THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
Case no: 164/07

In the matter between:

JOINT STOCK COMPANY VARVARINSKOYE	Appellant
and	
ABSA BANK LIMITED	First Respondent
LIEBENBERG DAWID RYK VAN DER MERWE NO	Second Respondent
LIEZEL MAGRIETHA PONT NO	Third Respondent
THEODOR WILHELM VAN DEN HEEVER NO	Fourth Respondent
ENVER MOHAMED MOTALA NO	Fifth Respondent
METALLURGICAL DESIGN & MANAGEMENT (PTY) LTD	Sixth Respondent

Coram: *Howie P, Navsa, Ponnan, Maya et Cachalia JJA*

Date of hearing: **26 February 2008**

Date of delivery: **28 March 2008**

Summary: Appropriation by bank of money held in client's account – account used for specific purpose of funding the establishment of a mine and processing facilities by other parties – bank's client having no legal interest in the money appropriated – held that appellant proved an entitlement to the money appropriated – bank ordered to repay the money.

Neutral citation: *Joint Stock v Absa Bank Ltd* (164/07) [2008] ZASCA 35 (28 March 2008)

JUDGMENT

NAVSA JA

NAVSA JA:

[1] On 10 December 2005 the first respondent, Absa Bank Limited, a company conducting business as a registered commercial bank, appropriated an amount of R28 244 780.59[1] standing to the credit of an account held at its Sandton Business Centre branch by its client, Metallurgical Design and Management (Pty) Ltd ─ the sixth respondent, which has its registered office in Parktown, Johannesburg. I shall for the sake of convenience refer to the first respondent as Absa and the account in question as account 1313.

[2] The appellant, a company incorporated according to the laws of the Republic of Kazakhstan, with its registered office in Varvarinka, in the Province of Kostanay Oblast, in that country, laid claim to the money appropriated by Absa. It applied to the Johannesburg High Court for an order in the following terms:

'1. Declaring that the rights to the monies which stood to the credit of the Absa account at the time of [Absa's] purported appropriation thereof, vests in the Applicant;

2. Ordering [Absa] to pay the Applicant a sum of money equal to the sum purportedly appropriated, together with *mora* interest at the rate of 15.5% per annum from the date of purported appropriation, alternatively the date of demand.'

[3] In this appeal we are called upon to decide whether the Johannesburg High Court (Willis J) was correct in dismissing the application. The present appeal is before us with the leave of that court.

The Background

[4] The appellant is a company associated with the European Minerals Corporation (EMC), which has offices in Hampshire, England. EMC is a mineral exploration and

[1]The amount left in credit in that account was R80.59 after Absa Bank Limited passed a debit of R28 244 700 on the basis that the account holder was indebted to it in a sum far exceeding the latter amount. The basis of the appropriation and the challenge to it is dealt with in later paragraphs. The appellant seeks an order for payment of the entire credit amount in that account before the appropriation. See, in particular, para 19 below.

development company which holds interests in mineral projects in Kazakhstan. EMC is listed on both the Toronto and London Stock Exchanges.

[5] EMC's key asset is the Varvarinskoye gold-copper deposit located in Northern Kazakhstan, held through subsidiary companies, namely the appellant, Althames Holdings Limited and Three K Exploration and Mining Limited. The establishment of a gold and copper mine and processing facilities at the site is known as the Varvarinskoye Project (the VP). EMC decided that the appellant would be responsible for the VP and would establish the mine and processing facilities.

[6] South Africa was the country to which the appellant looked to appoint a project engineer and lead contractor for the VP for the purpose of supplying, on a design-build and turnkey basis, a complete and functional mineral plant for the production of gold ore and gold and copper concentrate. The company it chose was MDM Ferroman (Pty) Ltd, to which I shall refer as MDM.

[7] The sixth respondent and MDM are associated companies with common directors ─ bar one.

[8] On 28 September 2005, three months after MDM commenced work on the VP, the appellant and MDM concluded a written contract. In terms of the contract MDM was the lead contractor and had the right to appoint subcontractors. The contract price was US$ 55 744 623. The contract incorporated 'The General Conditions' published by the *Federation Internationale des Ingenieurs-Conseils*. The contract is made up of a number of constituent parts and is voluminous and complex.

[9] Design and manufacturing work on the VP continued. The finance for the project was raised by the appellant through EMC and associated companies. Furthermore, the appellant entered into a debt facility, guaranteed by EMC, with Investec Bank Limited, Investec Bank (UK) Limited and Nedbank Limited as lenders. No drawdown on the loan facility took place because of MDM's demise, which will be dealt with in due course.

[10] The appellant was concerned, before MDM was appointed as lead contractor, about MDM's reputation of repeated failures to pay subcontractors money it had received from previous employers in terms of construction or engineering contracts. The appellant had an interest in ensuring that subcontractors would be paid, to enable delivery of plant and equipment within schedule and thus to keep the VP on track. A safeguard was therefore built into the contract to address this concern. This was done by the insertion of a sub-clause in the contract.

[11] The relevant sub-clause is 14.4, which provides:

'**Schedule of Payments**

The Schedule of Payments will reflect a maximum payment entitlement for the Contractor from time to time which is commensurate with the cashflow forecast/drawdown profile set out in the Facility Agreement, irrespective of any acceleration in the programmed progress of the Works which the Contractor may achieve. For the avoidance of doubt any additional sums which may become payable to the Contractor pursuant to the terms of the Contract shall not be subject to such maximum payment entitlement.

Notwithstanding any other provision of Sub-Clause 14, each Statement shall certify the amount of each interim payment which is due to be paid by the Contractor to each Subcontractor and the Employer may deposit such amounts into an account to be maintained with ABSA Bank or, by agreement with the Contractor, Investec Bank (the "Subcontractor Account"). Signatures from both the Contractor and Investec Bank Limited ("the Subcontractor Account Bank") will be required to make any payments from the Subcontractor Account.

Sums may only be withdrawn from the Subcontractor Account if the Contractor makes a request in writing to the Subcontractor Account Bank and the Subcontractor Account Bank has received a copy of an invoice from the relevant Subcontractor detailing the amount of such payment, the account into which the amount should be paid and an irrevocable instruction from the Contractor to make such payment to the Subcontractor's account.'

[12] Sub-clause 14.4 instituted a mechanism to ensure that payment was made conditional upon certain formalities being met in order to ensure delivery of the plant and equipment on schedule. It is undisputed that sub-clause 14.4 is a clause common

to construction and engineering contracts. In practice, the procedure adopted to give effect to this sub-clause was as follows:

(i) MDM would submit a request for an interim draw to the appellant, which included amounts due to subcontractors and attached the invoices from them;

(ii) the appellant would endorse MDM's own claim for remuneration as well as the subcontractors' invoices as 'approved', ensure that sufficient funds had been transferred to account 1313 to cover the proposed payments, and send copies of the approved invoices to Investec Bank and MDM;

(iii) cheques drawn in favour of MDM and the subcontractors would then be drawn against account 1313 and jointly signed by MDM and an authorised signatory employed by Investec Bank, the latter in its capacity as administrator of the debt facility having the right to refuse payment if it was not satisfied that the proposed payment fell within the scope of the VP contract.

[13] The appellant had from the outset intended to open an account with Investec Bank dedicated to payment of the accounts of MDM's subcontractors, but there had been a delay in this regard. In the interim, the appellant decided to use account 1313, held by the sixth respondent, to pay to both MDM and its subcontractors the money earned in respect of the VP.

[14] Account 1313 had been opened by the sixth respondent approximately three years before the VP contract was concluded. When money destined for the subcontractors and MDM was first deposited by the appellant into account 1313, the account had a nil balance — prior to this the account had been dormant for a considerable period. Only money due to the subcontractors and money earned by MDM were deposited into this account. No money was paid out other than in accordance with sub-clause 14.4.

[15] Before account 1313 was utilised by the appellant, the VP contract was supplied to Absa. Absa knew about the process referred to in sub-clause 14.4. On 7 June 2005,

in a letter addressed to EMC, Absa confirmed the arrangement in relation to the authorised signatories.

[16] It is necessary to record that MDM, the sixth respondent and various other associated companies held a number of banking accounts with Absa. On 23 May 2005, the directors of the sixth respondent executed a document in terms of which they agreed that any credit balance on any of the sixth respondent's accounts may at any time, in the discretion of Absa, be set-off against any money owed by the sixth respondent to Absa.

[17] By late November 2005 MDM was experiencing financial difficulties and the relationship between the appellant and MDM had become strained. It is not contested that during this period MDM failed to release cheques due to subcontractors and that, despite there being sufficient funds in account 1313, cheques were dishonoured.

[18] On 1 December 2005 the sixth respondent, MDM and two other companies entered into a deed of cross-suretyship, whereby they bound themselves, jointly and severally, as sureties and co-principal debtors in favour of Absa for payment, on demand, of any sum or sums of money which any of them may owe Absa from whatever cause arising.

[19] The sixth respondent was the holder of another account with Absa, to which I shall refer as account 7348. On 10 December 2005 account 7348 was overdrawn, with a debit balance of R60 150 608.36. The agreed limits of the overdraft facility of R17 million granted to MDM and the sixth respondent had thus been exceeded. On 10 December 2005, relying on the written agreements referred to in para 16 above and on the deed of cross-suretyship referred to in the preceding paragraph, Absa purported to apply set-off in relation to the money held in account 1313 and reduced the credit amount in that account to R80.59. As pointed out above, immediately before this was done, the credit balance in account 1313 had been R28 244 780.59. At that time two other MDM accounts reflected credit balances of R5 269 574.12 and R7 789 006.64

respectively. On 11 December 2005 those two balances were reduced to R74.12 and R6.64 respectively. The debit balance on account 7348 was thus reduced to R18 847 408.36 but still exceeded the credit limit of R17 million.

[20] On 31 January 2006 the appellant, following the procedure set out therein, cancelled the VP contract.

[21] On 1 February 2006 MDM was placed in provisional liquidation by order of the Pretoria High Court. On 17 February 2006 the second, third, fourth and fifth respondents were appointed as joint provisional liquidators by the Master of the High Court. The provisional liquidation order was subsequently made final. I record that the sixth respondent has also been placed in liquidation, but for present purposes that occurrence is irrelevant. This is particularly so because neither the sixth respondent nor its liquidators have ever laid claim to any of the money appropriated by Absa.

[22] The appellant claimed that the money in account 1313 rightly 'belonged' to it and that consequently Absa was not entitled to apply set-off against the funds in the account, as none of its debtors referred to in preceding paragraphs had any entitlement to or interest therein. The appellant demanded that Absa return the money which it had appropriated. The appellant's demand was rejected, leading to the application, the dismissal of which ultimately gave rise to this appeal.

[23] Summarising the appellant's case, account 1313 was utilised to warehouse money destined for MDM and its subcontractors, until formalities were complied with entitling either or both to withdrawals of money. At the time that the money was appropriated by Absa, there was no money due to MDM and the subcontractors were the only persons who had any claim to what was in the account. The money appropriated had been deposited for the very specific purpose of meeting subcontractor claims. Subsequent to the appropriation by Absa, in order to keep the VP going, the appellant had found approximately R28 million from its own resources to pay subcontractors their due. No subcontractor *now* had any further claim to any of the

money that had formerly been held in account 1313. Absa knew of the source and purpose of the deposits and could not have been under any illusion that the sixth respondent had any rightful interest in or claim to the money that had been appropriated.[2] The money therefore rightfully 'belonged' to the appellant.

[24] Absa's case, on the other hand, is that money deposited into a bank account of a client becomes the property of the bank, and only the sixth respondent (the account holder) had any right to contest the appropriation which, in the circumstances of the documentation executed by its debtors, referred to earlier, it was unable to do ─ Absa, it will be recalled, relied on set-off to justify the appropriation. A third party, such as the appellant, had 'no right whatsoever' to the money which stood to the credit of the sixth respondent's account. In addition, there was no contractual nexus between the appellant and the subcontractors and the appellant's interest in account 1313 ceased the moment it discharged its obligation to the lead contractor, MDM, by 'paying' the money into that account.

[25] The provisional liquidators filed an affidavit for the 'assistance' of the court, providing information and stating that they would abide any decision of the court. MDM does not appear to be in possession of any meaningful or tangible assets. Mr Gordon McCrae, one of the directors and major shareholders of MDM, informed the liquidators that amounts due to MDM were included in the money appropriated by Absa. On that basis the liquidators did not discount that MDM might have retained an interest in part of the amount appropriated. However, neither Mr McCrae nor the liquidators specified or itemised such interest. Mr McCrae also disputed the appellant's right to cancel the VP

---

[2]In this regard what is said by Mr Francois van der Colff, Absa's regional credit manager at its Sandton Business Centre branch in the answering affidavit on behalf of Absa is significant:
'From about May 2005 until the beginning of December 2005, Dr Gideon Van Rhyn ('Van Rhyn') and Mr Marius Ittmann ("Ittmann"), respectively a business banker and a senior analyst in the employ of the First Respondent, dealt with MDM and the Sixth Respondent on a direct basis to manage the relationship between the First Respondent and these customers. During this time, MDM and the Sixth Respondent would furnish Van Rhyn and/or Ittmann with information, particularly financial information, regarding the business affairs of the two companies. They were updated by representatives of MDM and the Sixth Respondent regarding the companies' business activities, including MDM's Varvarinskoye project in Kazakhstan. Included in the information provided by MDM were copies of contracts entered into between MDM and the Applicant.'

contract. The liquidators, however, have themselves not adopted a position in relation to the cancellation of the contract.

[26] In argument before us counsel for Absa tentatively suggested that as the termination of the VP contract did not appear to have been accepted by MDM the consequence is that all the entitlements to the money appropriated could not be finally decided. This submission has to be seen against Absa's answering affidavit in which it states clearly and concisely that it does not dispute the termination of the VP contract by the appellant. Even now, more than two years later, the liquidators have not taken any steps contesting the appellant's cancellation of the VP contract, nor is there any indication that there is likely to be any such action. There has as yet been no specific claim asserted on behalf of MDM (in liquidation) to any part of the money appropriated.

[27] In the appellant's replying affidavits it took great care to repeat that all the funds deposited into account 1313 were used only to pay subcontractors and MDM, and for no other purpose. An affidavit filed by the appellant's attorney refers to bank statements and other documentation and contains an exhaustive analysis of entries into and withdrawals from account 1313 and demonstrates that, at the time of the appropriation, the only debits unaccounted for were sundry bank and foreign exchange charges (neither of which is in issue). It was submitted that, in the light of the accounting exercise conducted by the appellant's attorney, no interest on the part of persons other than subcontractors (who had already been paid from another source) could be proved.

The court below

[28] Willis J appreciated that he was dealing with a '*quasi-vindicatory*' claim. He considered that it was in dispute that the funds in account 1313 were, as a matter of objective fact, the funds of the appellant and further that Absa knew that this was the case. On that basis, he dismissed the application with costs, including the costs of two counsel and the costs previously reserved (in relation to a postponement to enable the appellant to finalise its replying affidavit). Willis J 'emphasised' that he was in no way

determining the actual merits of the case and that there was nothing to prevent the appellant from proceeding against Absa by way of an action.

Application to lead further evidence on appeal

[29] The appellant sought to introduce documentation emanating from Absa, including internal memoranda, in order to demonstrate that the bank had knowledge of the source and ownership of the funds. It also sought to introduce transcripts of parts of the evidence presented at an enquiry in terms of sections 417 and 418 of the Companies Act 61 of 1973 into the affairs of the sixth respondent (in liquidation), to the same effect.

[30] In my view, this application must fail. I shall, in due course, set out the reasons for the refusal of the application. Thus, in deciding the issues in this appeal, I will therefore only have regard to the record in the court below.

Conclusions

[31] It is not correct, as contended for on behalf of Absa, that it is a universal and inflexible rule that only an account holder may assert a claim to money held in its account with a bank. Nor does the proposition that money deposited in an account becomes the property of a bank, necessarily militate against a legitimate claim by another party.

[32] In *McEwen NO v Hansa* 1968 (1) SA 465 (A), a mortgage bond debtor made monthly payments into a savings account with the Allied Building Society in the name and under the control of Mr Mortimer. It was clear that, save for very limited purposes, there was never any intention that Mr Mortimer would acquire any rights whatever in relation to the monies deposited into the account. When Mr Mortimer was sequestrated

the question arose whether the amount standing to the credit of the account formed part of Mr Mortimer's insolvent estate. In that case, as in the present, it was submitted that only the account holder had the exclusive right to claim money therein. That submission was rightly rejected.

[33] In *McEwen* this Court accepted the basic proposition that when the money was deposited with the Building Society it passed into ownership of the latter.[3] The issue before it was properly identified as follows: Who had the right to claim the credit balance in the savings account? In that case this Court considered the account holder to be the agent of the mortgage debtor. Of importance is the following dictum:

'Under circumstances such as these, this Court should not, in my opinion, allow the apparent, as distinct from legal, absolute right of control vested in the agent prior to his insolvency to withdraw monies from the account to transcend the realities of the situation so as to permit the insolvent's creditors to reap the benefit of that which was in truth never legally vested in the insolvent himself.'[4]

The funds in an account may also 'belong' to someone other than the account holder or, for that matter the bank or institution holding the money.

[34] In *Dantex Investment Holdings (Pty) Ltd v National Explosives (Pty) Ltd (in liquidation)* 1990 (1) SA 736 (AD), the appellant and respondent had, prior to the latter's liquidation, entered into a factoring agreement in terms of which the respondent, as cedent, would offer claims against its debtors for sale to the appellant, as cessionary. It was agreed that the cedent would attend to the collection, on due date, of every debt relative to a ceded claim and deposit all monies into a banking account nominated by the cessionary. The latter did not nominate an account and the monies collected were paid into the banking account of the cedent, which then made an equivalent payment to the cessionary. Some time later, the cedent ceased paying over to the cessionary the amounts it collected from the debtors. The funds were retained and used in the continuing operations of the cedent. In the local division an order was sought directing the cedent company (in liquidation) to pay over to the cessionary the amounts collected from the debtors. The local division refused to grant the order, holding that the

[3]See also *S v Kearney* 1964 (2) SA 495 (AD) and *S v Kotze* 1965 (1) SA 118 AD.
[4]At 472D-E.

cessionary had no real right in relation to the funds in the bank account, but only a personal right which did not entitle it to anything more than to prove a concurrent claim.

[35] On appeal (in *Dantex*) this Court held that the local division had been correct in concluding that the question was whether the cessionary had a better claim to the funds collected and that the question had to be formulated in this way for the reason that the bank was undoubtedly the owner of funds in the bank account. The court considered that in *McEwen*, the account had been opened and operated on the mortgagor's behalf by the insolvent as agent, but that in the case before it the account was a general one and that there was therefore no question of the funds being 'earmarked funds' in respect of which a quasi-vindicatory claim was competent. It was only if the cessionary was the owner of the money or had some other real right that it would not be obliged to queue in the *concursus creditorum* as regard payment of its claim. The following dictum is significant:

'If there had been an agreement between Dantex, the Standard Bank and Natex, that moneys deposited in this account in respect of debts ceded to Dantex could only be withdrawn by Dantex that would, of course, alter the position. That is not the case here. There is no evidence to suggest that the Bank agreed to hold the funds in respect of those cheques as agent for Dantex. Had Dantex nominated a bank account as provided for in the agreement, and had the cheques in question been paid into that account, the position might have been different.'[5]

[36] In the present case the basis on which Absa claimed the right to appropriate was set-off, in relation to money owed to it by its debtors, including the sixth respondent and MDM ─ nothing more. It is clear that Absa was aware, from the outset, of the purpose of account 1313. It knew of the source and very specific purpose of the funds and that the sixth respondent had no involvement or interest in the money. The sixth respondent, the bank and the appellant in effect agreed that the funds could only be withdrawn after compliance with a prescribed procedure which did not involve control of any kind by the sixth respondent. The sixth respondent and the bank merely acted as the appellant's agents to warehouse the money in account 1313 for the specified purpose. In these

[5]At 749H-750A.

circumstances there can be no question of set-off against money in account 1313, to which money none of Absa's relevant debtors could legitimately lay claim.

[37] A relationship between banker and client is based on contract. It involves a debtor and creditor relationship in terms of which the banker becomes owner of money deposited on the client's account subject to its obligation *to its client* to pay cheques drawn on it.[6] In the South African cases cited above the bank was not a disputant, was uninterested and stood back whilst others claimed 'ownership' of money in an account. In the present case the bank's knowledge of the source and purpose of the funds in account 1313 is of course directly relevant to its asserted right to effect set-off, which it claimed by virtue of a contract entered into with the account holder, its client. Furthermore, its knowledge is highly relevant in relation to the appellant's claim that the bank and the account holder had agreed to warehouse the money in account 1313 and that there was thus no entitlement to the money on the part of either.

[38] If we accept, as we must, that in this case the bank had knowledge of the source and purpose of the funds, then it is not necessary to consider other theoretical hypotheses, such as what the position might have been had the bank not possessed such knowledge. For, as stated in *McEwen*:

'However, as the Building Society is not a party to the present proceedings, I express no view in relation to their possible knowledge and pause only to record that, on the papers before the Court, the aforementioned intention, as deposed to by the respondent, Allison, and Mortimer, is not in any way denied by the Building Society.'[7]

Similarly, in *Dantex* the following appears at 749I-J:

'There is no evidence to suggest that the bank agreed to hold the funds in respect of those cheques as agent for Dantex.'

Nor, it seems to me, would it be advisable, to lay down any abstract general principle of law based on such a speculative hypothesis, in the absence of a proper alternative factual matrix and I accordingly refrain from doing so. This is particularly so, since we were referred to no South African authority dealing with the bank's assertion of its right

[6]See F R Malan and J T Pretorius assisted by S F du Toit *Malan on Bills of Exchange, Cheques and Promissory Notes* 4 ed (2002) p 335.
[7] Page 469B-C.

to ownership as against claims by persons other than the account holder and where it was held that in those circumstances the bank's knowledge of contractual arrangements between its account holder and other parties was irrelevant. In any event, for present purposes, that situation is entirely irrelevant.

[39] In the present case, as stated in para 36 above, the bank and the account holder had agreed that the funds could be withdrawn only upon a particular procedure being followed which did not involve any control by the account holder. As pointed out earlier it has been clearly proved that the account holder and the bank had agreed to act as the appellant's agent to warehouse the money in account 1313. I am disinclined to decide this matter other than on the basis of the facts of the present case, namely, that the bank had the knowledge referred to above, which was directly relevant in relation to the claim and defence in the present dispute.

[40] The appropriation in question was effected by a bookkeeping entry. There was no suggestion that the funds appropriated by Absa, wherever presently held, could not be traced as the funds emanating from account 1313, or that there was some other impediment in this regard. It was not the basis of Absa's defence, for example, that the money appropriated could not be followed to where it was presently held on the basis that it was not the same coinage, and therefore could not be recovered in the manner sought by the appellant.

[41] In *Nissan South Africa (Pty) Ltd v Marnitz NO and Others (Stand 186 Aeroport (Pty) Ltd Intervening)* 2005 (1) SA 441 (SCA), Streicher JA, in dealing with the perplexing question of the appropriate remedy available to a person laying claim to money wrongfully transferred from its own bank account to another over which it had no control, and considering an earlier decision by this court,[8] said the following:

'This Court was aware that its decision may not be strictly according to Roman-Dutch law but stated that Roman-Dutch law was a living system adaptable to modern conditions. As a result of the fact that ownership in specific coins no longer exists where resort is made to the modern system of banking and

[8]The case referred to was *S v Graham* 1975 (3) SA 569 (A) where the question arose whether an accused was guilty of the theft of a cheque of R37 153.88 or of the theft of that amount and the court was dealing with the principle of Roman-Dutch law that only corporeal things were capable of being stolen.

paying by cheque or kindred process, this Court came to regard money as being stolen even where it is not corporeal cash but is represented by a credit entry in books of account.'[9]

[42] In the *Nissan* case this court took into account that it was common cause that, if it concluded that the liquidators in that case were not entitled to the contested funds, the appellant was entitled to payment thereof and made an order accordingly. In the present case the parties were agreed that, if we find that no person other than the appellant had any interest or claim to the money appropriated by Absa, the appellant was entitled to the relief sought. I can see no reason why, in the present case, for the reasons stated in the *Nissan* case and considering the conclusions arrived at in the preceding paragraphs, a similar result should not follow.

[43] It is now necessary to set out the reasons for refusing the application by the appellant for leave to adduce further evidence on appeal. The appellant sought to have the application to adduce further evidence decided conditional upon the appeal (on the present record) being dismissed. This is notionally difficult to appreciate. Even though Willis J described his judgment as not finally settling the dispute between the parties, it certainly cannot be contended that his was not a final judgment susceptible to an appeal. A decision by this court on the correctness of the decision of Willis J would in itself be final. It is conceptually not tenable first to consider the correctness of that final decision and then to decide whether or not to introduce the new evidence. After such a decision a court is *functus officio*. An appellant wishing to re-open its case must therefore make an election before the appeal hearing whether to apply for re-opening. If that is refused the appeal proceeds. If it is granted there has to be remittal and the appeal will fall away.

[44] It has been suggested that the appellant was prompted to apply to adduce evidence on appeal because of the finding of the court below that it could not, on the available facts, arrive at a conclusion in relation to the 'ownership' of the funds and the knowledge of the bank in relation thereto. In my view, this suggestion is without merit. It is clear from what is set out in the appellant's founding affidavit, supplemented by the

[9]Para 24.

uncontested evidence contained in its replying affidavit, that Absa was fully aware of and party to the arrangements to use account 1313 for the VP. It is abundantly clear from those affidavits that, on Absa's own documentation, referred to by the deponents, Absa knew of the source of the funds and of the arrangements concerning payment to MDM and subcontractors. The evidence sought to be introduced at this stage, in effect, will achieve nothing more than enhancing an already established case.

[45] Furthermore, even taking into account the stressed circumstances under which the appellant launched proceedings in the Johannesburg High Court, it nevertheless had at its disposal the means provided by the rules of court[10] to compel the production of the bank statements and documents which it now seeks to introduce. That evidence was in existence at the time that the application was first brought. The evidence in relation to the enquiry in terms of the provisions of the Companies Act referred to earlier, cannot fully be appreciated until and unless it is considered in the context of all the relevant evidence adduced at the enquiry, which has not been proffered.

[46] For all these reasons the application for leave to adduce further evidence must be refused.

[47] There is one further issue requiring attention. Willis J, in dismissing the appellant's application with costs, included an order that the costs were to include the costs previously reserved in relation to an opposed application by the appellant for a postponement in order to finalise its replying affidavit. It is uncontested that the appellant had, prior to the postponement being argued, tendered to pay the costs of the postponement on an unopposed scale, which tender was refused. In all the circumstances there appears to be no justification for Absa to have adopted such a stance. The order in relation to the reserved costs should therefore be altered.

[10] See inter alia Uniform rule 35(13).

[48] The following order is made:

1. The application for leave to adduce further evidence is dismissed with costs, including the costs of two counsel.

2. The appeal succeeds with costs including the costs of two counsel.

3. The order of the court below is set aside and substituted as follows:

'(i) It is declared that the rights to the monies which stood to the credit of the ABSA account (account number 40-5616-1313) on 9 December 2005, vest in the Applicant;

(ii) The First Respondent is ordered to pay the Applicant the sum of R28 244 780.59, together with *mora* interest at the rate of 15,5% *per annum* from 10 December 2005.

(iii) The First Respondent is ordered to pay the costs of the application, including the costs of two Counsel.

(iv) The Applicant is ordered to pay the costs related to the postponement granted on 12 September 2006, in terms of the tender on its behalf, on the unopposed scale and the respondent is ordered to pay the costs occasioned by opposition.'

_____
M S NAVSA
JUDGE OF APPEAL

CONCUR:

HOWIE P
PONNAN JA
MAYA JA

CACHALIA JA:

[49] I have read the judgment of my colleague Navsa JA and agree with the order he proposes. I come to the same result but via another route. The essential difference is that I consider the bank's knowledge of account 1313's intended purpose to be irrelevant to its claimed entitlement to set-off the money that was held in that account.

[50] The facts have carefully been set out in the main judgment. They need not be repeated. That the bank owned the funds that had been deposited in account 1313 is undoubtedly so. But it is well-established that ownership of the money held in an account does not, of itself, preclude the assertion of rights of other parties to the money. This is because the solitary act by someone who opens a separate bank account in the name of another and deposits money in that account does not confer any special title on the person named as the account holder.[11] Thus, where an agent opens a separate account on behalf of a principal and deposits money into that account, the agent, or anyone claiming title through him or her has no vested right in the money.[12] And it follows, logically, that if the account holder has no title to the money so deposited, so too does the bank not have. The fact that the bank owns the money does not detract from this conclusion. Where, as in this case, there is a dispute between the parties regarding their entitlement to funds that have been deposited in a separate bank account, the intention of the parties to the agreement must be determined. And *McEwen*, I think, makes clear that the intention with which the bank holds the money is irrelevant to the determination of this question,[13] unless it is a party to the agreement.

[51] The only question, therefore, that is relevant in this appeal is whether the terms of the agreement between the appellant and MDM, particularly clause 14.4 thereof, conferred any title on the sixth respondent to the funds, which the appellant had deposited into account 1313. Absa asserts that because payments by the appellant into the account were made to discharge its obligations to MDM, the appellant no longer had a proprietary interest in the money. And, so it says, the fact that the money may have been paid for a certain purpose, namely to pay sub-contractors, does not detract from this.

[52] I do not agree with Absa's submission. The purpose of clause 14.4 and the use of account 1313 are discussed at paragraphs [10]-[14] of the main judgment. It is plain that

---

[11] *Vereins-Und Westbank AG v Veren Investments* 2002 (4) SA 421 (SCA) para 14.
[12] *McEwan* (supra) para 32; *Dantex* (supra) 34 at 749I-50B.
[13] At 469A-C; *Barnard Jacobs Mellet Securities (Pty) Ltd v Matuson* 2005 CLR 1 (W) para 26.

the account was held in the name of the sixth respondent solely to warehouse the money pending the appellant's authorisation for payment to be effected to the subcontractors. The sixth respondent had no involvement in the agreement or the VP and therefore had no personal claim to the money in the 1313 account. Until authorisation for payment to the subcontractors was forthcoming from the appellant, MDM had no claim to the money either. And in respect of the money that was appropriated it is common cause that the appellant had not authorised MDM to make payments to the sub-contractors. MDM therefore had no personal claim to the money before this. Neither did the sixth respondent, which was no more than the nominated account holder for the VP project.

[53] Properly construed the agreement between the appellant and MDM required the money, which the appellant had deposited into account 1313, to be held in trust and to be dealt with only according to its instructions. Whether Absa was aware of the arrangement ought not to have any bearing on the matter. For the same reason I would hold that it was unreasonable, in the circumstances, for the appellant to apply to adduce further evidence to demonstrate that Absa was indeed aware.

_____

A CACHALIA
JUDGE OF APPEAL