IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

9/9/16

Case No: 14361/2013

In the matter between:

THE SPAR GROUP LIMITED Plaintiff

and

FIRSTRAND BANK LIMITED First Defendant

ARNALDO FABIO PAULO Second Defendant

(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

9/9/16
DATE

SIGNATURE

JUDGMENT

D S FOURIE, J:

[1] The plaintiff ("Spar") instituted action against the first defendant ("the Bank") and the second defendant ("Paulo") on two *quasi-vindicatory* and two delictual claims, seeking payment from the Bank and Paulo jointly and severally in a total sum in excess of R5 million. When the trial commenced,

Spar had already obtained default judgment against Paulo and the trial proceeded between Spar and the Bank only.

BACKGROUND

[2] Prior to March 2010 Spar and a business known as Umtshingo, represented by Paulo, stood in a trading relationship in terms of which Spar as wholesaler supplied goods and services on credit to Umtshingo as retailer. As security for Umtshingo's indebtedness to Spar a notarial bond over Umtshingo's movable assets was registered in favour of Spar. It was a term of the notarial bond that should Umtshingo fail to pay any amount due to Spar on the due date thereof, or commit a breach of any of the provisions of the notarial bond, Spar would be entitled to enter upon, cease and take full possession of the business and all the assets of Umtshingo and to hold same as security for the repayment of all amounts due to Spar.

[3] At all times relevant Umtshingo conducted three businesses in Nelspruit, being a supermarket in the name of Bella Donna Kwik Spar and two liquor stores, Bella Donna Tops and Sonpark Tops. Prior to 8 March 2010 the proceeds of speed-point sales of the three businesses were deposited into the following bank accounts held at the Bank (first defendant):

- Bella Donna Kwik Spar: the 323 account held in the name of Central Route;

- Bella Donna Tops: the 655 account held in the name of Umtshingo; and

- Sonpark Tops: the 309 account held in the name of Umtshingo.

[4] At the beginning of March 2010 Umtshingo was, according to Spar, indebted to it in the sum of R2 539 408.14. Spar then launched an application against Umtshingo for the perfection of its notarial bond in the Magistrate's Court, Nelspruit and obtained a provisional order on 5 March 2010. Subsequently, on 8 March 2010, the order was executed and the three businesses were attached and possession given to Spar.

[5] Umtshingo was reluctant to have the businesses closed down pending the further court proceedings and the parties entered into negotiations for the conclusion of a short-term lease of businesses agreement. Various versions of a draft lease were exchanged, but a final version was never signed. However, from 9 March 2010 Spar traded the Bella Donna Kwik Spar, Bella Donna Tops and Sonpark Tops businesses for its own profit or loss.

[6] Spar then requested the Bank to change the beneficiary accounts into which the credits from the speed-points would be paid. However, Paulo insisted that the speed-point proceeds should continue to be paid into Umtshingo's bank account and as from 9 March 2010, the speed-point

proceeds of the three businesses continued to be paid into the 323, 655 and 309 accounts.

[7] It is common cause between Spar and the Bank that:

- the Bank, during the period 9 March until 24 June 2010, permitted Central Route to draw cheques and process debit and stop orders on the 323 account on condition that Central Route first made deposits or transfers into the 323 account in sufficient amounts to cover such debts;

- as from 24 June 2010, the 323 account was frozen in terms of a court order;

- on 8 March 2010, Central Route was indebted to the Bank in the sum of R1 343 422.92 being the debit balance on the 323 account;

- on 9 March 2010, Umtshingo was indebted to the Bank in the sum of R292 140.84 being the debit balance on the 309 account;

- the indebtedness of Central Route to the Bank on the 323 account was extinguished on or about 12 July 2010 and thereafter the account remained in credit at all times;

- the indebtedness of Umtshingo to the Bank on the 309 account was extinguished on or about 8 May 2010;

- the Bank did not obtain the plaintiff's permission to set off the speed-point credits of R1 300 051.21 against the indebtedness of Central Route on the 323 account;

- the Bank did not obtain the plaintiff's permission to set off the speed-point credits against the overdraft indebtedness of Umtshingo on the 309 account as at 8 March 2010, the payment guarantee of R400 000.00 debited on 25 June 2010, the monthly loan agreement instalment debited during the period March 2010 to June 2011 and the interest charged by the Bank on a monthly basis on the debit balance from time to time;

- the quantum of Spar's claims is no longer in dispute.

[8] Having regard to the issues between the parties (to which reference will be made later), this case concerns the question, in broad terms, whether the Bank is liable towards the plaintiff on the basis of alleged unlawful appropriation (Claims 1 and 4) and in delict (Claims 2 and 3) in respect of an alleged duty of care to avoid economic loss in circumstances where it is alleged that the Bank had knowledge pertaining to the alleged true owner of moneys deposited into the bank accounts referred to above.

THE PLEADINGS

CLAIM 1

[9] Claim 1 is for payment in the amount of R1 343 422.92. It concerns the 323 account held at the Nelspruit branch of the Bank in the name of Central Route. It is Spar's contention that, in respect of all the speed-point and cash moneys credited to the 323 account, the personal rights to these funds vested in Spar at all times and that the Bank was aware that the funds credited to the 323 account did not belong to either Umtshingo or Central Route. The Bank has, in its amended plea, denied that it unlawfully appropriated payments made into the 323 account and has pleaded that its appropriation of payments was lawful under the circumstances.

[10] The parties have agreed that the following pertinent issues are in dispute with regard to Claim 1:

- Whether the Bank was entitled, during the period 9 March 2010 to 12 July 2010, to apply set off between the funds being paid into the 323 account as a consequence of the trading in Bella Donna Kwik Spar, and the accountholder's indebtedness of R1 343 422.92 in respect of the overdraft balance on the 323 account as at 8 March 2010, or to receive such moneys in payment of the amounts owing to the Bank by the accountholder;

- In the event of the court finding that the set off or payment contended for by the Bank or payment in respect of the 323 account was impermissible, whether the Bank is liable to pay Spar the sum of R1 343 422?

CLAIMS 2 AND 3

[11] Claim 2 is for payment in the amount of R2 039 948.68 and relates to the 655 account. Claim 3 is for payment in the amount of R1 358 890.90 and relates to the 309 account. In its very essence these claims rest on the contention that the Bank should not have allowed Umtshingo and Central Route to withdraw funds from the 655 and 309 accounts as these funds did not belong to either Umtshingo or Central Route, but to the plaintiff. It is also alleged that the Bank had a duty of care to avoid economic loss to Spar and by allowing Paulo to withdraw some of the speed-point funds, the Bank's conduct was wrongful in that it breached its duty of care to Spar.

[12] The Bank has denied Spar's alleged personal rights to these funds and has also denied the existence of a duty of care as pleaded by Spar. In its amended plea the Bank has, *in the alternative*, pleaded contributory negligence on the side of Spar.

[13] The issues between the parties with regard to both these claims are the following:

- Whether the Bank permitted Umtshingo (the accountholder) to withdraw moneys in excess of the amounts deposited or transferred into account 655 and account 309 after 9 March 2010;

- Whether the Bank owed Spar a duty of care to avoid economic loss in the circumstances;

- In the event of a finding that such a duty of care existed, whether the Bank breached the duty of care;

- Whether the Bank acted intentionally or negligently in permitting the excess funds to be withdrawn by the accountholder;

- Whether Spar suffered damages as a result of the Bank's conduct in the amount of the excess funds so withdrawn;

- Whether the Bank is liable to pay the plaintiff the amount of R2 039 948.68 (Claim 2) and R1 358 890.90 (Claim 3).

CLAIM 4

[14] Spar's fourth claim is for payment in the amount of R898 744.92 and relates to the 309 account. The relevant time-period pertaining to this claim is 9 March 2010 until 22 March 2011. This claim is, similar to the first claim, based on alleged unlawful appropriation (as opposed to allowing

withdrawals to be made as alleged in Claim 3) by the Bank in respect of credit payments made to it into the 309 account during the said period. Spar again relies on the allegation that the relevant funds did not belong to either Umtshingo or Central Route and that the 309 account was *"used to warehouse moneys belonging to the plaintiff"*.

[15] The Bank has, in its amended plea, denied that it unlawfully appropriated payments and has pleaded that its appropriation of payments was lawful. In its amended plea, the Bank has also raised a special plea of prescription.

THE EVIDENCE

[16] Spar has called three witnesses. They are Mr Du Preez, Ms Hopley and Ms Streicher. Pursuant to the close of Spar's case, the Bank has closed its case without calling any witnesses.

MR DU PREEZ

[17] Mr Du Preez is the Divisional Financial Director of the plaintiff. He is also a chartered accountant. He was referred to an application between the Bank, Spar and Central Route in case No: 12713/2011. He testified that this application *"happened during the time that I was Financial Director so I have got close knowledge of this"*. He made certain observations about the contents of this application which is not necessary to repeat herein.

According to him they were under the impression, for a considerable period, that all the funds were deposited into the 323 account only. The Bank never notified Spar that other accounts (655 and 309) were also involved. He also referred to another application between Spar and Umtshingo, Central Route and the Bank in case No: 36926/2010. According to him that application was brought by Spar to obtain an order that account 323 be frozen pending final adjudication of legal proceedings to be instituted. After discussing the contents of that application, he also referred to a Spar membership agreement entered into between Spar and Umtshingo. Reference was also made to a notarial bond registered by Umtshingo in favour of Spar as security for Umtshingo's indebtedness as retailer to Spar.

[18] Umtshingo was unable to comply with its obligations as a result whereof Spar brought an application in the Magistrate's Court of Nelspruit for the perfection of the notarial bond in terms whereof Spar took possession of the business of Umtshingo. It was then decided, to prevent a close down of the business, to enter into a short term lease of business agreement with Paulo. A business lease agreement was never signed because Spar insisted that the speed point credits should be paid into its own bank account, whereas Paulo refused to give his consent. The result was that *"the money was banked into what we thought the 323 account"* was. When asked for whose profit and loss the business had been conducted, the witness replied *"it was definitely for the Spar group ... all three stores"*. In order to justify this statement, the witness also referred to various invoices.

[19] The witness then explained that the day after Spar had started trading for its own account a representative of the Bank was informed about this arrangement. The Bank then indicated that *"in the light of the fact the clients cannot trade any more we cannot allow any debits against the accounts"*. The witness also referred to a telephonic discussion with the Bank during the week of 12 March 2010 when the Bank was informed about the perfection of the notarial bond and that the management of Bella Donna Kwik Spar, Bella Don Tops and Sonpark Tops had been taken over by Spar. The Bank was then requested to urgently change the bank details of all three these businesses to that of Spar. He was informed that the Bank will not change the bank details unless they are given permission to do so.

[20] The witness then referred to an email dated 24 March 2010 in terms whereof Spar was informed by the Bank that the Bella Donna account had been frozen and that only prefunded cheques (a deposit out of the client's own external funds) will be honoured. According to the witness he then accepted that their funds would be safe. After a request by Spar that certain deposits be transferred to Spar's account, the Bank again replied that these amounts cannot be transferred without Paulo's written permission.

[21] The witness was then referred to an email from the Bank to Spar dated 2 June 2010. The following has been stated:

> *"Can Spar just sign a new speed point agreement and have the funds redirected to their account whilst the business is technically*

still that of the Paulos despite the fact that Spar is running the store? I would think that either Paulo should agree or the Court order needs to be perfected and not be provisional."

The witness indicated that his understanding of this email was that, although the Bank was acknowledging that Spar was running the business, it was not going to support *"changing the account numbers"*.

[22] The witness also referred to an email from the Bank to Spar dated 17 June 2010. In terms thereof Spar was informed that the Bank cannot change the beneficiary account of the speed point machines, that the Bank has removed all limits on the account on 10 April 2010 and that it has no control over credit balances which the client is able to transfer. According to the witness he was then very much concerned as he realised that the account was no longer frozen as he thought it would be.

[23] In cross-examination the witness conceded that right from the beginning Paulo refused to give permission that speed point credits may be allocated to Spar. He also accepted that the only basis on which Spar could have continued with the business, despite the interim order granted by the Magistrate's Court, was by agreement with Paulo. The witness accepted that in terms of the agreement between Spar and Paulo, credit and debit card credits would be paid into the account of Bella Donna conducted by Central Route. According to the witness he understood the word *"frozen"* to mean that funds could not be withdrawn unless they were deposited or prefunded

by Paulo himself. It was then put to the witness that profits earned by Spar which had to be set off against Umtshingo's indebtedness to Spar did not restrict Paulo using any of the cash in Umtshingo's bank account. He replied as follows: *"There is no agreement that says that restricts him. You are correct."*

[24] The witness was then cross-examined about the possibility of these businesses conducting an overdraft on the accounts concerned. He conceded that it would not have been unusual, although he was not aware of it. However, he admitted that he did not give any thought as to whether there was indeed an overdraft facility or not. With reference to the affidavit by Paulo in case No: 12713/2011 the witness conceded, if the affidavit had been studied properly, that he should have known that not all of the moneys went into the 323 account and that Spar would have to look at all three accounts. The witness finally conceded that the Bank's attitude towards Spar always had been, with regard to the accounts concerned, to *"either get written permission or get a court order"*.

MS HOPLEY

[25] Ms Hopley is a Credit Manager employed by Spar for the Lowveld Division. She referred to speed point deposits as well as a consolidated bank account for reconciliation purposes. The parties thereafter came to an agreement in terms whereof the quantum of all the claims is admitted.

[26] She then testified that, following the attachment of the businesses, a meeting was held with Paulo on 8 March 2010. The witness, Paulo, his attorney and the attorney of Spar were all present. At this meeting Paulo and his attorney resisted the closing of the stores pending the return date of 1 April 2010. They indicated that a closure would damage the businesses and the trade name. It was then suggested by the attorney of Spar that the stores could be traded in the interim period if a short term business lease agreement was concluded between Spar and Umtshingo. Paulo accepted the idea in principle, but his attorney insisted to first see the terms and conditions in writing.

[27] A copy of Spar's business lease agreement was later forwarded to Paulo's attorney. In terms of the proposed business lease agreement Spar would be entitled to operate the business solely for its own profit or loss, subject to the proviso that all net profits earned during the existence of the lease shall be set off against Umtshingo's indebtedness to Spar. It also contained a clause authorising bank details to be changed into the name of Spar and that payments be made into the name of Spar. According to the witness Spar was allowed to operate the business solely for its own profit or loss, but Paulo refused to agree that banking details be changed as stipulated in the draft agreement. A number of versions of the draft agreement were exchanged, but a final lease agreement was never signed by the parties.

[28] On 23 March 2010 the witness sent an email to the Bank. She notified the Bank that Spar was now trading for its own account until the return date of 1 April 2010. It was then pointed out to the Bank that as Spar was trading for its own account, *"we need the credit card payments to not be paid into the existing bank account, but to be paid to us"*. The witness then also referred to an email from the Bank in terms whereof Spar was informed that the account had been frozen on 10 March 2010. Later, on 17 June 2010, the witness was informed by the Bank that it could not change the beneficiary account of the speed point machines and that only Paulo could authorise the bank to change the account details. The witness was concerned and immediately started proceedings to obtain a court order to have the accounts frozen. On 24 June 2010 a rule *nisi* was granted with interim operation in terms whereof account 323 was frozen pending final adjudication of a legal process to be instituted by Spar.

[29] In cross-examination the witness conceded that it was not unusual for Spar stores to have overdraft facilities with their bankers. She also conceded that on 10 or 11 March 2010 no business lease agreement had been concluded as she and Paulo were still busy negotiating an agreement. She explained that Spar was entitled to all the funds because *"we were trading for our own profit and loss"*. She conceded that she never had considered the possibility that there could have been an overdraft facility for the 323 account. She then referred to this account which had been *"blocked"*, but immediately conceded that *"credits would still come in"*.

MS STREICHER

[30] Ms Streicher is the Financial Director of Spar, but during 2010 she was the accountant. She referred to an email addressed to the Bank dated 10 March 2010. In that email she informed the Bank that the management of all three outlets had been taken over by Spar. She also requested the Bank to change the banking details of all three businesses to that of Spar. Later, on 19 March 2010, she repeated this request. On 23 March 2010 she informed Ms Hopley that the Bank was still refusing to change the bank details as they were awaiting a court order. She also informed Ms Hopley that the Bank would change the bank details *"if the signatories sign an authorisation letter that they can do so"*. According to the witness Paulo was thereafter requested to sign such a letter, but he refused to do so.

[31] In cross-examination she explained that they had reluctantly agreed that the speed point moneys could be deposited *"into a frozen account but it was always our money because we provided the stock for it"*. She conceded that there was a dispute regarding the terms of the business lease agreement and therefore it was never signed. She also pointed out that they had requested copies of bank statements from the Bank, but was unable to obtain access to those statements. She conceded that Spar already knew in June 2010 that there existed a significant deficit, in excess of R1,8 million, in respect of the available funds in the 323 account.

DISCUSSION

PLEA OF PRESCRIPTION

[32] Before considering the merits of the claims and the defence thereto, it is necessary to first deal with the Bank's special plea of prescription with regard to Claim 4. Spar has instituted its fourth claim on 28 July 2015 by service on the Bank of its notice of amendment dated 27 July 2015. A plea of prescription was anticipated in paragraph 48 of the amended particulars of claim. It reads as follows:

> *"The plaintiff discovered the existence of the debts referred to in 47.1-47.4, the identity of the first defendant as its debtor in respect of these debts, and the facts from which these debts arose, during or about January 2015 when the first defendant furnished the plaintiff with statements for the 309 account for the period March 2010 to September 2012, and the plaintiff was able to perform a reconciliation of the debit and credit entries on the 309 account."*

[33] In its plea, the Bank pleads that the plaintiff could have acquired knowledge of the identity of the Bank and the facts from which the alleged debt arose, by exercising reasonable care on or immediately after the relevant dates. The relevant dates referred to, are the following:

- 8 May 2010, being the date on which the debit balance on the 309 account was extinguished;

- 25 June 2010, being the date on which the Bank debited the 309 account with the amount of R400 000.00 paid to Spar under the payment guarantee;

- the period March 2010 until June 2011 during which the Bank debited the 309 account with the monthly instalments on Umtshingo's loan agreement with the Bank;

- the period March 2010 until September 2012, being the period during which the Bank debited the 309 account with interest on the debit balance.

[34] Claim 4 is based upon alleged unlawful appropriation of funds in the 309 account which occurred on the dates or during the periods referred to above. Section 12(1) of the Prescription Act, No 68 of 1969 provides that, subject to the provisions of subsections (2), (3) and (4), prescription shall commence to run as soon as the debt is due. In terms of subsection (3) a debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises, provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.

[35] Having regard to the special plea as pleaded, it seems that the Bank's case is not that Spar had actual knowledge of the identity of its debtor and the facts from which the debt arose, but rather that such knowledge could have been gained by Spar by the exercising of reasonable care. The onus of proof rests on the party raising the special plea of prescription. In the present case, it is for the Bank to allege and prove the date upon which Spar should have had knowledge of the identity of the Bank and of the facts from which the debt arose (*Gericke v Sack* 1978 (1) SA 821 (A)).

[36] It was pointed out on behalf of the Bank that Mr Du Preez acknowledged that Spar could have obtained knowledge of the fact that the speed point sales were not channelled into the 323 account only (held in the name of Central Route), had Spar investigated the matter earlier and had Spar made enquiries with Mr Paulo in this regard. In answer thereto it was contended on behalf of Spar that it only learnt about the existence of the 309 account when the Bank eventually in January 2015 furnished Spar with bank statements for this account. It was further pointed out that, given the Bank's insistence on customer confidentiality and refusal to provide Spar with the information relating to the balances from time to time or copies of the bank statements, it was impossible for Spar to have knowledge of the fact that the Bank appropriated these amounts for its own benefit.

[37] The Bank relies on the provisions of section 12(3) of the Prescription Act, i.e. that Spar could, with the exercise of reasonable care, have acquired the relevant knowledge. This can be referred to as

constructive or deemed knowledge. This means that a creditor is deemed to have the requisite knowledge if a reasonable person in his position would have deduced the identity of the debtor and the facts from which the debt arises (*Drennan Maud & Partners v Town Board of the Township of Pennington* [1998] 2 All SA 571 (A) at 580 (e-f)).

[38] In *Minister of Finance and Others v Gore* 2007 (1) SA 111 (SCA) par 17 it was emphasised that time begins to run against a creditor when it has the minimum facts that are necessary to institute action. The running of prescription is not postponed until a creditor becomes aware of the full extent of its legal rights, nor until the creditor has evidence that would enable it to prove a case comfortably. In short, the word *"debt"* does not refer to a cause of action, but more generally to a *"claim"* (*Drennan Maud & Partners v Pennington Town Board, supra*, at 583 c-d in a separate concurring judgment by Harms JA).

[39] Ms Streicher acknowledged that Spar already knew in June 2010 that there existed a significant deficit (R1,8 million) in respect of the available funds (in the 323 account held in the name of Central Route), regard being had to Spar's particular knowledge of the proceeds of the relevant speed point sales for the period in question. Mr Du Preez admitted that he gave no consideration as to whether or not Central Route's bank account and/or the bank account of Umtshingo may have been in overdraft.

[40] However, it is common cause that on 17 June 2011 an affidavit by Paulo was served on the attorneys of record for Spar in a matter between the Bank, Spar and Central Route (Case No 12713/2011). In that affidavit (par 28 thereof) Paulo furnished particulars in respect of the flow of funds (speed point proceeds) into three different accounts held at the Bank. He referred to account 323, account 655 and account 988. He explained that account 323 had been the operating account of the Bella Donna Kwik Spar and that this account still received credits in the form of credit card transactions. The purpose of account 655, according to Paulo, had always been to be credited with transactions paid for by way of credit cards at the Bella Donna Tops. The 988 account was, according to him, credited with payments by way of credit cards at the Sonpark Tops as well as with instalments on a loan from the Bank to Umtshingo.

[41] Except for an incorrect reference to one account (988 instead of 309) it was clearly explained by Paulo that there were three different accounts at the Bank and that these accounts received credits in the form of credit card transactions concluded at the three different businesses. This means that during June 2011 Spar already had information to conclude that speed point sales from the two Tops stores were being banked into accounts other than the 323 account, all being held at the same Bank. It could, for purposes of formulating a claim timeously, have requested the necessary information from Paulo who would, in all probability, have been in possession

of all the bank statements, not to mention the possibility to avail itself of the procedure set out in Rule 35(12) in that application.

[42] Having regard to the relevant time-period pertaining to the fourth claim as pleaded in paragraph 46 of the amended particulars of claim, i.e. 9 March 2010 until 22 March 2011, it appears to me that Spar could already have obtained the necessary information during June or July 2011 to enable it to formulate a claim timeously. Spar should therefore be deemed to have obtained knowledge of the identity of the alleged debtor (the Bank) and of the facts from which the alleged debt (fourth claim) arose. I therefore conclude that Claim No 4 has become prescribed, as a period of more than three years has expired since June/July 2011 before this claim was introduced on 28 July 2015. I shall now proceed to consider the merits of Claims 1, 2 and 3.

CLAIM 1

[43] As pointed out above, Claim 1 (and for that matter also Claim 4) has been formulated on the premise that the 323 account was used to warehouse moneys belonging to the plaintiff, that the Bank was aware of this arrangement and therefore unlawfully appropriated the amount of R1 343 422.92 of the plaintiff's deposits in order to settle the debt of Central Route to the Bank. It does not appear from the amended particulars of claim that the plaintiff is relying on an agreement with the Bank to the effect that account 323 would be used to warehouse the moneys allegedly belonging to

the plaintiff. It is in this sense that it has been referred to as a *quasi-vindicatory* claim.

[44] The general rule is that moneys deposited into a bank account fall into the ownership of the Bank. The resulting credit belongs to the customer, the Bank having a contractual obligation to pay the customer on demand and to honour cheques validly drawn on the account to the extent that it stands in credit (*Standard Bank of SA v Echo Petroleum* 2012 (5) SA 283 (SCA) at par 27). However, the Bank's apparent ownership of the funds in an account does not in all circumstances confer an absolute or unqualified right on it to treat the funds as its own or the credit as the property of its customer (*Standard Bank of SA v Echo Petroleum, supra*, par 28 and the authority cited therein).

[45] In *Joint Stock Co Varvarinskoye v ABSA Bank Ltd & Others* 2008 (4) SA 287 (SCA) the Supreme Court of Appeal considered a bank's appropriation of moneys standing to the credit of one of its client's accounts in set-off of money due by the same client on another account (account 1313). The appellant contended that account 1313 was utilised to warehouse money until certain formalities were complied with. It was contended on behalf of the Bank that money deposited into a bank account of a client becomes the property of the Bank and only the client concerned (the accountholder) had the right to contest the Bank's appropriation, which was justified by a set-off between the two accounts. However, it appears that only money due to certain subcontractors and money earned by another party

were deposited into account 1313 by this other party and that this arrangement was confirmed by the Bank.

[46] With reference to the Court *a quo*'s decision, the Supreme Court of Appeal accepted that the case concerned a *quasi-vindicatory* claim. The appellant claimed that the money in account 1313 rightly belonged to it and that the Bank was not entitled to apply set-off. The Supreme Court of Appeal concluded that the accountholder, 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 accountholder. The following was said in this regard (par 39):

> *"As pointed out earlier it has been clearly proved that the accountholder and the bank had agreed to act as the appellant's agent to warehouse the money in account 1313."*

[47] In *ABSA Bank v Intensive Air* 2011 (2) SA 275 (SCA) it was again pointed out that the relationship between banker and client is characterised as being one of debtor and creditor, so that a bank is entitled to appropriate a credit balance in a client's account by setting it off against the client's indebtedness to the bank (par 20). The bank and the accountholder may, however, agree instead that the client will hold the account as agent for a third party, in which case the client will not, even though he or she is the nominal accountholder, be entitled to deal with the funds in the account as if they were his or her own (par 21). With reference to *Varvarinskoye* it was

pointed out that if funds held in an account can be identified as having been reserved for or *"belonging"* to another by agreement with the bank, the accountholder is not entitled to deal with those funds. The person actually entitled thereto has a *quasi-vindicatory* claim to demand payment of such funds from the bank (par 24).

[48] It was then concluded by Bertelsmann AJA (in *ABSA Bank v Intensive Air*) that the facts in that case differ significantly from those in *Varvarinskoye*. The learned Judge of Appeal said the following in this regard (par 26):

> *"It is clear that the bank was not party to any agreement to treat the funds in Louw's ticket account in any way other than those of the accountholder. There is no evidence of any agreement other than that of client and banker entered into by Louw and the bank."*

[49] What is the position if a bank has knowledge of an arrangement between one of its clients (the accountholder) and a third party with regard to the latter's right to claim ownership of moneys deposited into the accountholder's account in the absence of an agreement with the bank? This question was answered as follows by Heher JA in *Standard Bank of SA v Echo Petroleum, supra,* par 31:

> *"Echo did not prove that the bank had knowledge of the modus operandi of Sky's business with it. Even if the bank had been so informed it was not bound to subordinate its interests to Sky in the absence of an agreement between them: compare ABSA Bank Ltd*

v Intensive Air (Pty) Ltd & Others 2011 (2) SA 275 (SCA) at 280I-281B."

[50] It should be pointed out that the reference to *"Sky"* in the above *dictum* is a reference to the accountholder. It therefore seems to me, properly interpreted, that mere knowledge of the Bank about a particular arrangement is not sufficient. A person claiming to have a *quasi-vindicatory* claim with regard to funds deposited into an account held in the name of a client of the Bank will have to prove that the Bank was a party to an agreement with its client to warehouse such moneys on behalf of such other person claiming to be entitled thereto. This appears to be a sound principle because in the absence of such an agreement (between the bank and its client, the accountholder) it would mean, for instance, that the accountholder and a third party would be able to agree, where the client's account shows a debit balance, that funds deposited into that account by the third party would not fall into the ownership of the Bank, by merely notifying the Bank about this arrangement. The effect would be that a bank can then unilaterally be deprived of its ownership with regard to moneys deposited into such account without being a party to the agreement. If this were to be the law one can imagine the devastating consequences it will have for commercial banks in future.

[51] The question now to be considered is whether the plaintiff was able to prove the existence of an agreement between the Bank and its client, the accountholder to warehouse the speed-point funds deposited into the 323

account on behalf of Spar? Mr Du Preez testified that the Bank was not prepared to change the bank details unless given permission by Paulo to do so. He also conceded in cross-examination that right from the beginning Paulo refused to give permission that speed-point credits may be allocated to Spar. Ms Hopley testified that on 23 March 2010 she notified the Bank that Spar was trading for its own account and that Spar needed the credit card payments to be paid into its account. She was then also informed by the Bank that it could not change the beneficiary account of the speed-point machines and that only Paulo could authorise the Bank to change the account details. Ms Streicher was of the view that the speed-point credits belonged to Spar because it *"provided the stock for it"*. She then also requested the Bank to change the bank details of all three businesses to that of Spar. She was also informed that the Bank would be prepared to change the bank details *"if the signatories sign an authorisation letter that they can do so"*. According to her Paulo was thereafter requested to sign such a letter, but he refused to so do.

[52] It is important to point out that this account was in debit during the period 9 March 2010 to 12 July 2010. This means that the accountholder, Central Route was for this period a debtor of the Bank. It was also during this period that the funds in question, totalling R1 343 422.92 (the amount claimed) were paid into this account. The evidence clearly shows that, although the Bank was notified that Spar was trading for its own account and that Spar requested credit card payments to be made to it, the Bank's attitude

always had been to *"either get written permission or get a court order"*. It also appears to be common cause, according to the evidence, that Paulo refused to agree that banking details be changed as stipulated in the draft lease agreement. He never consented to any change in this regard and that is why the Bank insisted that Spar should either obtain a court order or written authorisation by Paulo. The fact that the account was at some stage frozen only means, as was rightly conceded by Ms Hopley, that the Bank will not allow any further debits (unless prefunded by Paulo himself), but *"credits would still come in"*.

[53] The result is that in this account the debit balance was reduced by the amount of credit entries. This is in accordance with the general rule that moneys deposited into a bank account fall into the ownership of the bank in which event a set-off between debit and credit entries will lawfully take place, unless the Bank was party to an agreement with its client (the accountholder) to warehouse funds deposited into that account on behalf of a third party claiming to be entitled thereto. There is no evidence of any such agreement and therefore Claim 1 falls to be dismissed.

CLAIMS 2 AND 3

[54] As indicated above, Claim 2 is for payment in the amount of R2 039 948.68 and relates to the 655 account. Claim 3 is for payment in the amount of R1 358 890.90 and relates to the 309 account. The relevant

period with regard to both claims is from 9 March 2010 until 22 March 2011 (par 28 and 38 of the amended particulars of claim).

[55] In respect of both these claims, the plaintiff *inter alia* relies upon the allegation that:

- The funds concerned were transferred into these accounts for a purpose other than to make them available to Central Route, Umtshingo or the second defendant, namely that these accounts were used to warehouse moneys belonging to the plaintiff;

- The first defendant, as banker, owed the plaintiff, who was a customer of the first defendant's Durban Corporate Division, a duty of care to avoid economic loss to the plaintiff in circumstances where the first defendant knew that the plaintiff was the true owner of the moneys concerned; and

- The first defendant wrongfully breached its duty of care to the plaintiff as a result whereof the plaintiff suffered damages.

[56] In essence both these claims are founded on the contention that the first defendant should not have allowed Umtshingo, Central Route or Paulo to withdraw funds from these accounts, regard being had to the allegations referred to above. The plaintiff's contention that a duty of care existed is based primarily on the allegation that the plaintiff was a customer of

the first defendant's Durban Corporate Division and that the first defendant was aware of the plaintiff's alleged entitlement to these funds as the true owner thereof. It is not in dispute that during the relevant period the plaintiff was a customer of the first defendant's Durban Corporate Division (but not a customer of the first defendant's Nelspruit branch). However, the first defendant has throughout and also in its amended plea denied the existence of a duty to care as pleaded by the plaintiff.

[57] It was pointed out by counsel acting for the plaintiff that as far as he could ascertain, our Courts have never been called upon to decide whether or not a duty of care exists in terms of which a banker is obliged to avoid the loss to a person other than the accountholder in respect of the funds being deposited into such bank account. However, it was pertinently and forcefully argued that the Bank knew that Spar was the true owner of the funds concerned and also knew (or should have foreseen) that if Paulo was allowed to withdraw the relevant funds, they may well never be recoverable by Spar. Central to this argument is the contention that the plaintiff was the true owner of the moneys concerned and therefore had an identifiable subjective right with regard to these funds.

[58] The learned authors Neethling, Potgieter & Visser, *Law of Delict*, 7th Ed p 55 are of the view that even where a subjective right is identifiable, there are circumstances in which it is more appropriate to determine wrongfulness by asking whether a legal duty has been breached than by

asking whether a subjective right has been infringed. They explain the position as follows:

> *"Accordingly, in cases of liability for an omission or for causing pure economic loss (with the exception of the infringement of the right to goodwill in the case of unlawful competition) wrongfulness is normally determined not by asking whether the plaintiff's subjective right has been infringed, but rather by asking whether, according to the boni mores or reasonableness criterion the defendant had a legal duty to prevent harm, in other words whether the defendant could reasonably (according to the boni mores) have been expected to act positively."* (pp 55 and 56)

[59] No doubt, both Claims 2 and 3 are pure economic loss claims. They are founded on the contention that the first defendant should not have allowed Umtshingo, Central Route or Paulo to withdraw funds from these accounts. Put differently, according to this argument the first defendant should have prevented these withdrawals by taking some positive action. The question is therefore whether, according to the *boni mores* or reasonableness criterion, the first defendant had a legal duty to prevent pure economic loss to the plaintiff by acting positively?

[60] It was pointed out in *Country Cloud Trading v MEC* 2015 (1) SA 1 (CC) par 23 that our law is generally reluctant to recognise pure economic loss claims, especially where it would constitute an extension of the law of delict. Wrongfulness must therefore be positively established to provide the necessary check on liability in these circumstances. It functions in this

context to curb liability and, in doing so, to ensure that unmanageably wide or indeterminate liability does not eventuate and that liability is not inappropriately allocated (par 25).

[61] The same authors (*Law of Delict, supra*, p 56) also point out that the requirement of a legal duty in respect of wrongfulness is probably because impairment is not *prima facie* wrongful in these cases, but rather *prima facie* lawful, because according to the *boni mores* criterion there is neither a *general* duty to prevent loss to others by positive conduct, or a *general* duty to prevent pure economic loss. They conclude as follows:

> *"Therefore, one must determine in each case whether there is a legal duty to act positively or a duty to avoid pure economic loss. In these cases, it is consequently more appropriate to make use of a breach of a legal duty rather than infringement of a subjective right, to establish and express wrongfulness."* (p 56)

[62] The existence of a duty of care or a legal duty to prevent loss is a conclusion of law depending on a consideration of all the circumstances of the case. The enquiry encompasses the application of the general criterion of reasonableness, having regard to the legal convictions of the community as assessed by the Court (*Knop v Johannesburg City Council* 1995 (2) SA 1 (AD) at 27F-I). An omission is wrongful if the defendant is under a legal duty to act positively to prevent the harm suffered by the plaintiff. A defendant is under a legal duty to act positively to prevent harm to a plaintiff if it is reasonable to expect of the defendant to have taken positive measures to

prevent the harm (*Van Eeden v Minister of Safety & Security* 2003 (1) SA 389 (SCA) at pp 396 and 400).

[63] Can it be said that the first defendant had a legal duty to avoid economic loss to the plaintiff by acting positively? When considering this question one has to take into account that the plaintiff was not a customer operating a bank account at the first defendant's Nelspruit branch, although it was a customer of the first defendant's Durban Corporate Division. Both accounts 655 and 309 were conducted in the name of Umtshingo at the first defendant's Nelspruit branch. The first defendant therefore had a duty of confidentiality towards Umtshingo and was therefore obliged not to disclose any particulars concerning the accountholder's bank accounts and the transactions concluded by such accountholder. No doubt, considerations of public policy dictate that the relationship between a bank and its client must be of a confidential nature, unless for considerations of public policy this duty is overridden by a greater public interest (*FirstRand Bank Ltd v Chaucer Publications (Pty) Ltd* 2008 (2) SA 592 (CPD) at par 19 and 20).

[64] Another important consideration to be taken into account is the question whether these accounts were indeed *"used to warehouse moneys belonging to the plaintiff"*. As already pointed out above (par 44), the general rule is that moneys deposited into a bank account fall into the ownership of the bank. I have also concluded (par 50) that a person claiming to have a *quasi-vindicatory* claim with regard to funds deposited into an account held in the name of a client of the bank will have to prove that the bank was a party

to an agreement with its client to warehouse such moneys on behalf of such other person claiming to be entitled thereto. There is no evidence to prove the existence of such an agreement between the Bank and Umtshingo (or Paulo), the accountholder of both these accounts. On the contrary, the evidence indicates that Paulo refused to agree that the proceeds of the speed-point sales be routed to the plaintiff's own bank account.

[65] It was also suggested by counsel for the plaintiff that the public will be benefited by a better safeguarding of *"their funds"* in similar circumstances if a liability on the bank is imposed to prevent pure economic loss. The problem with this submission is twofold. First, it assumes that the funds in question belonged to the plaintiff after these funds had been deposited into another person's account (Umtshingo). Having regard to the facts of this matter, this assumption about entitlement is not correct (par 63 above). Second, one has to bear in mind that the imposition of such a duty would probably place too heavy a burden on banks to protect the interests of third parties in circumstances where the interests of its own client(s) are also to be taken into account. This can result in a conflict of interest which may have a detrimental effect on the interests of existing clients of a bank. I am therefore not convinced that in this case public-policy requires the imposition of such a duty on the Bank. Furthermore, such a duty may result in an unmanageably wide or indeterminate liability as was referred to in *Country Cloud Trading, supra*.

[66] Having regard to all these considerations and by applying the general criterion of reasonableness, it will be unreasonable to conclude that the Bank in the present case had a legal duty (or a duty of care) to avoid economic loss to the plaintiff as contended for in the pleadings. Claims 2 and 3 can therefore not succeed. Having regard to this conclusion, it is not necessary to consider any of the other issues pertaining to Claims 2 and 3.

[67] Finally, there still remains a dispute with regard to the reserved costs of a postponement on 3 March 2015. I was given a chronology regarding the events which preceded the postponement. According to this chronology it appears that the main cause of the postponement was the late discovery of documents relating to the 309 account by the Bank, notwithstanding service of two Rule 35(3) notices by Spar. In the circumstances I am of the view that the Bank should be held liable for payment of the wasted costs occasioned by the postponement.

ORDER

In the result I make the following order:

1. Plaintiff's claims 1, 2, 3 and 4 against the first defendant, are dismissed;

2. Subject to paragraph 3 below, costs of suit shall be paid by the plaintiff, including the costs of two counsel;

3. Costs reserved on 3 March 2015 shall be paid by the first defendant, including the costs of two counsel.

D S FOURIE
JUDGE OF THE HIGH COURT
PRETORIA

Date: 9 September 2016