# THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

## JUDGMENT

Case No: 237/2010

In the matter between:

**EDS SOUTH AFRICA (PTY) LTD** **Appellant**

and

**NATIONWIDE AIRLINES (PTY) LTD (IN PROVISIONAL LIQUIDATION)** **First Respondent**

**DUNCAN OKES INC** **Second Respondent**

**THE MASTER OF THE HIGH COURT (WITWATERSRAND LOCAL DIVISION)** **Third Respondent**

**Neutral citation:** ***EDS v Nationwide*** **(237/2010) [2011] ZASCA 16 (14 March 2011)**

**Coram:** HARMS DP, CLOETE and MALAN JJA

**Heard:** **4 March 2011**

**Delivered:** **14 March 2011**

**Summary:** Funds held in attorney's trust account – whether attorney stakeholder – control of funds.

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**ORDER**

**On appeal from:** South Gauteng High Court (Johannesburg) (Spilg J sitting as court of first instance):

The appeal is dismissed with costs.

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**JUDGMENT**

MALAN JA (HARMS DP, CLOETE JA concurring)

[1] This is an appeal with leave of the court a quo against the judgment and order of Spilg J dismissing a claim of EDS South Africa (Pty) Ltd for the payment of funds held in an investment account by the attorneys for Nationwide Airlines (Pty) Ltd, Duncan Okes Inc, and in the name of Nationwide.

[2] Nationwide was provisionally liquidated on 29 April 2008 and is represented in these proceedings by its provisional liquidators. EDS supplied information technology services to Nationwide and the funds held by Duncan Okes form part of fees allegedly owing by Nationwide to EDS.

[3] Prior to Nationwide's liquidation there existed an information technology agreement in terms of which EDS undertook to render such services to Nationwide. A dispute arose between them as to the extent of Nationwide's indebtedness. On 1 February 2008 the attorneys for EDS wrote to Nationwide demanding payment of the fees alleged to be owing. It concluded with reference to s 345(1) of the Companies Act 61 of 1973 by stating that should Nationwide fail to pay the amount claimed or secure or compound it to the satisfaction of EDS within a period of 21 days Nationwide would be deemed to be unable to pay its debts.

[4] Further correspondence followed and on 22 February 2008 Duncan Okes responded on behalf of Nationwide disputing the amount of the indebtedness in respect of various categories of charges. It recorded Nationwide's denial of indebtedness and

stated that the latter refused to make payment albeit that it was able to do so. The letter continued that certain amounts, in respect of which Nationwide denied liabIility, had been paid by the latter to Duncan Okes and that Nationwide had 'instructed us to deposit it into an interest bearing account under our control and instructed us as follows' -

'(a) If your client institutes dispute resolution proceedings against our client for payment of [certain charges] within two months from date hereof, we must keep this amount in the said account and pay it out in terms of the final outcome of such proceedings.

(b) Those instructions will not be revoked otherwise than on written notice to yourselves of not less than a month.

(c) If dispute resolution proceedings are not instituted within the aforesaid period of two months, our client reserves the right to require us to withdraw this amount for repayment to it.'

[5] The attorneys for EDS replied to this letter on the same day. They did not accept the proposal but enquired whether, in the event of an agreement being reached to proceed in terms of the dispute resolution clause in the information technology agreement, certain provisions could be dispensed with and whether Nationwide would be agreeable to pay into trust further amounts that EDS contended would be owing so as to demonstrate its ability to pay on an ongoing basis.

[6] On 10 March 2008 EDS's attorneys wrote to Duncan Okes discussing the proposed arbitration and suggesting the following terms to be incorporated in the arbitration agreement –

'2.1 the procedure and time limits for the arbitration shall be substantially those set forth in the annexed draft arbitration agreement;

2.2 the existing funds in trust shall continue to be held and your client shall agree to pay into trust such further amounts as our client contends would be owing as and for [certain charges], all such amounts being held until the final outcome of the arbitration or the termination of the agreement (whichever shall occur first);

2.3 all funds paid into trust shall be held in escrow/trust by a third party such as an unrelated law firm which will be mandated to hold the funds and release them, together with all accrued interest to the relevant party, upon production of a settlement agreement or alternatively a final award by the arbitrator

(which has not been appealed) or the appeal tribunal. The funds shall be invested [in an] interest bearing account with a financial institution of your client's choice.'

The final sentence of the letter reads that '[i] goes without saying that should we not reach agreement regarding the referral to arbitration our client's rights remain otherwise reserved'.

[7] In reply Duncan Okes on 19 March 2008 wrote -

'2.1 That the dispute between our clients should be resolved by way of a speedy arbitration as proposed by you;

2.2 The funds being held in our trust account shall continue to be held in trust and our client will make payment of all further amounts in respect of [certain charges] into trust until the final outcome and determination of the dispute;

2.3 The funds currently held in our trust account together with such further amounts that are to be held will be transferred to a third party law firm, of our client's choice, who will hold the funds in trust in an interest bearing account and who shall be mandated to release such funds and the interest accrued thereon to the relevant party, upon production of a settlement agreement or a final award by the arbitrator (which have not been appealed) or appeal tribunal.'

[8] The arbitration agreement was signed by EDS and Nationwide on 3 and 4 April 2008 respectively in terms of which the dispute was submitted to arbitration. It recorded in clause 1.2 that the parties agree -

'that the amounts contended by [EDS] to be owing shall forthwith be paid into the trust account of an independent firm of attorneys nominated by [Nationwide] who shall hold the funds and release them, together with all accrued interest to the relevant party, upon production of a settlement agreement or a final award by the Arbitrator (which has not been appealed) or the Appeal Tribunal. The funds shall be invested in an interest–bearing account with a financial institution of [Nationwide's] choice.'

[9] On 4 April 2008 the attorneys for EDS acknowledged receipt of the signed arbitration agreement, enclosed their client's statement of claim and added -

'We confirm finally that you will let us have your client's final proposals regarding the holding of the funds in trust pending the outcome of the arbitration and also the list of arbitrators.'

[10] On 30 April 2008 the attorneys for EDS wrote to Duncan Okes informing them of their understanding that a winding-up application had been brought against Nationwide and requesting confirmation that 'you are still holding the funds referred to in your letter of 22 February 2008'. They also stated that they relied 'upon your undertaking and the provisions of the arbitration agreement in regard to the funds held by you in trust'. To this letter Duncan Okes replied on 7 May 2008 confirming 'that we are holding an amount of R 3, 678, 896.15 in an interest bearing account in accordance with our instructions as recorded in our letter of 22 February 2008'.

[11] It is common cause that Nationwide did not nominate 'the independent firm of attorneys' as agreed to in the arbitration agreement. On 29 April 2008 Nationwide was provisionally wound up without the funds having been transferred to the 'independent firm of attorneys'.

[12] In the court a quo Spilg J held that Duncan Okes' letter of 22 February 2008 was written not only to demonstrate an ability to pay but also contained an offer. He found that the arbitration agreement did not amount to an acceptance of the offer because it specifically provided for the paying over of the funds to an independent firm of attorneys nominated by Nationwide who would hold it as a stakeholder. Moreover, he could not infer from the exchange of the letters of 10 March 2008 and 19 March 2008 that an agreement that Duncan Okes was to be the stakeholder had been concluded. Nor could Spilg J find that a tacit agreement to that effect had been reached. He concluded that because there was no compliance with clause 1.2 of the arbitration agreement the funds remained in the estate of Nationwide. He accordingly upheld the claim of the provisional liquidators. I agree with his judgment.

[13] The argument on behalf of EDS proceeded along the following lines: it was submitted that EDS timously complied with the conditions referred to in Duncan Okes' letter of 22 February 2008 (cited in paragraph 4 above) by instituting dispute resolution

proceedings. It was at that time that Nationwide lost control of the funds.[1] Since this occurred before the winding up the funds fell outside the assets of Nationwide and it mattered not that clause 1.2 calling for the transfer of the funds to an independent firm of attorneys of the Arbitration agreement was not 'literally' complied with. EDS further relied on Duncan Okes' letter of 7 May 2008 in which it confirmed that it was holding the funds in accordance with the instructions as recorded in their letter of 22 February 2008. This, it was submitted, provided further evidence of a tacit understanding between the attorneys that if no independent firm of attorneys were nominated the funds would remain in Duncan Okes' trust account on the same terms.

[14] A stakeholder agreement is based on contract to which Duncan Okes must be a party in addition to EDS and Nationwide.[2] Absent an agreement of stakeholding the funds remained those of Nationwide. Its unilateral action of paying the funds into the investment account of Duncan Okes could not have given the funds a different character creating rights *in rem* to them.[3] The offer contained in Duncan Okes' letter of 22 February 2008 was never accepted. The reply on behalf of EDS on the same day does not contain an unequivocal acceptance of the offer, and suggests that a counter-proposal may be made. Moreover, their letter of 10 March 2008 contains a counter-proposal ending with the words that it went without saying that should agreement not be reached EDS's rights remain reserved. EDS cannot rely on certain terms of the offer contained in the letter of 22 February 2008. That offer was never accepted, and there is, accordingly no basis for the submission that Nationwide had lost control of the funds at

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[1] Relying on *Ngwalangwala v Auto Protection Insurance Co Ltd* (in Liquidation) 1965 (3) SA 601 (A) at 611D-E and *Silverleaf Pastry & Confectionery Co (Pty) Ltd v Joubert & another* 1972 (1) SA 125 (C) at 127D-1287H.

[2] See *Sadie v Currie's City (Pty) Ltd & others* 1979 (1) SA 363 (T) at 366B-C: '[T]he stakeholder also assumes a contractual obligation to hold the stake for and on behalf of the person who becomes entitled to it.' See *Baker v Probert* 1985 (3) SA 429 (A) at 441B-E; *Ramdin v Pillay & others* 2008 (3) SA 19 (D) para 14.

[3] *Ex parte Kelly* 1942 OPD 265 at 271-2.

that or, for that matter, any other stage. Moreover, the funds were held pending resolution of a dispute relating to fees that were disputed. No admission that they were due was ever made.

[15] Duncan Okes had never agreed to be a stakeholder. Although clause (a) of their letter of 22 February 2008 may suggest such, clause (b) makes it clear that Nationwide may revoke the instructions to Duncan Okes. A stakeholder is not the agent of any of the other parties to the stakeholding:[4] on the evidence Duncan Okes held the funds as agent of Nationwide. Nor do clauses 2.1 and 2.3 proposed by the attorneys for EDS (and agreed to by Duncan Okes in their letter of 19 March 2008 with some amendments) convert them into a stakeholder. The stakeholder envisaged is the 'unrelated law firm' mentioned in clause 2.3 of these letters, not Duncan Okes, whose obligation it was to transfer the funds to the stakeholder (clause 2.3 of their letter of 19 March 2008). The negotiations between the parties culminated in the conclusion of the arbitration agreement which provided expressly for the stakeholder to be nominated by Nationwide. No nomination was made. The suggested tacit term or agreement contended for that Duncan Okes would be the stakeholder is in conflict with this term.

The appeal is dismissed with costs.

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F R MALAN
JUDGE OF APPEAL

[4] *Baker v Probert* 1985 (3) 429 (A) at 441B-E.

APPEARANCES:

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| For Appellant: | M J Fitzgerald SC |
| | Instructed by: |
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