IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

26/5/15

Case Number: 7881/14

In the matter between

MVELAS & MAHWANA CONSTRUCTION CC	First Plaintiff
A4 CONSULTANCY CC	Second Plaintiff
MABULELA RAIL & INFRASTRUCTURE SOLUTIONS CC	Third Plaintiff
NQAYIZIVELA TRADING CC	Fourth Plaintiff
PHUPHA-NJALO TRADING SERVICES CC	Fifth Plaintiff
LEATILE TRADING CC	Sixth Plaintiff
BAFAMADI PROPERTY DEVELOPMENT CC	Seventh Plaintiff
And	
ABSA BANK LIMITED	Defendant

JUDGMENT

BAM J

1. On 31 January 2014 the plaintiffs issued summons against the Defendant, ABSA, claiming payment of R1 240 046 70 plus interest.

2. The said amount held by ABSA was transferred to another account on 11 October 2013.

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

26/5/2015
DATE

SIGNATURE

3. It is averred by the plaintiffs that ABSA, contrary to the provisions of a Court order dated 12 March 2013, paid out the said amount. ABSA defends the action and denies the averments.

4. The only question for this Court to adjudicate, as agreed between the parties during a pre-trial held on 22 April 2015, is whether ABSA was entitled to pay out the said amount as a result of the lapse of the order of 12 March 2013 . A separation of the issues in terms of Rule 33(4) is therefore granted.

5. The order of 12 March 2013, issued from this court, citing the plaintiffs as applicants and ABSA as second respondent, reads as follows:

"1. THAT pending action proceedings to be instituted by the applicants against the first respondent;

1.1 THAT the first and third respondent be interdicted and restrained from requesting, withdrawing or accepting any payment from the second respondent from the funds held in account number 4067798268 held in favour of the first respondent at the second respondent's Midrand branch (the "interdicted account") to a maximum of R2 000 000.00 (two million Rand) together with interest at 15.5% a tempore morae to date of payment, or such lesser amount as may currently be held or owing by the second respondent or in favour of the first respondent.

1.2 THAT the second respondent be interdicted and restrained from making any payment of amounts due to the first respondent, (or any third party in respect of any amount due to the first respondent), from the funds held in the interdicted account, up to a maximum of R2 000 000,00 (two million Rand), together with interest 15.5 % per annum a tempore morae to date of payment, or such lesser amount as may currently be held by the second respondent to or in favour of the first respondent;

2. THAT action proceedings be instituted by the applicant within a period of 15 (fifteen) days from the date of granting this order;

3. THAT the first respondent and/or the third respondents pay the costs of this application on an attorney and client scale."

6. It is common cause that the said order, served on ABSA on the same day it was issued, provided that the proceedings, envisaged in the order, had to be instituted against Citra Shine 606 Trading CC, ("Citra"). Litigation between these parties was therefore within the contemplation of all involved

7. On 4 April 2013 under case number 19961/13 the plaintiffs issued the summons against Citra and on 9 April 2013 the summons was served.

8. A simple calculation reveals that the last day for instituting the action, counting 15 court days from 14 March 2013, would have been 5 April 2013. The summons was served on 9 April 2013.

9. On 29 April 2013 the plaintiffs applied for default judgement against Cipra which was eventually granted on 29 November 2013.

10. On 2 December 2013 the plaintiffs' attorney discovered that the amount in question had already on 11 October 2013 been paid out by ABSA .

11. ABSA's main argument therefore is that the interdict had lapsed before plaintiffs had instituted the action against Cipra and, consequently, that it was entitled to transfer the money.

12.There can be no doubt that the action instituted by the plaintiffs against Cipra, namely on the date the date of service, was out of time, albeit only a few days. See *Finishing Touch 163 v BHP Billiton Energy Coal SA* 2013 (2) SA 204, pars. [19] and [20].

13. This, however, is not where the matter ends. What is of importance is that ABSA was not a party in the action between the plaintiffs and Cipra. Accordingly, whether the action was instituted after the 15 days stated in the court order of 12 March 2013, and whether the action was void or voidable, was a question to be addressed by the plaintiffs and Cipra during their litigation. Although ABSA was involved in that it held the money in trust in its capacity as banker, it had nothing to do with the litigation between the plaintiffs and Citra.

14. Accordingly, short of a court order declaring the action void and a nullity, ABSA, cannot hide behind its own assumption that the action had lapsed. The matter between the plaintiffs and Cipra were still pending at the time and the issues between them still had to be adjudicated upon. There is also no indication that ABSA was in any way prejudiced by the initial court order.

15.If ABSA was indeed considered and was of the opinion that the court order restricting it to pay out the money had lapsed at the time the action was instituted, it went unexplained why ABSA waited more than 6 months to transfer the money. It is also not explained why ABSA at that stage decided to transfer the money.

16.It follows that it cannot be found in favour of ABSA that the particulars of claim in question, even when issued after the expiration of the 15 days provided for in the court order of 12 March 2013, had automatically lapsed at any time. ABSA was indeed in breach of the said order.

ORDER

1. The particulars of claim issued by the plaintiffs, as envisaged in the Court Order of 12 March 2013, have not lapsed;
2. The interdict of 12 March 2013, restraining ABSA from transferring the amount of R1 240 046.70, had not lapsed at the time of the transfer on 11 October 2013.
3. Costs to be costs in the cause.

A J BAM JUDGE OF THE HIGH COURT

25 May 2015