



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

SIGNATURE

DATE: 9 June 2025

Case no: A2024-038898

In the matter between:

MSG MARKETING (PTY) LTD

First Appellant

PROFESSIONAL WORLDWIDE SERVICES (PTY) LTD

Second Appellant

and

FIRSTRAND BANK LIMITED

Respondent

CORAM: WILSON J, NOKO J AND BOTSI-THULARE AJ

JUDGMENT

WILSON J (with whom NOKO J and BOTSI-THULARE AJ agree):

- 1 The appellants, to whom I shall refer collectively as “MSG”, provide immigration consulting services to the general public via a call centre. MSG arranged banking facilities with the respondent’s retail banking arm, FNB. The banking relationship between FNB and MSG included the provision to MSG of access to international payment clearing and settlement services, which

were extended to it subject to terms embodied in the Visa Core Rules. The Core Rules regulate the terms on which Visa, a globally well-known payment clearing and settlement company, will extend its services to merchants and bankers throughout the world.

Visa “chargebacks”

- 2 One feature of Visa’s terms is the “chargeback”. Chargebacks are payments reversed at the request of the payer. If, for example, a Visa credit or debit cardholder in the United States purchases goods and services from a merchant in South Africa, they must provide that merchant with their Visa card details. The merchant uses those details to raise a charge against the cardholder’s account. If all goes well, the merchant provides the good or service, and the cardholder pays the merchant through the Visa system.
- 3 Sometimes, though, things go wrong. The merchant raises a charge to which they are not entitled, or fails to provide the good or the service for which the cardholder contracted. There may also, conceivably, be a fraudulent transaction debited to the cardholder in favour of the merchant, even if the merchant was not the source of the charge. In those and a range of other circumstances, the payer may raise a chargeback request. They may do so by contacting the bank that issued their Visa card, which then contacts the merchant’s bank to notify the merchant of the chargeback request. The merchant’s bank then passes the chargeback request on to the merchant, who may then choose to honour or contest the request.
- 4 In either case, however, the chargeback request, if well-founded, must be honoured by the merchant’s bank, whether or not the merchant is able to place

the bank in the funds necessary to do so. This is a critical feature of Visa's international payment clearing and settlement system. Ultimately, the duty to honour a valid chargeback rests with the bank, and not with the merchant. In this way, Visa ensures the security of, and confidence in, its payments system, since banks are more likely to be able to secure and honour valid chargebacks than the presumably millions of individual merchants who use the Visa payment system internationally.

- 5 Accordingly, in providing access to the Visa payment system to its merchant customers, FNB takes a risk. If the merchant customer cannot or will not honour a valid chargeback request, FNB must do so. FNB seeks to indemnify itself against this risk by incorporating the Visa Core Rules into its contracts with its merchant customers. Accordingly, in terms of FNB's contract with its merchant customers, the merchant becomes liable to FNB to honour a valid chargeback request. In terms of its agreements with its merchant customers, FNB may debit chargeback requests against the merchants' accounts. There is no dispute in this case that this is the arrangement to which MSG was subject when it contracted with FNB for access to the Visa payment system.
- 6 The Visa Core Rules provide for a maximum period of 540 days for the processing of a chargeback request. Most chargeback requests will presumably be processed much quicker than this, but where the entitlement to a chargeback is disputed, the process can become protracted. Five hundred and forty days (around a year and a half) is accordingly the maximum period in which any chargeback dispute must be resolved. Again, if the chargeback dispute is resolved against the merchant to whom FNB provided banking

services, under the Visa Core Rules, it is FNB that becomes liable to honour the chargeback, not the merchant.

The dispute between MSG and FNB

- 7 Having extended banking services incorporating the Core Rules to MSG, FNB became suspicious of the unusually high number of chargeback requests being made against MSG. It was also concerned that MSG was providing access to the payment system to a third party, which was, allegedly, using the system to trade in cryptocurrency. That use was beyond the scope of the purposes for which MSG was permitted access to the Visa system. FNB also identified a heightened risk of fraud.
- 8 For all these reasons, FNB terminated MSG's banking facilities. However, it froze MSG's funds for 540 days in order to insure itself against any chargebacks that may have been levied on or after the date on which MSG's facilities were terminated. MSG did not take issue with FNB's right to terminate its banking services. MSG did, however, object to the hold FNB placed on MSG's accounts until the 540-day period specified in the Visa Core Rules expired.
- 9 In particular, MSG complained that, properly interpreted, the suite of agreements that regulated its banking relationship with FNB did not permit FNB to place such a hold on its accounts after terminating those agreements. In the alternative, MSG contended, the 540-day hold, if permitted by the agreements, was contrary to public policy and invalid.

- 10 Neither argument succeeded in the court *a quo*, but MSG sought and was granted leave to appeal to us against the order of the court below dismissing its application.

Mootness

- 11 Shortly before the court below gave its judgment, the 540-day hold on MSG's accounts expired. FNB now contends that, as a result of the expiration of the hold, MSG's appeal is moot. Mr. Amm, who appeared for FNB, argued the point on the basis that it was for MSG to show that the appeal was not moot, and not for FNB to show that it was.
- 12 In this Mr. Amm was mistaken. It is for the party alleging mootness to prove it. In this case, the allegation of mootness rests on the proposition that, the hold on MSG's accounts having been lifted, there is nothing for this court to determine. However, the hold was placed on MSG's accounts in order to indemnify FNB against any chargeback claims raised against it during the 540-day period. If chargeback claims have reduced MSG's balance during that period, then, if MSG wins the appeal on the basis that the hold was unlawful, it is plainly entitled to be repaid the money debited to its account.
- 13 When the matter was heard in the court below, the account was still frozen. In its founding affidavit, MSG said that it believed that just over R975 000 had been debited after its banking facilities had been terminated, but only FNB could definitively have said whether chargeback claims had been debited to MSG's balance. FNB does not appear to have done so. On appeal, neither party adduced any new facts setting out what, if any, chargebacks were levied

against the account – although, the account having been unfrozen, MSG was in as good a position as FNB to adduce that evidence.

14 Since neither party has adduced the relevant evidence, and the onus rests on FNB, we are, I think, bound to proceed on the basis that the appeal is not moot. I am also compelled to point out that, if there had been no chargebacks levied against the account during the hold period, FNB could easily have told us. It chose not to tell us. FNB asks us instead to non-suit MSG on the basis of mootness in circumstances where it has chosen not to put up a version on what is practically at stake in this appeal. Accepting FNB's argument in these circumstances, would, I think, open the door to stratagems too cynical to countenance.

15 Mr. Amm also suggested that proceeding with the appeal in circumstances where we do not know what, if anything, has been levied against MSG's frozen accounts would hamstring our ability to provide an effective remedy. Here, too, Mr. Amm was mistaken. If MSG is successful, it is but a small matter either to direct FNB to tell us what, if anything, was debited, or to make an order declaring that MSG is entitled to be repaid whatever amount was debited. I see no reason why either form of relief would be ineffective.

16 The mootness objection fails.

The banking relationship

17 MSG does not dispute that its merchant service agreement with FNB entitled FNB to recover chargebacks by debiting its account. Clause 41.4 of the agreement authorised FNB to recover the full amounts owing under the

agreement by setting those amounts off against anything FNB owed to MSG, and by debiting MSG's bank accounts. Under clause 41.6 of the agreement, "amounts owing" is defined to include chargebacks. Under clause 41.10, FNB had the right to recover and to continue to debit any outstanding amounts, including chargebacks, to MSG's account, even after termination of the agreement. Clause 15.7.4 of the agreement permits FNB to pledge an amount equal to an estimate of any potential losses to FNB that might result from a fraudulent or suspicious transaction. A pledged amount is an amount that is in the customer's account, but which is frozen and held as security against the loss for which it is pledged.

18 MSG disputes none of this. The thrust of MSG's case on appeal is that FNB's decision to terminate the banking relationship brought all those rights to an end. In particular, it argues that clause 41.10 applies only to chargebacks that were due and payable at the point of termination. MSG says that the clause does not apply to any chargebacks that became due after the account was terminated.

19 However, FNB's transactional accounts and debit card terms and conditions specifically allow FNB to keep funds in MSG's accounts to defray amounts that may become due after termination. MSG seeks to avoid that term by separating the merchant service agreement, which defines and deals with MSG's access to the international payments system, from the transactional accounts and debit card terms and conditions.

20 I do not think that is tenable. The banking relationship that MSG signed up to was a unitary arrangement that incorporated both documents, together with

FNB's global terms, which deals with foreign currency transactions, and its general terms and conditions, which deal with the terms on which FNB interacts with every class of its customers. It strikes me as artificial to separate out the four documents that governed the banking relationship, and to differentiate between them according to the nature of the transaction being considered or the type of account being operated. The agreements were clearly intended to operate as an integrated whole. So, if MSG agreed that FNB may retain an amount in its transaction accounts in respect of sums which may become due after termination, it must have accepted that those sums would include chargebacks levied under the merchant service agreement, especially given that the transactional accounts were nominated in the merchant service agreements as the accounts through which chargebacks would be processed.

21 Given that the merchant service agreement was subject to the Visa Core Rules, MSG must have known that chargebacks could take up to 540 days to process, and that FNB could retain or pledge any amount it reasonably thought was necessary to defray those chargebacks. MSG does not say that the amounts frozen by FNB were unreasonable in light of its potential chargeback liability. It says simply that the right to retain funds to defray that liability ended when FNB terminated its banking services. For the reasons I have given, that proposition cannot be sustained.

22 Mr. Pincus, who appeared for MSG, argued that interpreting the agreements to subject MSG's funds to a 540-day hold would not be "sensible" or "businesslike" within the meaning of the decision in *Natal Joint Municipal*

Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at paragraph 18.

23 However, that contention appears to have been advanced on the sole basis that the 540-day period was burdensome to MSG. That is not, in itself, an unbusinesslike result. The burden has to be evaluated in the context of the relationship as a whole and the purpose for which it was created. The 540-day period was a condition the parties agreed to in order to give MSG access to a robust and extensive international payment network. The period itself is necessary to allow disputes arising from the use of that network to be worked out. MSG does not say that subjecting it to the Visa Core Rules is *per se* unbusinesslike. It merely criticises the period as excessive. But the period was not invented by FNB. It is a term that bound FNB just as much as it bound MSG. FNB simply wished to ensure that it was not left carrying liability for chargebacks that MSG should have paid. This is not “unbusinesslike”.

24 Indeed, MSG’s interpretation of the banking relationship it had with FNB would have allowed it to knowingly facilitate fraudulent transactions on its customers’ Visa cards, and then leave FNB liable for any chargeback claims by simply terminating its banking facilities and withdrawing the fraudulently obtained money. It is not suggested that MSG actually did this, but that possibility cannot sensibly have been intended by either party.

25 To sum up: MSG agreed to be bound by a suite of agreements that incorporated the Visa Core Rules. It knew that its accounts could be debited with “chargebacks” due under those rules. It also knew that chargeback disputes could take up to 540 days to determine. Finally, it agreed that FNB

could retain or debit sums that fell due from it, including chargebacks, even after the banking relationship was terminated. To interpret MSG's agreement with FNB otherwise would result in FNB having to pay chargebacks for which MSG was liable under its agreement with FNB – a result that is as unbusinesslike as it is inequitable.

26 In these circumstances, the proper interpretation of the agreement is beyond serious contestation. FNB was entitled, as it did, to retain any amount that was reasonably related to the expected liability it would face in chargebacks after it terminated MSG's banking services. MSG does not suggest that the amount retained was unreasonable, merely that the right of retention for 540 days was itself not what the agreements envisaged.

27 In these circumstances, FNB was perfectly entitled to do as it did.

Public policy

28 Foreseeing the possibility that this would be our conclusion, MSG argued in the alternative that the 540-day hold FNB was entitled to place on MSG's funds is contrary to public policy.

29 In my view, the public policy challenge is stillborn. MSG nowhere identifies the public policy principle that is transgressed by the 540-day hold period. It is beyond dispute that the 540-day hold is potentially onerous, but MSG does not pitch its case at that level. MSG does not say that the 540-day hold as applied to it in the circumstances of this case was so unreasonable as to be contrary to public policy. That path was clearly open to MSG (see *Barkhuizen v Napier* 2007 (5) SA 323 (CC), paragraph 56). But it was not taken.

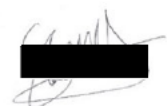
30 What MSG instead says is that the 540-day hold is *per se* incompatible with public policy. But there is nothing on the papers that would even begin to justify such a proposition. There is, in particular, no indication of what public norm or constitutional value or right is infringed by the hold. It is clear from the decisions in *AB v Pridwin Preparatory School* 2019 (1) SA 327 (SCA), paragraph 27 and *Beadica 231 CC v Trustees for the time being of the Oregon Trust* 2020 (5) SA 247 (CC), paragraph 82 that this is where inquiry has to start. MSG offers no such starting point. MSG attacks the 540-day hold simply because it did not like being subject to it. That is not enough.

31 This is especially so when the 540-day hold is embedded in an international payments system which provides security and predictability to literally millions of users. The 540-day hold appears to me, on the face of things, to be a price worth paying for participating in a fair, secure and frictionless international payment network. MSG adduces no evidence to the contrary.

32 For these reasons, the public policy challenge must fail.

Order

33 The appeal is dismissed with costs. Counsel's costs may be taxed on scale "C".



S D J WILSON
Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on

Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 9 June 2025.

HEARD ON: 14 May 2025

DECIDED ON: 9 June 2025

For the Appellants: SP Pincus SC
Instructed by Howard S Woolf Attorneys

For the Respondent: GW Amm SC
Instructed by Glover Kannieappan Inc