

10/12/2010
NOT REPORTABLE
IN THE HIGH COURT OF SOUTH AFRICA

CASE NUMBER: 45809/08

In the matter between

ECHO PETROLEUM

AND

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	<input checked="" type="radio"/> YES <input checked="" type="radio"/> NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	<input checked="" type="radio"/> YES <input checked="" type="radio"/> NO
(3) REVISED.	
10/12/2010	<i>ifheer</i>
DATE	SIGNATURE

SKY PETROLEUM

1ST RESPONDENT

STANDARD BANK OF SOUTH AFRICA

2ND RESPONDENT

LIMITED

JUDGMENT

TLHAPUJ

[1] The applicant approached the court by way of an urgent application for the following

Order:

- "1. Dat hierdie aansoek as een van semi-dringende aangehoor word vir die nakoming van hofreëls met betrekking tot vorm en betekening;
2. Dat die Respondente gelas word binne 24 uur van betekening van die bevel, die bedrag van R710 000.00 aan die Applikant te betaal;
3. Dat die Respondente die koste van hierdie aansoek gesamentlik en afsonderlik betaal op 'n skaal soos tussen prokureur en klient;"

The applicant having filed its founding affidavit and the second respondent having opposed the matter and having filed its answering affidavit, the applicant instead of replying filed a supplementary founding affidavit, and the order given on the 4 August 2009 related to the condonation of the filing of a supplementary founding affidavit by the applicant and the re-enrollment of the matter on the opposed roll, it having been struck off by the court. The second respondent refused to file its answering affidavit to the supplementary founding affidavit before the finalization of the condonation application. The reasons that now follow relate to the order given at that time which read.

- (a) Application for condonation is granted;
- (b) The second respondent is to file its answering affidavit;
- (c) Matter is postponed sine die;
- (d) Costs reserved.

THE FACTS

[2] The applicant traded as a wholesaler in petroleum products, a business conducted within the jurisdiction of this court. The products were sourced through the first respondent which had its registered offices in La Lucia, Natal and which was registered as a distributor of the products on behalf of the supplier, Sasol. The said products could only be sourced through a registered distributor, hence the relationship between the applicant and the first respondent. The second respondent was the banker for the applicant and first respondent.

[3] The purpose of the application was to compel the first and second respondent to return to the applicant an amount of R710 000.00 which it had deposited into the account of the first respondent on the 1 October 2008 and which amount was

earmarked for the purchase and delivery of petrol for that amount. The modus operandi for the purchase was that the applicant would fax through his order to the first respondent which was followed by payment of the purchase price into the bank account of the first respondent. The delivery would only be effected by Sasol to the applicant and at Secunda branch upon receipt of the order and proof of payment. On this occasion applicant could not take delivery of the petroleum because the second respondent had laid claim to the R710 000.00 in the first respondents account and further frozen the first respondents account. The issue revolved around the ownership of the money whether same had passed to the first respondent or not.

14. The second respondent raised certain points in limine namely: that applicant lacked locus standi to bring the application against it; there was no contractual nexus between it and the applicant, giving the applicant the right to demand payment of the price of goods ordered from the first respondent and that second respondent was not aware of any terms and conditions governing the contractual relationship between the applicant and the first respondent; that the registered offices of the first respondent were situated in Natal, therefore this court lacked jurisdiction to hear the matter. The second respondent contended that as a result of various issues, a dispute of fact had arisen and this matter could not be resolved by way of application.

15. According to the second respondent, the first respondent was indebted to it in respect of overdraft facilities and other obligations. The first respondent was experiencing financial problems. At the time the first respondents indebtedness exceeded R800 000.00. When the R710 000.00 was received from the applicant or was paid in on behalf of the applicant the second respondent set off such leaving a balance owing of about R183 000.00. The monies were withdrawn from the first respondents bank account after it had failed to meet certain undertakings to pay substantial monies owing to the second respondent and after failing to honour

deadlines set

[1] The urgent matter did not proceed because the applicant had approached the second respondent for a postponement to file a replying affidavit also tendering costs. Apparently applicant failed to communicate this request in writing via e-mail as arranged with the attorneys for the second respondent. There was no appearance for the applicant or first respondent at the hearing and the matter was struck off. The order was taxed and costs were then paid by the applicant.

[7] The applicant filed a supplementary founding affidavit stating that the facts raised therein would not prejudice the respondents and if they wished to, second respondent was at liberty to amplify its answering affidavit. The applicant addressed the issue of jurisdiction and its relationship with the first respondent. As I see it, the applicant in the supplementary founding affidavit gave better and full details of how petrol was purchased through the first respondent which details were not provided in the founding affidavit. The second respondent opposed the application for condoning the filing of this founding affidavit. It contended that the initial founding affidavit failed to make out a case and that by filing a supplementary founding affidavit it was attempting to change the facts in the founding affidavit by substituting a new case in the supplementary affidavit and it gave some examples.

[8] It was submitted for the applicant:

1. that the supplementary founding affidavit did not abandon the cause of action set out in the founding papers, that there was no prejudice to the second respondent if it filed a supplementary answering affidavit since it had reserved its right to supplement its answering affidavit.

2. that the supplementary affidavit dealt with the issue of jurisdiction and the confirmatory affidavit of the first respondent to address hearsay issues, which confirmatory affidavit could not be obtained because the applicant had approached the court by way of urgency;
3. that the applicant had a strong case on the merits and the law: the second respondent being aware of the debt problems it had with the first respondent had allowed the first respondent to deal with his accounts without freezing them and that the unsuspecting public deposited monies into those accounts;
4. that the contract between the applicant had not been honoured therefore it was entitled to cancel the contract due to non-delivery of the purchased goods, that the applicant and first respondent had been in agreement that the contract had been cancelled as a result, the first respondent was not entitled to the money;
5. that the money deposited with the first respondent was not meant to pay the first respondent's debt with the second respondent but that it was meant to pay Sasol for the delivery of the petrol ordered and that before the petrol was delivered there was no entitlement to the money;

The following was submitted for the second respondent:

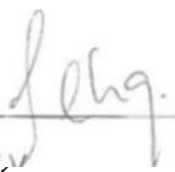
6. that the applicant was attempting to convert a claim it had against the first respondent into a claim against the second respondent: the applicant has not in any way sought an order against its contracting party, the first respondent;
7. that the applicant had to show that the money paid into the first respondents account was its money: the deponent to the founding affidavit contradicted himself with regard to ownership of the money;

8. that on a closer look at the activity of the first respondent's account into which applicant had deposited the money, it was evident that such account was not created for the sole purpose of purchasing petrol for the applicant from Sasol; first respondent had used the same account to conduct other business;
9. that the basis of the application was contrived in that it emanated from a suggestion from first applicant 'that the application is to be done on the basis that the funds in question were earmarked';
10. that that the applicant attempted to enforce its contract with the first respondent when he demanded documentation in order to enable him to take delivery of the petrol, that is before 'cancellation' was suggested by the first respondent; furthermore that as at the time the money was set off by the second respondent, the applicant and first respondent had an extant contract;
11. that the supplementary founding affidavit suggested that the transaction concluded between the applicant and first respondent was a cash sale, which fact was never mentioned in the founding affidavit and that this issue was prejudicial to the second respondent which is expected to engage the arduous task of investigating its records to discover whether it knew or should have known the relationship between the applicant and first respondent;

Without going into the merits, it is not disputed that the applicant was in the business of selling petroleum products and that the first respondent was the only agent through which such product could be sourced from Sasol. While second respondent was not a party to the contract between applicant and first respondent, on the other hand applicant was not a party to the relationship between the first and second

respondent where the latter had extended overdraft facilities to the first respondent. What requires to be looked into was the intention for which payment was made in the account of the first respondent. This could only be achieved if there was a detailed enquiry into the matter, this being the case even where it shall entail an extensive investigation into the records of the bank and the parties, hence the grant of the application, being to allow a full ventilation of the issues.

[10] Although the facts in Nissan South Africa (Pty) Ltd v Maritz and Others (Stand 186 Airport (Pty Ltd Intervening) 2005 (1) SA 441 (SCA) and Joint Stock Co Varvarinskoye v Absa Bank Ltd and others 2008 (4) are distinguishable, they serve to show that depending on the circumstances, the court could oblige a party in this instance, the bank, to pay back monies which were in another's account where such money did not belong to such person or the bank and, was utilized for purposes other than what it was intended for. While the second respondent views the suggestions made by the first respondent to the applicant as to how the money could be demanded back from the second respondent, it remains a suspicion and does not necessarily mean that there was something untoward in the suggestion. It would further be in the interests of justice that this matter be properly investigated and ventilated.


T. HADIM

(JUDGE OF THE HIGH COURT)

ATTORNEYS FOR THE APPLICANTS

CILLIERS & REYNDERS INC

ATTORNEYS FOR THE RESPONDENTS

SHAUN NEL PROKUREURS