THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 31/2010

In the matter between:

ABSA BANK LIMITED **Appellant**

and

INTENSIVE AIR (PTY) LIMITED (IN LIQUIDATION) **First Respondent**
GEOFF FERREIRA NO **Second Respondent**
LESLIE MATUSON NO **Third Respondent**
RISCHARD CASSIM NO **Fourth Respondent**

Neutral citation: *ABSA Bank v Intensive Air* (31/2010) [2010] ZASCA 171 (1 DECEMBER 2010)

Coram: HARMS DP, CACHALIA, SNYDERS and SHONGWE JJA and BERTELSMANN AJA

Heard: **2 NOVEMBER 2010**

Delivered: **1 DECEMBER 2010**

Summary: Banking – banker and customer relationship – company income paid into sole director's and shareholder's personal account – credit in director's account appropriated by bank setting it off against director's debts owing to bank – no agreement with bank to hold funds credited to director's account as those of the company – absence of ius in re.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Hartzenberg and Claassen JJ and Mabuse AJ sitting as full court).

The following order is made:

1. The appeal is upheld with costs, including the costs of two counsel.
2. The order of the full court is set aside and the following order is substituted therefore:

'The appeal is dismissed with costs, including the costs of two counsel.'

JUDGMENT

BERTELSMANN AJA (HARMS DP, CACHALIA, SNYDERS and SHONGWE JJA concurring).

[1] Dr J W K Louw ('Louw'), a Johannesburg heart surgeon, had a passion for flying. He established an air ambulance service in the eighties, first under the name 'Care Air' and then 'Intensive Air' of which he was the sole proprietor. He expanded the air ambulance into a full air travel operation during about 2001.

[2] A licence to conduct air passenger travel services was issued to the first respondent, Intensive Air (Pty) Ltd, a company ('the company') with limited liability duly incorporated in terms of the Companies Act 61 of 1973. The company is in liquidation. Louw was the sole shareholder and director of the company. Louw opened several bank accounts with the appellant, Absa Bank Ltd, at the latter's Private Bank Division.

[3] One of the accounts opened by Louw was a cheque account with account number 4061777725, conducted in his personal name trading as ‘Intensive Air’. Louw identified himself as the sole proprietor of this business when the bank opened the account in his name. This account was described in the proceedings in the court of first instance as the ‘ticket account’ because all the proceeds of tickets sold by the company to its passengers on its regular flights, and no other funds, were deposited into this account. This account was opened in May 2000, some time before the air transport services commenced.

[4] Other accounts opened by Louw with the bank in his own name included one called the ‘aircraft lease account’, upon which Louw obtained an overdraft of R25m. This sum Louw devoted to the purchase of several passenger aircraft in his personal capacity that he leased to the company.

[5] Another account was conducted as Louw’s personal and practice account, while the company also conducted an account with the bank into which speed point payments were received. Further accounts in the name of both Louw and the company were opened at Standard Bank.

[6] Louw was obliged to pay the interest to the bank on the overdraft of R25m on a monthly basis. The funds required for this purpose were transferred from the ticket account to the aircraft lease account. These interest payments were in turn credited as aircraft rental payments to Louw’s loan account in the company, which reflected a debt of R5m to Louw, arising from rentals and money lent and advanced when the company was liquidated. It is important to note that the loan account represented a reconstruction of these transactions by the company’s auditors as these were not properly recorded by Louw.

[7] The funds in the ticket account were also used to pay other company expenses such as the fuel and the aircraft maintenance accounts. Some transfers were also made to Louw’s personal account.

[8] Louw provided security for the bank's claims against the company and himself in the form of a suretyship for the company's liabilities, a cession of his loan account in the company, a cession of his policies, by registering bonds over his immovable properties and executing a cession of all sums standing to his credit in any account conducted with the bank.

[9] The air passenger service ran into financial difficulties and the company was liquidated during the first half of 2002, the liquidation application having been lodged on 10 April 2002. At that date a credit balance of R293 656.56 was shown in the ticket account, which the bank appropriated by claiming that it was automatically set-off against Louw's indebtedness to it.

[10] The second to fourth respondents were appointed as the first respondent's final liquidators. They regarded the payment of funds earned by the company into the ticket account as dispositions to the bank without value, liable to be set aside in accordance with s 26 of the Insolvency Act 24 of 1936 read with the provisions of s 340 of the Companies Act. They also claimed the credit balance in the ticket account, on the date of insolvency, as moneys earned by the company to which the latter was entitled. The bank disputed these assertions. Summons was issued. Respondents' first claim was for payment of R7 387 957.34 as the total of all dispositions without value, while payment of the amount of R293 656.56 was demanded on the grounds that it 'belonged' to the company. The bank pleaded specifically that the ticket account was opened in Louw's name as sole proprietor of 'Intensive Air'. The respondents therefore had to prove that it was the company, and not Louw in his personal capacity, that was entitled to claim the credit balance in this account.

[11] The respondents called the company's financial manager, Mr Gerhard Louw (not related to Louw), as their first witness. He confirmed that the ticket account, on which he had signing powers, had been opened in Louw's personal name and that the latter was the account holder. He explained that funds were channelled from this account to the aircraft lease account – which

was also held in Louw's name - and were further used to pay the company's liabilities.

[12] He testified that he had recommended that the company's finances should be dealt with separately from the director's affairs, but that his advice was not implemented.

[13] The evidence of Mr Richard Evans, the company's accountant, was also that the relevant accounts were held in Louw's name and that the funds deposited into them were used to defray the company's expenses. Evans regarded the book-keeping practices he found when he joined the company as unsatisfactory, but could not effect a change before the company was liquidated.

[14] This was the sum total of the evidence presented to support the respondent's claims. The other witnesses called by the respondents did not give any evidence that had a bearing on the issues in dispute between them and the bank. For reasons that remained unexplained Louw was not called to testify. The bank closed it case without calling witnesses.

[15] The trial court dismissed both claims. It found that the ticket account was held by Louw personally. Money deposited into that account did not constitute a disposition to the bank. The first claim was dismissed on this ground. By the same token, the credit balance appropriated by set-off was held to have been Louw's asset and not that of the company, rendering the second claim unenforceable. Leave to appeal to the full court was granted in respect of the second claim only. A petition to this court for leave to appeal against the dismissal of the first claim failed.

[16] The full court upheld the appeal against the dismissal of the second claim. Relying upon this court's judgment in *Joint Stock Co Varvarinskoye v Absa Bank Ltd & others* 2008 (4) SA 287 (SCA), it held that the liquidators had established that Louw had conducted the air service venture through the company and not in his own name. The funds deposited into the ticket

account were thus those of the company and 'belonged' to the company. As a result the bank was not entitled to set-off any credit in the ticket account against any claim it might have against Louw personally.

[17] The full court found support for this conclusion in the fact that Louw held a loan account in the company. The existence of this account, the full court reasoned, was proof that the affairs of the company were conducted separately from Louw's financial dealings. It adopted the view that, had Louw's funds been intermingled with those of the company, it would have been nonsensical to conduct the loan account at all. This finding is not supported by the evidence.

[18] Special leave to appeal to this court having been granted, the bank argued that the full court erred in regarding funds deposited into the ticket account as those of the company. They 'belonged' to Louw as the latter had agreed with the company, whose sole shareholder, director and guiding mind he was, to deposit the income from the ticket sales into this account of which he was the holder. The respondents supported the full court's reasoning.

[19] Before further considering the judgment of the full court, it is useful to recall some basic principles in this area of the law.

[20] The relationship between banker and client is one of debtor and creditor. '...it has long been judicially recognised in this country that the relationship between bank and customer is one of debtor and creditor. When a customer deposits money it becomes that of the bank, subject to the bank's obligation to honour cheques validly drawn by the customer...' per Holmes JA in *S v Kearney* 1964 (2) SA 495 (A) at 502-503. Although the liquidators proceeded from the assumption that the funds in Louw's account 'belonged' to the company, their case clearly was not vindicatory or quasi-vindicatory, but contractual. Their case had to be that the company (and not Louw) represented by its sole director had opened the account with the bank and that it was the bank's creditor, in spite of the fact that the bank's Private Bank

Division does not deal with corporate accounts and that the account was conducted in Louw's name.

[21] The respondents therefore had to prove that Louw was a disclosed agent of the company. The bank must have agreed to conduct the account on this basis: *Dantex Investment Holdings (Pty) Ltd v National Explosives (Pty) Ltd* (in liquidation)1990 (1) SA 736 (A) at 748E-749. Milne JA says at 749D-E:

'…in our law, money held by virtue of a fiduciary relationship in which the holder stands to another is, unlike the position in English law, not deemed to be earmarked and is not charged with the fiduciary obligation.'

And at 749I

'There is no evidence to suggest that the Bank agreed to hold the funds in respect of those cheques as agent for Dantex.'

Van den Heever J in Ex parte Estate Kelly 1942 OPD 265 at 272, states:

'[b]y paying these monies into the bank, Kelly acquired a personal claim against the bank and his creditors have nothing but personal claims against him.'

[22] Had Louw been an undisclosed agent, the liquidators would have had no claim against the bank: *Symon v Brecker* 1904 TS 745. Had the company's money been stolen, and had the thief paid off his overdraft with the stolen money, the company would have had no claim for repayment thereof against the bank, *(First National Bank of Southern Africa Ltd v Perry NO & others* 2001 (3) SA 960 (SCA) para 16) but would, of course, have had a claim against the thief and a possible enrichment action against anyone who knowingly received or retained the stolen money. Had the thief, however, deposited the stolen money into an account where it was still identifiable as the fruit of the misdeed, the company would have had a quasi-vindicatory claim to it : *Nissan South Africa (Pty) Ltd v Marnitz NO & others* (*Stand 186 Aeroport (Pty) Ltd intervening*) 2005 (1) SA 441 (SCA). The liquidators may also have shown that the rights of the account holder to operate upon the account had been limited in terms of an agreement between the company and the bank, as was the case in *Varvarinskoye.*

[23] Turning then to the judgment appealed against, the full court appears to have overlooked the specific circumstances that prevailed in the *Varvarinskoye* matter. There, Absa Bank had been expressly informed that the moneys standing to the credit of an account conducted in the name of its client, MDM, were held specifically to provide a fund from which sub-contractors of the appellant joint stock company would be paid. Funds could only be withdrawn from this account for the purpose of effecting payment of approved sums to clearly identified sub-contractors. Every withdrawal had to be expressly authorised by the appellant. Absa Bank was fully aware of these facts and knew that MDM had no claim to the money deposited in the account in its name. MDM had signed cross-suretyships with and in favour of two associated companies that were clients of Absa Bank. When MDM and its associated companies experienced financial hardship and the associated companies were unable to meet their commitments to Absa Bank, the latter purported to appropriate the funds in the MDM account, claiming that the money deposited into the dedicated account became the property of the bank, as if the account had been opened by a client in the ordinary course of banking business. Only the account holder, it was argued, could claim the money standing to the credit of an account, and MDM's claim had been extinguished by the set-off effected by enforcing the cross-suretyships.

[24] On appeal in *Varvarinskoye* this court confirmed that if funds held in an account can be identified as having been reserved for or 'belonging' to another by agreement with the bank, the account holder is not entitled to deal with those funds. The person actually entitled thereto has a quasi-vindicatory claim to demand payment of such funds from the bank: *Fedsure Life Assurance Co Ltd v Worldwide African Investment Holdings (Pty) Ltd & others* 2003 (3) SA 268 (W). Should they become intermingled with other moneys in an account held by a person not entitled thereto, they can no longer be identified as funds to which a non-account holder has a better claim than the holder and the money becomes the property of the bank. The claimant is then left with only a personal claim against the holder of the account: *Dantex Investment Holdings (Pty) Ltd* supra.

[25] By agreeing to the specific terms under which the MDM-account was conducted in *Varvarinskoye*, Absa Bank was placed in the position of the joint stock company's agent holding the latter's money as a separate fund reserved for a specific purpose. Absa Bank was therefore not entitled to appropriate the credit balance in MDM's account to itself. To Absa Bank's knowledge, the funds 'belonged' to the appellant and could not be set-off against MDM's liabilities to Absa Bank. The appeal was upheld in accordance with basic principles and without purporting to create new ones.

[26] The facts in this case differ significantly from those in *Varvarinskoye*. It is clear that the bank was not party to any agreement to treat the funds in Louw's ticket account in any way other than those of the account holder. There is no evidence of any agreement other than that of client and banker entered into by Louw and the bank. While the bank was certainly aware of the fact that Louw was director and shareholder of the company, there was no suggestion made to it at any stage that Louw was not entitled in his personal capacity to the proceeds of the company's ticket sales – which funds were in turn devoted in large measure to the payment of company expenses. The financial arrangements made by Louw in respect of his own and the company's funds may have been unorthodox, imprecise and even chaotic, while the recordal of the various transactions in his and the company's books of account may have been, as counsel for the bank put it during the hearing in the court of first instance ' an auditor's nightmare'. It does not follow that he therefore did not conduct the ticket account in his personal capacity.

[27] The existence of the loan account in the company does not contradict this conclusion. It does not, as the full court held, prove that the company and Louw conducted separate books and drew clear distinctions between transactions performed by the one or the other. The evidence of the financial director and the accountant emphasises that Louw transferred company earnings into accounts he held with the bank, intermingled them with his own funds and used the available financial resources to pay company and personal expenses. They confirmed that the loan account was basically created by the company's auditors in an effort to untangle Louw's various

transactions in the company's books. In any event the existence of its loan account did not establish that the bank had a contract with the company.

[28] Louw clearly regarded the company and its business as his personal fiefdom which he could control as he pleased. His own financial fortunes were intertwined with those of the business. From the bank's perspective there was no reason to suspect that the agreement between Louw and the company to transfer the proceeds of ticket sales into Louw's personal account was anything but bona fide and untainted by any illegality. Unlawful conduct in respect of any arrangement between Louw and the company cannot be presumed: '[t]here exists a presumption in law that parties intend to perform agreements in a lawful manner' per Snyders AJA in *Wypkema v Lubbe* 2007 (5) SA 138 (SCA) para 17 and *Juglal NO & another v Shoprite Checkers (Pty) Ltd t/a OK Franchise Division* 2004 (5) SA 248 (SCA).

[29] The onus was on the respondents throughout to establish that the funds in the ticket account 'belonged' to the company. They failed to present any evidence that would justify this conclusion. The witnesses called in support of the respondents' case had no knowledge of the agreements between Louw and the company and Louw and the bank. They could not gainsay that Louw was the contracting party who agreed with the bank to open the ticket account. Louw was the bank's debtor and the set-off against the credit balance of this account was effective.

[30] The appeal must succeed. The following order is made:

1. The appeal is upheld with costs, including the costs of two counsel.
2. The order of the full court is set aside and the following order is substituted therefore:

'The appeal is dismissed with costs, including the costs of two counsel.'

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E BERTELSMANN
Acting Judge of Appeal

APPEARANCES:

For appellant:	F H Terblanche SC J E Smit
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