HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 89853/15

29/1/16

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.

(3) REVISED. ✓

28/1/2016

DATE **SIGNATURE**

IN THE MATTER BETWEEN

ABSA BANK LIMITED Plaintiff

and

GINO LUIS VELUDO Defendant

JUDGMENT

DAVIS AJ

HEARD ON: 25 JANUARY 216

JUDGMENT HANDED DOWN: 29 JANUARY 2016

[1] This is an opposed application for summary judgment.

[2] The basic facts pertaining to the Plaintiff's cause of action are largely common cause or haven't been placed in dispute. They are the following:

2.1 The Plaintiff is a banking institution and the Defendant is a client of the Plaintiff with a certain account of which the suffix is 00543 (in order to protect the privacy of the parties involved, the remainder of the number is not disclosed);

2.2 Another client of the Plaintiff, whose identity has been disclosed in the Plaintiff's particulars of claim, also has an account with the Plaintiff, but the suffix of which account number is 05543;

2.3 On 24 June 2015 and due to an administrative error of an employee of the Plaintiff an amount destined to be credited to the account with suffix 05543, was credited to the Defendant's aforementioned account;

2.4 By way of a number of cash withdrawals, notably one of R210 000,00 on 29 June 2015, the Defendant has withdrawn the amount erroneously credited to his account.

[3] The Plaintiff now claims repayment of the amount in question, being R534 236.30.

[4] The Defendant's version is curious one. He alleges in paragraph 11.1 of his affidavit resisting summary judgment the following:

> *"I humbly submit that it is patently clear that I was the victim of fraud and that it is very coincidental [on seeing the amount of funds in my bank account] that an official in the bank of the Plaintiff may have committed such fraudulent transactions".*

[5] The alleged fraud was explained by counsel for the Defendant as being that of an alleged purchaser of gemstones who had misrepresented to the Defendant that the purchase price of the gemstones had been paid (when in fact it had not), causing the Defendant to part with the gemstones.

[6] The gemstone transaction is set out in very cursory fashion by the Defendant in his affidavit. The Defendant says that he had won R500 000 "in a competition" at Sun City (a well-known casino and entertainment destination). A person who had apparently heard of this was eager to do business with the Defendant and was introduced to him by a friend of the Defendant.

[7] This 'person', one Akhbar Mohammed Hussein (who the Defendant deduced was from Indian, Pakistani or Afghani descent) apparently asked the Defendant if the latter could 'get hold of any precious metals and/or gemstones' as Mr Hussein 'had a large overseas market for these type of goods'.

[8] The Defendant approached a friend of his, one Mr Dada who apparently often buys gemstones 'over the internet' who provided the Defendant with an unspecified number of Tanzanite stones of unknown carats but allegedly to the value of R375 645.60. The Defendant showed the stones to Mr Hussein at an asking price of R590 000.00. It was then that Mr Hussein allegedly offered to buy the stones at an amount which coincidentally approximates the amount erroneously credited to the Defendant's bank account, being an alleged price of R534 000,00. (The Defendant states that he would make a profit of R158 354.40 being the difference between this price and that asked by Mr Dada).

[9] Mr Hussein allegedly promised to deposit the agreed purchase price into the Defendant's bank account and on 24 June 2015 the Defendant received an sms-message from the Plaintiff that the amount of R534 236.30 had been credited to the Defendant's bank account. The sending of an sms-message is the customary fashion in which the Plaintiff informs the Defendant of movements on his account. The Defendant states that he, however, find it 'highly suspicious' that his bank statements refers to this deposit as a "direct credit".

[10] In the meantime and, on the strength of the sms-message, the Defendant released the Tanzanite stones to Mr Hussein (who apparently promised to return to the Defendant for a "possible second shipment"). What the Defendant further did in respect of the amount credited to his account, he describes as follows:

"Further on the strength of the communication, I made various small withdrawals, and in turn on 29 June 2015, I withdrew the amount of R210 000,00 ... and paid in cash the amount of R200 000,00 to Mr Dada, whom the Tanzanite belonged to".

[11] Save as set out above, nothing else is stated by the Defendant regarding the Tanzanite transaction or Mr Hussein. No confirmatory affidavit of Mr Dada is annexed nor is any allegation made regarding any further payment to him or any attempt at contacting Mr Hussein.

[12] The Defendant states that it was with shock that he received a telephone call from a bank official informing him of the erroneous (or fraudulent) credit to his account. He was dismayed at the fact that the Plaintiff had allowed him to "transact freely" on the account before informing him "of any irregularities". He was requested to attend to the nearest branch of the bank and to furnish the Plaintiff with a statement concerning what he knew about the deposit into his account. He chose not to do so but immediately went to his attorney, who is also his attorney of record in this matter.

[13] On the basis that it contained an admission of the erroneous credit, a letter from the Defendant's attorney has been annexed to the Particulars of Claim. The significant portion of the letter reads as follows:

"Mnr Veludo deel ons mee dat daar klaarblyklik verkeerdelik 'n bedrag van R534 00,00 in sy bankrekening inebtaal is, en het later vasgestel dat dit geld is wat aan die een of ander Unie behoort.

Mr Veludo was nie bewus daarvan nie, en het soos hy geregtig was om te doen, die gelde gretrek.

Tot sy onsteltenis is hy meegedeel dat hierdie gelde nie hom toegekom het nie.

Die agtergrond hiervan is dat hy sekere Tanzanite stene verkoop het aan 'n person vir R 550 000,00 en hy het onderneem om die geld aan mnr Veludo te betaal, wie aan hom die bankrekeningnommer verskaf het.

Dit blyk verder te wees dat hierdie person wat die gelde moet oorbetaal, dit nie gedoen het nie, en nou ook met die stene verdwyn het... "

[14] In his affidavit resisting summary judgment, the Defendant relies on the aforementioned letter as setting out "what had transpired".

[15] It is immediately apparent that there are a number of anomalies and/or discrepancies in the Defendant's version:

15.1 There is a difference in the purchase price which Mr Hussein would purportedly have paid between what is stated in the Defendant's affidavit (R530 000,00) and what was stated on his instruction by his attorney in the above quoted letter (R550 000,00).

15.2 The difference is significant if the deposit allegedly corresponding to the purchase price led the Defendant to believe that he was entitled to withdraw it.

15.3 The difference between the alleged price of R530 000,00 and the credit of R534 236,30 is also never explained.

15.4 There is an absence of any allegation regarding any further contract with either Mr Dada or Mr Hussein.

15.5 The absence of such contact or attempts thereof becomes more significant in view of the apparent admission in the attorney's letter that Mr Hussein had indeed not made the deposit.

15.6 There is an absence of any explanation for the fact that only R200 000,00 had allegedly been paid to Mr Dada while the amount due to him would supposedly have been R375 645.60.

15.7 It is a curious fact that the Defendant did not attend to his banker when told that an incorrect amount had been credited to his account, but reverted to his attorney in the fashion that he did.

[16] In the letter of demand attached to the summons, hearsay evidence is included to the effect that the Defendant had told a bank official that the R210 000-00 which he had

withdrawn from his bank account had been used by him to purchase a motor vehicle and that he had been urged by the official to consider surrending the vehicle for re-sale to assist him in repaying the funds. Although this is hearsay evidence, it constitutes allegations attributed to him which he does not deal with.

[17] Apart from the absolutely astounding coincidence of the amount erroneously credited to the Defendant's account very nearly approximating the alleged sale price of the Tanzanite to Mr Hussein, I find the Defendant's version "vague and sketchy" (to use the oft quoted words used in this regard in the well-known case of *Breitenbach v Fiat SA (PTY) Ltd* 1976 (2) SA 226 T at 228 D – F and the various annotations thereof).

[18] More importantly however I find the Defendant's allegations that he was defrauded by Mr Hussein (if indeed a sale contract of Tanzanite existed in the terms alleged by the Defendant), read with the allegations contained in the Defendant's attorneys letter written on his instructions, to amount to a concession that he was not entitled to the amount credited to his account. Put otherwise, the Defendant's affidavit does not disclose a defence to the Plaintiff's claim for repayment of the erroneous credit.

[19] As a last-ditch attempt, counsel for the Defendant argued that the Plaintiff's cause of action, being one for enrichment due to a payment *sine causa*, had not sufficiently been pleaded. She argued that it had not expressly been alleged that the Plaintiff had been impoverished. On the facts however, it is clear that the Plaintiff would be liable for the amount of the erroneous credit to the true beneficiary thereof and has been "impoverished" by such liability. Apart from the allegations of unjustified enrichment, pleaded in paragraph 7 of the Plaintiff's particulars of claim, the Plaintiff however also pleaded that the Defendant had not been entitled to the funds erroneously credited and had therefore unlawfully withdrawn and "appropriated" it. This of course would flow from the common-law nature of the banker-client relationship between the Plaintiff and the Defendant. I am of the view that the Plaintiff's case had sufficiently been pleaded. I am also not of the view that a punitive costs order should be granted against the Defendant.

[20] I therefore make the following order:

Summary judgment is granted against the Defendant for payment of the following:

1. The sum of R534 236.30;
2. Interest on the aforesaid amount from 24 June 2015 to date of payment at the rate of 9% per annum;
3. Costs of suit.

N DAVIS
ACTING JUDGE OF THE HIGH COURT

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