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IN THE SOUTHERN-GAUTENG HIGH COURT OF SOUTH AFRICA

JOHANNESBURG

CASE NO: 28485/06

DATE: 24/02/2009

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE YES/NO
(2) OF INTEREST TO OTHER JUDGES YES/NO
(3) REVISED

DATE 23/3/2009 SIGNATURE

In the matter between

REDLEX 226 (PTY) LTD APPLICANT

and

STANDARD BANK OF SOUTH AFRICA LTD 1st RESPONDENT

AND OTHERS

JUDGMENT

WILLIS J: This is an application for a leave to appeal against the judgment which I gave *ex tempore* in this matter on 25 April 2007 in the opposed motion court. I dismissed the application with costs.

Recently I received from the office of the deputy judge president an imploring letter requesting that I assist in the giving or reasons for the judgment which I gave on 25 April 2007 by reason of the fact that

there was a pending application for leave to appeal.

It was only then that I was aware of the problem. It appears that for reasons that are utterly inexplicable LOM Business Solutions who typed the transcripts of *ex tempore* judgment were unable to transcribe a single word. It remains a mystery to me why it has taken the Registrar's office so long to place the file and the correspondence of the distressed attorneys before me.

Almost immediately that this problem that my judgment and the reasons therefore were lost in cyberspace became apparent, I sent a letter to the attorneys for both sides on 11 February 2009 and suggested that I hear the matter today. I also suggested in the letter that it may be best if I give somewhat unusually, but excusably in the circumstances, a single omnibus judgment in terms of which I attempted to recall to the best of my ability the reasons for my judgment and order given on 25 April 2007 and then proceeded to deal with the question of the application for leave to appeal.

Counsel for both parties agreed that in all the circumstances of the matter this was probably the best course to adopt. I am unable to think of any that may be better.

Fortunately, during the course of argument on the application for leave to appeal I was able to be completely refreshed about the issues that were before me approximately two years ago.

The case is in fact in my view a simple one. The applicant claims payment of a sum of money being R800 000.00 alternatively R488 195.00 held in an interest bearing account held with the first

respondent under the name of "Masondo suspense account".

The applicant claims that sum of money in motion proceedings. It is common cause between the parties that the basis of the applicant's claim is one of enrichment. It is common cause that the applicant together with various other persons, including the sixth respondent, Superseed Developments (Pty) Ltd was defrauded by one "Masondo" who held himself out to be the son of the then mayor of Johannesburg. It is common cause that on 30 November 2005 in response to an application brought before my brother Jajbhay J, a sum of money in the account of one "Obose" was a "frozen" or made the subject of "preservation order".

It is the money in this account to which the applicant directs its eyes. This account is now known as the "Masondo suspense account" to which reference is made in the notice of motion.

I should point out that it is clear that the applicant has been impoverished to the extent of R800 000.00. It is also clear that the first respondent has been enriched to the extent of at least this sum.

What is in dispute however - and this is this is the critical point - is whether the enrichment was "at the expense of" the applicant. As I have already indicated, these are motion proceedings. The basis upon which one determines motion proceedings in regard to the facts has been set out in the well-known case of *Plascon Evans (Pty) Litd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H to 635(C), applied in innumerable cases and recently affirmed with emphatic resolution in the case of the *NVPP v Zuma* (573/08) [2009] SASCA (12

January 2009) at paragraph [26].

The respondents dispute that these funds in the so-called "Masondo suspense account" arise because of an enrichment at the expense of the applicant. They contend that the funds are to be distributed among a *concursus creditorum*, there being, as I have already, indicated a number of persons to whom Masondo owed money in particular by reason of his having defrauded them.

The critical date to which I have referred earlier is 30 November 2005, the date upon which my brother Jajbhay J granted the order. Up until this date the first respondent, the bank, was completely unaware of the "shenanigans" with which "Masondo" was engaged.

The cases of *First National Bank of Southern Africa Ltd v Perry NO and others* 2001 (3) SA 960 (SCA) and *Nissan South Africa (PTY) Ltd v Marnitz NO and others* 2005 (1) SA 441 (SCA) make it clear that there can be no question of the bank being enriched until such time as it was made aware of the dishonest dealings of its customer. In other words there can be no question of the bank (in this case the first respondent) having being enriched before 30 November 2005.

I have already indicated that the respondents dispute that as at 30 November 2005 the enrichment of the first respondent was at the expense of the applicant. Without putting too fine a point on the matter, the applicant wishes to steal a march on the *concursus creditorum*.

I should pause here to point out that it is not envisaged by any of the parties in this matter that the bank will remain enriched forever. The key question is whether it is the applicant who should receive the spoils

of the funds that have been frozen or whether these frozen funds should be distributed among a number of other persons which may include the applicant.

The respondents' version of events is supported by documentation upon which the applicant relies and which was annexed to the founding affidavit.

The bank account of "Masondo" shows that on 3 October 2005 the sum of R800 000.00 was indeed deposited into "Masondo's" bank account with Standard Bank. Immediately prior to that deposit the "Masondo" account had a credit of R47 845.76. It is common cause that this R800 000.00 deposited into the account of Masondo on 3 October 2005 was a payment from the applicant to Masondo.

Thereafter [i.e. after the deposit of the R800 000.00] various disbursements were made from the account.

A further deposit was made to this account on 6 October in an amount of R220 000.00.

On 11 October 2005, a deposit from the sixth respondent, Superseed Developments (Pty) Ltd was effected to the account, at that stage bringing the balance up to R1 988 105.04.

There continued throughout to be disbursements from the account. On 14 October 2005 there was yet another deposit of R235 000.00. On 19 October a further payment of R22 000.00, on 20 October R5 000.00, on 25 October R60 000.00, on 26 October R1 200 000.00, on 28 October R24 000.00, on 31 October R3 500 00.00 and on 1 November R6 000.00.

On 31 October 2005 Masondo paid the sum of R1 200 000.00 into the account of Obose (the account which has been frozen). The applicant contends that of that amount of R1 200 00.00 is the sum of R800 000.00 which it paid into the account of Masondo on 10 October 2005 and that this is the amount by which the bank has been enriched at its expense.

There are certain factual difficulties for the applicant. In the first place, it is certainly not clear that this sum of R1 200 000.00 was transferred into the "Obose" account from the "Masondo" account into which the R800 000.00 had been deposited on 10 October 2005.

Be this as it may, as at 31 October 2005 the "Masondo" account into which the sum of R800 00.00 had been paid on 3 October 2005 reflected a credit balance of R3 689 226.45. It will be recalled that on 31 October there was a deposit of R3 500 000.00 paid into this account (The "Masondo" account) by someone other than the applicant and that there had been various other transfers into the account since the R800 000.00.

In other words, it is quite clear from the documentation provided by the applicant in its founding papers that as at 30 November 2005 when Jajbhay J granted the order and upon which the question of enrichment arises, it cannot be said that the enrichment of the first respondent was "at the expense of" the applicant. That to my mind is the end of the matter.

Mr Louw, who appeared for the applicant, in both the original application and in this application for leave to appeal, attempted

valiantly to persuade me that there were complex legal issues relating to causation that deserved a further hearing before another court. I beg to disagree. The issue ultimately is a factual one. There is a dispute by the respondents, strongly supported by the available evidence that the bank, the first respondent, was not enriched at the expense of the applicant at the critical date in question and accordingly the application must fail.

That to me is the end of the matter. That formed the basis of my reasoning on 25 April 2005 and however interesting questions of causation may be, they can only be argued upon a sure factual foundation. There is no such sure factual foundation upon which the applicant can in my view even begin to argue.

There are, in my view, no reasonable prospect of success in an appeal in the light of this solid factual dispute in motion proceedings.

Accordingly, I repeat that above judgment includes my reasons for dismissing the application and they also include the reasons for my considering the application for leave to appeal and the reasons why the judgment is in the form that it is.

The following order is made:

The application for leave to appeal is dismissed with costs.