IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

9/6/2016

CASE NO: 89859/2014

In the matter between

9/6/2016

MARION LURIE	APPLICANT
And	
MARK FINKELSTEIN	FIRST RESPONDENT
PROUD HERITAGE PROPERTIES 169 (PTY)LTD	SECOND RESPONDENT
THE STANDARD BANK OF SOUTH AFRICAN LIMITED	THIRD RESPONDENT
THE SHERIFF OF THE HIGH COURT,STANDTON SOUTH	FOURTH RESPONDENT
THE LAW SOCIETY OF THE NORTHERN PROVINCES	FIFTH RESPONDENT
ESEBETSE TRADING & PROJECTS (PTY)LTD	SIXTH RESPONDENT
QUANTUM LEAP INVESTMENT 88(PTY)LTD	SEVENTH RESPONDENT
MAKHADO PROJECT MANAGEMENT (PTY) LTD	EIGHTH RESPONDENT

JUDGMENT

MOSEAMO AJ

INTRODUCTION

[1] The applicant seeks an order in the following terms:

'1. That the sum of R651, 220.00 attached by the Fourth Respondent on the instructions of and pursuant to a writ of attachment issued by the Second respondent from the monies standing to the credit of the trust banking account conducted by the First Respondent under account number 20320892, on or about 24 October and removed from the First Respondent's said trust banking account on or about 25 November 2014, be declared the sole and absolute property of the Applicant;

2. That the attachment by the Fourth Respondent of the sum of R651,220.00 on the instruction of and pursuant to a writ of attachment issued by the Second Respondents, from the monies standing to the credit of the trust banking acount conducted by the First Respondent at the Germiston branch of Third Respondent under account number 20320892, on or about 24 October and removed from the First Respondent's said trust banking account on or about 25 November 2014 be set aside;

'3. That the Third Respondent be hereby interdicted from paying the said sum of R651,221.00 into the First Respondent's trust account;

4. That the Third Respondent make payment of the sum of R651,220.00 to the Applicant's attorneys of record, namely Rapeport Incorporated at Nedbank, account number 1916072313, Killarney Branch, Branch code 191605;

5. That the First Respondent pay to the Applicant damages in the form of interest on the sum of R602, 500.00 at the prime rate plus 2% per annum thereon from 12 December 2014 to the date that the Third Respondent complies with the provisions of 4 above, in full;

6. That the costs of this Application be paid by the First and the Second Respondent (and any other Respondent that opposes this Application), on the

scale as between attorney and client, jointly and severally, the one paying the other to be absolved.'

[2] Only the second respondent opposes the application. The second respondent brought an application for the condonation of the late filing of the answering affidavit which although the applicant initially opposed the application for condonation in her papers, at the hearing of the application the opposition was abandoned.

[3] According to the second respondent the delay in filing the answering affidavit was as a result of the application for joinder of the 6th, 7th and 8th respondents as parties to this application which was necessary. There was a further delay which was occassioned by an error which led the 8th respondent being joined later than the 6th and 7th respondents. I find that the second respondent has shown good cause for non compliance with the rules and further that the applicant will not suffer any prejudice and therefore the condonation application should succeed.

[4] Applicant's counsel indicated that an out of court settlement was reached with the first respondent and therefore they will only be seeking costs against the second respondent. The settlement agreement was handed in.

BACKGROUND

[5] On or about 25th September 2014 at Johannesburg applicant entered into a written agreement with Shamain Dayal (Dayal) in respect of which she sold her property, a sectional unit situated at section 11 Tibidabo, situated at 9 Link road, Corlett Gardens, Johannesburg for the sum of R1 200 000. Applicant instructed the first respondent who is her cousin, to attend to the convenyancing in respect of the said sale. Dayal paid an amount of R1 215 844.60 and R22 000 in respect of the purchase consideration and the legal costs for registration of the transfer on the 18th November 2014.

[6] Subsequent to the sale of her property applicant purchased a new property at 46 Dowerwiew, Johannesburg. Bennet McNaughton are the conveyancers who were appointed to transfer the property to the applicant. The first applicant paid an amount of R500 000 to Bennet McNaughton on the 8th December 2014 which is only part of

the money held by him in trust. The first respondent failed to pay the balance required by Bennet McNaughton to effect the transfer of the property to applicant's names.

[7] Applicant obtained a loan in the sum of R602 500 after the first respondent indicated to Bennet McNaughton that he does not have the balance in his trust account as the money had been attached in a totally unrelated matter. Applicant required the amount of R602 500 to ensure the simultaneous transfer of the property she sold and the property she bought. Both properties were subsequently transferred on the 12th December 2014.

[8] The facts relating to the attachment of the money in the first respondent's trust account is as follows:

[8.1] There was a dispute between the second respondent represented by Jacobus Coenradus Scholtz (Scholtz) and Esebetse Trading & Projects (Pty) Ltd (Esebetse) and Quantum Leap Investment 88 (Pty) Ltd (Quantum) who are first respondent's clients. The first respondent was required to pay over the money held in trust to Scholtz for the benefit of the second respondent in respect of a court order.

[8.2] When the first respondent failed to pay over the money, second respondent issued a writ of attachment against movable goods of Esebetse for R651 220. The writ authorises attachment of an amount of R355 000 from the first respondent's trust banking account. The fourth respondent attached an amount of R651 220 from the first respondent's trust account.

[9] The second respondent raised numerous defences to the applicant's application. Among others the second respondent raised the defence that (a) the money that was attached does not belong to the applicant; (b) attachment not completed as second respondent has not been notified of the attachment by the sheriff; (c) non-joinder of Dayal.

[10] I firstly wish to deal with the applicant's right to bring this application. The applicant is claiming an order that the money that was attached by the fourth respondent from the first respondent's account be declared her sole and absolute property. An applicant for a declaratory relief must set out her contentions regarding her alleged right and the interest she has in the right.

[11] It is submitted on behalf of the applicant that the money that was attached by second respondent and fourth respondent belongs to the applicant as it was deposited by Dayal as consideration for the purchase of her property. It is further submitted that the money is easily identifiable as at the time Dayal deposited the money, there was no money in the first respondent's trust account. It was further contended that the trust account protects the applicant as the first respondent is required to keep a record of trust creditors.

[12] It is submitted on behalf of the respondent that the applicant's contention that the money that was attached by second and fourth respondent belongs to her is fundamentally flawed. The respondent contends that once the money is deposited into a bank account it becomes property of the bank, that the account holder acquires a personal right against the bank in respect of the amount deposited.

[13] Respodent relied on the case of Trustees of the Insolvent Estate of Graham Ernest John Whitehead v Leon Jean Alexandre Dumas and Absabank (323/12) [2013] ZASCA 19 (20 March 2013) where it was stated:

'Generally, where money is deposited into a bank account of an accountholder it mixes with other money and, by virtue of commixtio becomes property of the bank 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 but acquires a personal right to payment of that amount from the bank, arising from their bank-customers 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 that an entry in the receiving bank's account. The bank's obligation, as owner of the funds credited to the customer's account, is to honour the customer's payment instructions. Where the depositor is not the account-holder he relinquishes any right to the money and cannot reverse the transfer without the accountholder's concurrence.'

[14] It is a long established principle that money when deposited into a bank account it ceazes to be the principal's money; it is then the money of the banker who is bound to return an equivalent by paying a similar amount to that deposited on demand. See R v Stanbridge 1959 (3) SA 274 at 278 B-H

[15] In Rosseau NO v Standard Bank of SA LTD 1976 (4) SA 104 CPD at 106 B-D Watermeyer J stated 'The legal relationship between a banker and a customer whose account is in credit is that of the debtor and creditor. The customer is a creditor who has a claim against the bank in the sense that he has a right to have it make payments to him, or to his order, on cheques drawn by him up to th amount by which his account is in credit (see Ormerod v Deputy Sheriff Durban, 1965 (4) SA 670 D at p673; De Hart NO v Kleinhans and Others, 1970 (4) SA 383 (O) at p387; S v Kotze 1965 (1) SA 118 (AD) at p124) Ownership of the money standing to a customer's credit in his bank account, although it is losely spoken of as the "customer's money", is however vested in the bank...'

[16] It was contended on behalf of the applicant that the money held by an attorney in his trust account is different in that the mandatory record keeping makes the money is easily identifiable. S78(1) of the Attorneys Act 53 of 1979 compels a practising attorney to keep a separate trust account at a banking institution within the Republic and to deposit therein the money held or received by him on account of any person.

[17] In terms of s78(7) of the Attorneys Act the amount standing to the credit of an attorneys' trust account shall not form part of that attorneys assets and as such shall not be liable to attachment at the instance of any creditor of such an attorney. I must state that the money attached was not attached at the instance of the first respondent's creditors and therefore it does not fall foul of s78(7).

[18] The nature of the attorney's trust account was dealt with in the case of Fuhri v Geyser NO and Another 1979 (1) SA 747 (N) at 749 C-E by Hefer J as follows:

'Despite the separation of trust moneys from an attorneys assets thus affected by s33(7), it is clear that trust creditors have no control over the trust account: ownership in the money in the account vests in the bank or other institution in which it has been deposited (S v Kotze 1965 (1) SA 118 (A) at 124), and it is the attorney who is entitled to operate on the account and to make withdrawals from it (De Villiers NO v Kaplan 1960 (4) SA 476 (C)). The only right that trust creditors have, is the

right to payment by the attorney of whatever is due to them, and it is to that extent that they are the attorneys creditors. The right to payment plainly arises from the relationship between the parties and has nothing whatsoever to do with the way in which the attorney handles the money in his trust account.'

[19] In the case of Louw NO and Others v S J Coetzee and Others, [2003] 1 ALL SA 34 (SCA) (29 November 2002) the court considered whether the deposits in an attorney's trust form part of the bank's assets. The respondents in this matter had successfully argued in the court a quo that the funds deposited by an attorney in terms of s78(2A) of the Attorneys Act were precluded from becoming part of the bank's assets in terms of Act 28 of 2001. The court found that the principle that money once deposited into a bank account becomes the property of the bank and that the bank had an obligation to return not the exact money deposited, but an equivalent amount had not been altered by the expanded definition of trust property in Act 28 of 2001.

[20] It is not in dispute that: (a) the money deposited by Dayal into first respondent's trust account was to be paid to the applicant upon the transfer of the property; (b) the money that was attached by the second and fourth respondent in the first respondent's trust account was deposited by Dayal. Upon transfer of the applicant's property to Dayal, the applicant became the trust creditor of the first respondent.

[21] Following the approach in the Dumas case and Fuhri's case Dayal as the depositor, relinquished any right to the money when she deposited it into first responden's trust account. First respondent as the trust account holder has a personal right to payment of that amount from the bank which arises from the bank-customer relationship. The money that was deposited by Dayal becomes the property of the bank by virtue of commixtio. Although the cases dealt with the sequestration of the account holders, the principle applicable is the same.

[22] It therefore follows that although the applicant became entitled to the amount paid in by Dayal after the transfer of her property to Dayal, she cannot claim the money that was attached as her money. Upon the transer of her property the

applicant became entitled to the money and thus became a trust creditor of the first respondent.

[23] The applicant therefore has a claim against the first respondent and not the bank. In my view first respondent as the account holder is the one who has the right to claim the money that was attached by the second and the fourth respondent and not the applicant. In the result I find that the applicant has failed to prove that she has the right to bring this application and therefore on that basis alone the application stands to be dismissed. In view of the above conclusion it is therefore not necessary for me to deal with the rest of the defences.

[24] I now turn to deal with the issue of costs. It is common cause that the dispute resulted from the first respondent's failure to comply with a court order granted in favour of the second respondent and also his failure to comply with his obligations to pay the money paid by Dayal to Bennet McNaught as instructed by the applicant.

[25] The first respondent did not oppose the application but entered into a settlement agreement with the applicant. It does not appear that the first respondent did anything to recover the attached money.

[26] It has frequently been emphasized that in awarding costs , the court has a discretion to be exercised judicially upon consideration of the facts of each case. Further that the law contemplates that the court will weigh the issues in the case, the conduct of the parties and any other circumstance which may have a bearing on the issue of the costs and then make such order as to costs as would be fair and just between the parties.

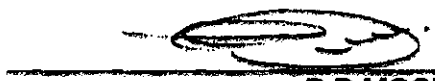
[27] In my view the second respondent and the applicant were both victims of the first respondent's unproffessional conduct. I therefore find that this is one case where the costs should not follow the results.

In the result I make the following orders:

1. The applicant's late filing of the answering affidavit is hereby condoned.

2.The application is dismissed.

3. Each party to pay its own costs.



P D MOSEAMO
ACTING JUDGE OF THE HIGH COURT