THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 323/12
Reportable

In the matter between:

THE TRUSTEES OF THE INSOLVENT ESTATE OF GRAHAME ERNEST JOHN WHITEHEAD	**APPELLANT**

and

LEON JEAN ALEXANDRE DUMAS	**FIRST RESPONDENT**
ABSA BANK LIMITED	**SECOND RESPONDENT**

Neutral citation: *The Trustees of the Insolvent Estate of Grahame Ernest John Whitehead v Dumas* (323/12) [2013] ZASCA 19 (20 March 2013)

Coram: Lewis, Ponnan, Cachalia, Theron, Petse JJA

Heard: **1 March 2013**

Delivered: **20 March 2013**

Summary: Where A transfers money from his bank account to B's bank account pursuant to an agreement induced by B's fraudulent misrepresentation, B's personal right to the credit falls to his insolvent estate on sequestration.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Makgoba J sitting as court of first instance):

The following order is made:

‘1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the high court is set aside and replaced with the following:

‘The application is dismissed with costs.’

JUDGMENT

CACHALIA JA (LEWIS, PONNAN, THERON AND PETSE JJA CONCURRING):

[1] This appeal concerns a dispute over an amount of R3 million between the trustees of a fraudster’s insolvent estate and a disgruntled investor. The investor, Dr Leon Dumas, the first respondent, had been induced to pay the money into the bank account of the fraudster, Mr Graham Whitehead, in contemplation of participating in the latter’s illegal financial scheme. Whitehead’s estate was subsequently sequestrated and its administration placed in the hands of the trustees, the appellant.

[2] Dumas lays claim to the money on the ground that it was obtained from him fraudulently, and therefore cannot form part of the insolvent estate. The trustees, on the other hand, contend that the funds became part of the estate on sequestration, and thus subject to the concursus creditorum. The parties’ competing claims may best be understood against the background circumstances that led to the dispute.

[3] Whitehead operated an unlawful and fraudulent ‘Ponzi’ or Pyramid scheme, which involved investors putting up bridging finance for fictitious transactions purportedly undertaken by the Salvation Army in the United Kingdom. In return for their short term investments, investors were promised, and in some instances apparently received, huge profits. The scheme, as with other similar schemes, depends on an ever-increasing flow of funds from new investors. It initially pays out high returns to lure more investors. The ‘return’ to the initial investors is paid out from the new investments and not out of any profits because there are no real profits. When the scheme is unable to attract sufficient numbers of new investors its hierarchical payment structure becomes unsustainable. So the scheme collapses – as it inevitably must – with most of the participants losing the money they put in.

[4] Dumas, a specialist medical practitioner, was duped through representations made by an agent acting on Whitehead’s behalf into believing that Whitehead’s scheme was legitimate, and that his investment would yield a lucrative return of a third of his investment within a year. On the strength of this belief he instructed his Bank, First National Bank, to transfer the R3 million into Whitehead’s Absa Bank account on 23 April 2009. He understood from the agent that the money would remain his property until he concluded a contract with Whitehead a few days later. But unbeknown to both the agent and Dumas, Whitehead had been under arrest for fraud in the United Kingdom at the time; so the planned meeting between the parties to finalise the detail of the investment agreement did not take place. Whitehead has since been convicted and sentenced to a ten year term of imprisonment for this crime. In addition his assets were frozen and his estates in South Africa and the United Kingdom sequestrated.

[5] On 28 April 2009, after learning of Whitehead’s arrest, Dumas instructed his bank, FNB, to reverse the transfer to Whitehead’s account. Acting on his instructions FNB wrote to Absa requesting that the account into which the money had been paid be put on ‘hold’. No transactions were made from this account thereafter.

[6] On 5 May 2009, the Absa account had a credit balance of R 3 293 677.42, and a second account, also held by Whitehead with Absa, had a credit balance of R 4 943 078.22.

[7] On 7 May 2009, an urgent order was granted for the provisional sequestration of Whitehead's estate. The court also ordered that the funds in both Whitehead's accounts be transferred to the trust account of Attorneys Coetzee Inc. In terms of the transfer order an amount of R 8 236 605.54 was drawn from the two Whitehead accounts and paid into the Coetzee Inc trust account. The order stated that the funds were to be held in the account pending the appointment of provisional trustees or further directions of the court.

[8] On 20 May 2009, the Master appointed the provisional trustees of Whitehead's insolvent estate. On 25 May 2009, Coetzee Inc paid the total amount of R 8 236 605. 54 over to the trust account operated by the trustees. Coincidentally, this account too is held by Absa. Absa therefore held the money, and continues to hold the money, as banker in the name of Whitehead's insolvent estate.

[9] The following day, on 26 May 2009, Dumas instituted a vindicatory application for the return of the moneys in the North Gauteng High Court.

[10] In his founding and replying affidavits Dumas premised his claim on his alleged ownership of the funds deposited into Whitehead's account. But formulated in these terms, the claim was bad because when money is paid into a bank account that money becomes the property of the bank. The rei vindicatio, which is the common law remedy for an owner seeking to recover his property, was therefore not available to Dumas. When he realized the problem, no doubt on the advice of his lawyers, he filed a supplementary replying affidavit in which he altered the legal basis of his claim. His claim was no longer vindicatory but premised on enrichment – the *condictio ob turpem vel iniustam causam* – a remedy available to a plaintiff who innocently transfers money to a defendant under an agreement which, to the knowledge of the defendant, is illegal. In this case the enrichment claim was sought to be enforced against Absa even though it was not party to the agreement between Dumas and Whitehead.

[11] Although Dumas sought relief against seven respondents, including Absa Bank, only the appellant opposed the application. As is usual in matters of this nature involving contested claims to the money standing to the credit of an account-

holder, Absa properly adopted a neutral stance of a stakeholder awaiting a court decision on the dispute.

[12] The high court (Makgoba J) upheld Dumas' claim, holding that as he had caused the transfer of the money into Whitehead's bank account to the credit of Whitehead through a fraud and theft perpetrated on him by Whitehead, Whitehead had no entitlement, and thus no claim against Absa, to the money. The court concluded that the money therefore fell outside Whitehead's estate, was not subject to the concursus creditorum and the bank, which would be enriched if it kept the money, had to repay the amount to Dumas. The high court refused the appellant leave to appeal, but this court granted the necessary leave. It is convenient at this stage to restate the legal principles governing a dispute of this nature.

[13] Generally, where money is deposited into a bank account of an account-holder it mixes with other money and, by virtue of *commixtio*, becomes the property of the bank[1] regardless of the circumstances in which the deposit was made or by whom it was made. The account-holder has no real right of ownership of the money standing to his credit[2] but acquires a personal right to payment of that amount[3] from the bank, arising from their bank-customer relationship. This is also so where, as in this case, no money in its physical form is in issue, and the payment by one bank to another, on a client's instruction, is no more than an entry in the receiving bank's account.[4] The bank's obligation, as owner of the funds credited to the customer's account, is to honour the customer's payment instructions.[5] Where the depositor is not the account-holder he relinquishes any right to the money and cannot reverse the transfer without the account-holder's concurrence.[6]

[14] Once ownership passes to the bank it immediately incurs the obligation to account to its customer. But a customer does not always acquire an enforceable personal right to the credit in his account merely by virtue of the deposit. A bank is

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[1] *Louw NO & others v Coetzee & others* 2003 (3) SA 329 (SCA) at 334H-I; *Commissioner of Customs and Excise v Bank of Lisbon International & another* 1994 (1) SA 205 (N) at 208I.
[2] *S v Kearney* 1964 (2) SA 465 (A) at 503. See also *S v Graham* 1975 (3) SA 569 (A) at 577.
[3] See *Louw NO v Coetzee* 2003 (3) SA 329 (SCA) para 12.
[4] *Muller NO v Community Medical Aid Scheme* 2012 (2) SA 286 (SCA) para 13.
[5] *Muller* para 13.
[6] *Take and Saving Trading CC v Standard Bank of SA Ltd* 2004 (4) SA 1 (SCA) para 17.

entitled to reverse a credit in the account-holder's bank account if it transpires that the account had been credited in error, that the customer had acquired the money by fraud or theft,[7] that the drawer's signature on a cheque had been forged, or that the bank notes deposited in the account were forgeries.[8] It is contended on behalf of Dumas that because he was the victim of fraud or theft by Whitehead the bank must reverse the credit in the trustees' account.

[15] Where, as in this case, A causes the transfer of money from his bank account to the account of B, no personal rights are transferred from A to B; what occurs is that A's personal claim to the funds that he held against his bank is extinguished upon the transfer and a new personal right is created between B and his bank. Ownership of the money – insofar as money in specie is involved – is transferred from the transferring bank to the collecting bank, which must account to B in accordance with their bank-customer contractual relationship.[9] This is so even where A was induced to enter into an agreement through B's fraudulent misrepresentation. In that case A will have a claim for delictual damages against B to compensate him for his loss[10] but will not be able to claim a retransfer of the credit from the bank. And if B is subsequently sequestrated the claim will lie against B's estate because an insolvent's personal right to credit falls into his estate upon sequestration.[11]

[16] The enquiry in this case therefore turns on whether or not Whitehead acquired a personal right to the credit when Dumas caused the money to be transferred to Whitehead's account. If he did the funds accrued to Whitehead's estate upon sequestration. However, if Whitehead himself did not acquire a personal right to the funds, neither would his estate have upon sequestration; the funds then remain the property of the bank with Whitehead's estate having no claim to its payment. And the bank would be unjustly enriched, at Dumas' expense, if it retained the funds without incurring an obligation to release it to the trustees.

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[7] *Nedbank v Pestana* 2009 (2) SA 189 (SCA) para 9.
[8] *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in Liquidation)* 1998 (1) SA 811 (SCA) at 823B-D.
[9] W Schulze 'Countermanding an electronic funds transfer: the Supreme Court takes a second bite at the cherry' (2004) *SA Merc LJ* 667, 671; J du Plessis 'The cause of action in *Nissan South Africa (Pty) Ltd v Marnitz NO*' in H Mostert and M J de Waal (eds) *Essays in Honour of C G van der Merwe* (2012) 6; *Muller* above para 13.
[10] R H Christie and G B Bradfield *Christie's Law of Contract in South Africa* 6 ed (2011) 307-308.
[11] R Sharrock K, Van der Linde and A Smith *Hockly's Insolvency Law* 7 ed (2002) at 58.

[17] The foundation for the learned judge's decision to uphold Dumas' claim was this court's judgment in *Nissan South Africa (Pty) Ltd v Marnitz & others* (*Stand 186 Aeroport (Pty) Ltd Intervening*).[12] The facts were these: Nissan was a customer of Firstrand Bank Ltd (FNB). It instructed the bank to pay an amount of just under R13 million to one of its creditors, TSW, but mistakenly gave the bank the incorrect account details. As a result of this mistake, FNB paid the amount in question to an incorrect payee. The payee was aware of the error, but nonetheless withdrew the funds and was liquidated shortly thereafter. Nissan applied for an order declaring that what was left in the payee's account did not form part of the insolvent's estate.

[18] The high court refused to grant the order, holding that the payee, and not FNB, had been enriched by the transfer but that Nissan had a concurrent claim against the insolvent estate. Nissan appealed against the order to this court. On appeal Streicher JA dismissed the liquidator's submission that once a bank unconditionally credits a customer's account with an amount received, the bank must pay the money to the customer on demand, even where the money was received through fraud or theft.[13] And, he continued:

'If stolen money is paid into a bank account to the credit of a 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.'[14]

[19] Consequently, so he held, because the payee had no claim to the money that was mistakenly paid to it, the liquidators of the payee's insolvent estate had no claim to the money either. And he therefore concluded that because the bank, and not the payee, was enriched, it had to release what was left in the payee's account.

[20] Mr Harpur, who appears for Dumas in this appeal, seeks to defend the high court's invocation of *Nissan* in support of his case. Mr Wasserman, who coincidentally appeared for the successful appellant in *Nissan*, contends that the high court applied the ratio decidendi of that case incorrectly.

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[12] *Nissan South Africa (Pty) Ltd v Marnitz* 2005 (1) SA 441 (SCA).
[13] Ibid para 23.
[14] Ibid para 23.

[21] It is apparent that the circumstances in *Nissan* were very different to those that we are considering. There the court was dealing with funds that were paid into an incorrect bank account. The payee then withdrew the money from that account knowing that he had no claim to it; in effect he stole the money. Thus, in commenting on this case, Malan JA recently observed in *Absa Bank v Lombard Insurance Company Ltd*:[15]

'The bank had no duty to account to its customer. Nor did the customer have a contractual or other right to the stolen funds. The bank, by remaining in possession of the funds without any corresponding liability to account to its customer, was enriched and liable to make restitution to the owner.'

[22] The reference to 'fraud or theft' in *Nissan* must be understood in context:[16] and one must have regard to the approach of Thirion J in *Commissioner of Customs and Excise v Bank of Lisbon International Ltd*,[17] which Streicher JA approved.[18] Here, R defrauded the Commissioner and paid an amount of money into his bank account with the Bank of Lisbon. The circumstances under which R obtained the money – the taking of the moneys having been nothing short of theft – Thirion J held were such as to deprive its delivery of any legal effect.[19] In other words the bank acquired ownership of the money without a corresponding obligation to account to its customer and the customer had no contractual or other right to the funds. And, although he considered it unnecessary to decide whether the Commissioner could invoke an enrichment action against the bank because the matter was referred to the trial judge for oral evidence to be heard, he accepted that such a claim (the condictio sine causa) was competent.[20]

[23] So both *Nissan* and *Bank of Lisbon* were concerned with theft or fraud outside a contractual context. By contrast the investment transaction between Dumas and Whitehead, though tainted by fraud, nevertheless constituted the causa for the payment. Dumas intended to pay Whitehead and voluntarily made the payment into

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[15] *Absa Bank v Lombard Insurance Company Ltd* 2012 (6) SA 569 (SCA) para 14.
[16] *Nissan* para 23.
[17] *Commissioner of Customs and Excise v Bank of Lisbon International Ltd & others* 1994 (1) SA 205 (N).
[18] *Nissan* paras 13-16.
[19] *Commissioner* at 208G.
[20] Ibid at 220A-B.

Whitehead's account; it is immaterial that the payment was solicited through Whitehead's misrepresentation and fraud.

[24] As I have said, as between the account-holders no personal rights are transferred; the personal right to the credit of the one account-holder is extinguished upon the transfer and a new personal right created immediately for the other. Whitehead, as a customer of Absa, immediately acquired the new right to the money in his account, which was enforceable against the bank when ownership passed to it, despite the absence of valid causa – ie a valid underlying agreement. Absa then had both a duty to account and a corresponding liability to its customer, Whitehead, and on his sequestration two weeks later, to the trustees of the insolvent estate. Absa is therefore not enriched and no enrichment action lies against it. Dumas had only a delictual claim against Whitehead arising from the fraudulent misrepresentation, which induced the transfer of the money, and on the latter's sequestration a claim against the trustees.

[25] I am aware that in *Nissan* Streicher JA was concerned that the usual remedies open to a creditor – interdicts and attachments to prevent the debtor from disposing of his assets pending an institution of an action by the creditor – may not be adequate remedies in the event of a debtor's insolvency. And he thus held that the law would be deficient if it did not provide a remedy for recovery of stolen money direct from the bank in those circumstances.[21] There were accordingly different considerations for affording a remedy to the creditor against the bank in that case, as there was in *Bank of Lisbon.*

[26] The appeal is accordingly upheld. The matter is obviously important, not only to the parties but more broadly as it deals with a complex area of the law. The trustees were therefore justified in engaging the services of two counsel. There is no reason why they should not be granted these costs.

[21] *Nissan* para 16.

[27] The following order is made:

‘1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the high court is set aside and replaced with the following:

‘The application is dismissed with costs.’

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A CACHALIA

JUDGE OF APPEAL

APPEARANCES

For Appellant:	J Wasserman SC (with him G Amm) Instructed by: Lowndes Dlamini, Pretoria Matsepes Inc, Bloemfontein
For Respondent:	G D Harpur SC Instructed by: Rajespree Naidoo & Associates, Pretoria Lovius Block, Bloemfontein