THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 142/08

In the matter between:

NEDBANK LIMITED Appellant

and

JOSE MANUEL PESTANA Respondent

Neutral Citation: *Nedbank v Pestana* (142/08) [2008] ZASCA 140 (27 November 2008)

Coram: STREICHER, BRAND JJA and GRIESEL AJA

Heard: 14 November 2008
Delivered: 27 November 2008

Summary*:* Banker – transfer of funds to client's account – whether bank entitled to reverse transfer without client's authority in view of bank's appointment as agent in terms of s 99 of Income Tax Act 58 of 1962.

ORDER

On appeal from: High Court, Johannesburg (Goldstein, Schwartzman and Tshiqi JJ sitting as a court of appeal):

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

GRIESEL AJA (STREICHER and BRAND JJA concurring):

Introduction

[1]This appeal concerns the effect of s 99 of the Income Tax Act 58 of 1962 (*the Act*)[1] and, more specifically, the question whether the section permits a bank in the position of the appellant to reverse a credit to a client's account without the latter's authority. (For convenience, I refer to the appellant, Nedbank Limited, as *the bank* and to the respondent, Mr Jose Manuel Pestana, as *the plaintiff*.)

[2]The matter originally came before the Johannesburg High Court (Matopho J), where the question posed above was answered in favour of the bank. On appeal to a full court, the order of the trial court was reversed and judgment was granted in favour of the plaintiff as claimed.[2] The present appeal comes before us with special leave of this Court.

[1] Section 99 provides: '**Power to appoint agent –** The Commissioner may, if he thinks necessary, declare any person to be the agent of any other person, and the person so declared an agent shall be the agent for the purposes of this Act and may be required to make payment of any tax, interest or penalty due from any moneys, including pensions, salary, wages or any other remuneration, which may be held by him or due by him to the person whose agent he has been declared to be.'

Factual background

[3]The case arises from a series of transactions, all taking place on 4 February 2004, involving the appellant's Carletonville branch (*the branch*). The facts are common cause and have been placed before court by way of a stated case in terms of Uniform rule 33(1) and (2). For purposes hereof the salient facts may be summarised as follows:

(a) The plaintiff had been conducting a current account at the branch since 1969. A namesake, one Joseph Michael Pestana (*Pestana*), conducted a similar account at the same branch.[3]

(b) On 4 February 2004, at a stage when Pestana's account was in credit in an amount of R 496 546,40, he requested the branch to transfer an amount of R 480 000 from his account to that of the plaintiff.

(c) At 11h33 the branch carried out Pestana's instruction and 'transferred the amount of R 480 000 to the plaintiff's account' from Pestana's account.[4] The said amount was credited to the plaintiff's account and his bank statement (a copy of which was

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[2]The judgment of the full court (per Schwartzman J; Goldstein and Tshiqi JJ concurring) has been reported: see *Pestana v Nedbank* 2008 (3) SA 466 (W); [2008] 1 All SA 603 (W). The judgments of the two courts below have attracted academic discussion, both *pro* and *contra.* See: W G Schulze, 'Electronic Fund Transfers and the Bank's Right to Reverse a Credit Transfer: One Small Step for Banking Law, One Huge Leap for Banks' (2007) 19 *SA Merc LJ* 379–387 (*Schulze 2007)*; W G Schulze, 'Electronic Fund Transfers and the Bank's Right to Reverse a Credit Transfer: One Small Step (Backwards) for Banking Law, One Huge Leap (Forward) for Potential Fraud: *Pestana v Nedbank* (Act One, Scene Two)' (2008) *20 SA Merc LJ* 290–297 (*Schulze 2008)*; J C Sonnekus, 'Eensydige Terugskryf van Kliënt se Krediet deur Bank Onregmatig' (2008) *TSAR* 348–354.

[3]The stated case is silent as to the relationship between the two Pestanas.

[4]Again, it is not stated exactly how the transfer was effected, eg by way of electronic funds transfer or by some other means, but nothing turns on this. It is accordingly not necessary, for purposes of this case, to enter 'the maze of problems and uncertainties underlying the law relating to electronic fund transfers' (Schulze (2008) at 291).

attached to the stated case) reflected a credit entry to that effect, with a corresponding debit to Pestana's account.

(d) Unbeknown to the staff member at the branch who attended to the transfer of the money to the plaintiff's account, the bank's head office in Rivonia had earlier that day, at 8h44, received a telefaxed notice in terms of s 99 of the Act from the Randfontein office of the South African Revenue Service (*SARS*) in respect of Pestana's account. In terms of the pre-printed notice, SARS informed the bank that Pestana was indebted to it in an amount of some R340 million; it appointed the bank as the agent for Pestana and required the bank to make payments in respect of the amount due to SARS 'as funds is (*sic*) available or became (*sic*) available till full settlement'. The covering letter accompanying the instruction impressed upon the bank that it was intended for its 'very very urgent attention'.

(e) Later that day, and after it had already transferred the R 480 000 to the plaintiff's account, the branch was notified by its head office of the bank's appointment in terms of s 99 of the Act.

(f) The branch thereupon 'reversed the transfer to the plaintiff's account' and, still on the same day, paid an amount of R 496 000 to SARS from Pestana's account.

(g) The bank did not request the authority of the plaintiff to reverse the amount of R 480 000 and no authority to do so was given by the plaintiff.

[4]Against this background, the parties asked the court to determine the following question of law:

> Was the [bank] and having regard to its appointment in terms of s 99 of the Act, entitled to reverse the payment of R 480 000 without authority from the plaintiff?

It was agreed between the parties that if the answer to this question was in the negative, the plaintiff would be entitled to judgment as claimed.

[5]With regard to the question of law posed, the plaintiff contended that the notice in terms of s 99 of the Act was received by the branch after transfer of the money to the plaintiff's account. The branch was not aware of the notice which had been given by SARS to the bank's head office and was accordingly not obliged to act in terms thereof. Once the funds had been transferred from Pestana's account to the plaintiff's account, the funds belonged to the plaintiff; accordingly the funds could not be transferred out of the plaintiff's account without his authority and consent which was not given.

[6]The bank contended, on the other hand, that it was obliged, following its appointment as agent of SARS in terms of s 99, to reverse the transfer made to the plaintiff's account as the bank was appointed as such prior to the transfer being made to the plaintiff's account. The instruction by Pestana to transfer the money to the plaintiff's account was received after the bank's appointment in terms of s 99 and accordingly the transfer to the plaintiff's account was invalid and was made erroneously, with the result that the plaintiff was not entitled to receive the money so transferred. The act of crediting the plaintiff's account in its books, so the bank contended,

did not in itself create liability towards the plaintiff, as the credit in the plaintiff's account was wrongly made and could be reversed.[5] Finally, the bank contended that the transfer of the funds to the plaintiff's account was invalid and the defendant could not validly adhere to the instruction given to it by Pestana in the light of the notice in terms of s 99, as the notice was received prior to the instruction being given to the bank by Pestana.

[7]As mentioned earlier, the trial court answered the question of law in favour of the bank, holding that the bank was entitled to reverse the credit to the plaintiff's account. The full court disagreed with this conclusion for the reasons stated in the reported judgment. In essence, the court held that a completed and unconditional payment had been effected when the bank credited the plaintiff's account, with the result that the bank could not unilaterally reverse the credit.[6]

Legal position

[8]It is well-established that, in general, entries in a bank's books constitute prima facie evidence of the transactions so recorded. This does not mean, however, that in a particular case one is precluded from looking behind such entries to discover what the true state of affairs is.[7] Some examples where a credit may be validly reversed by a bank were mentioned by Zulman JA in *Oneanate*:[8]

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[5]This contention appears to be based on a dictum by Schutz JA in *First National Bank of SA Ltd v Perry NO & Others* 2001 (3) SA 960 (SCA) para 32.

[6]Paras 13 and 14 of the judgment.

[7]*Standard Bank of South Africa v Oneanate Investments (in Liquidation)* 1998 (1) SA 811 (SCA) at 823B. See also *Perry's* case, *supra, loc cit.*

[8]*Supra* at 823B–D.

'. . . [I]f a customer deposits a cheque into its bank account, the bank would upon receiving the deposit pass a credit entry to that customer's account. If it is established that the drawer's signature has been forged it cannot be suggested that the bank would be precluded from reversing the credit entry previously made. So, too, if a customer deposits bank notes into its account the bank would similarly pass a credit entry in respect thereof. If it subsequently transpires that the bank notes were forgeries it can again not be successfully contended that the bank would be precluded from reversing the credit entry.'

[9]Further examples where a credit may be validly reversed, include cases where a cheque has been deposited into a client's account and the resultant credit entry is treated as provisional (or conditional), subject to a hold period in terms of 'standard banking practice';[9] or where the client came by the money by way of fraud or theft;[10] or where a wrong account was erroneously credited.[11] Absent *some* legitimate reason for reversal, however, the general principle is that once an amount has been *validly* transferred by A to the credit of B's bank account, the credit belongs to B and the bank has to keep it at B's disposal; it cannot simply retransfer the money back into the account of A without the concurrence of B.[12]

[10]Reverting to the case at hand, the court a quo rightly observed that its duty was to ascertain 'whether the court below came to the correct conclusion *on the case submitted to it*'.[13] This means that the parties *and*

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[9]*Burg Trailers SA (Pty) Ltd & Another v ABSA Bank Ltd & Others* 2004 (1) SA 284 (SCA) para 9. See also *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton* 1973 (3) SA 685 (A) at 693G–H; *Absa Bank Ltd v Standard Bank of SA Ltd* 1998 (1) SA 242 (SCA) at 252A–F.

[10]*Nissan South Africa (Pty) Ltd v Marnitz NO & Others (Stand 186 Aeroport (Pty) Ltd Intervening)* 2005 (1) SA 441 (SCA) para 23; *Perry's* case, *supra*, *loc cit*.

[11]*Nissan* case *supra*. For further examples, see Schulze (2008) at 296 *in fin*.

[12]*Take and Save Trading CC & Others v Standard Bank of SA Ltd* 2004 (4) SA 1 (SCA) para 17; *Nissan SA, supra* para 22.

[13]Para 5 (my emphasis). See also *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) at 23D–H.

the court are bound by the agreed facts as set out in the stated case. In terms of rule 33(3), '. . . the court may draw any inference of fact or of law from the facts and documents placed before it as if proved at a trial', but it may not stray beyond those parameters. It is wholly impermissible, therefore, for the court to read between the lines, as it were, and to speculate (as Schulze does)[14] that, because the available facts 'have a decidedly suspicious ring to them', the mandate given by Pestana to the bank may have been 'tainted with fraud' and that it was therefore 'in all probability not a valid mandate as it was given in order to commit a crime'. On the agreed facts and documents before us, there is no suggestion that either Pestana or the plaintiff were parties to a theft or a fraud or any other improper conduct relating to the money in Pestana's account; nor are there any facts from which it can be inferred that the transfer of the money to the plaintiff's account was in any way conditional.

Section 99

[11]Against the foregoing background, counsel attempted to justify the bank's unilateral reversal of the transfer by relying squarely on the provisions of s 99. Counsel submitted in their written heads of argument (a) that the appointment of the bank in terms of s 99 was a form of garnishment, such as is available in regard to ordinary civil judgments; and (b) that it 'has an effect similar to a seizure of the funds'. While there is authority for proposition (a),[15] we were not referred to any authority in support of proposition (b), nor am I aware of such authority.

[14]Schulze (2008) at 296.

[15]*Hindry v Nedcor Bank Ltd & Another* 1999 (2) SA 757 (W) at 770I and the authorities referred to therein. See also para 8 of the judgment of the court a quo.

[12]The court a quo did not accept this argument, holding instead '. . . that there were two things that the s 99 notice did not do: it did not freeze Pestana's account and it did not transfer or effect a cession of the funds in Pestana's account to SARS'.[16] Later in the judgment, the court emphasised that 'the s 99 notice did not divest Pestana of the R 480 000 standing to the credit of his account'.[17] In my view, these conclusions are clearly correct, with the result that the bank's argument cannot succeed.

[13]A related argument on behalf of the bank was based on the following finding of the court a quo, paraphrasing a dictum by Harms JA in *Burg Trailers, supra,*[18] namely that –

'the [bank] could on 4 February 2004 only have had one intention and this intention would have affected both of its clients. It was not possible for it to intend to accept payment on behalf of the plaintiff while simultaneously intending, on behalf of Pestana, not to pay. Once it intended to pay unconditionally on behalf of Pestana, it could not intend not to accept payment on behalf of the plaintiff. If the payment to the plaintiff, or the crediting of his account, was unconditional, it follows that the bank could not unilaterally reverse the credit.'[19]

[14]Counsel submitted that it was common cause that the bank's head office – the 'directing mind' of the bank, in the words of counsel – intended to comply with its appointment in terms of s 99. Although this is not spelt out in so many words in the stated case, I am prepared to accept for purposes of the present argument that this was indeed the bank's intention at head office level. From this premise, counsel sought to conclude that

[16]Para 10.

[17]Para 15. See also *Sonnekus op cit* at 351 para 9.

[18]Footnote 9 above, para 7.

[19]Para 13.

'[t]herefore the decision by the branch to effect the credit entry (without knowledge of the s 99 appointment) is not relevant in law: it was not a decision made by the [bank], ie by its relevant organ'.

[15]In my view, this argument amounts to a non sequitur. First, whereas the s 99 notice to head office may be regarded as effective notice by SARS to the bank as a single corporate entity, it does not follow that it must at the same time be regarded as constructive notice to each branch of the bank. It was incumbent upon the bank – and obviously in its own interest – to ensure that notice of its appointment reaches the relevant branch(es) as soon as possible.[20] Second, until such time as it received actual notice of the bank's appointment as agent in terms of s 99 and head office's intention thereanent, the branch was entitled to continue its ordinary everyday banking functions. Thus it was entitled to accept a valid and lawful mandate from its client, Pestana, to transfer money from his account to that of the plaintiff. In executing that mandate in the ordinary course of its business, the branch clearly intended to pay on behalf of Pestana and to accept payment on behalf of the plaintiff.[21] I cannot agree, therefore, that the decision to pay was 'erroneous', or that the decision of the branch is 'not relevant in law', as argued. The fact that the branch subsequently changed its mind cannot, in my view, undo the validity of the completed transaction. As it was put by the court a quo:[22]

'Once the debit and credit occurred as they did, they constituted a completed juristic act independent of any underlying *justa causa*.'

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[20]Cf Schulze (2007) at 385.

[21]Cf *Burg Trailers supra loc cit*; *Volkskas Bank Bpk v Bankorp Bpk (h/a Trust Bank en 'n Ander)* 1991 (3) SA 605 (A) at 611E–F.

[22]Para 16.1.

[16]In argument before us, counsel for the bank conceded that if it were to be found that the bank intended to make payment to the plaintiff, that is the end of the matter. For the reasons set out above, I am satisfied that the bank, as represented by the branch in question, clearly had the requisite intention.

Conclusion

[17]It follows that, in my view, the court a quo came to the correct conclusion with regard to the legal question posed in the stated case. Accordingly the appeal is dismissed with costs, including the costs of two counsel.

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B M GRIESEL

ACTING JUDGE OF APPEAL

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