MANDATE AND THE BANK AND CUSTOMER RELATIONSHIP

DA Ungaro & Sons (Pty) Ltd v Absa Bank Ltd
[2015] 4 All SA 783 (GJ)[*]

OPSOMMING

Lasgewing en die bank/kliënt verhouding

Die *Ungaro*-saak handel met die aanspreeklikheid van ŉ bank wat ŉ spaarrekening vir ŉ kliënt geopen het en daarna op nalatige wyse toegelaat het dat ŉ ongemagtigde persoon

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onttrekkings uit die rekening maak. Alhoewel die hof bevind het dat daar 'n lasgewingskontrak tussen die bank en die kliënt tot stand gekom het, wil dit voorkom asof die uiteindelike uitspraak op delik gegrond was. Verskeie aspekte van die uitspraak word vir bespreking uitgesonder, naamlik die regsaard van die verhouding tussen 'n bank en die houer van 'n spaarrekening; die eiser se aksiegrond en die basis van die regter se beslissing; regspraak waarna verwys en nie verwys is nie; nalatigheid van die bank, die lei van getuienis en die bewyslas; en die "plig" van 'n bank om ondersoek in te stel en moontlike probleemaangeleenthede te verifieer. Die gevolgtrekking is dat die uitslag van die saak korrek is, maar dat die uitspraak nie 'n toonbeeld van regsuiwerheid is nie.

1 Introduction

Kriegler J once said that litigation can present a minefield of hard choices, each and every one of which can have decisive consequences for the litigant (*S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* 1999 4 SA 623 (CC) para 94). The decision in *DA Ungaro & Sons (Pty) Ltd v Absa Bank Ltd* [2015] 4 All SA 783 (GJ) bears witness to the wisdom expressed by Kriegler J. In a matter that was described as having "a chequered, long, and old history" (para 1), the court described the plaintiff company's claim against Absa Bank as being "based on alleged negligence, and the breach of an agreement relating to the plaintiff's bank account" (*ibid*). For a number of reasons mentioned by the court, the matter was dragged out for a very long time (para 6). The plaintiff had to navigate through a minefield of hard choices, least of which was to find an expert to give expert evidence on banking practice. (Both the present writers have been approached on numerous occasions to act as "expert witnesses" on behalf of plaintiffs intending to sue a financial institution. Since neither of us have any practical banking law experience, we do not qualify as expert witnesses nor can we "testify" on what the "law" is.) The court was also called upon to hear testimony of events that took place some thirteen years before the trial.

2 Facts and decision

In July 2000 the plaintiff's financial manager (one Huang) opened a savings account with the defendant, Absa Bank, on behalf of and in the name of the plaintiff. One of the plaintiff's directors testified that although Huang had authority to open the account in question, he had no authority to make withdrawals or transfers in respect of the account (para 14). Over a period of a year, Huang unlawfully withdrew more than R11 million from the savings account, of which R9 million was eventually recovered. Some of these withdrawals had seemingly been performed telephonically and included cash withdrawals. The plaintiff claimed the remainder, more than R2,6 million, from the defendant on the basis that the Bank was negligent in allowing Huang to withdraw money from the account when, in fact, he was not authorised to do so (para 30).

Having traversed the evidence led by the plaintiff, Moshidi J identified "at least three" issues for determination (para 24), namely:

> "[a] Whether the opening of the account on behalf of the plaintiff resulted in the conclusion of an agreement between the plaintiff and the defendant; and if it is so;
>
> [b] Whether it was a term of the agreement, express or tacit, that the defendant agreed to make payments out of the plaintiff's account . . . only on the instructions authorised by the plaintiff; and/or;
>
> [c] Whether the defendant and its officials acted negligently in dealing with and handling the account."

In view of the evidence before it – it should be noted that the defendant closed its case without leading any evidence (para 24; and see section 3 4 below) – the court eventually came to the following conclusion (para 43):

> "In the circumstances, I concluded that the plaintiff has succeeded in proving, on a balance of probabilities, that there was an agreement between the parties in the opening of the account in question. Further that, during the opening of the account, which was on instructions of the plaintiff, and subsequently, the defendant proceeded to breach its duty of care towards the plaintiff as its client, and acted wrongfully and negligently in regard to the account. This was a direct cause of the plaintiff's loss, as claimed. *In her evidence Taylor of the defendant* [sic], the defendant informed the court that in the event the plaintiff proved that the withdrawals in the account were indeed unauthorised, the defendant admitted the quantum of the plaintiff's claim. This was the amount of R2 680 928,74, as pleaded" (our italics).

The italicised part of the judgment is clearly a mistake. Taylor was a bookkeeper employed by the plaintiff (see paras 12 16). It is also not clear from the report that the plaintiff did make the concession mentioned at the end of the above quotation. The judge merely said (para 18) that "[t]here was plainly no reason to doubt her evidence, which was in any way not rebutted at all".

Several aspects of the court's findings deserve comment.

3 Discussion

3 1 Opening the account: An "agreement"

Under the heading "The relationship between banker and client", the court held that this issue could be disposed of in favour of the plaintiff with relative ease (para 25). With reference to, *inter alia*, *Giulio v First National Bank of South Africa* 2002 6 SA 281 (C) para 17; *Volkskas Bpk v Johnson* 1979 4 SA 775 (C) 777H 778A; *Standard Bank of SA Ltd v Oneanate Investments* (*Pty*) *Ltd* 1995 4 SA 510 (C); Malan *et al Malan on bills of exchange, cheques and promissory notes* (2009) para 217 and Itzikowitz and Du Toit "Banking and currency" 2(1) *LAWSA* (2003) para 343, it held that there is "no doubt" that the relationship between a banker and its client is based on a mandate. The latter source is to the following effect:

> "The relationship between a bank and its customer is contractual in nature, with authority for the view that the relationship is that of debtor and creditor, that it is a contract *sui generis* or a contract of mandate. According to Malan [*et al On bills of exchange, cheques and promisory notes* (2002) para 203] the 'bank and customer relationship is based on a comprehensive mandate in terms of which the customer lends money to the bank on current account, the bank undertakes to pay it on demand by honouring cheques drawn on it and to perform certain other services for the customer, such as the collection of cheques and other instruments, and the keeping and accounting of his current account.' The bank thus receives money and collects bills for the account of its customer, borrows the proceeds and undertakes to repay them to the customer on demand. When a customer deposits money it becomes that of the bank subject to the bank's obligation to honour cheques validly drawn by its customer. Any money deposited with a bank is not held in trust for the customer but constitutes a loan, without interest, to the bank. When a customer's account is overdrawn the relationship is reversed. The customer becomes the debtor and any deposit made by the customer reduces his or her indebtedness to the bank. The relationship between the bank and customer comes into existence by agreement between the two and the customer becomes a customer when the bank accepts a deposit and opens an account in his or her name" (footnotes omitted).

The above explanation is basically correct in case of current accounts and as a general statement. In *Volkskas Bpk v Johnson* 1979 4 SA 775 (C) 777–778 Grosskopf J explained:

> "The relationship between banker and client entails that the banker has to execute his client's order to pay as expressed in a cheque. If he does so, he is entitled to debit the client's account with the amount of the cheque."*

It is unfortunate that, as far as *savings* accounts are concerned, the advocates in the matter failed to refer the court to *African Life Assurance Co Ltd v NBS Bank Ltd* 2001 1 SA 432 (W). In this case, Boruchowitz J said (443) that the legal characteristics of a savings account were aptly described as follows by Stassen "Banke en hul kliënte – 'n Herwaardering van Engelsregtelike eienaardighede in die lig van die Suid-Afrikaanse gemenereg, Bankwet en Wisselwet" 1983 (5) *Modern Business Law* 80 83:

> "The tacit agreement that comes into being when a savings account is opened, contains a contract of loan in terms of which the bank borrows the first deposit from the holder of the savings account and also undertakes to borrow further amounts that the client pays into the account. The understanding that the holder of the savings account may deposit cheques and other payment instruments of which the client is the beneficiary into the client's account adds the additional element of mandate (*mandatum*) to their legal relationship. The contents of this contract of mandate is that the bank, unlike in the case of the deposit of money (ie, coins and notes), does not become the owner of the cheques upon deposit, but that the bank collects it as mandatary of the client and only borrows the amount thereof from the client upon receipt thereof."**

In view of the above legal principles, it goes beyond comprehension why counsel for the defendant contended or argued that there was no agreement in opening the account and that the plaintiff had to allege and prove same and the terms thereof. The court correctly held that these contentions were without any merit and described the defendant's attitude as "unnecessarily obstructionist and dilatory" (para 26). Going out of its way "to place all and every impediment in the way of the plaintiff to present its case", the defendant only in late 2015 admitted that the parties had indeed entered into an agreement (*ibid*). It is also not clear why the plaintiff was saddled with the burden of proof. (See the discussion in section 3.4 below.)

* Own translation of: "Die verhouding tussen bankier en kliënt behels dat die bankier sy kliënt se opdrag om te betaal, soos uitgedruk in 'n tjek, moet uitvoer. Indien hy dit doen, is hy geregtig om die kliënt se rekening te debiteer met die bedrag van die tjek."

** Own translation of: "Die stilswyende ooreenkoms wat tot stand kom wanneer 'n spaarrekening geopen word, bevat 'n leenkontrak ingevolge waarvan die bank die eerste deposito van die spaarrekeninghouer leen en onderneem om ook verdere bedrae wat hy op die rekening inbetaal te leen. Die verstandhouding dat die spaarrekeninghouer tjeks en ander betalingsinstrumente waarvan hy die begunstigde is op sy rekening kan deponeer voeg 'n bykomende element van lasgewing (*mandatum*) by tot hul regsverhouding. Die inhoud van hierdie lasgewingskontrak is dat die bank, anders as by die deponering van geld (dws muntstukke en note) nie by deponering eienaar van die tjeks word nie, maar dat hy dit as 'n lashebber van die kliënt invorder en eers by ontvangs van betaling die bedrag daarvan leen."

3 2 What exactly was the cause of action and the basis of the court's decision?

In its particulars of claim (see para 1 of the report), the plaintiff, apart from alleging the existence of the "agreement" concluded either orally or in writing dealt with in the preceding paragraph, stated that in terms of the agreement the defendant agreed that it would not act negligently in dealing with and handling the account; that in breach of its obligation under the agreement the defendant debited the account with various sums of money which were not authorised by the plaintiff; that the defendant breached the agreement in that it acted negligently in dealing with and handling the account, in that it, *inter alia*, failed to ascertain that Huang was not authorised to instruct the defendant to make payments out of the account and failed to take all reasonable steps to ensure that payments out of the account were only authorised by the plaintiff. The plaintiff also stated that as a consequence of the defendant's conduct and breach of the agreement, it suffered a loss in the sum of R2 680 928,74. It further stated that had the defendant acted without negligence and not breached the agreement, the plaintiff would not have suffered the loss. Also stated was that the above loss suffered by the plaintiff was contemplated by the parties as foreseeable at the time of conclusion of the agreement.

It goes without saying that, in view of the above, the plaintiff's cause of action was breach of contract by the defendant. If one accepts as correct the court's finding that the contract ("agreement") between the parties was one of mandate, the defendant's negligence in the performance of its mandate goes no further than non-compliance with what is normally expected from a mandatary, namely, to act with the necessary care, diligence and skill. Joubert and Van Zyl "Mandate and *negotiorum gestio*" 17(1) *LAWSA* (2009) para 10 explain as follows:

> "In so far as mandate is a consensual contract based on good faith . . . the mandatory must perform his or her mandate with reasonable care and diligence. Should the failure to do so be attributable to negligence, the mandatory will be liable for any damage or injury caused the mandator . . . Should the performance of the mandate require special knowledge, skill, competence or expertise, the mandatory warrants, by acceptance of the mandate, that he or she is suitably qualified. If the mandatory is not, he or she will be liable for damages arising therefrom. Such liability usually relates to ordinary and special damages, although it may include liability for consequential loss."

As regards the question whether it was a term of the agreement between the parties that the defendant agreed to only make payments and transfers out of the account on instructions by the plaintiff, the judge quoted at length (para 29) from the judgment of Corbett AJA in *Alfred McAlpine & Son* (*Pty*) *Ltd v Transvaal Provincial Administration* 1974 3 SA 506 (A) 531 regarding implied terms in contracts. Having analysed the evidence in this regard, the judge in *Ungaro* held (para 30):

> "On the basis of the legal principles set out above, it was clearly an implied term of the agreement between the parties, *by the nature of things*, that the defendant agreed to only make payment and transfers out of the account on specific instructions by the plaintiff. The credible evidence presented by the plaintiff proved convincingly that the defendant failed in its obligations and breached the agreement" (our italics).

One may agree with the judge's finding, provided that one clearly understands what is meant by an implied term in this context, namely, that it is a term that "does not originate in the contractual *consensus:* it is imposed by the law from

without" and "may derive from the common law, trade usage or custom, or from statute" (per Corbett AJA in *McAlpine* 531).

> "In a sense 'implied term' is, in this context, a misnomer in that in content it simply represents a legal duty (giving rise to a correlative right) imposed by law, unless excluded by the parties, in the case of certain classes of contracts. It is a *naturalium* [*sic*] of the contract in question" (*ibid*).

This was echoed by Harms DP in *Bredenkamp v Standard Bank of South Africa Ltd* 2010 4 SA 468 (SCA) para 6 in his succinct distinction between implied and tacit terms:

> "An implied term is one implied by law into all contracts of a particular nature (a *naturale*). This means that it is a rule of law that can be varied or made inapplicable by agreement. A tacit term is one that has to be implied with reference to the presumed intention of the parties to a particular contract."

(Lewis JA's explanation in *Seven Eleven Corporation of SA (Pty) Ltd v Cancun Trading No 150 CC* 2005 5 SA 186 (SCA) para 33 is even shorter: "The distinction between implied and tacit terms is now trite. The former is a term implied by the law, the latter a term implied by the facts." See also, in general, Vorster *Implied terms in the law of contract in England and South Africa* (PhD thesis Cantab 1987) 150 ff.)

In view of the aforegoing discussion, it is therefore difficult to comprehend or explain the way in which Moshidi J phrased the judgment quoted above (see section 1 above and para 43 of the report). Apart from acknowledging the existence of the contract of mandate and its implied terms, the judge seems to have had the principles relating to delictual liability in mind when making the award of damages, namely, (a) the breach of its duty of care towards the plaintiff both when opening the account and thereafter, which was (b) unlawful, (c) negligent, and was (d) the direct cause of (e) the plaintiff's loss (see generally on the elements of a delict Neethling and Potgieter *Neethling-Potgieter-Visser Law of delict* (2015) 4; *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 1 SA 461 (SCA) 468; *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as amicus curiae)* 2003 1 SA 389 (SCA) 395).

One may ask whether it is correct for a judge to frame a decision in delictual terms while the plaintiff ostensibly based its cause of action on breach of contract. This is especially relevant in a case such as the present where the (possible) delictual conduct of the defendant involved issues of pure economic loss (see, eg, Neethling and Potgieter "Breach of contract and delictual liability to third parties. *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* 2015 1 SA 1 (CC)" 2015 *THRHR* 711). On the other hand, would it have made any difference as to the quantum of damages awarded in this case? Probably not, as the amount claimed was liquid and *apparently* "admitted" by the defendant (see our remarks under section 1 above). (One could also run into problems of concurrency. In *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 1 SA 475 (A), a case which concerned a claim by a client against a firm of consulting and structural engineers with which it had originally entered into a contract, the former Appellate Division held that where a plaintiff has or had a contractual relationship with the defendant, there is no delictual remedy for a negligent breach of the defendant's duty which results in pure economic loss. An important consideration influencing the decision in *Lillicrap* not to extend Aquilian liability to a case where there is or was a contractual *nexus* between the parties was that, in general, contracting parties contemplate that their contract should lay down their reciprocal rights and

obligations. This decision was criticised on numerous occasions and referred to in subsequent judgments. We do not want to venture into this "minefield".)

3 3 Case law referred to

Many of the cases referred to by the court, such as *Columbus Joint Venture v Absa Bank Ltd* [2002] 1 All SA 105 (A); *Columbus Joint Venture v Absa Bank Ltd* 2000 2 SA 491 (W); *Energy Measurements (Pty) Ltd v First National Bank of SA Ltd* 2001 3 SA 132; *KwaMashu Bakery Ltd v Standard Bank of South Africa Ltd* 1995 1 SA 377 (D) and *Powell v Absa Bank Limited t/a Volkskas Bank* 1998 2 SA 807, are concerned with the legal position of a collecting bank dealing with cheques and are therefore irrelevant regarding the legal position of a bank when opening a savings account. (See the discussion by Pretorius "More guidelines on negligence and the collecting bank" 2000 *SA Merc LJ* 359 and "New bank accounts and the collecting bank" 2002 *SA Merc LJ* 501.) As the court itself remarked (para 40), the defendant's reliance on cases such as *Marfani and Co Limited v Midrand Bank Limited* [1868] 2 All ER 573; *Powell supra* and *Strydom v Absa Bank Bpk* 2001 3 SA 185 (T) did not advance its case in the matter. In both *Barclays Bank DCO v Straw* 1965 2 SA 93 (O) and *Absa Bank Limited v Hanley* 2014 2 SA 448 (SCA) the courts were dealing with a valid signature (authority) of the client that had authority but the order to the bank had been altered without the client's consent. This involved the question as to the proximate cause of the loss and is "related" to the so-called last opportunity rule.

In *Ungaro*, we are dealing with the absence of authority to withdraw funds from a savings account. It concerns a breach of contract and the bank's negligence is merely indicative of its breach of the mandate (as pointed out in section 3 2 above). Like in *Big Dutchman (South Africa) (Pty) Ltd v Barclays National Bank Ltd* 1979 3 SA 267 (W), there could perhaps have been an estoppel if there was a negligent representation by the principal that Huang had authority to withdraw, but this question was never properly examined nor was there any reference to the *Big Dutchman* case. It is also important to note that the alleged representation should have been made by the plaintiff itself and not by Huang because the latter did not have the authority to make such representation. (See Moorcraft *Banking law and practice* (looseleaf 2009 Service Issue 10 15-10–15-11 for a full discussion of this decision.)

As far as the plaintiff's own negligence in the context of a possible estoppel being raised against it is concerned, the often-quoted statement by Philips AJ in *Big Dutchman* 283 should be kept in mind:

> "A customer's duty to his banker is a limited one. Save in respect of drawing documents to be presented to the bank and in warning of known or suspected forgeries he has no duty to the bank to supervise his employees, to run his business carefully, or to detect frauds."

(See also *Holzman v Standard Bank Ltd* 1985 1 SA 360 (W) 363; *Columbus Joint Venture v ABSA Bank Ltd* 2000 2 SA 491 (W) 514; Pretorius "Law of negotiable instruments" 1985 *Annual Survey* 349; Malan *et al On bills of exchange, cheques and promisory notes* (2009) 267; Itzikowitz and Du Toit 2(1) *LAWSA* para 345.)

We submit that the *Big Dutchman* case is more on par with *Ungaro* and find it very strange that this decision was not brought to the attention of the court by counsel. This decision makes it clear that a bank cannot debit a client's account without due authority. It is one of the most basic principles of the contract of mandate.

3 4 Negligence and onus of proof

The court remarked (para 41) that the defendant's allegations that the plaintiff was negligent as regards Huang's lack of authority were not based on any evidence. In fact, "the defendant dragged the plaintiff throughout the duration of the trial to prove its case, and [ended] with the defendant not tendering any countering evidence at all" (para 42). The court held (*ibid*) that although this fact, as well as the probable inferences to be drawn from such failure, "did not justify to be unduly overemphasised . . . it remained a significant factor" in the trial. However, in a startling statement, the judge said (*ibid*): "In the end, it remained the prerogative of the defendant to run its case, as it did." It is one of those "minefields" that Kriegler J was referring to and to which we alluded in section 1 above.

It goes without saying that the fact that the defendant closed its case without leading any evidence is a very odd feature of the case. We submit that this "significant factor" was actually underemphasised by the judge. Allowing the bank "to run its case as it did", actually underplayed another very strange and questionable feature of this case, namely, the onus of proof. Surely the onus of proof should have been on the defendant as was the position in the very similar *Big Dutchman* case *supra* where Philips AJ remarked (275) that "at the outset of the hearing, the defendant [bank], in my opinion correctly, assumed the *onus* of proof". In other words, the onus of proof should have been on the bank to prove that it was entitled to debit its customer's account due to the fact that the bank complied with the customer's mandate. Why this case was not placed before the court in *Ungaro* remains a mystery. It is one of the leading cases on this topic.

3 5 The bank's "duty" to verify

The fact that the account in *Ungaro* was a savings account and that the plaintiff did not have a card and PIN to withdraw money from the account, played an important role in the court's decision whether there was a "duty" on the bank to verify the identity, authority and signature of the person making the withdrawals (para 35). It is perhaps not quite correct to speak of a "duty" on the bank to verify. The answer is simply that if the bank fails to verify its customer's signature or authority to make withdrawals it does so at its own peril. In this regard, the famous remark by Scrutton LJ in *AL Underwood Ltd v Bank of Liverpool and Martins* 1924 1 KB 775 793 comes to mind: "If banks, for fear of offending their customers, will not make enquiries into unusual circumstances, they must take with the benefit of not annoying their customer, the risk of liability because they do not enquire." In similar vein, Malan J said in *Columbus Joint Venture v Absa Bank Ltd* 2000 2 SA 491 (W) 510–511: "A bank should also be careful not to inquire where inquiries might offend the customer and invade his privacy. A right balance should be struck: a bank should inquire where it is put on inquiry or the transaction is out of the ordinary" (also referred to by the court in *Ungaro* para 38). However, in *Columbus Joint Venture v ABSA Bank Ltd* 2002 1 SA 90 (SCA) the court remarked that "amidst current conditions where fraud is rife" (para 23), if circumstances "should put a bank on inquiry in extending new facilities to an existing customer or creating facilities for a new customer, the necessary inquiries must be made, and fear of offending the customer cannot inhibit performance of that duty" (para 25).

4 Conclusion

Although we agree with the outcome of the decision, it is submitted that there is some confusion with regard to the legal principles involved. It is clearly wrong to base a decision regarding breach of contract on principles of delict. This probably explains why the defendant, albeit without the benefit of hindsight, did not pursue its reliance on contributory negligence on the part of the plaintiff. The manner in which the plaintiff's claim was formulated may also have played a part in the confusion. Perhaps if the court had simply stuck to the application of the basic principles of the law of contract it would have resulted in a well-reasoned judgment. The application of the basic principles could have avoided some of the dangers of the "minefield" involved in litigation.

To sum up: although the court correctly identified the contract between the parties as being one of mandate the court did not correctly consider the consequences of such finding. The case itself may also illustrate the consequences that may follow if a defendant closes its case without leading any evidence to rebut the plaintiff's version of his claim.

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