficiary in the LC, the first beneficiary being Efstral. See page 79 and 86 of the Index: Pleadings.

[14] The LC required three documents to be presented before payment could be made under it viz, a signed commercial invoice in threefold, a packing list in threefold and a copy courier receipt.

[15] MSC in purporting to comply with the requirements of the transferred letter of credit presented documents to ABSA, in early November 2001 and on 12 November 2001, sent documents to ABSA. See pages 91-94 of the Index: Pleadings.

[16] The contents of the document clearly cannot be correct because they reflect a transaction that occurred prior to the delivery of the diamonds mentioned in the LC.

[17] It is important to mention that on the oral evidence of Mr. Steyn no diamonds were delivered on or before the date in the documents being the 10 November 2001. Mr. Steyn said ABSA rejected the documents out of hand. The documents were drafted by MSC and presented to ABSA and ABSA presented them to FNB.

[18] FNB initially did not realise that the courier receipt was faulty and it confirmed, however, after discovering the errors, before the obligation to pay under the LC arose, it refused to pay and it managed to trace the R2 million emanating from the MSC account into which ABSA had made payment after FNB's confirmation to the account. It is common cause that ABSA discounted the LC and paid the proceeds thereof in two tranches to MSC, as follows:

(i) R1 834 254,50 on 15 November 2001.

(ii) R2 919 025.00 on 28 November 2001

Total amount paid by ABSA is R4 753 279,50

[19] Immediately before the second tranche was paid into the MSC account, on 28 November 2001 the balance in the MSC Account was R23 017, 88. Thereafter the balance was R2 942 042, 88 after the amount of R2 919 025 was deposited. From this

balance, on 29 November 2001, an amount of R2 million was paid into the plaintiff's account held at defendant's bank, see page 153 of the Index: Pleadings

[20] The amount in the plaintiff's account on which the hard hold was placed, can be traced directly to the discounted amount paid by ABSA to MSC.

[21] Importantly, Mr. Steyn in his evidence conceded that it was a tacit term of the contract between the plaintiff and FNB that should an amount deposited into plaintiff's account be traced to a fraudulent transaction or if the monies deposited are proceeds of crime, FNB would not be obliged to pay such proceeds.

[22] Advocate P. F. Louw SC submitted on the defendant's behalf that the deposit on 29 November 2001 of R2 million into the plaintiff's account constituted proceeds of a crime because false documents were fraudulently submitted to ABSA for payment in respect of the LC.

[23] Mr. Louw further argued vigorously that even if Mr. Steyn or MSC did not have knowledge of the fraud if there is a forged document in the LC transaction the effect thereof would be that the fraud unravelled the LC.

[24] Advocate Geach SC on behalf of the plaintiff, correctly in my view, submitted that since FNB relies upon fraud as a defence the onus is on it to prove fraud by presenting sufficient evidence.

[25] Mr. Geach eloquently submitted that there was no agreement between the parties to adduce evidence at the trial by way of affidavits and consideration of the evidence on

affidavit is inappropriate as the whole point of proceeding to trial was to hear oral evidence. Since the defendant chose not to call any witnesses the plaintiff did not have an opportunity of cross-examining defendant's witnesses.

[26] He argued that the defendant failed to prove any fraudulent conduct on the part of the plaintiff. The matter would then be decided on the plaintiff's evidence only. He further argued that pleadings do not constitute evidence, nor do propositions put in cross-examination. He submitted that the plaintiff was therefore entitled to succeed.

[27] It is indeed so that the defendant did not call any witnesses. However, in determining whether plaintiff should succeed with its claim or not, the court should consider the value of the evidence presented together with the contents of the pleadings, including the affidavits.

[28] In the evaluation of the evidence the court cannot disregard the effect of cross-examination by the defendant's counsel on the evidence of Mr. Steyn and the concessions made by Mr. Steyn.

[29] Regarding the LC, one of the requirements of the LC that a copy of the courier receipt had to be presented. Mr. Steyn when he testified admitted that MSC received the Chaddi courier receipt and that it handed it to ABSA under the LC. FNB did receive the courier receipt.

[30] The said receipt reflects the delivery of diamonds at the Hong Kong Airport on 10 November 2001, see page 96 of Index: Notices, that is two days prior to the receipt being represented to ABSA for payment. However, Mr. Steyn testified that the diamonds

had not been delivered.

[31] It is clear from the papers that:

31.1 The three essential documents to the LC viz, the commercial invoice, the courier receipt and the commercial invoice had falsified information regarding the actual transaction that had to take place in terms of the LC.

31.2 Mr. Steyn said he knew nothing about the falsified information in the said documents. He blamed his 'attorney' Braam Cillier for the mistakes.

31.3 On careful analysis of the facts of this case the payment was triggered by the forged documents.

31.4 What stands out clear from the facts of this case like oil in water is that the monies in the plaintiff's account were proceeds of a transaction which was contaminated.

[32] On the facts of this case, FNB traced the origin of the funds that were in the plaintiff's account. It is trite that if money is in a bank account a client has a personal right to claim the said monies. I think that the plaintiff cannot use a vindicatory action or proceedings to claim the said monies.

[33] The relationship between a bank and the client are regulated by a contract and the tacit terms of the law, for example, it is trite that a bank will have no obligation to pay out funds to its client if it knows that funds are proceeds of a crime. The person who is entitled to the said funds can claim these funds from the bank.

[34] The court must have regard to the weight and totality of the evidence in deciding whether the plaintiff's claim should succeed. This case further depends on the express and tacit contract between the plaintiff and FNB. The plaintiff's counsel submitted that if

there is fraud FNB would not be obliged to release the funds.

[35] On careful analysis of the documents that were submitted to ABSA by MSC it is clear that there was at least a forgery if not fraud FNB was justified in withholding the funds claimed by the plaintiff.

[36] **I therefore, make the following order:**

The plaintiff's claim is dismissed with costs.

A. P. LEDWABA

JUDGE OF THE HIGH COURT