THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 192/11
Reportable

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED **APPELLANT**

and

ECHO PETROLEUM CC **RESPONDENT**

Neutral citation: *Standard Bank v Echo Petroleum* (192/11) [2012] ZASCA 18 (22 March 2012)

Coram: HEHER, SNYDERS, MALAN, WALLIS JJA AND BORUCHOWITZ AJA

Heard: 9 March 2012

Delivered: 22 March 2012

Updated:

Summary: Bank – funds transferred to customer's account by third party contracting with customer – bank setting off credit thus arising against debit balance in second account – no right of vindication from bank by third party.

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ORDER

On appeal from: North Gauteng High Court (Pretoria) (Mothle AJ sitting as court of first instance):

The appeal succeeds with costs. The order of the court a quo is set aside and replaced with the following:

'The application is dismissed with costs.'

JUDGMENT

HEHER JA (SNYDERS, MALAN, WALLIS JJA AND BORUCHOWITZ AJA concurring):

[1] The issue in this appeal is, in broad terms, the following. A deposits money into B's bank account, in payment for goods that will be delivered in the future, intending that B will use these funds to purchase the goods B has sold to A. Unknown to A, B is heavily indebted to its bank, which promptly sets off the credit brought about by A's deposit against the debt. Can A recover the amount it deposited from the bank?

[2] The appeal is against an order made by Mothle AJ in the North Gauteng High Court in which the learned judge ordered the appellant ('the Bank') to pay R710 000 to the respondent ('Echo') with costs of suit. He subsequently granted the Bank leave to appeal to this Court.

[3] Echo brought an urgent application on 3 October 2008 claiming payment of the money from Sky Petroleum Ltd ('Sky') and the Bank jointly and severally. The juridical basis was unspecified in the founding affidavit but its vindicatory nature was made clear in a supplementary founding affidavit deposed to eight days later:

'The payment [of] R710 000.00 was paid to the First Respondent [Sky] in terms of a cash agreement of sale. As such, it had never been the intention of the Applicant to transfer ownership of the said money to the First Respondent before the Applicant had received the requisite product. If the First Respondent cannot deliver the product then obviously the First Respondent must return the money to the Applicant. This obligation flows not just from the First Respondent's breach of the

agreement but also because the money was not the property of the First Respondent to start with. At all relevant time the Applicant was and remained the owner of the money. As is evident from Annexure "I" the money of the Applicant is clearly identifiable. . . .

I am advised that even though the money might be in the possession of the First Respondent prior to the First Respondent providing the product to the Applicant, that the First Respondent did not hold this money, at the time, with the necessary intention to deal with it as an owner. Only after the First Respondent had delivered the product would the First Respondent acquire the necessary intention to deal with it as an owner. . . .

I am further advised that the First Respondent was quite able to identify the Applicant's funds which had been transferred into its bank account which is owed and owned by the Applicant.' (sic)

[4] Only the Bank opposed the relief. By the time that judgment was delivered (on 28 October 2010, through no fault of the learned judge) Sky had been liquidated and the order for payment was made against the Bank only, on grounds of unjust enrichment.

[5] The facts concerning the terms of their transaction were essentially within the knowledge of Echo and Sky. The Bank's deponents said that the Bank was unaware of the contractual arrangements between them. Although counsel for the Bank contended in his heads of argument for the existence of unresolved disputes of fact, the picture that emerges from the affidavits was not such as to leave doubt about the material circumstances of the case.

[6] Echo carried on business as a wholesale supplier of fuel. It sold Sasol products. Sasol allowed only authorised contractors to purchase fuel directly from it. Echo was not so authorised and was accordingly obliged to purchase fuel from Sky which was. Echo made frequent use of its services during the period January to October 2008.

[7] The modus operandi of their relationship is made clear in the affidavits of Mr Eben Marais, Echo's sole member, and Mr Tongai Mureka, a manager at Sky with whom Marais usually dealt.

[8] Sky's price for any order would consist of the price charged to Sky by Sasol plus a profit at an agreed rate of about R0,02 per litre of fuel. Echo would order petroleum from

Sky, either before 10h00 or before 14h00 on a particular day. It paid the purchase price into Sky's bank account. Once Sky had received an order from Echo and had been paid it would in turn place an equivalent order on Sasol and pay Sasol with the funds received from Echo. If the payment in respect of an order had been deposited before 13h00 on a business day Sky would, during the afternoon, make available loading documents that permitted Echo to take delivery from Sasol at its Secunda premises. If payment was made after 13h00 documents would not be issued until the following day. If no payment was made by Echo the order would simply lapse. Both Sky and Sasol sold the petrol on a purely cash in advance basis.

[9] Using the loading documents issued by Sasol and sent by Sky to it, Echo would load the product at a Sasol depot. It was Marais's practice to send the trucks to await delivery even before the receipt of the loading documents in the assurance of timeous receipt of such documents.

[10] On 1 October 2008 Marais faxed an order to Sky for six consignments of lead replacement and unleaded petrol and diesel for a total price of R710 111. He initially transferred R700 000 to the credit of Sky's bank account believing that Sky would meet the balance out of a substantial credit owed to Echo by it. Informed later in the day that Sky held insufficient funds in its account for that purpose, Marais caused a further R10 000 to be transferred.

[11] By about 16h30 on the same day Echo had received no loading documents. Marais, whose trucks were waiting at Sasol, ready to load, telephoned Mureka. He, after enquiry, sent an e-mail to Marais at 16h00 saying that he was uncertain as to cause of the delay and would investigate further.

[12] During the morning of 2 October Marais spoke telephonically with Mr Carlos Vieira of the Bank who informed him that the Bank had given instructions to freeze the Sky account.

[13] At 12h01 on that day Mureka notified Echo as follows:

'I have been instructed to inform you that you need to send an urgent demand to Standard Bank

advising that if funds are not cleared for payment, you will apply for a court order for the release of those funds. This will be done specifically on the basis that these were earmarked for payment to Sasol on your behalf and do not belong to Sky. Accordingly you are to cancel your order and demand the return of your funds.

We will do everything in our power to assist you and your lawyers are at liberty to contact us for any documents or affidavits that you may require to support your claim.

We assure you that the funds have not been used or dispersed for our own purposes.'

[14] At 12h41 Marais confirmed the conversation:

'As discussed Echo Petroleum CC paid yesterday 1 October 2008 the amounts of R700 000 and R10 000 respectively into the account of Sky Petroleum Limited (Account number 252103602). *This money was earmarked to be paid over to Sasol on our behalf and is not the property of Sky Petroleum Limited*.

According to Sky Petroleum Limited the account was frozen by Standard Bank for reasons unknown to me.

Unless the amount of R710 000.00 . . . is returned into our account before close of business today, we will bring a court application on an urgent basis to compel Standard Bank to return the money.' (My emphasis.)

[15] At 16h04 on the same day Marais responded, cancelling the orders placed on 1 October and requesting repayment of the amount of R710 000.

[16] At about 16h50 Echo received an e-mail from Mrs Val Botha of the Bank, who had earlier confirmed telephonically that the account had been frozen and the money in the account had been applied to a debt owed by Sky to the Bank, as follows:

'Please be advised that the bank accepted your deposits in the ordinary course of business into the account of Sky Petroleum (Pty) Ltd and any arrangements entered between you and Sky Petroleum are not binding on the bank. As a result, the bank is not able to comply with your demand.'

[17] At the request of Marais he was sent a copy of Sky's bank account by the Bank. Receiving it at about 17h00 on 2 October, he was surprised to observe that the deposit of R710 000 was still in Sky's account despite the information communicated to him earlier by Mrs Botha.

[18] On 3 October 2008 Echo instituted proceedings in the High Court to recover from the Bank the money appropriated by it.

[19] In Echo's founding affidavit Marais alleged that the Bank was fully aware of the practice followed by Echo and Sky in relation to the ordering of fuel, payment for it, and that ownership of the money would not pass until Sasol supplied the loading documents to Echo.

[20] The Bank, in its answering affidavit deposed to by Mrs Botha, set out the following history of its relationship with Sky.

[21] Early in 2008 Sky operated a current account (the '253 account') with an overdraft facility of R1 million. Later it opened a second current account without such a facility (the '602 account') which had to be conducted by agreement on a credit basis.

[22] From March 2008 Sky was in financial difficulty and the Bank appointed officials to manage its facilities. On 22 June the Bank placed Sky on terms to settle the debt failing compliance with which it would withdraw all such facilities at the end of July. Sky did not comply. Further futile negotiations ensued while the Bank held back on the implementation of its threat.

[23] On 1 October the 253 account reflected a debit balance of R897 730,41. The credit balance on the 602 account stood at R3 870,86. On that date Mrs Botha, who was monitoring the accounts, noticed that the balance on the 602 account had grown to R713 870,86. She decided that the Bank should effect a set off of the two accounts by appropriating the credit on the 602 account to the debit on the 253 account. During the morning she caused an electronic block to be placed on the first-mentioned account that prevented access by Sky and gave instructions for the funds in it to be transferred to the 253 account. Because of the internal processes of the Bank the transfer was only reflected on the following day.

[24] Mrs Botha denied that the deposits by Echo were 'earmarked' for payment to Sasol. She pointed out that although Marais had said under oath that Echo's order form contained

full details (of the terms of the deposit) there was no reference in it to such an appropriation. Moreover, she deposed, the 602 account was a general account in respect of which no 'earmarking' of funds is possible; when payment was made into the account the effect was a merger of the funds with those of Sky. Mothle AJ found that the funds were earmarked but gave no reasons. In the face of the Bank's unrebutted evidence that conclusion cannot be sustained. Any effective 'earmarking', ie designation for a particular limited purpose, must be objectively ascertainable by a third party who is sought to be bound by it, and not confined to the knowledge of the direct parties.

[25] Mrs Botha admitted that the 602 account had been used, from about January 2008, to conduct Sky's wholesale fuel business and to pay its business debts in respect thereof. She (and other deponents on behalf of the Bank) denied any knowledge of the modus operandi of the business and in particular whether transactions between Echo and Sky were conducted on a cash on delivery, or, more accurately, a cash prior to delivery, basis.

[26] This appeal depends, in the first instance, on whether a customer of a bank to whose credit a deposit had been made acquired a right to deal with the proceeds of that credit.

[27] The general rule is that moneys deposited into a bank account fall into the ownership of the bank. The resulting credit belongs to the customer, the bank having a contractual obligation to pay the customer on demand and to honour cheques validly drawn on the account to the extent that it stands in credit: *S v Kearney* 1964 (2) SA 495 (A) at 502H-503A.

[28] The bank's apparent ownership of the funds in an account does not in all circumstances confer an absolute or unqualified right on it to treat the funds as its own or the credit as the property of its customer: *Burg Trailers SA (Pty) Ltd and Another v Absa Bank Ltd* 2004 (1) SA 284 (SCA) paras 9 and 13; *Nissan South Africa (Pty) Ltd v Marnitz NO (Stand 186 Aeroport (Pty) Ltd intervening)* 2005 (1) SA 441 (SCA) para 23; *Joint Stock Co Varvarinskoye v Absa Bank Ltd* 2008 (4) SA 287 (SCA) paras 31 to 42; *Nedbank v Pestana* 2009 (2) SA 189 (SCA) paras 8 and 9.

[29] In reliance on these principles counsel for the respondent submitted that Echo and Sky contracted on the basis of a sale for cash on delivery; until Sky tendered delivery it was not entitled to payment. The consequence was, he said, that Echo's deposit and the bank's passing of a credit in favour of Sky were conditional upon delivery, an event that had not occurred by the time that the Bank appropriated the credit (and would not occur because of the cancellation of the agreement).

[30] I regret that I cannot agree with counsel. His argument depends on a distortion of the facts. Nor does it reflect the true basis of the relationship between Echo and Sky. The founding affidavit shows that Echo transferred the price pursuant to a contractual obligation to pay in advance of delivery so as to enable Sky in turn to pay Sasol and thereby procure delivery of the fuel to Echo. As soon as the deposit was credited to it Sky became entitled to use the funds for that purpose, and was, therefore, entitled to the benefit of the credit. The credit was thus a debt of the Bank to Sky against which existing debts of Sky to it could be set off. When Sky was unable to procure delivery Echo obtained a claim against it for breach of contract as any other creditor in its position would have. Such a claim did not include a vindicatory right to the contractual consideration that had been paid. On Sky's insolvency Echo became a concurrent creditor in its estate.

[31] Echo did not prove that the Bank had knowledge of the modus operandi of Sky's business with it. Even if the Bank had been so informed it was not bound to subordinate its interests to Sky in the absence of agreement between them: *cf Absa Bank Ltd v Intensive Air (Pty) Ltd* 2011 (2) SA 275 (SCA) at 280I-281B.

[32] Counsel for Echo, somewhat desperately, submitted that no set-off was possible in the absence of demand by the Bank for repayment of the debit amount on the 253 account. This, he conceded, had been made in June 2008, but pointed out that the 602 account had, between the date of demand and the receipt of Echo's deposit at the beginning of October stood in credit in varying amounts that frequently exceeded the debit balance on the 253 account. This, he submitted, served as a making of the funds available for payment in satisfaction of the Bank's demand. That the Bank chose not to appropriate the credits was of no significance; what was important was that a further demand became necessary in order to again render the 253 account due and payable. As no further

demand was forthcoming the debit on that account could not be claimed by the Bank and accordingly was not capable of set-off.

[33] This seems to be a wholly artificial argument. When demand was made for payment of the 253 account the debit balance became due and payable. The Bank did not then or later (until 2 October) consolidate the accounts or apply set off. The debt arising on the 253 account was never discharged and the demand stood. Although set off occurs automatically by operation of law, it only operates, retrospectively, if and when the debtor (the Bank) elects to rely on it. See *Southern Cape Liquors (Pty) Ltd v Delipcus Beleggings Bpk* 1998 (4) SA 494 (C) at 499I-501D and the authorities there cited. That election only took place on 2 October at a time when the 253 account remained unpaid and subject to the unsatisfied demand.

[34] I conclude, therefore, that Echo had no right in law to reclaim the deposit (or the amount of it) from Sky or the Bank by vindication. Although no foundation was laid for a claim based on unjust enrichment, it is clear from what I have said that the Bank acted lawfully in appropriating the credit and Echo could not have succeeded on that cause either.

[35] The appeal succeeds with costs. The order of the court a quo is set aside and replaced with the following:
'The application is dismissed with costs.'

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J A HEHER
JUDGE OF APPEAL

APPEARANCES

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