THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable

CASE NO: 27/2004

In the matter between :

NISSAN SOUTH AFRICA (PTY) LIMITED Appellant

and

MARNITZ, NADIA N.O. First Respondent
KEEVY, KAREN N.O. Second Respondent
FIRSTRAND BANK LIMITED Third Respondent

and

STAND 186 AEROPORT (PTY) LIMITED Intervening Party

Before:	**STREICHER, NUGENT, CONRADIE JJA, PATEL & PONNAN AJJA**
Heard:	**17 SEPTEMBER 2004**
Delivered:	**1 OCTOBER 2004**
Summary:	**Banking – mistaken transfer of money into incorrect bank account – accountholder not entitled to money.**

J U D G M E N T

STREICHER JA

STREICHER JA:

[1] What are the consequences of mistakenly transferring money to an incorrect bank account? That is the question that arises for decision in this appeal.

[2] The appellant is a customer of the third respondent ('FNB'). On 31 December 2002 it instructed FNB to make certain payments to its creditors. One such creditor was TSW Manufacturing. Insofar as TSW was concerned FNB was instructed to pay an amount of R12 767 468,22 to Standard Bank account number 0202216657. However, that account was the account of Maple Freight CC ('Maple'). Due to a clerical error the wrong banking details had been furnished. The appellant did not owe Maple any amount and had no intention of paying any amount to Maple.

[3] As a result of the erroneous instruction an amount of R12 767 468,22 was, on 31 December 2002, transferred by FNB from the appellant's account to Maple's account at Standard Bank. Shortly thereafter Maple became aware of the deposit into its account. It immediately realised that it had been made by mistake. One would have thought that it would have been obvious to Maple as to what should be done in the circumstances. However, that was not the case. Maple considered it necessary to obtain legal advice as to what its position was as recipient of the funds. Quite surprisingly it was advised that the amount should be transferred to a call account, that it was entitled to the interest earned on the funds and that the amount transferred would eventually have to be repaid on demand.

[4] In terms of a factoring agreement Maple had a receipts as well as payments account with FNB. Payments and transfers could not be made from the receipts account to any account other than the payments account. On 2 January 2003 Maple transferred an amount of R12 700 000 from its Standard Bank account to its FNB receipts account. It has not been explained why, if the intention was to follow the legal advice obtained, the call account had not been opened at that stage and the amount had not been paid into that account. On 2 January 2003 R12 700 000 was withdrawn from the receipts account and on 3 January 2003 R9 750 000 thereof was deposited into the payments account. On 6 January 2003 a further amount of R3 250 000 was deposited into the payments account.

[5] After payment into the FNB receipts account one Stanley, the sole member of Maple, instructed Maple's accountant to open a call account and to place the amount of R12 700 000 into that account. These instructions were conveyed to FNB and a call account was opened on 7 January 2003. According to Stanley the funds had been transferred from the receipts account to the payments account to permit them to be transferred to the call account. He does not explain the discrepancy between the amount debited to the receipts account on 2 January and the amount credited to the payments account on 3 January.

[6] However, the funds were never transferred to the call account, due, according to Stanley, to an error on the part of FNB. According to FNB it was never instructed to transfer funds to the call account but was told that

Maple would do so electronically. In the meantime, unbeknown to Stanley, so he says, the funds were being utilised in conducting the day-to-day business of Maple.

[7] On 20 January 2003 when TSW made enquiries about the amount that should have been paid to it by 31 December 2003, the appellant became aware of the erroneous payment. The appellant thereupon demanded return of the funds. Maple indicated that it was prepared to comply with the demand subject to it retaining the interest earned thereon and a lavish 'administration fee' of 4% of the amount concerned.

[8] According to Stanley, Maple was on or about 23 January 2003 ‘in a position to pay the monies over’ to the appellant but then discovered that FNB had omitted to transfer the monies to the call account. Upon this discovery he drew three cheques in favour of the appellant but before the cheques could be deposited into the appellant’s account the appellant obtained a court order freezing Maple’s banking facilities. This step, according to Stanley, put Maple under considerable financial strain and resulted in him as the only member of Maple, resolving that the corporation be wound up voluntarily. The first and second respondents were appointed as liquidators. It apparently did not occur to Stanley that the appellant would agree to waive its rights in terms of the court order against repayment of the funds.

[9] As at 23 January 2003 the credit balance on the payments account was R10 558 818,05. It would, therefore, appear that Maple was in fact not

in a position to pay the monies over to the appellant as alleged by Stanley. The first and second respondents contend that the total amount of R10 558 818,05 forms part of the insolvent estate of Maple and is subject to a *concursus creditorum*. The appellant contends that at least the R9 750 000 which can be traced to the amount transferred from its account to Maple's account, does not form part of the insolvent estate. By agreement between the parties the amount of R10 558 818.05 was, on 20 February 2003, transferred to a bank account under the control of the first and second respondents where it is being held pending the present proceedings.

[10] Having obtained the interim interdict the appellant applied to the Witwatersrand Local Division for an order:

(a) Declaring that the amount of R9 750 000 and any interest that accrued thereon from 20 February 2003 did not form part of the insolvent estate of Maple Freight CC (in liquidation); and

(b) Directing the first and second respondents to pay the amount to the appellant alternatively FNB.

Stand 186 Aeroport (Pty) Ltd ('the intervening party') subsequently, with the leave of the court *a quo*, intervened as a party to the proceedings. Stanley is its sole director and shareholder.

[11] Mailula J held that Maple and not FNB was enriched by the transfer of the funds and that the appellant, therefore, did not have a claim against FNB but had a concurrent claim against the insolvent estate of Maple. In

the result the court *a quo* dismissed the application with costs. With the necessary leave the appellant now appeals against the court *a quo's* judgment.

[12] Counsel for the appellant submitted that, because there was no intention on its part to pay Maple, Maple had no entitlement as against Standard Bank to the funds transferred to Standard Bank. They contended, furthermore, that since Maple had no entitlement to the funds as against Standard Bank it could not acquire a greater title as against FNB by transferring the funds to another account with that bank. The first and second respondents, on the other hand, submitted that when Standard Bank unconditionally credited the funds received to Maple's account it became obliged to pay the amount so credited to Maple. They submitted that that was the position even if Maple acquired the funds by way of theft or fraud. In this regard, they relied on Malan and Pretorius *Malan on Bills of Exchange, Cheques and Promissory Notes* 4 ed at 341; *Commissioner, South African Revenue Service, and Another v Absa Bank Ltd and Another* 2003 (2) SA 96 (W) at 129E-131G in which the decision in *Commissioner of Customs and Excise v Bank of Lisbon International Ltd and Another* 1994 (1) SA 205 (N) is criticised; and on *Take and Save Trading CC and Others v Standard Bank of SA Ltd* 2004 (4) SA 1 (SCA).

[13] In *Bank of Lisbon* money was fraudulently obtained by one of the respondents ('Reob') from the Commissioner of Customs & Excise by way of cheques which were deposited into Reob's bank account with the Bank

of Lisbon. Thirion J held that 'the circumstances under which Reob obtained the moneys . . . were such as to deprive delivery to Reob of any legal effect'. [1] He held, furthermore, that the ownership of the money, being *res fungibiles*, and the bank having received it without reason to believe that it had been stolen or obtained by fraud, passed to the bank when it was paid into the account with the bank.[2] For that reason, the money could not be reclaimed by a vindicatory action.[3] The Bank of Lisbon argued that the Commisioner's only remedy was to obtain judgment against the thief, Reob, and then to levy execution against any claim which the thief may have against the bank in respect of any credit balance in his bank account. Thirion J was of the view that our law would be gravely deficient if it did not provide a better remedy to a party in the position in which the Commissioner found himself.[4] He proceeded to find that the *actio Pauliana* and also the *condictio sine causa* were such better remedies.[5] In regard to the *actio Pauliana* he said:[6]

'It would appear to me moreover that the *actio Pauliana* finds application in a case such as the present where the debtor pays into his bank account moneys which he has obtained by fraud and which moneys, on being paid into the Bank, become the property of the Bank. When Reob obtained the moneys by fraud from the Commissioner it became indebted to the Commissioner in the amount so obtained and became obligated to the Commissioner to repay him a like amount. By paying the

[1] At 208G
[2] At 208I
[3] At 208H-I
[4] At 209A-B
[5] At 213H-215A
[6] At 213H

moneys to the Bank, Reob diminished its assets which were available to pay its debt to the Commissioner.'

[14] Malan and Pretorius say in respect of this decision that since there was no agreement between the parties as to the purpose for which the cheques were given, no contract came about between them on the instrument.[7] The Commissioner could have recovered the cheques by way of *rei vindicatio* or, after payment of the cheques, the amount paid, on the ground of enrichment or as damages. The specific passage relied upon by the first and second respondents reads as follows[8]:

'The crucial fact is that the respondent bank is obliged, in terms of the bank and customer contract subsisting between it and the company, to pay cheques of the company drawn on it or repay the amount standing to the credit on the account to the company on demand. This contract is neither invalid nor illegal but enforceable by the company or its liquidator. To allow the Commissioner to claim the amount standing to the credit of the company would, at best, deprive the company or the general body of creditors of this asset or at worst, force the respondent bank to pay the same amount twice! There is, surely, no room for an action by the Commissioner against the respondent bank, whether this be the *actio Pauliana* or a *condictio sine causa*.'

Both an interdict and attachment are according to Malan and Pretorius adequate remedies available without the need for judgment against the thief first having been obtained.[9]

[15] In *Commissioner of Customs and Excise v Bank of Lisbon International Ltd* Van der Nest AJ stated that he shared Malan and

[7] *Op cit* 338
[8] At 341
[9] *Op cit* 341

Pretorius's criticism of the judgment in *Bank of Lisbon*. In his view the duty of the Bank of Lisbon to repay the amount deposited and to honour cheques and withdrawals whilst the account was in credit was unaffected by the initial fraud perpetrated on the Commissioner. By paying the funds into its account Reob acquired a personal claim against the bank.[10]

[16] I agree with Thirion J that our law would be deficient if it did not provide a remedy for recovery of stolen money direct from the bank which received that money to the credit of the thief's account, for as long as the amount stands to the credit of the thief. The interdict and attachment that according to Malan and Pretorius, are adequate remedies are what have been described as Mareva-type injunctions which are available to a creditor to prevent his debtor, pending an action instituted or to be instituted by the creditor, from getting rid of his assets to defeat his creditors.[11] However, such interdicts and attachments are not adequate remedies in the event of the insolvency of the debtor.

[17] In my view, having found that delivery of the money to Reob did not have any legal effect, it was not necessary in *Bank of Lisbon* to resort to the *actio Pauliana*. For this reason and also because the appellant did not in the present case rely on the *actio Pauliana* it is not necessary to deal with the question whether there was any room for the application of the action in that case.

---

[10] At 129G-130A
[11] See Malan and Pretorius *op cit* 337

[18] Courts often grant interim interdicts against persons in respect of allegedly stolen money paid into a bank account of the alleged thief and against the bank concerned, pending an action to determine whether the money had been stolen. (See *Lockie Bros Ltd v Pezaro* 1918 WLD 60; and *First National Bank of Southern Africa Ltd v Perry NO and Others* 2001 (3) SA 960 (SCA) at para 18). The banks usually do not oppose the application for such interdicts but adopt the stance of a stakeholder and await a decision of the court as to whether the money was stolen and as to who is entitled to it.

[19] Malan and Pretorius are, therefore, not correct insofar as their view would seem to be that these interdicts can only be granted on the basis upon which Mareva-type injunctions are granted. In *Lockie Bros* the dispute was whether the deposit which gave rise to the credit on fixed deposit with the African Banking Corporation in respect of which the interdict was granted consisted of stolen money and not whether the respondent should be prevented from getting rid of his assets so as to defeat his creditors. In *Perry* Schutz JA stated that he was aware of doubts expressed as to the correctness of the decision but that he considered it to have been correctly decided. He added: [12] 'What an applicant must do in such a case is to trace the money back to the stolen money, to identify it as a "fund" of stolen money in the defendant's hands.'

[12] At 968E

[20] *Perry* was an appeal against an order upholding exceptions against FNB's particulars of claim. In the particulars of claim it was alleged that a stolen and forged cheque was paid into the account of FPV, a firm of stockbrokers, with FNB. One Dambha who had a managed account with FPV represented to FPV that he was entitled to the proceeds of the cheque. In consequence Dambha's account was credited with the proceeds. Thereafter, Dambha instructed FPV to make out and hand to him three cheques, two of which, made out to himself and a trust, were deposited with Nedbank to the credit of himself and the trust respectively. The issue, insofar as the one respondent, Nedbank, was concerned, was whether FNB, or FNB as cessionary of FPV's claim, could recover from Nedbank the stolen money that had been deposited with Nedbank.[13] Insofar as Dambha and the liquidators of the trust were concerned, FNB sought a declaration that they had no right to the respective funds credited to their accounts. Schutz JA held that the funds deposited into the accounts with Nedbank were stolen money. But, referring to the rule that once money is mixed with other money without the owner's consent, ownership in it passes by operation of law, he stated that it followed that when payment was made of the two cheques payable to Dambha and the trust, ownership of the money passed to Nedbank. In the result the *rei vindicatio*, which is an assertion of ownership, was not available to FNB.[14] He then considered whether the

[13] At 964J
[14] At para 16

stolen money could be recovered by way of an enrichment action. In this regard, he stated that if Nedbank was obliged to account to its customer in respect of the money received it would not be enriched and there would not be an enrichment action against it.[15] Assuming that Nedbank was not obliged to do so and that it was enriched, Schutz JA held that the money could be recovered from Nedbank by way of an enrichment action.

[21] Schutz JA then dealt with the question whether Nedbank was obliged to account to its customers. Relying on *Absa Bank Ltd v Standard Bank of SA Ltd* 1998 (1) SA 242 (SCA) at 252, he stated that the act of crediting a customer in a bank's books did not in itself create a liability, because the credit could have been wrongly made and could be reversed. Insofar as the thief, Dambha, was concerned, he held that, on the allegations made against him, there could be no question of Dhamba having a claim against Nedbank.[16] In other words the thief who deposited the amount into his account with Nedbank, had no claim against Nedbank for the payment of the amount standing to his credit.

[22] In *Take and Save Trading CC and Others v Standard Bank of SA Ltd* Harms JA said that once an amount is transferred by A to the credit of B's bank account the credit belongs to B and the bank cannot on the instructions of A retransfer it without the concurrence of B.[17] The statement must be read in its context. The court was dealing with a valid transfer of

---

[15] At para 19
[16] At 972C
[17] At 9B-C

funds from A's account to B's account in payment of cigarettes to be delivered and actually delivered after such transfer. The transfer could obviously not be reversed without B's consent.

[23] It follows that the submission by first and second respondents' counsel that once a bank has unconditionally credited a customer's account with an amount received, the bank is required to pay the amount to the customer on demand, even where the customer came by such money by way of fraud or theft, is not correct. If stolen money is paid into a bank account to the credit of the thief the thief has as little entitlement to the credit representing the money so paid into the bank account as he would have had in respect of the actual notes and coins paid into the bank account.

[24] It is now necessary to consider to what extent, if any, the position of Maple as against FNB differed from Dambha's position as against Nedbank. Payment is a bilateral juristic act requiring the meeting of two minds (*Burg Trailers SA (Pty) Ltd and Another v Absa Bank Ltd and Others* 2004 (1) SA 284 (SCA) at 289B). Where A hands over money to B mistakenly believing that the money is due to B, B, if he is aware of the mistake, is not entitled to appropriate the money. Ownership of the money does not pass from A to B. Should B in these circumstances appropriate the money such appropriation would constitute theft (*R v Oelsen* 1950 (2) PH H198; and *S v Graham* 1975 (3) SA 569 (A) at 573E-H). In *S v Graham* it was held that if A mistakenly thinking that an amount is due to B gives B a cheque in payment of that amount and B, knowing that the amount is not

due, deposits the cheque, B commits theft of money although he has not appropriated money in the corporeal sense. It is B's claim to be entitled to be credited with the amount of the cheque that constitutes the theft. This court was aware that its decision may not be strictly according to Roman-Dutch law but stated that the Roman-Dutch law was a living system adaptable to modern conditions. As a result of the fact that ownership in specific coins no longer exists where resort is made to the modern system of banking and paying by cheque or kindred process this court came to regard money as being stolen even where it is not corporeal cash but is represented by a credit entry in books of account.[18]

[25] The position can be no different where A, instead of paying by cheque, deposits the amount into the bank account of B. Just as B is not entitled to claim entitlement to be credited with the proceeds of a cheque mistakenly handed to him, he is not entitled to claim entitlement to a credit because of an amount mistakenly transferred to his bank account. Should he appropriate the amount so transferred, ie should he withdraw the amount so credited, not to repay it to the transferor but to use it for his own purposes, well knowing that it is not due to him, he is equally guilty of theft.

[26] In this case FNB, as agent of the appellant, intended to effect payment to TSW, and Standard Bank, as agent of Maple, intended to receive payment on behalf of Maple. There was no meeting of the minds.

---

[18] At 576E-H

In these circumstances, Maple, did not become entitled to the funds credited to its account. Any appropriation of the funds by Maple, with knowledge that it was not entitled to deal with the funds, would have constituted theft. The transfer of the funds to the receipts account and thereafter to the payments account of Maple did not change Maple's position concerning those funds. Just like Standard Bank, FNB received funds to which Maple was not entitled. An appropriation of these funds by Maple, with knowledge that it was not entitled to the funds, would likewise have constituted theft thereof. The first and second respondents, consequently, have no claim against FNB in respect of the funds.

[27] It was common cause that, in the event of it being found that the first and second respondents were not entitled to the funds, the appellant was entitled to payment thereof.

[28] Counsel for the first and second respondents submitted that to hold that a bank in FNB's position is not liable to pay the amount standing to the credit of a customer in Maple's position would be destructive of banking practice. They submitted that it would mean that in respect of each customer and each transaction, a commercial bank would have to ascertain where the customer's funds came from and the reason therefore and why such funds were being paid to a named payee. I do not agree. The claim against the bank is based on enrichment. If the bank upon the instructions of its customer, without knowledge of the customer's defective title, transfers or pays the amount mistakenly received to a third party an

enrichment action against the bank would not succeed. If a third party claims to be entitled to the money deposited with the bank, the bank need not investigate the matter but may adopt the stance of a stakeholder. It would be well advised to adopt such a stance. Should the bank in such an event unilaterally reverse the credit to the customer's account it would be doing so at its peril.

[29] In the result the following order is made:

1 The appeal is upheld with costs including the costs of two counsel. Such costs are to be paid by the first and second respondents and the intervening party jointly and severally.

2 The order of the court *a quo* is set aside and replaced with the following order:

'1 It is declared that the amount of R9 750 000 and any interest that accrued thereon from 20 February 2003, which is subject to the attachment order issued under case number 2003/1508 and transferred by consent to an account under the control of the first and second respondents, does not form part of the insolvent estate of Maple Freight CC (in liquidation).

2 The first and second respondents are directed to release the amount of R9 750 000 and any interest that accrued thereon from 20 February 2003, as referred to in para 1 above, to the applicant.

3 The first and second respondents and the intervening party jointly and severally are ordered to pay the applicant's costs including the costs of two counsel.'

_____

P E STREICHER
JUDGE OF APPEAL

NUGENT JA)
CONRADIE JA)
PATEL AJA) **CONCUR**
PONNAN AJA)