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**IN THE HIGH COURT OF SOUTH AFRICA  
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

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CASE NO: 9898/2016

In the matter between:

**SIVAPRAGASEN KRISHANAMURTHI NAIDU**

**APPLICANT**

and

**THE RESERVE BANK OF THE  
REPUBLIC OF SOUTH AFRICA**

**FIRST RESPONDENT**

**FIRST RAND BANK LIMITED**

**SECOND RESPONDENT**

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**ORDER**

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[1] The application is dismissed with costs, such costs are to include the costs of 29 November 2016 and 17 March 2017 and any reserved costs.

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## J U D G M E N T

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### HENRIQUES J

#### Introduction

[1] This is an urgent application instituted by the applicant,<sup>1</sup> in which he seeks the following relief:

- ‘(a) To revoke and suspend the trading licenses of Wesbank, a division of First Rand Bank Limited. A bank duly registered and incorporated in terms of the banking laws of the Republic of South Africa.
- (b) Reserve Bank of the Republic of South Africa to reprimand and enlighten Wesbank of their failure to comply with the Banking Code of Conduct, Government regulatory acts as set down by law in the Republic of South Africa.
- (c) To pay the applicants claim in reconvention dated 24 day of November 2011 an Annexure hereto attached as (A) for the sum of (four million and six hundred thousand rand with interest as claimed.)
- (d) Costs of suit.’

[2] The application which is opposed by the first respondent was subsequently also opposed by the second respondent,<sup>2</sup> pursuant to an application to intervene, which was initially enrolled for hearing on 29 November 2016. On that date, Moodley J issued orders in which the main application was adjourned *sine die*, and issued directives for the filing of affidavits in the application to intervene as well as the main

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<sup>1</sup> The application papers were issued on 30 September 2016.

<sup>2</sup> In the first respondent's answering affidavit deposed to on 23 November 2016, the non-joinder of First Rand Bank Limited was raised.

application. The applicant opposed the application to intervene by First Rand Bank Limited.

[3] When the intervention application served before me on 17 March 2017, the applicant consented to First Rand Bank Limited intervening in these proceedings. Further orders were issued by consent, the effect of which was to render the main application ripe for hearing as an opposed motion.<sup>3</sup>

[4] I must make mention of the fact that even though the applicant did not file an affidavit in opposition to First Rand Bank Limited intervening, I was satisfied that the second respondent had established that it had a direct and substantial interest in the subject matter of the litigation and was entitled to intervene despite the notice of opposition by the applicant. The nature of the relief which the applicant sought impacted directly on the second respondent and it was entitled to intervene in these proceedings.

#### Background facts

[5] In order to contextualise the application it is necessary to briefly set out the facts which precipitated this application.<sup>4</sup> In 2011, the second respondent instituted action against the applicant in this court under case no. 9097/2011 in which it sought *inter alia* the return of a vehicle, a Mitsubishi Triton 3,5 MPI club cab, which it had financed for the applicant pursuant to a credit instalment agreement in March 2010. The action was instituted as a consequence of the applicant's alleged failure to make

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<sup>3</sup> Although the applicant challenged the validity of the orders of Moodley J, he agreed to the order allowing First Rand Bank Limited to intervene, for the sake of expediency and as he had been advised by the Judge President in writing of what steps to follow should he wish to challenge Moodley J's orders.

<sup>4</sup> This has been gleaned from the papers filed, more specifically the founding affidavit filed by the second respondent in the application to intervene.

payment of the instalments for a period of time. The action was defended by the applicant who filed a claim in reconvention as well as various other counterclaims.

[6] At the trial which proceeded before Ndamase AJ, the second respondent consented to the applicant's application for the adjournment of his counterclaims, and the trial proceeded in respect of the second respondent's claim.

[7] The only remaining issues in the trial were whether or not the applicant had received the s 129 notice in terms of the National Credit Act 34 of 2005 and whether or not he was in arrears. During the course of his evidence, the applicant acknowledged receipt of the s 129 notice as well as the fact that he was in arrears.

[8] The trial court therefore had to decide whether the applicant was justified in not paying the monthly instalment, his defence at the time being that he had given notice in terms of the 'take-a-break' clause.

[9] The trial court rejected the applicant's defence that he was justified in not paying his monthly instalments as a consequence of the 'take-a-break' clause and granted a money judgment in favour of the second respondent. The applicant, who appeared in person at the trial, has not enrolled the counterclaims for hearing nor has he appealed the orders granted in the action in favour of the second respondent.

[10] Essentially, the applicant seeks the relief in his notice of motion on the following grounds:

[10.1] The second respondent has violated the banking code of conduct;

[10.2] The second respondent has contravened its consumer installment contractual agreement;

[10.3] That as a consequence of Wesbank's contravention of the contractual installment agreements terms and conditions, the applicant has lost his family, his health has deteriorated rapidly and he is in a serious financial crisis.

[11] The respondents essentially oppose the application and deny the allegations contained in the applicant's founding affidavit. The grounds of opposition to the relief sought by the applicant are essentially the same.

### Issues

[12] The issues which the court has to determine in this application are the following:

[12.1] Does this court have jurisdiction;

[12.2] Whether claim (c) which is the claim for a money judgment is *lis pendens*, alternatively *res judicata*;

[12.3] Whether the court is competent to grant the relief sought in the notice of motion?

### SARB's application for condonation for the late filing of its answering affidavit

[13] Before dealing with these issues, it is necessary to deal with a matter raised by the first respondent in its answering affidavit, being an application for condonation

for the late filing of its answering affidavit. It is common cause that the affidavit has been filed out of time. It is trite that the first respondent must show good cause as to why the late filing of its answering affidavit should be condoned. 'Good cause' requires the first respondent to explain the delay sufficiently so as to enable the court to understand how it came about and to assess the first respondent's conduct and motive and, in addition, for the court to satisfy itself that the first respondent has a *bona fide* defence.<sup>5</sup>

[14] Having regard to the first respondent's answering affidavit<sup>6</sup> and the explanation set out, it is my view that the first respondent has satisfactorily explained the delay. It has not been dilatory or reckless, nor has it intentionally disregarded the rules of court. I am also not convinced that the first respondent's non-compliance with the rules has been done intentionally to delay and frustrate the applicant in his claim. In addition, I am satisfied that the first respondent has a *bona fide* defence to the application. Consequently, to the extent necessary, the first respondent is granted condonation for the late filing of its answering affidavit.<sup>7</sup>

#### Applicant's opposition to the filing of the first respondent's heads of argument

[15] At the hearing of the matter the applicant filed a notice entitled 'Urgent

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<sup>5</sup> *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 353A; *Dalhousie v Bruwer* 1970 (4) SA 566 (C) at 571A and 572C.

<sup>6</sup> Deposed to by Robert Urry, paras 35-56 thereof.

<sup>7</sup> I may add that at the hearing on 17 March 2017, all parties concerned including the applicant, indicated that they were desirous of having the matter heard as a matter of urgency. In the light of the applicant's difficulties with the orders granted by Moodley J on 29 November 2016, and the fact that he wanted an investigation conducted in regard thereto, (page 48 of the indexed papers), I deemed it prudent to issue further orders in relation to the late filing of the affidavits and also allow the second respondent to intervene in these proceedings after obtaining the applicant's consent. It is for this reason that such orders were granted to that effect by consent.

Attention Denying First Respondent Heads of Argument'. In essence he objected to the first respondent having served its heads of argument. The notice recorded this was not provided for in the court order of 17 March 2017. Even though the order of 17 March 2017 made provision for the filing of heads of argument, Mr *Thatcher SC*, who appeared for the first respondent, agreed to argue the matter on the affidavits of the first respondent only.

[16] The preliminaries dealt with, I now propose to deal with the grounds of opposition raised by the respondents.

This court has no jurisdiction to hear the application

[17] The applicant submits that this court has jurisdiction to deal with this application as the cause of action which was the subject matter of a trial in this court under case no. 9097/2011 arose in the jurisdiction of this court.

[18] In terms of s 21(1) of the Superior Courts Act 10 of 2013, a division has jurisdiction over all persons 'residing or being in, and in relation to all causes arising . . . within, its area of jurisdiction. . . .'

[19] It is common cause that the first respondent has its registered address and principal office in Pretoria.<sup>8</sup>

[20] In terms of s 3 of the Banks Act 94 of 1990, the following provisions are made:

'For the registration as banks. . . and for the other purposes of this Act there shall, as

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<sup>8</sup> Indexed papers at 19, paras 22-25.

part of the Reserve Bank, be an office in Pretoria called the Office for Banks, and at the head of such office shall be a person to be styled the Registrar of Banks.’

[21] The Office for Banks has its offices in Pretoria.<sup>9</sup> The Office for Banks, headed by the Registrar of Banks, is a body which deals with the registration of banks and the general administration of the Banks Act. Both the Office for Banks and the Registrar of Banks are based in Pretoria and form part of the first respondent.

[22] First Rand Bank Limited does not have a registered address nor does it have its principle place of business within the area of jurisdiction of this court.<sup>10</sup> The respondents make the point that the applicant has not in either his founding affidavit or in his replying affidavit alluded to any allegations to disclose that this court has jurisdiction to deal with the application, all the more so if one considers the relief which the applicant seeks in the notice of motion in paragraph (a), namely that the first respondent revoke and suspend the trading licences of Wesbank.

[23] The first respondent and the Office for Banks have their registered address and their principal offices in Pretoria at 370 Helen Joseph Street, Pretoria.

[24] It is common cause that the application was served at a branch of the first respondent. This branch is essentially a note depot and is used for the distribution of cash. It is neither the registered address nor the principal office of the first respondent nor the Office for Banks.

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<sup>9</sup> Indexed papers at 53, paras 6-7.

<sup>10</sup> Indexed papers at 53, paras 6-7.



[25] In the absence of sufficient allegations as to why the court has jurisdiction, this point *in limine* appears to be a good one and the application falls to be dismissed on this ground alone. In the event that I am wrong in this conclusion, and given the fact that the applicant appears in person, I propose to deal with the remainder of the grounds of opposition raised and the relief sought.

#### The revocation and suspension of Wesbank's trading licences

[26] In paragraphs 2 to 9 of his founding affidavit, the applicant submits that the first respondent ought to suspend and revoke the second respondent's trading licences for the following reasons:

2.

Wesbank has violated the Banking Code of Conduct, including government regulatory acts as set down by law, by illegal activities in varying summaries. Not limited to the aforesaid acts (paragraph two).

3.

Wesbank contravened its consumer installment contractual agreement as set down, with the applicant.

4.

The Banking Code of Conduct has been contravened by Wesbank employee's unethical behaviour, misrepresentation and deceit.

5.

The Banking Code of Conduct has been contravened in the High Court DBN KZN, by Wesbank. Wesbank representative Consul disobeyed the uniform court rules as

laid down by this high court. Further Wesbank representative Consul abused the rule fair and equal justice for all. Wesbank and its representative's violated the Banking Code of Conduct in serious white collar irregularities.

...

#### 7.

After complying with all Wesbanks contractual installment agreement terms and conditions the applicant is still harassed by Wesbank's representatives, at random. The applicant has not received a repudiated letter in regard to his claim, from Wesbank, to date. As a result of Wesbank's actions the applicant lost his family, health deteriorated rapidly and is in a serious financial crisis, his status as platinum banker destroyed.

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#### 9.

As a consequence of the aforementioned it is compulsory that the Reserve Bank of South Africa enforce the order as claimed by the applicant. Wesbank has violated the Banking Code of Conduct, committed serious white collar illegalities and disobeyed the uniform Rules of the High Court Durban KZN, including disregard for law and order, justice as set down in the Republic of South Africa. The applicant has therefore made a direct application to the Reserve Bank, in view of the aforesaid.<sup>11</sup>

[27] In essence, the applicant has alleged that the second respondent is guilty of 'unethical behaviour, misrepresentation and deceit'. This is a conclusion drawn by the applicant and no specific acts in support of such conclusion have been enumerated in the founding affidavit.

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<sup>11</sup> Indexed papers at 5-6.

[28] The reference to a 'trading licence' by the applicant is incorrect. In terms of s 17 of the Banks Act, the Registrar of Banks may on application by an institution for registration as a bank, grant such an institution authorisation to operate as a bank. Sections 23 and 24 of the Banks Act set out the procedure and circumstances under which the Registrar of Banks has the power to cancel or suspend the registration of a bank. Section 25 of the Banks Act provides that the Registrar of Banks may on application to the High Court apply for an order cancelling or suspending the registration of a bank.

[29] Consequently, the Banks Act only makes provision for the Registrar of Banks to make such application and not the applicant. As such, the applicant does not have *locus standi* to bring such application to obtain the suspension, alternatively, the cancellation of the registration of a bank, by a court.

[30] Having regard to the founding affidavit and replying affidavits and argument presented at the opposed motion, the applicant has not reported the matter to the Registrar of Banks or to the first respondent. The closest he has come is to reporting the matter to the banking ombudsman, who has indicated that it will not intervene in these proceedings. Consequently, there could be no basis upon which the Registrar of Banks or the first respondent could apply to the court for the revocation and suspension of Wesbank's 'trading licences'.

[31] I may add that it would appear that the applicant's complaint against the second respondent lies in the fact that it obtained a judgment against him in May

2014 pursuant to a trial. It is common cause that the applicant has not prosecuted an appeal against that judgment.

The order seeking the South African Reserve Bank to reprimand and enlighten Wesbank of their failure to comply with the Banking Code of Conduct

[32] The applicant does not set out any facts in support of this relief and it appears that he relies on paragraphs 2 to 9 of his founding affidavit. Firstly, the applicant refers to the Banking Code of Conduct. The respondents have pointed out that there is no Banking Code of Conduct and the applicant must have intended to refer to the Code of Banking Practice. This is a voluntary code agreed to by those banks who are members of the Banking Association of South Africa. Such code deals with standards of banking services to clients which banks agree to uphold and/or dispute resolution mechanisms in the event of the bank not resolving a client's complaint to the latter's satisfaction. In such instances, the ombudsman for banking services may thereafter be approached.<sup>12</sup>

[33] Neither the Registrar of Banks nor the first respondent has the power to reprimand banks. Section 6(6) of the Banks Act empowers the Registrar of Banks to issue a directive to a bank. Such directive may be in writing which may constitute a non-financial sanction or a directive requiring the bank to cease or refrain from engaging in any act, omission or course of conduct or to perform such acts necessary to remedy a situation.

[34] The relevant portion of s 6(6) provide as follows:

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<sup>12</sup> The applicant appears to have made an approach to the ombudsman for banking services who has declined to intervene.

‘(a) The Registrar may from time to time, in writing, after consultation with the relevant bank. . .issue a directive to such a bank. . .regarding the application of the Act.

(b) The directive contemplated in paragraph (a) may include the issuing of a non-financial sanction or a directive requiring a bank. . .within the period specified in the directive, to-

- (i) cease or refrain from engaging in any act, omission or course of conduct or to perform such acts necessary to remedy the situation;
- (ii) perform such acts necessary to comply with the directive or to effect the changes required to give effect to the directive; or
- (iii) provide the Registrar with such information and documents relating to the matter specified in the directive.’

[35] It would appear that it is only the Registrar of Banks who has the power to decide whether to issue such directive and this decision can only be taken after having consulted with the bank in question, and only in so far as the Banks Act applies to the conduct complained of. Such decision by the Registrar of Banks is also subject to internal review procedures as provided for in s 9 of the Banks Act. In addition, the Registrar of Banks’ power to cancel or suspend a bank’s registration or decision to issue a directive is an administrative action falling solely within the discretion of the Registrar of Banks. Consequently, the court cannot direct the Registrar to take such a decision to issue a directive.

[36] There is no indication in the founding affidavit that the applicant has reported any conduct of the second respondent to the Registrar of Banks warranting the issue

of a directive. In addition, the applicant has not put up a copy of his 'direct application' to the first respondent nor does he in his application papers set out any facts from which this court or the Registrar of Banks can conclude that such complaint must firstly be dealt with by the second respondent, failing which the Registrar of Banks. In addition, any complaint that he may have falling within the Code of Banking Practice must be referred to the banking ombudsman.

[37] Consequently, the applicant has not made out a case for the relief he seeks in paragraph (b) of the notice of motion.

The order in which the applicant seeks a money judgment in terms of which the respondents are directed to pay the applicant's claim in reconvention dated 24 of November 2011 in the sum of R4 600 000 with interest as claimed

[38] The respondents take the view that this claim for a money judgment is either *res judicata* or *lis pendens*. At the hearing of the matter the applicant conceded that the claim in reconvention forms the subject matter of the action in this court under case no. 9097/2011. The applicant confirmed that his claim in reconvention was adjourned *sine die* when the trial proceeded in May of 2014 and that he has not been able to enrol the counterclaims for hearing as the court file had been archived.

[39] Consequently, it would appear that the claim in reconvention is pending before the court and is consequently *lis pendens*.

[40] In addition, such claim in reconvention has only been filed as against the second respondent and not against the first respondent and the applicant cannot

obtain this relief against the first respondent. In the premises, this court cannot grant the relief sought in paragraph (c) of the notice of motion.

### Conclusion

[41] It would appear that this court cannot grant any of the relief prayed for in paragraphs (a) to (c) of the notice of motion. In addition, in light of the fact that the applicant has been unsuccessful in this application, there is no reason to depart from the normal rule that costs follow the result.

[42] In the premises the order I issue is the following:

The application is dismissed with costs, such costs are to include the costs of 29 November 2016 and 17 March 2017 and any reserved costs.

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**HENRIQUES J**

### **Case Information**

Application heard on: 18 April 2017

Judgment handed down on: 22 June 2017

Applicant appears in person: Mr S K Naidu  
[...], Durban 4091 KZN

Cell: [...]

### **Appearances**

Counsel for the first respondent: Mr G R Thatcher SC instructed by:  
T G R Attorney  
c/o Shepstone & Wylie  
24 Richefond Circle  
Ridgeside Office Park  
Umhlanga Rocks

Email: [smith@wylie.co.za](mailto:smith@wylie.co.za)

Tel no. 031 – 575 7000

Counsel for the second respondent: Mr M C Tucker instructed by:  
Strauss, Daly Incorporated  
9<sup>th</sup> Floor  
Strauss Daly Place  
41 Richefond Circle  
Ridgeside Office Park  
Umhlanga Rocks



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