

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO:12713/2011

In the matter between:

15/6/2012

FIRSTRAND BANK LIMITED

APPLICANT

And

THE SPAR GROUP LTD

(REG NO 1967/001572/06)

CENTRAL ROUTE TRADING 64 CC

FIRST RESPONDENT

SECOND RESPONDENT

DATE WHENEVER IS NOT APPLICABLE
TABLE: YES/NO.
INTEREST TO OTHER JUDGES: YES/NO.
REVISED.
15/06/2012
DATE
SIGNATURE

JUDGMENT

MAVUNDLA, J.

[1] On the 23 March 2012 I made the draft order Marked X, presented to me by agreement between the applicant's and first respondent's counsel, an order of court . This Order read as follows:

"Having heard Counsel and having read the documents filed of record it is ordered that:

1. It is declared that the first respondent is entitled to the credit balance on account number 62101-769-323 held by the applicant in the name of second respondent.
2. Subject to paragraph 4 below, the applicant is directed to pay the full credit balance referred to in paragraph 1 above to the first respondent.
3. The applicant is authorized to close the second respondent's account referred to in paragraph 1 above, after the applicant has complied with its obligations in terms of the Order.
4. The applicant is permitted to recover its taxed costs from the funds which are currently held in the account referred to in paragraph 1 above.
5. The second respondent is ordered to pay the first applicant's costs of the application."

[2] I indicated that the reasons will follow. I proceed to set out the reasons for the aforesaid order herein below.

[3] The applicant brought the application for the declaratory order, in terms of which it is ordered that the first respondent is entitled to the funds currently held in the banking account number 62101769323, directing it(i.e. the applicant) to pay the funds to the first respondent and permitting it to close the account.

[4] The first respondent, was in principle not opposed to the order sought by the applicant, save that it sought an amended order, along substantially the same lines as reflected in the order marked X referred to herein above.

[5] The second respondent was opposing the matter, claiming that it is entitled to the moneys standing to the credit of the bank account number 62101769323, which is in its name. It prayed for the dismissal of the application with costs.

BACKGROUND FACTS

- [6] It is common cause that Umtshingo Trading 30 (Pty) Ltd (hereinafter referred to as "Umtshingo" at all relevant times traded as Belladonna Kwik Spar, Belladonna Tops Bottlestore and Sonpark Tops, and did not have an account in its name.
- [7] Bella Donna Kwik Spar utilized the account in the name of the Second respondent, under bank account number 62101769323, held with the applicant. All payments received went into this account and all expenses of Bella Donna Kwik Spar were paid from this account. Since March 2010 the applicant allowed no debits against this account. The account still received credits in the form of credit card transactions(the so-called "speed payments") at the Bella Donna Kwik Spar.

[8] A further account was being operated by Sonpark Tops, held in the name of Umtshingo Trading 30 (Pty) Ltd under account number 62117-754-988. This account was credited with credit cards payments at the Sonpark Tops. This account was further debited with installments on a loan from the Applicant to Umtshingo Trading 30 (Pty) Ltd.

[9] The first respondent supplied Umtshingo with certain goods and allowed certain credit facilities to Umtshingo for trading purposes. In order to secure Umtshingo's indebtedness to the first respondent from time to time, Umtshingo agreed to pass a notarial bond over its movable assets¹. Umtshingo fell behind in terms of its payment obligations towards the first respondent, to such an extent that the first respondent acted on the basis of the registered notarial bond to protect its security on 8 March 2010. A provisional order perfecting the notarial bond was granted, although it was not finally adjudicated due to various postponements of the matter. As at 3 March 2010 the outstanding balance owing by Umtshingo towards the first respondent

¹ Vide page 162 of first respondent's answering affidavit para 22 thereof.

was approximately R2,5 39 408. 14.² The fact that Umtshingo was indebted to the first applicant, was never disputed by Paulo, save the exact amount.³ Besides, Paulo has himself acknowledged an indebtedness in the sum of R2, 287 300, 33 alternatively R2 539, 408, 14 as reflected in the account balance summary and certificate of balance compiled by Loraine Patricia Hopley the credit manager of the Spar Group.⁴ The Magistrate proceedings are pending as the result of the intervention of deregistration of Umtshingo but there is an interim order not confirmed nor discharged.⁵

[10] It is common cause that subsequent and consequential to the perfecting of the notarial bond, the first respondent has since taken occupation and possession of the Spar Outlets (referred to as Belladonna Kwik Spar, Belladonna Tops and Sonpark Tops) pursuant to the grant of the provisional order in the Magistrate's Court⁶. It was a tacit term of the agreement that the first respondent would run the

² Vide First respondent's answering affidavit paginated page 166.

³ Vide paginated page 167 para 25; paginated page 313 para 5 of Paulo's answering affidavit in the Magistrate's Court proceedings under case 3020/2010..

⁴ Vide paginated pages 335-6.

⁵ Vide paginated pages 296-298 of first respondent's answering affidavit.

⁶ Vide paginated page 172 of first respondent's answering affidavit at para 35-36 and paginated page 32 para 6.5 of applicant's founding affidavit.

business of the aforesaid business entities for its own profit and loss, pay off all the expenses of Umtshingo through the relevant account 62101769323.⁷

[11] in accordance with the tacit business agreement to run the business of the 3 outlets, cash collected at the three stores amounting to R20 176 311, 41 were paid into the second respondent's bank account by the first respondent. According to the first respondent, during the first 12 months from March 2010 up to 12 February 2011, the first respondent has paid the approximate sum of R4 585 561, 43 towards the expenses of the three businesses.⁸ During the same period the proceeds of the credit card transactions in the three stores amounting to the value of R7 807 753 were paid into the bank account to which "speed point" credit card machines were collected⁹. According to the first respondent, Mr. Paulo has diverted approximately R4.1 million from the speed point payments,¹⁰ although it is denied by Paulo.

⁷ Vide paginated page 32 para 6.7 of applicant's founding affidavit and paginated pages 172 para 36 and 174 para 40.1 of first respondent's affidavit.

⁸ Vide paginated page 178 para 48 of first respondent's answering affidavit.

⁹ Paginated page 179 of first respondent's answering affidavit.

¹⁰ Paginated page 177, 179-180 of the first respondent's answering affidavit.

[12] The designated account which Umtshingo used to run the Spar business, was the account number 62101769323 held in the name of the second respondent with Mr. Arnold Fabio Paulo as the sole member of the second respondent and at all relevant times the person in charge of the business activities of Umtshingo and the second respondent. Paulo and his sister in law, Mrs Maria Joao Venture Lopes Paulo were the only directors and shareholders of Umtshingo. They de-registered Umtshingo on 16 July 2010. After the deregistration of Umtshingo, which is referred to herein below¹¹, the Paulo(s) directors failed to have Umtshingo re-registered.¹²

[13] Mr Arnaldo Fabio Paulo was allowed access to the three stores although the first respondent was running the businesses¹³. The first respondent paid all moneys received from the business into the relevant account. Contrary to the first respondent's belief, the "speed point" payments were not paid into the designated account number

¹¹ Page 8 para[16].

¹² Vide applicant's replying affidavit paginated page 439-440.

¹³ Vide page 175 para 40.4 of first respondent's answering affidavit.

62101769323 which Umtshingo utilized to run the Spar business, but diverted into another account by Mr. Arnold Fabio Paulo¹⁴.

[14] Upon realizing that the speed point payments were being diverted, the first respondent brought an urgent application, under case number 17061/11 against Mr. and Mrs. Paulo in which on 22 March 2011, Fabricius J granted an interim order which was confirmed on 20 May 2011 by agreement between the parties.¹⁵ On 10 May 2011 Paulo was ordered, by agreement, by Van den Heever AJ to pay the proceeds of the retail sales in respect of the revenue earned by Belladona Kwik Spar, Belladona Tops and Sparks Tops into the account held in the name of the second respondent, subject to the freezing order granted by Prinsloo J on 24 June 2010.

[15] The first respondent subsequently launched an urgent application, under case number 17061/11 against Mr. and Mrs. Paulo in which on 22 March 2011, Fabricius J granted an interim order interdicting them from, *inter alia*, "directly or indirectly, dealing with, alienating,

¹⁴ Vide paginated pages 178-9 para 49 et page 441 para 3.4

¹⁵ Paginated page 467-474.

disposing of or in any way dissipating and or removing any of the movable assets or appropriating the proceeds of the retail sales of stock be it in cash, cheque, debit card or credit card transactions associated with the businesses of the aforesaid three stores. This order by agreement between the parties was confirmed on 20 May 2011.¹⁶ On 10 May 2011, Mr. Paulo was ordered by agreement by Van den Heever AJ to pay the proceeds of the retail sales in respect of the revenue earned by Belladona Kwik Spar, Belladona Tops and Sparks Tops into the account held in the name of the second respondent, subject to the freezing order granted by Prinsloo J on 24 June 2010.

[16] The first respondent subsequently brought an urgent application under case number 300795/2011 for the restoration of the registration of Umtshingo's registration to the company registrar, under the same name and registration number that it previously had. Mabuse J granted an interim order on 28 June 2011 which was eventually confirmed by Heefer J on 6 September 2011. The effect of the last mentioned order was to restore the previously *bona vacantia* assets

¹⁶ Paginated page 467-474.

of Umtshingo to the latter and declaring void any action taken by the Paulo(s) whilst Umtshingo was deregistered.¹⁷

[17] The attitude of the first respondent in not opposing the relief sought, was that it is entitled to be paid the full balance up to the date of the closure of the account. This includes not only the funds in the account as at the date of the launch of the present application, or the date this Court makes an order, but also the funds paid into the bank account pursuant to the Court order granted on 22 March 2011 by Fabricius J under case number 17061/11.

[18] The second respondent, in its opposing affidavit, contended that applicant is the second respondent's banker and therefore there existed a banker and client relationship between applicant and second respondent and therefore, strictly speaking, applicant should act within the scope of the mandated granted to it by the second respondent. The relationship between the applicant and the second

¹⁷ Paginated pages 479-483.

respondent carries with it duties of fiduciary nature, which entails that information within its privy regarding the second respondent is confidential. The applicant must therefore protect the interest of the second respondent. The applicant seeks an order from the Court which entails that it must close the second respondent's account, which the latter has no intention of closing.

[19] The second respondent further is opposed to the order sought being granted. It denied that it is indebted to the first respondent and contended, *inter alia*, that it has no relation with the first respondent.¹⁸ It further contended that it has no legal obligation to pay for the debts of Umtshingo and has no desire to close its account with the applicant. It however does not deny that Umtshingo did not have an account and utilized the account belonging to the second respondent.

[20] The second respondent further contended, *inter alia*, that there is no legal basis in terms whereof the first respondent is entitled to the funds held by the applicant on behalf of the second respondent. It

¹⁸ Paginated page 412 para 10

further contended that the first respondent has not instituted any action against the second respondent for payment of its alleged debt. Second respondent further contended that the first respondent has not instituted any summons against Umtshingo and or the second respondent for payment of the alleged amount of R2 058 191, 94 allegedly owing. The second respondent is not legally obliged to pay the debts of Umtshingo. It further contended that the deponent to the applicant's founding affidavit has no personal knowledge regarding this matter and his knowledge comes from the allegations of the first respondent. The second respondent further denied that it is indebted to the first respondent. The second respondent submitted that the application should be dismissed with cost.

- [21] The relief sought is a semi interpleader. An interpleader application "is a form of procedure whereby a person in possession of property not his own (e.g. a stakeholder or other custodian of property to which he lays no claim in his own right), which is claimed from him by two or more other persons, is enabled to call upon the rival claimants to such property to appear before the court in order that the right to such property, as between the rival claimants, may be determined

without putting the holder of the property to the trouble and expense of an action or actions.”¹⁹

[22] *In casu*, from the evidence that has been placed before me, it is clear that the applicant is holding in this specific account, sum of moneys. The applicant does not lay claim to this money. It merely seeks an order relieving it of this money and placing it in the hands of the first respondent. The order sought by the applicant was in nature like an interpleader procedure.

[23] It may well be so that there exists a fiduciary relationship between the applicant and the second respondent with regard to the account in issue. That does not, however, in my view, preclude the applicant in approaching the court, where there is a need for an order akin to an interpleaded order.

¹⁹ Erasmus Superior Court Practice, B1-399.

[24] The second respondent does not dispute that the account in issue was being used by Umtshingo to conduct the latter's business transactions. The second respondent was not conducting any business of its own or at all, but at best was an agent for Umtshingo. The second respondent can therefore not dispute that any money that found its way into the relevant account was either generated by Umtshingo and or the first respondent through the three business entities, namely as Belladonna Kwik Spar, Belladonna Tops Bottle store and Sonpark Tops and not by itself.

[25] Paulo is the only member of the second respondent²⁰. Although Paulo and his sister-in-law, Mrs. Maria Joao Venture Lopes Paulo (Mrs Paulo), were the only directors and share holders of Umtshingo, Paulo acted as the latter's representative²¹ and presented himself as the owner thereof²². The first respondent took over the running of the three businesses of Umtshingo. This could not have materialized if the latter was not indebted to the first respondent. In business transactions, in my view, it is fundamental that parties must at all

²⁰ Paginated page 409

²¹ Vide page 158 para 16 of the first respondent's answering affidavit.

²² Paginated page 269.

times demonstrate *uberrimae fides*, utmost good faith, vide *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*²³. Any denial of the aforesaid indebtedness by Paulo and or the second respondent can only be disingenuous on Paulo's part as the second respondent's sole member, and I find as such.

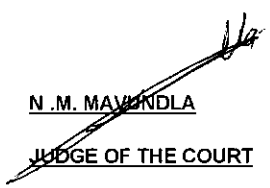
[26] The evidence reveals that the first respondent took charge of the running of the business of Umtshingo as from 9 March 2010 and continues to do so to date. The first respondent conducted the businesses of Umtshingo from 9 March 2010 until the date of de-registration of Umtshingo on 16 July 2010 and has continued ever since. During the aforesaid period, the applicant has been running the business of Umtshingo. In my view, the second respondent did not at any stage generate any money deposited into this account, save allowing the use of the account. This fact is also admitted in the letter of the second respondent's attorneys dated 25 October 2010²⁴. In my view, the second respondent does not have any right of entitlement to the moneys lying in this specific account, particularly, because it

²³ 2012 (1) SA 256 (CC) at 268 para [36].

²⁴ Paginated page 58 annexure "F" para 3.1.

did not generate these moneys, and was in the same position as an agent receiving the moneys into the relevant account on behalf of Umtshingo *vide Mc Ewen, NO v Hansa*,²⁵ over and above the fact that the first respondent was operating the relevant businesses for its own profit and loss, subject to it defraying the indebtedness of Umtshingo; *vide Joint Stock Co Varvarinskoye v ABSA Bank Ltd and Others*.²⁶

[27] In my view, for the above mentioned reasons, the applicant was justified in bringing these proceedings and entitled to the order sought and granted herein above.


N.M. MAVINDLA

JUDGE OF THE COURT

HEARD ON THE : 30/03/2012

DATE OF JUDGEMENT : 15 /06 /2012

²⁵ 1968 (1) SA 465 (A) at 472B-E.

²⁶ 2008 (4) SA 287 (SCA) at 295B-H.