



THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

No precedential significance

Case No: 686/08

NEDBANK LIMITED

Appellant

and

P U INJECTION MANUFACTURING (PTY) LTD

First Respondent

SOUTH AFRICAN RESERVE BANK

Second Respondent

Neutral citation: **Nedbank Ltd v P U Injection Manufacturing**
(686/2008) [2009] ZASCA 61 (29 May 2009)

Coram: STREICHER ADP, CLOETE and LEWIS JJA and LEACH
and TSHIQI AJJA

Heard: 22 May 2009

Delivered: 29 May 2009

Summary: Claim for payment of money from a bank account in which financial rand had been held refused where applicant unable to prove any right to the money.

ORDER

On appeal from: Pretoria High Court (Pretorius and Preller JJ and Makhafola AJ, sitting as a full court on appeal).

1 The appeal is upheld with costs, including the costs of two counsel where so employed.

2 The order of the court of first instance is altered to read:

‘The application is dismissed with costs.’

JUDGMENT

LEWIS JA (STREICHER ADP, CLOETE JA AND LEACH AND TSHIQI AJJA concurring)

[1] The question in this appeal is simple: did the first respondent, PU Injection Manufacturing (Pty) Ltd (PUI) have a claim against the appellant, Nedbank Ltd, for payment of the sum of R4 3242 817.16 plus interest? Its application for an order for payment was granted by the court of first instance, and that order was confirmed on appeal to a full court. Nedbank appeals with the special leave of this court.

[2] The undisputed facts relevant to the determination of the question are these. PUI required funding for a manufacturing business. The funding was to be provided by a company, Olympus Investments Ltd (Olympus), registered in Guernsey, the sole purpose of which, allegedly, was to make financial rand available for the benefit of PUI and another company.

[3] On 22 November 1988 Nedbank, an authorized dealer in terms of the Exchange Control Regulations (RG 45, GG 123, 1 December 1961) as amended, submitted an application on behalf of Olympus to the South African Reserve Bank for the release of financial rand to the value of some R12.5m.

(Curiously, Olympus was incorporated only on 30 November, after its application was made, but nothing in this appeal turns on this.) On 12 January 1989, pursuant to the application, the Reserve Bank approved the release of financial rand in the sum of R12.5m. The beneficiary of the application was said to be PUI. The approval was, however, subject to various conditions, in particular that the financial rand could be released only against the issuing of ordinary shares at a premium in PUI.

[4] Funds introduced from overseas were converted into financial rand and deposited in a financial rand suspense account in the name of P U Injection Manufacturing Pty Ltd / Olympus Ltd at Standard Corporate Bank, Bramley. Some of the financial rand were paid out, amongst others to PUI's account with Standard Merchant Bank, Bramley, leaving a balance of R2 497 793,80 in the financial rand suspense account and R415 027,54 in PUI's account. The papers do not disclose whether shares in the required form were ever issued. On 5 May 1989 the Reserve Bank issued an order to the Standard Bank of South Africa Ltd attaching all funds held in the name of P U Injection Manufacturing / Olympus Ltd in terms of reg 22A(1)(a)(i), pending an investigation by the Reserve Bank. We are not told why the attachment was ordered nor whether there was an investigation, let alone its outcome. Pursuant to the attachment the funds were transferred to the Reserve Bank's account at Standard Bank.

[5] Attachments in terms of reg 22A are, however, subject to the provisions of reg 22A(3) which in effect provides that the Treasury must release funds from attachment, unless they are forfeited in terms of reg 22B, within a period of three years of the attachment. Regulation 22A(3) requires that the Treasury must return the money to the person 'in whose possession it has been found or the person entitled thereto'.

[6] The financial rand attached were in fact released on 22 October 1992, three years and five months after attachment. The funds, plus interest, were transferred by Standard Bank to Nedbank (on the instruction of the Reserve Bank) by means of a SWIFT (Society for World Wide Interbank Financial

Telecommunication) message. The beneficiary customer was stated to be Olympus. It is not disputed that SWIFT messages inter banks are binding. Since the money was regarded as foreign currency, being financial rand, it could be paid out only with the permission of the Reserve Bank.

[7] Some ten years later PUI finally settled its dispute with the Reserve Bank and the Reserve Bank wrote to Nedbank on 25 September 2002 advising that the funds could be released. I shall revert to this letter. When PUI subsequently requested payment of the funds in the Nedbank Olympus account it was advised that all moneys in the account had been paid out to two other entities. PUI maintains that Nedbank is nonetheless obliged to pay to it the sum transferred by Standard Bank in 1992 since it, and not Olympus, should have been the beneficiary of the payment.

[8] PUI's claim is founded on the assertion, made in the founding affidavit, that the SWIFT message ought to have referred not to Olympus, but to PUI Manufacturing (Pty) Ltd/ Olympus. PUI contends that this is so since the sole purpose of Olympus was to pay funds into an account for the benefit of PUI. The assertion is not substantiated by anything else. There is no such entity as PUI Manufacturing (Pty) Ltd/Olympus. And of course the entitlement of PUI to the funds paid by Olympus was dependent on the issue of shares in the company to Olympus. There is no evidence – and not even an allegation – that those shares were issued. There is thus nothing to suggest that PUI was entitled to the funds at any stage.

[9] PUI nonetheless contends that the Reserve Bank letter of 25 September 2002 to Nedbank's legal adviser amounted to an instruction to Nedbank to pay the moneys in the Olympus account to PUI. The letter stated that the matter between the Exchange Control Department of the Reserve Bank and PUI/Olympus had been 'settled', and that the funds paid in to Nedbank in October 1992, plus interest, should be transferred to the trust account of PUI's attorney.

[10] The letter does not, contrary to PUI's contention, confer any right on PUI. It does no more than indicate that the funds may be released in view of the settlement. The Reserve Bank, in the letter, does not purport to give any right to PUI to claim payment, nor could it do so. After all, it had some ten years previously, released the funds from attachment, hence the SWIFT transfer from Standard Bank to Nedbank.

[11] In view of the fact that PUI has shown no right to the funds that were transferred into the Nedbank Olympus account, its claim should have failed and the appeal must succeed.

[12] It is thus ordered that:

1 The appeal is upheld with costs, including the costs of two counsel where so employed.

2 The order of the court of first instance is altered to read:

'The application is dismissed with costs.'

C H Lewis
Judge of Appeal

APPEARANCES:

FOR APPELLANT:

J G Wasserman SC
P T Rood

Cliffe Dekker Hofmeyer Inc
Pretoria

Instructed by

Webbers Attorneys
Bloemfontein

FOR RESPONDENT:

D A Gordon SC
H C Janse van Rensburg

Julian Pokroy Attorneys
Pretoria

Instructed by

Horn & van Rensburg Attorneys
Bloemfontein