

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO.: A270/2022

(1) REPORTABLE:

(2) OF INTEREST TO OTHER JUDGES: [Y/N]

(3) REVISED: [Y/N]

(4) Signature:

Date: 23/10/24

In the matter between:

INNSCOR DISTRIBUTION (PTY) LTD

Appellant

And

JACOBUS JOHANNES JURGENS HEUNIS

Respondent

JUDGMENT

MYBURGH AJ

1. This matter comes before us on appeal from the regional magistrates' court for the regional division of Gauteng, held in Pretoria (Magistrate T J Ndwandwe presiding).
2. The key facts are, and were at all material times, common cause. They can conveniently be summarised as follows:
 - 2.1. The appellant, which was the plaintiff in the court of first instance, is a Zimbabwean company which is involved in the importation of commodities into that country. The first defendant was a South African company, Bay Drive Trading 64 (Pty) Ltd ("Bay Drive"). That company was based in Durban. As the

name suggests, it was involved in trading activities – more specifically commodities. The current respondent, who was the second defendant in the court below, is an attorney who practices as such from premises in Pretoria. Bay Drive has, since the commencement of the proceedings in the magistrates' court, been deregistered. It is accordingly not a party to this appeal.

- 2.2. The respondent had relationships with Bay Drive and a Mr Hodoul, who appears to have been the controlling mind of that company, which pre-dated the events which gave rise to the litigation between the parties.
- 2.3. During the latter part of 2012, or perhaps early in 2013, Mr Hodoul informed the respondent that Bay Drive had in mind to become involved in a transaction which involved the purchase and on-sale to the appellant of a quantity of sugar. The two of them discussed the use of the respondent's trust account for the purpose of securing the purchase price, which proposal the respondent was amenable to. The respondent also gave Mr Hodoul some advice. Precisely what advice is unclear, but also not important.
- 2.4. In the course of discussions between the appellant and Bay Drive concerning the purchase of sugar by the appellant from that company it was accepted that the use of a trust account (described as an "escrow" account) administered by an attorney would be an acceptable way of securing the payment of the purchase price.
- 2.5. Consequent on this the respondent, acting on the instruction of Bay Drive, addressed a letter, on his firm's letterhead, to the appellant on 14 February 2013, the material portion of which read, *"We hereby confirm that we manage the Escrow account*

of Bay Drive Trading 64 (Pty) Ltd whereof the details are as follows: Nedbank of South Africa, Account Number 7[...], SWIFT CODE: N[...].” (“the escrow account”)

- 2.6. On the following day Bay Drive sent an email to the appellant in which it was stated *inter alia* that, “*Bay Drive Trading has opened an Escrow account in the name of J. Heunis Trustee Attorney for any funds received* ” ¹ and “*Bay Drive Trading will and confirms that they have available 120 tons IC 45 (4 Trucks) for despatch via your agent from Durban.*”
- 2.7. On the same day, and pursuant to a request contained in the last-mentioned email, the appellant sent a letter to Bay Drive in which it confirmed its order for the 120 tons of sugar. That letter, which was co-signed by the plaintiff’s managing director and group financial director also recorded that “*We also confirm that on receipt of an invoice we will process the funds to be transferred into an Escrow account in the name of J. Heunis Trustee Attorney, provided no Vat is charged for export and a SADC Certificate accompanies the documents for cross border export.*”
- 2.8. Three days later, which is to say on Monday 18 February 2013, Bay Drive addressed an email to the appellant, copied to the respondent which, *inter alia*, contained the following records:
- i. *The sum required for 120 tons at USD643 p.t. is S77160. (seventyseven (sic) thousand one hundred and sixty); and*
 - ii. *This sum would be held by our Attorney and only released when your agent confirms with our representative on site that the 120 tons of sugar has been loaded onto your trucks together with the*

¹ As will appear from what follows, this was not true. Although an account was opened (at some time), it was not a trust account in the name of the respondent.

certificates of proof that the sugar is of Brazilian Origin and accompanied with the SGS certificate.

- 2.9. On the following day, 19 February 2013, Bay Drive sent an invoice to the appellant in the amount of USD77160. The narrative recorded that it was in respect of 120 metric tons of refined white sugar.
- 2.10. On 20 February 2013 the appellant paid the agreed amount of USD77160.00 into the account which the respondent had designated.
- 2.11. The respondent caused the United States Dollars to be converted into South African Rands, which were paid into another account on which he was authorised to transact. Why exactly this was done is unclear; however it is also not important². According to the respondent's evidence the rand amount received into his trust account was "in the region of R670 000".
- 2.12. On 22 February 2013 the respondent caused an amount of R402 192 to be paid to a third party, Goldkeys International (Pty) Ltd ("Goldkeys"). This was done on the telephonic instruction of Mr Hodoul.³
- 2.13. On Monday 25 February the respondent received another telephone call from Mr Hodoul who instructed him to pay a

² In his evidence in chief the respondent stated that the money was paid into his trust account; however that was clearly not the case. The account was held in the name of Bay Drive.

³ This payment was made from another account of Bay Drive Trading 64 (Pty) Ltd with Nedbank (account number 1[...]) and the authoriser is recorded as having been the respondent.

further amount of R201 096.00 to Goldkeys. The respondent complied with this instruction.⁴

- 2.14. Only 3 truckloads of sugar, the combined weight/mass of which amounted to 90 metric tons were despatched – i.e. there was a shortfall of 30T.
- 2.15. On 26 February 2013 Bay Drive addressed an email to the appellant in which it acknowledged the shortfall (which it attributed to logistical issues) and stated that “the balance of the funds deposited against the 4th truck will be refunded through the appropriate banking channels”.
- 2.16. In the months that followed, correspondence passed between the appellant and Bay Drive in relation to the outstanding quantity of sugar. Notwithstanding numerous undertakings on the part of Bay Drive, the balance was never despatched. The appellant also did not receive any refund.
- 2.17. On 18 July 2013 the appellant addressed an email to the respondent in which it requested him to confirm that it continued to hold 25% of the amount which had originally been deposited into what was described as the “*Escrow Trust account in the name of Bay Drive Trading.*” That appears not to have elicited any response.
- 2.18. On 11 November 2013, by which time the appellant had run out of patience, Ms Jackson of the appellant telephoned the respondent with a view to obtaining a refund. She followed up with an email in which she briefly set out the history of the matter and recorded that the appellant required the balance of

⁴ Payment was made from the same bank account and again the voucher records that the authoriser was the respondent.

the monies which she believed to have been retained in the escrow account repaid to it.

2.19. The respondent replied saying he would “take instructions” and revert.

2.20. In fact, neither a refund nor any substantive responsive was forthcoming.

3. The appellant accordingly proceeded to institute action against Bay Drive and the respondent in the magistrates’ court from which this appeal arises. In terms of its particulars of claim, as amended, the current appellant advanced two alternative causes of action: one in contract and one in delict. The claim in contract was based on an alleged term (presumably tacit) to the effect that the respondent would be obliged to refund monies corresponding to the value of any sugar that was not despatched – calculated in accordance with the rate stipulated in the mandate. In the alternative, the appellant relied on the breach of a legal duty of care – i.e., a claim in delict. The relief claimed was payment of USD 19 290.00, being the value of the outstanding quantity of sugar at the stipulated rate of USD643 per metric ton.
4. In his plea the respondent admitted having received the money in issue and that he managed the account into which it was deposited but otherwise denied all of the plaintiff’s allegations and put it to the proof of its case. Amongst the allegations which were expressly denied were the existence of a contractual relationship between him and the plaintiff (i.e., the current appellant) and that he owed any duty of care to the plaintiff. He furthermore pleaded that he had at all times administered the account in accordance with the instructions of Bay Drive *“as agreed between the plaintiff and the first defendant ”*.
5. Two witnesses testified at the trial: a Ms Jackson on behalf of the plaintiff/appellant, and the respondent, Mr Heunis. As we have already dealt with the core common cause facts, it is not necessary to deal with Ms Jackson’s

evidence. The respondent's evidence can conveniently be summarised as follows:

- 5.1. He understood the word "escrow", to be a synonym for "trust" and hence understood that what was required of him was to hold the purchase price in trust pending fulfilment of the condition stipulated in what he referred to as his mandate.
- 5.2. He could not receive foreign currency into his trust account. He accordingly opened a separate account with Nedbank (i.e., the account designated in his letter of 14 February 2013) with Nedbank.
- 5.3. Upon, or immediately following, receipt of the funds into the designated account they were converted into South African Rands, which were paid into his trust account, from which he was able to disburse moneys.⁵ The funds, when converted, yielded approximately R670 000.00.
- 5.4. Both of the abovementioned payments to Goldkeys were made on the telephonic instruction of Mr Hodoul. The first of the instructions was received during the morning of Friday 22 February 2013 and the second was received on the morning of 25 February 2013. In dealing with these instructions the respondent initially stated that Mr Hodoul had expressly told him that the purchaser's agent (who was never identified) had confirmed and that a portion of the funds should be released. However, he later conceded that he did not have a clear recollection of the conversations and said that the essence of what Mr Hodoul had conveyed to him was that everything was in

⁵ This evidence appears not to have been completely true given that the transactional/current account in issue was in the name of Bay Drive (see fn 3 *supra*); however nothing turns on that for present purposes.

order and that he should therefore release a portion of the funds to Goldkeys.

5.5. He did not, at the time, know exactly how much sugar had been despatched or why the two payments were required to be made to Goldkeys. He also did not personally take any steps to ascertain whether the required confirmation had in fact been given as he did not understand the mandate to require that of him. He simply accepted, based on what Mr Hodoul had told him, that the stipulated condition had been fulfilled – for which purpose 120 metric tons of sugar would have needed to have been loaded. That being the case, the funds, on his understanding, belonged to Bay Drive and fell to be dealt with according to that company's instructions.

5.6. A balance of approximately R70 000.00 remained in the transactional account after the second payment to Goldkeys.

5.7. Acting on further instructions from Mr Hodoul the respondent made a number of further payments which included a payment to Bay Drive. Those payments, together with bank charges, completely depleted the funds in the account.

6. To complete the picture, the facts were that Goldkeys which was Bay Drive's supplier, insisted on receiving payment before allowing the sugar to be loaded onto the respondent's trucks.⁶ Email correspondence, which was copied to the respondent, passed between the parties in relation to that issue. It is not clear that the respondent in fact read any of the emails. The only relevance for present purposes is that it is clear that loading had not yet even begun when the respondent released the first payment. Indeed, respondent's counsel repeatedly put it to Ms Jackson in the course of cross-examination that, as a matter of fact, payment had to precede loading. While that may have been, and indeed clearly

⁶ The trucks appear to have been those of a contractor rather than the appellant's own trucks; however nothing turns on that.

was, Goldkey's position, that was a matter between Bay Drive and Goldkeys. There is absolutely no indication that the appellant ever agreed to amend the terms of the mandate to allow drawdowns so as to enable Bay Drive to satisfy its obligations to Goldkeys – which is clearly what occurred.

7. The magistrate found for the current respondent and accordingly dismissed the claim with costs. As the judgment is an extremely terse one, we will not comment on it directly. Instead we will deal with the applicable legal principles and whether, on a proper application thereof, the claim fell either to be upheld or to be dismissed. We do so in the paragraphs which follow.
8. Turning to the legal issues, that a party who holds moneys in trust owes fiduciary obligations to the depositor is so well settled as to be trite. He/she is obliged to deal with the funds strictly in accordance with his/her mandate, with due regard to the competing interests of the depositor and whoever may become entitled to receipt of the funds upon the happening of the stipulated event. Indeed, it is established that the nature of the obligation is so onerous that the trustee may be held liable even if the funds are lost as a result of a fraud perpetrated upon him/her. These obligations apply *a fortiori* in the case of attorneys by virtue of the fact that they are officers of the court and persons whose ordinary business specifically includes the handling of trust moneys. The law reports are replete with authorities to this effect. The denial of the existence of an obligation towards the appellant (which was not persisted with in argument before us) was thus untenable – as indeed was the denial of a contractual relationship between the appellant and the respondent. As the respondent's counsel did not persist in these lines argument on appeal we will say no more in this regard.
9. What was required of the respondent was that he should deal with the funds which had been placed under his control strictly in accordance with the mandate. While it might be so that he would, in practice, first have been contacted by a representative of the seller (who was his client), what was required of him was to take all reasonable steps to ensure that the condition stipulated in the mandate had in fact been fulfilled before releasing any portion of the funds. The condition which had to be met was that the purchaser's agent had confirmed that the

stipulated quantity of sugar (120T) had been loaded onto the purchaser's trucks together with the necessary certificates of origin and what the parties described as "the SGS certificate". The position of the respondent was akin to that of a banker when dealing with a letter of credit payable against presentation of bill of lading – i.e. while he was not required to satisfy himself that the stipulated tonnage had in fact been loaded, he was required to take proper (i.e., diligent) steps to satisfy himself that the purchaser's agent had indeed given the necessary confirmation. The fact that he happened to be based in Pretoria whereas the sugar was to be loaded at the port of Durban is neither here nor there in this context. Neither is the fact that the mandate did not identify the purchaser's agent or stipulate a mode of communication. The respondent had only to pick up the telephone or, better still, send an urgent email.

10. As we have already indicated, what in fact triggered Mr Hodoul's instructions to the respondent was Goldkeys' insistence on receipt of payment before loading. Had the respondent read the email correspondence then he would have been aware of those facts. He however testified that he was not so aware, and we are prepared to accept that that evidence was truthful and hence that the respondent acted in good faith. That is however ultimately immaterial for present purposes. What is relevant is that the respondent did not act strictly in accordance with the mandate. He also did not conduct himself with the requisite degree of care in dealing with the funds which had been entrusted to him. If he made even the simplest of enquiries, then he would have ascertained that the stipulated condition had not been fulfilled. What exactly would have occurred if he had sought instructions from the appellant cannot be said with certainty. On a conspectus of the evidence it seems probable that the appellant would have been prepared to authorise payment in tranches against delivery of the sugar onto the trucks. However, one thing that is clear is that the appellant would not have authorised the release of funds in excess of the value of sugar actually loaded, calculated at the agreed rate. Indeed, the very purpose of placing the purchase price in trust was to guard against the risk of non-delivery of all or part of the goods associated with the transaction and consequent financial loss.

11. Whether one categorises the respondent's negligent conduct as a breach of a contractual term implied by law (which we believe it to have been), or simply a breach of legal duty of care, the result is the same – i.e., the respondent is liable to compensate the appellant for its loss.
12. It was argued on behalf of the respondent that any amount that may be awarded to the appellant should be in South African currency and should be computed with reference to the Rand amount which the conversion yielded – i.e., a portion of R670 000.00. In our view these arguments are without merit. It is settled law that our courts are empowered to order payment in foreign currency. The only question which arises is whether it is appropriate to do so. The answer to that question falls to be determined on a case-by-case basis with reference to the facts of the matter under consideration.⁷ *In casu*, the matter is one which concerns international trade as opposed to a domestic transaction. The transaction was, moreover (as is the norm in international trade), denominated in foreign currency – viz. United States Dollars, and the funds which were deposited into what was described as the escrow account were in that currency. The loss was moreover “felt” in United States Dollars, not South African Rands. These considerations being so, the appellant is entitled to an award in U S Dollars.
13. The appellant entrusted the respondent with USD77 160.00, being the agreed purchase price of a consignment of 120 metric tons of sugar at USD643 per metric ton. The respondent released the full amount in circumstances where only 90 metric tons were despatched. The appellant has accordingly suffered a loss equal to the value of the tonnage of sugar which was not despatched (30T) at the stipulated price of USD643/T, that is to say USD19 290,00. That is also the amount which would, on the probabilities, have remained in the escrow account if the respondent had sought and obtained the appellant's authority to effect payment for the quantity of sugar which was in fact despatched. It is settled law that a judgment debtor is entitled to discharge a judgment debt expressed in foreign currency by paying the creditor an amount of rands sufficient to enable the creditor to purchase the stipulated amount of foreign currency from a licensed

⁷ Standard Chartered Bank of Canada v Nedperm Bank Ltd [1994] 2 All SA 524 (A).

foreign currency dealer on the date of payment. We will accordingly say nothing further in this regard.

14. In its particulars of claim, as amended, the appellant (as plaintiff) sought interest at the rate of 9 percent per annum from 25 February 2015, being the date upon which it demanded payment from the respondent. The claim for interest was disallowed in *Standard Chartered*; however, that was because the plaintiff's claim for interest was advanced as one for special damages – which the court found not to be competent. Such considerations do not arise *in casu* given that interest is claimed on the ordinary basis rather than in terms of an agreement or as a special head of damages. Claims for interest in similar matters were allowed in *Elgin Brown and Hamer (Pty) Ltd v Dampskibsselskabet Torm Ltd* 1988 (4) SA 671 (N) and also in *Barclays Bank of Swaziland Ltd v Mnyeketi* [1992] 3 All SA 901 (W). Although neither of those decisions is binding on us, their correctness has not been questioned in any other judgment that we are aware of; nor was that done in argument before us. We accordingly consider the approach adopted in those matters to be correct.

15. As to costs, it was not argued that the normal rule (viz. that costs should follow the result) should not apply, nor are we aware of any consideration which militates against its application. The appellant is accordingly entitled to costs.

The order in the court below is accordingly set aside and substituted with the following order:

1. The respondent is ordered to pay the appellant an amount of USD 19 290.00 plus interest thereon calculated at the rate of 9% per annum reckoned from 25 February 2015.
2. The respondent may discharge its indebtedness to the appellant in terms of the preceding paragraph by paying to the appellant an amount of South African Rands sufficient to enable the appellant to purchase the stipulated amount of USD19 290.00 net of commissions and charges (which will, in that

event, be for the respondent's account) from a licensed foreign exchange dealer on the date of payment.

3. The respondent is ordered to pay the appellants costs.
4. The respondent shall also pay the costs of this appeal, as taxed or agreed.

G S MYBURGH
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

M P KUMALO
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA
(I agree and it is so ordered)

Appearances:

For the appellant: Adv B Manning

Instructed by: Fullard Mayer Morrison Inc

For the respondent: Ad L Van der Merwe

Instructed by: Du Plessis & Eksteen Inc