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

Appeal Case No: A145/ 17
Case No: 14361/13

DELETE WHICHEVER IS NOT APPLICABLE

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

23/08/19
DATE SIGNATURE

In the matter between:

**SPAR GROUP LIMITED** Appellant

and

**FIRSTRAND BANK LIMITED** Respondent

# JUDGMENT

## Baqwa J

1 This is an appeal against the judgment handed down by North Gauteng High Court (Fourie J) on 9 September 2016 in which he dismissed claims 1 2 3 and 4 against the respondent and in which he further ordered that the appellant pay the costs of suit save for the reserved costs of 3 March 2015 which were to be paid by the respondent.

2 The trial court refused leave to appeal on 9 November 2016 and leave was subsequently granted by the Supreme Court of Appeal on 7 March 2017.

3 In this judgement the appellant and the respondent are referred to as "Spar" and "the Bank" respectively, the other parties and entities being Umtshingo Trading 30 (Pty) Limited ("Umtshingo"), Central Route Trading 64 CC ("Central Route") and Arnaldo Fabio Paulo ("Paulo").

## Facts

4 Spar and Umtshingo had a business relationship as a wholesaler and retailer respectively. Umtshingo operated three businesses and procured stock for these businesses from Spar. The three businesses were Belladonna Kwikspar, Belladonna Tops and Sonpark Tops.

5 The proceeds of these businesses were in the form of cash or speedpoint collections from debit cards or speedpoints. The speedpoint accounts were operated at the Bank under the following account numbers: 323 for Belladonna Kwikspar, 655 for Belladonna Tops and 309 for Sonpark Tops.

6 Spar registered a special and general notarial bond over Umtshingo's movable assets as security for Umtshingo's indebtedness to it.

7 As at March 2010 Umtshingo's indebtedness to Spar amounted to R2 539 408.14 according to Spar whilst Umtshingo quoted it's indebtedness as amounting to R2 287 300.33.

8 As a direct result of the debt Spar proceeded to perfect it's notarial bond by way of court action through which it obtained a provisional order on 5 March 2010 which was executed on 8 March 2010 and through which the three businesses were attached with possession being taken over by Spar.

9 In an effort to keep the businesses running whilst the parties were engaged in litigation, Spar and Umtshingo negotiated a short term lease. The parties agreed the majority of the terms and conditions of the lease except that clause in terms of which Spar desired to change the banking details to ensure that the speedpoint proceeds were banked into an account which was in the name of Spar. Paulo, representing Umtshingo was adamant that the proceeds be paid into Umtshingo's bank account and Spar reluctantly agreed to that arrangement.

10 Spar effectively took over all Umtshingo's erstwhile businesses as from 9 March 2010 and traded them for its own account. All the cash takings were paid into Spar's bank account. Spar purchased all of Umtshingo's stock and supplied the business with trading stock. Spar was responsible for the payment of rent for the leased premises together with salaries, finance instalments for equipment and all operating costs.

11 Despite this apparent total takeover the speedpoint proceeds were still banked into Central Route and Umtshingo's bank accounts. Spar did not, however let up, with its efforts to try and divert the speedpoint connections to its own bank account. Paulo however continued to resist those efforts which were directed at both the Bank and Umtshingo's attorney.

12 The Bank was made aware of Spar's perfection and that Spar was trading the businesses for its own accounts via short term lease. This was done, inter alia on 26 May and 15 June 2010. These notifications were not contested by the Bank.

13 It so happened that on 9 March until 24 June 2010 the Bank allowed Central Route to draw cheques and process debit and stop orders on the 323 account conditional on Central route first making transfers into the 323 account sufficient to cover the said debits.

14 The Bank brought an application for a declaratory order in February 2011 with Spar and Central Route as respondents. The Bank sought clarification regarding entitlement to the balance standing to the credit of the 323 account.

15 In a judgment of this court by Mavundla J the Court granted the Bank's application directing the bank to pay the full credit balance in the sum of R13 367 836.78 to Spar on 15 June 2012.

16 The Bank did not however notify Spar of a set-off which it had made against the 323 account in respect of an overdraft owed by Central Route in the sum of R1 343 422.92 and a sum of R292 140.84 which was an overdraft debt owed by Umtshingo in respect of account number 309. These debts had been extinguished as a result of the speedpoint deposits. Similarly, the bank did not notify Spar of having debited account 309 with R400 000 on 25 June 2010 regarding monthly loan agreements debited to that account during the period March 2010 to June 2011 together with interest charged on a monthly basis on that account, and which were also set off against credits to account 309.

**The claim**

17 In the court a quo, Spar formulated its claim as follows:

17.1 Claim 1 was in respect of the unlawful appropriation of the sum of R1343 422.92 of monies belonging to Spar by setting off a debt owing to the Bank by Central Route in account number 323.

17.2 Claim 2 arose out of the unlawful permission by the Bank for Paulo to withdraw monies belonging to Spar in the sum of R2039 948.68 from the 655 account.

17.3 In Claim 3 the Bank allowed Paulo to withdraw monies belonging to Spar to the tune of R1358 890.90 from the 309 account.

17.4 A sum of R898 744.92 belonging to Spar was appropriated by the Bank to settle debts owed by Umtshingo to the Bank in the 309 account.

**The issues**

18 The central issue before the court *a quo* was to determine who was entitled to the proceeds of the speedpoint credit and debit card sales deposited into the accounts of Central Route and Umtshingo who were the account holders of the bank.

19 Ancillary to the central issue were the determination of whether in the event of delictual liability of the Bank, Spar was also negligent and if so, whether such negligence contributed to the damages claimed by Spar in claims 2 and 3.

20 Another issue was whether the Bank had acted unlawfully when it permitted Paulo to withdraw monies from the speedpoint accounts and whether the Bank could lawfully appropriate some of the speedpoint proceeds referred to in claims 1 and 4.

21 At the hearing before the court *a quo* the respondent closed its case without calling any witnesses whilst the appellant presented the evidence of three witnesses, namely Du Preez, Hopley and Streicher.

**Assessment of the judgment of the Court *a quo***

22 The court *a quo* placed much reliance on the judgment in the matter of *Joint Stock Co Varvarinskoye v Absa Bank Ltd and others* 2008 (4) SA 287 (SCA)

("*Varvarinskoye*"). I do not agree with the manner in which *Varvarinskoye* was applied to the present case by the court *a quo*.

23 For that reason, I have deemed it necessary to quote from the headnote of that case to put matters in perspective:

"*When the first respondent ('the bank') appropriated moneys standing to the credit of one of its client's (the sixth respondent's) accounts, in set-off of the money due by the sixth respondent to the bank, the appellant instituted motion proceedings in the High Court for orders (i) declaring that the right to the moneys appropriated vested in the appellant; and (ii) ordering the bank to pay to the appellant an amount equal to the amount appropriated. The appellant had used the account exclusively for the purpose of warehousing moneys to meet the claims of subcontractors of a certain mining project abroad for which the appellant was responsible. Subsequent to the appropriation of the moneys, the appellant had, out of its own resources, paid the sub-contractors their due. The respondents resisted the application on the basis that the money deposited into a bank account of a client became the property of the bank, so that only the sixth respondent had any right to contest the appropriation. The High Court dismissed the application and the appellant appealed against that decision to the Supreme Court of Appeal.*

*Held, that was not correct, as contended for by the bank, that only an account-holder could assert a claim held in its account with a bank. The funds in an account could also "belong" to someone other than the account-holder or the bank. (Paragraphs [31] and [33] at 294 H-I and 295 D-E)*

*Held, **further, that it was clear that the bank was aware from the onset of the purpose of the account. It knew 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 and the bank merely acted as the appellant's agents to warehouse the money in the account for the specified purpose. In those circumstances, there could be no question of set-off against money in the account** (Paragraph [36] at 296 D-G)*

*Held, **further taking into account that the parties were agreed that if the court found that no person other than the appellant had any interest or claim to the money appropriated, the appellant was entitled to the relief sought, that the appellant had to be found to have unlawfully appropriated the moneys** (Paragraphs [42] at 298D).*

*Held, **accordingly, that the appeal had to succeed and the order of the court a quo set aside and replaced with an order (i) declaring that the rights to the moneys which stood to the credit of the sixth respondent's bank account vested in the applicant and (ii) ordering the bank to make payment to the applicant of the amount appropriated, together with interest a tempore morae** (Paragraph [48] at 299 G-I)."* (My emphasis)

24 The facts in *Varvarinskoye* and the relief sought are strikingly similar to the facts and relief sought in the appellant's case, the main difference being the presence of a warehousing agreement in *Varvarinskoye*.

25 The court *a quo* held that in our law, it is required for 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 to prove that the Bank was a party to an

agreement with its client to warehouse the funds on behalf of such person claiming to be entitled thereto and that mere knowledge by the Bank regarding a particular arrangement between the third party claimant and the account holder was not sufficient. (Paragraphs 34, 35 and 36)

26 The court a quo further opined that it would have devastating commercial consequences for banks if they were merely notified of an arrangement as the Bank concerned would be unilaterally deprived of its ownership with regard to monies deposited into the account without the bank being a party to the agreement.

27 The court *a quo* further correctly stated that there was no evidence of a warehousing agreement between the Bank and the account-holder. On that basis claim 1 was dismissed.

28 In support of its finding the court a quo also relied on the case of *Absa Bank v Intensive Air (Pty) Ltd*[1] and *Standard Bank of SA v Echo Petroleum CC*[2]. A mere perusal of the Headnote quote (supra), demonstrates that the court *a quo* misdirected itself in coming to the conclusion reflected in its judgment whilst at the same time referring to *Varvarinskoye* as authority for the said conclusion.

29 More specifically the following was stated in *Varvarinskoye*:

*"[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*

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[1] 2011 (2) SA 275 SCA
[2] 2012 (5) SA 283 SCA

*account becomes the property of a bank, necessarily mitilate against a legitimate claim by another party.*

*[50]. . . . 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 right 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. Thus when 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. 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 the conclusion."*

30 In the normal course of banking, upon depositing funds into a bank account, the credit accrues to the account-holder. Despite this, a party other than the account-holder may lawfully lay claim to the money held in the account. The essence of the issue in not ownership of the funds which may vest in the bank, it is who has a better claim between the account holder and the third party.

31 The bank is essentially a debtor in relation to the monies to be credited to the account with either the account-holder or the third party as the creditor. The onus is on the third party to prove that he or she has a better claim to the funds in the account.

32 In *Absa Ltd v Intensive Air (Pty) Ltd and others*[3] ("*Intensive Air*"), the Court, commenting on the relationship between a banker and a client pronounced as follows:

"*The relationship between banker and client (in the sense of account holder) is characterised in South African law 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. The bank and 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 account holder, be entitled to deal with the funds in the account as if they were his or her own. An example of such an arrangement would be where the sole director of a company opens an account in his or her own name, but arranges with the bank that the funds in the account will "belong" to the company. In such circumstances the bank will not be entitled to appropriate them for set-off against the director's personal debts to the bank. Any party alleging the existence of such an arrangement would have to show that the bank had agreed to treat the funds in that account as not being those of the account holder (the company director), but as 'belonging' to the company. Absent such proof, the bank will be entitled to treat such funds as those of the account holder. (Paragraphs [20] – [22] and [24] – [26] at 279B – 280B and 280G – 281D.)*" See Headnote at P275.

33 As alluded to (supra), it was a misdirection on the part of the court *a quo* to rely on *Intensive Air* to dismiss the appellant's claims. *In casu*, it is common cause that when Spar took over the businesses operated by Paulo, Umtshingo and

[3] 2011 (2) SA 275 (SCA)

Central Route, the monies deposited into the speedpoint accounts were for Spar's credit. The Bank was fully aware of Spar's attempts to have the speedpoint accounts transferred into Spar's name. Instead, the Bank dilly-dallied and kept on referring Spar to Paulo for consent to such transfer. The bank was thus aware of Spar's better right vis-à-vis the account holder's rights. Put differently, the respective account-holders did not have the right to authorise the Bank to set-off their debts by utilising the funds standing to Spar's credit.

34 From an evidential point of view, *Intensive Air* was distinguishable from the present case but still it could not be relied on to support the conclusion of the court *a quo*. This is apparent from conclusion reached in *Intensive Air* as follows:

"*[29] The onus was on the respondents throughout to establish that the funds in the ticket account 'belonged' to the company. They failed to present any evidence that would justify this conclusion. The witnesses called in support of the respondents' case had no knowledge of the agreements between Louw and the company and Louw and the bank. They could not gainsay that Louw was the contracting party who agreed with the bank to open the ticket account. Louw was the bank's debtor and the set-off against the credit balance of this account was effective.*"

*In casu*, from a perusal of the evidence presented, nowhere is it, nor can it be lawfully suggested, that the appellant was the bank's debtor. Absent such a suggestion, tampering with the funds standing to appellant's credit cannot but be unlawful.

35 In the circumstances it was a misdirection on the part of the court *a quo* to find that the absence of an agreement with the bank in relation to funds deposited by a third party would have devastating consequences for commercial banks in the future. This issue is discussed further, *infra*. The court *a quo* simply found that in the absence of proof of a warehousing agreement between the Bank and Central Route to warehouse the speedpoint funds on behalf of Spar, the Bank was entitled to a set-off against the credit entries in the speedpoint accounts.

36 It is common cause that Spar did not base its case on an express agreement with the accountholder to warehouse the monies accredited to the speedpoint accounts. On the basis of *Varvarinskoye*, despite the absence of an agreement between the Bank and the accountholder, the Bank is liable on the basis of its knowledge of the source of the funds and the purpose thereof. The same knowledge simultaneously entitled the third party (Spar) to a quasi-vindicatory claim.

37 The amended particulars of claim were quite explicit in stating at paragraph 18 that the personal rights to the funds deposited in the 323 account vested in the plaintiff and that such funds did not belong to either Umtshingo or Central route. It was also stated therein that the speedpoint and cash funds were transferred into the 323 account for the purpose other than to settle the debit balance on the account and that the 323 account was used solely to warehouse monies belonging to the plaintiff. Claim 4 was also couched in a similar manner.

38 In *Varvarinskoye*, Navsa JA stated as follows regarding the issue of the Bank's knowledge:

"*39. . . . 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.*"

The majority, on behalf of whom Navsa JA spoke, held that the Bank was liable on the basis of its knowledge whilst the minority held that the Bank was liable whether it had relevant knowledge or not.

39 It would seem that the court *a quo*'s erroneous view arose out of a failure to treat the appellant's claim as was done in *Varvarinskoye* and instead treated it as a contractual claim.

40 The evidence, which was not in dispute before the court *a quo* was that the lease between Spar and Paulo was enforced in all its terms. One of those terms was that Paulo would be entitled to the net profits of Spar's trading in the three stores and that the net profits would not be paid to Paulo but set-off by Spar against the existing indebtedness of Paulo's entities.

41 Spar obtained an assurance from Paulo's attorneys that a full reconciliation of the speedpoint funds deposited into the bank accounts of Central Route and Umtshingo would be done and this further entrenched the view that at all material times Paulo knew that the monies deposited into the speedpoint

accounts were the sole preserve of and for the credit of Spar, and that he had no claim thereto.

42 The *Echo Petroleum* case on which the court *a quo* also relied was similarly to *Intensive Air* distinguishable. The facts are briefly that the *Echo Petroleum* case was also a quasi-vindicatory claim where Echo Petroleum transferred the purchase price of fuel to Sky's bank account being an advance payment to enable Sky to pay Sasol for the delivery of fuel to Echo Petroleum. The court in that case found that Sky became entitled to the credit in its account. That credit constituted a debt of the Bank to Sky against which existing debts of Sky to the Bank could be set off.

43 *Echo Petroleum* was distinguishable from the present matter in that the purchase price paid into Sky's bank account vested in Sky and became available for Sky's use. *In casu*, Umtshingo and Central Route as account holders were not entitled to use the monies deposited by Spar into the speedpoint accounts.

**Application of the law to the facts**

44 What is clear from the discussion above is that before the court *a quo* the basis of Spar's case has always been the bank's knowledge of the source and the reason why the funds were deposited. The Bank was aware that the source was Spar's trading at entities which had hitherto been controlled by Paulo – but which were at that time under Spar's full and legitimate control. Spar's case had

never been that an agreement had been concluded with the bank by either Spar or the account-holder.

45 The main finding, therefore of the court *a quo* that in the absence of proof of an agreement between the Bank and Central Route to "warehouse" the speedpoint monies deposited on behalf of Spar gave the Bank the right to set off the debit balance owing by the account-holder against the credit entries made in favour of Spar constituted an incorrect application of the legal principles involved.

46 From the pleading stage Spar had always maintained that the monies credited to the 323 account emanating from speedpoint transactions pursuant to its trading at the Belladonna Kwikspar business belonged to it and not Umtshingo or Central Route. It also maintained that such funds were never meant to settle any debit balance on that account. Spar's plea in respect of claim 4 was similarly phrased.

47 The correct legal position is that Spar's claim was quasi-vindicatory. Spar was claiming what belonged and had always belonged to it with the Bank's full knowledge.

48 The Bank had been informed that the three businesses had been taken over by Spar which would trade for its own profit and loss account and that monies deposited into the accounts of Umtshingo and Central Route would belong to Spar. In the circumstances the Bank ought to have known it could not utilise funds belonging to Spar without the latter's consent.

49 What emerges in these circumstances is that the court *a quo* misdirected itself in a number of respects. It is trite that the Bank is always the owner of monies deposited into the accounts by the account holders and the Bank becomes a debtor with the account-holder becoming a creditor in respect of those funds. It is however possible for a third party to have a better right than the account-holder.

50 This is the issue that ought to have been determined by the court *a quo* namely, who was vested with stronger personal rights to claim credit from the Bank between Spar and the account-holder. This aspect was not considered by the court *a quo* which instead anchored its judgment on the absence of an agreement with the Bank. This was the misdirection on the part of the court *a quo* which in its finding said that prohibiting the Bank from dealing with the funds deposited by an account-holder without an agreement would lead to devastating consequences for commercial banks.

51 It was also a misdirection by the court *a quo* to find that in order for Spar to exercise its quasi-vindicatory claim it had to prove the existence of an agreement between the Bank and the account-holder that the Bank would warehouse the funds on behalf of Spar.

52 In *Varvarinskoye* (supra) the applicable legal principles were stated with absolute clarity by Navsa JA writing for the majority as follows:

"*[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 the 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 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."*

53 Similarly *in casu*, the basis on which the Bank claimed to appropriate was set-off in relation to money owed to it by its debtors including Paulo, the account-holder. Similarly the Bank was aware, from the outset of the purpose of the cash and speedpoint deposits into the Umtshingo and Central Route accounts. In essence, the Bank was merely warehousing the monies belonging to Spar in these accounts. Logically in the circumstances there could be no question of set-off against monies in these accounts.

**Claims 2 and 3**

54 In claims 2 and 3 Spar's alleges that the Bank unlawfully permitted Paulo to withdraw the amounts of R2 039 948.68 and R1 358 890.90 from accounts 655 and 309 respectively. These claims are based on delict in that Spar contends that it was owed a duty of care by the Bank to protect it from economic loss in circumstances where the Bank knew that Spar was the true owner of the speedpoint credits and cash deposited into the account-holder accounts. The

basis of the legal duty was the Bank's knowledge of Spar's entitlement for the Bank to take steps to avoid harm to Spar.

**Legal Duty of a Bank**

55 The factual matrix of this case provide an opportunity to grapple with the issue of the legal duty of a bank to avoid loss to someone other than the account-holder of moneys deposited in the account-holder's bank account. According to Spar there was such a duty upon the Bank.

56 According to the court *a quo*

"*[c]entral to this argument is the contention that [Spar] was the true owner of the moneys concerned and therefore had an identifiable subjective right with regard to these funds.*"

57 Reference was made by the Court to *Neethling and Potgieter*[4] regarding the breach of a legal duty as against infringement of a subjective right 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*" (55 56)

[4] Neethling Potgieter Visser, 'Law of Delict' 7th edition LexisNexis (2015) at 55

58 It is trite that conduct resulting in pure economic loss is not prima facie wrongful. The court *a quo* referring to *Neethling and Potgieter* 56 (supra) confirms this view. The learned authors conclude:

"*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.*"

59 Accepting this as the correct statement of the applicable legal principles, it is therefore incumbent upon a court to determine whether having regard to the natural justice, the interests of the litigants and the *boni mores* it is proper to impose liability in a given case. The factors to be considered cannot be predetermined in an exhaustive manner and the issues have to be decided depending on the facts of each case.

60 The following factors are set out as a useful guide in LAWSA 3rd edition, Volume 15, Delict, par 87

60.1 Whether the loss is finite.

60.2 Whether the number of potential plaintiffs is limited and identifiable

60.3 The foreseeability of the harm and the likelihood of it occuring. The availability of protective measures, and to whom they are available.

60.4 The ease with which protective measures could have been implemented.

60.5 The cost of such protective measures.

60.6 The likelihood of success of such protective measures.

60.7 The plaintiff's vulnerability to risk and ability to protect his/ her own interests in the circumstances

60.8 Whether there will be further consequential liability.

60.9 The burden associated with and the financial and social consequences of imposing further liability

60.10 The need for a delictual remedy especially where there are other remedies available.

60.11 Whether there are any considerations of equity, fairness and policy which favour a denial of the remedy.

61 It is also relevant and apposite to make reference in regard to legal liability of a bank to the matter of *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd*[5] in which the following is stated:

"*In view of the decision of Administrator, Transvaal v Trust Bank van Afrika Bpk 1979 (3) SA 824 (A) the decision in Yorkshire Insurance Co Ltd v Standard Bank of SA Ltd 1928 WLD 223 can no longer be regarded as authority for the proposition that no delictual action lies against a collecting banker who negligently caused loss to the true owner of a cheque. There can now be no reason in principle why a collecting banker should not be held liable under the extended lex Aquila for negligence to the true owner of a cheque, provided that all the elements or requirements of Aquilian liability have been met.*

*The above principle having been stated by the Court in an appeal from a decision upholding an exception to a claim by the true owner of a cheque*

[5] 1992 (1) SA 783 (A) 783-784 (Headnote)

*against a collecting banker for the loss sustained by the owner of the cheque as a result of the collecting banker having paid the proceeds of the cheque to a person who was not entitled to receive it, the Court went on to discuss various factors in favour and against the recognition of the existence of a legal duty of a collecting banker to the true owner of a lost or stolen cheque to avoid causing him pure economic loss by negligently dealing with such a cheque. The court stated that, on balance, the factors favouring the recognition of such a duty prevailed, but, at the stage of deciding an exception, a final evaluation and balancing of the relevant policy considerations which the Court had mentioned should not be undertaken. The Court held that it was sufficient for the purposes of deciding the appeal to say, firstly, that the lex Aquilia provided a basis upon which a collecting banker might be held liable in negligence to the true owner of a lost or stolen cheque, and that there were considerations of policy and convenience in the present case which prima facie indicated the existence of a legal duty on the part of the collecting banker to prevent loss by negligently dealing with the cheque in question. The Court pointed out further that such prima facie indication might be rebutted by evidence which the defendant might lead at the trial, duly tested and evaluated in the light of countervailing evidence which the plaintiff might lead...."*

62 In the present case the position of the Bank was the same as the collecting bank in the *Indac* decision. The amounts which the bank had allowed to be withdrawn and which were being claimed by Spar were common cause. The only issue was whether the actions of the Bank were legally justifiable or not. That issue was already discussed (supra) with reference to the *Vervaringskoye* decision to the effect that the Bank, which had prior knowledge that the monies

in question belonged to Spar and not to the account-holder, had acted unlawfully in permitting the withdrawal of the funds.

63 The *Indac* decision also finds support in the decision of Marais J in *Arthur E Abrahams and Gross v Cohen*[6] where the following was said:

"*A dependant may be held liable ex delicto for causing pure economic loss unassociated with physical injury but before he is held liable it will have to be established that the possibility of loss of that kind was reasonably foreseeable by him and that in all circumstances of the case he was under a legal duty to prevent such loss occurring. It is not possible or desirable to attempt to define exhaustively the factors which would give rise to such a duty because new situations not previously encountered are bound to arise and societal attitudes are not immutable.*"

64 In the present case, given the Bank's awareness that the monies paid into the Umtshingo and Central Route accounts did not belong to the account-holder, ought to have reasonably foreseen that they could be unlawfully withdrawn from the said accounts. This awareness ought to have been heightened by Paulo's resistance to Spar's attempts to have the deposits paid into its own account. In the circumstances, the Bank was under a legal duty to prevent a loss occurring to Spar as the custodian of monies belonging to Spar. In those circumstances it could have placed the money into a suspense account or placed a hold on the relevant accounts. The Bank could have effected these measures without breaching confidentiality owed to the account-holder.

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[6] 1991 (2) SA 301 (C) 309

65 The simple precautionary measures to protect Spar which was owed a duty as the Bank's client would in the circumstances not have given rise to a risk of indeterminate liability to the Bank and fear of such a risk arising was more apparent than real. The Bank would be legally protected if it was not given notice that the funds belonged to Spar as it could raise a defence of estoppel against the true owner of the funds based upon a representation that the funds belonged to the account-holder. This was however not the case with the Bank being fully apprised of the true situation and the factors referred to in *LAWSA* (supra) are relevant.

66 The unavoidable conclusion therefore is that the court *a quo* ought to have applied the *boni mores* test and found that the Bank had a legal duty to prevent economic loss to Spar. This does not have the effect of opening the floodgates against banks as suggested in the judgment of the court *a quo*. Each case must be decided on its own peculiarities and facts.

67 In the present case it was not disputed that there was only one plaintiff, Spar. The harm that Spar was likely to suffer was foreseeable and finite. There was no other way in the peculiar circumstances of the case that Spar could have protected itself and the available protective measures were well within the reach of the Bank.

68 In the result, I find that the court *a quo* misdirected itself in finding that it would be unreasonable and against public policy to impose a duty of care on the Bank to prevent economic loss to Spar.

**Claim 4**

69 Claim 4 was to the effect that the Bank had unlawfully appropriated the sum of R898 744.92 of Spar's monies in order to settle the debts of Umtshingo owed to the Bank in respect of account 309. At the end of the trial the amount claimed by Spar was no longer in dispute having been agreed via a list of common cause facts. The issue to be decided by the court *a quo* was who was entitled to the speedpoint monies deposited into the accounts of Umtshingo and Central Route, and whether the Bank could appropriate such proceeds to itself or allow Paulo to make withdrawals against such proceeds. Those issues have already been dealt with (supra).

70 Even though the factual matrix was similar to claim 1, claim 4 was different in that Spar only came to know about the existence of account number 309 at a later stage. By the time he sued the Bank for monies appropriated from that account by the Bank, the Bank pleaded prescription against the claim.

71 Claim 4 was brought into the action by way of an amendment of the particulars of claim on 28 July 2015. The debit balance in account 309 was extinguished on 8 May 2010 and the Bank debited the account with the sum of R400 000 which was paid to Spar under a payment guarantee.

72 During the period March 2010 to June 2011 the Bank debited the 309 account with monthly instalments relating to Umtshingo's loan account with the Bank. From March 2010 until September 2011 the Bank debited the account with interest on the debit balance.

**Prescription**

73 The special plea of prescription was to the effect that Spar could have acquired knowledge of the identity of its alleged debtor, namely the Bank and the facts from which the alleged debts arose by exercising reasonable care.

74 Section 12 of the Prescription Act 68 of 1969 (as amended) provides as follows:

> "*12* ***When prescription begins to run***
>
> *(1)* *Subject to the provisions of subsections (2) (3) and (4), prescription shall commence to run as soon as the debt is due.*
>
> *(2)* *If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.*
>
> *(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.*
>
> *(4)* . . . .." (my underlining)

75 The court *a quo* found that Spar could have obtained the relevant information to prosecute claim 4 during June/ July 2011 from Paulo by employing the Rule 35(12) procedure in a case brought by the Bank.

76 The evidence shows that Spar had no knowledge of the existence of account 309 in June 2011 nor was it aware that funds were being distributed. Spar's assumption from the knowledge in its possession was that the Bank had

permitted Paulo to withdraw funds from the Sonpark Tops bank account and on the basis thereof had formulated claim 3 for the payment of the sum of R2 331 324.33 subsequent to Paulo's withdrawal of proceeds from the Sonpark business.

77 It was only after the Bank had provided Bank statements regarding account 309 in terms of a Rule 35(3) notice in January 2015 that Spar became aware that the Bank had appropriated the sum of R848 744.09 to itself and permitted Paulo to withdraw funds from the speedpoint deposits, hence the amendment in terms of which claim 3 was reduced from R2 331 324.33 to R1 358 890.90 (withdrawn by Paulo) and a new claim for R898 744.90 (appropriated by the Bank).

78 The court *a quo* erred in suggesting that Spar could have obtained the relevant information, namely, the 309 account bank statements via Rule 35(12) as the application at the time involved Spar, the Bank and Central Route with the subject matter being account 323. It would have been impossible for the Bank to utilise Rule 35(12) in a case in which no mention was made of account 309 which was in the name of Umtshingo.

79 In making the finding that claim 4 had prescribed, the court *a quo* had failed to consider the applicable provisions of section 12(2) supra in that the Bank had wilfully prevented Spar from knowing the existence of account 309 and that prescription would not commence until Spar had become aware of the existence of the Bank's debt and account 309. This information only came to Spar's knowledge in January 2015.

**Obfuscation by the Bank**

80 On 14 August 2013 the Bank filed a plea (later amended in March 2016) in which it stated that the speedpoint proceeds from Sonpark Tops were deposited into the 988 account. The allegation was repeated in December 2014 in the Bank's reply to Spar's Rule 37(4) notice. The Bank refused to make any admissions which were sought regarding the Sonpark Tops account which can only be described as a deliberate obfuscation by the Bank.

81 On 30 November 2013 Spar served a notice to discover on the Bank but the Bank delayed filing its affidavit until August 2014. This delay was significant in light of the court *a quo*'s finding that claim 4 had prescribed about June/ July 2014.

82 Of equal significance was the fact that the Bank discovered the bank statements for the 323 and 655 accounts but failed to discover the bank statements for the Sonpark Tops business in its original discovery affidavit of August 2014. When Spar insisted on the production of the 988 account bank statements, it transpired that the 988 account was a dormant account.

83 It was a Rule 35(3) Notice by Spar in November 2014 which led to the production of the 309 account bank statements two months later. These were made available in January 2015. This was the first time Spar could set its eyes on the activities which had occurred in the 309 account.

84 The Bank's reliance on the provisions of section 12(3) (supra) can only be described as disingenuous and the court *a quo*'s finding in that regard as a misdirection. The Bank relied on the Spar's constructive knowledge of account 309 but such knowledge could only be established if the creditor could reasonably have acquired knowledge of the identity of the debtor and the facts on which the debt arose by exercising reasonable care. Given the events referred to (supra) Spar took all the steps that could have been taken by a diligent reasonable person.

85 It would have been an improbability for Spar to obtain the relevant knowledge of the debit transactions in the 309 account without access to the relevant bank statements. Spar was totally obstructed from obtaining the relevant knowledge through the use of a false/ incorrect bank account even during the pleading stage. Delaying tactics were employed until the point was reached where the Bank could plead prescription against any action in regard to account 309.

86 In the circumstances I have come to the conclusion that the court *a quo* erred in not finding that the Bank had deliberately obstructed Spar from obtaining knowledge of the debt and that prescription did not commence until Spar had become aware of its cause of action in relation to claim 4.

87 The court *a quo* further erred in finding that Spar could have obtained the relevant information during June/ July 2011 to enable it to institute claim 4 by employing the Rule 35(12) procedure in the case brought by the Bank even though that case did not involve account number 309.

**Contributory negligence**

88 Having found that the Bank is liable, for the unlawful appropriation of funds belonging to Spar it is necessary to determine whether as claimed by the Bank, Spar was also negligent and if so, whether such negligence contributed to the damages claimed by it in claims 2 and 3.

89 During the trial the Bank amended its plea in terms of the Apportionment of Damages Act 34 of 1956 to the effect that in the event of the court finding that the Bank owed Spar a duty of care and that such duty was breached by the Bank and that the Bank acted negligently, the Bank pleaded that Spar was also negligent and that such contributory negligence contributed to the financial harm suffered by Spar.

90 The Bank submitted the following grounds for contributory negligence:

90.1 That Spar should have removed the speedpoint machines in the stores and replaced them with machines which could process transactions into a bank account in the name of Spar.

90.2 That Spar could have established that the speedpoint monies of the two Tops stores were being banked into 655 and 309 accounts and taken steps to protect them.

90.3 That Spar failed to obtain the necessary authorisation from Central Route and Umtshingo to divert the speedpoint funds to bank accounts by Spar.

90.4 That Spar failed to timeously approach a court of competent jurisdiction for appropriate relief regarding the speedpoint funds.

90.5 That Spar, not having obtained a final perfection order in the Magistrate's Court, Nelspruit, allowed the position which it accepted was risky, to persist.

91 The evidence shows that from the very onset, namely when Spar took over the three businesses and entered into a lease agreement with Paulo, Spar requested that the speedpoint monies be diverted into Spar's account. Paulo steadfastly refused and/ or resisted all attempts in that regard despite Spar's persistent requests for consent and authorisation. Simultaneously Spar made attempts to the Bank for a switch in bank accounts into which speedpoint monies were paid without success.

92 Significantly it even appeared that Paulo was playing the blame game in that he would have Spar believe that it was the Bank which was resisting the switch to Spar's accounts. Spar was assured on 24 March 2010 that the account had been frozen but thereafter the Bank lifted the hold on the account. Spar obtained a freezing order on 24 June 2010 on an urgent basis.

93 Demonstrably, therefore, it was clear to all that Spar was at pains to protect its interests but failed to obtain the co-operation of both Paulo and the Bank. Spar was not aware of the existence of the 655 and 309 accounts and the seemingly deliberate attempts to keep Spar in the dark have been discussed in relation to claim 4 (supra). It is also true that even if it were to be accepted that there was neglect on the part of Spar (which is not supported by the evidence), it is not causally connected to the loss it suffered as a result of the unlawful withdrawals by Paulo.

94 Further, the evidence shows that Paulo physically prevented the installation of Standard Bank terminals at the businesses which Spar had applied for in March 2011.

95 The allegation that Spar failed to approach the Court timeously is not sustained by the available evidence. Spar was assured by McLagan that the account in question was frozen and when this was revoked on 17 June 2010 Spar launched an urgent application to freeze the account on 24 June 2010. When Spar realised that the speedpoint proceeds of the two Tops stores did not flow into the 323 account, it brought an application for an interdict on 16 March 2011. Spar also brought an application for liquidation of Umtshingo on 31 May 2010.

96 As alluded to (supra) the evidence demonstrates that it is also incorrect to suggest as the Bank does, that Spar ought to have learnt of the existence of the 655 and 309 accounts at an earlier stage. This allegation was accepted by and led to an incorrect finding by the court *a quo*. When Spar sought copies of bank statements in terms of Rule 35(3), the Bank supplied copies of the 988 bank statements whilst knowing that the speedpoint proceeds of Sonpark Tops were being deposited into the 309 account and that account 988 was a dormant account.

97 Lastly, it was not necessary for Spar to obtain a final perfection order in the Magistrate's Court Nelspruit because of the business lease agreement which was entered into between Spar and Paulo. Even in this instance there was no causal link between the unlawful appropriation of monies belonging to Spar by

the Bank and the unlawful permission by the Bank for Paulo to withdraw the speedpoint proceeds.

98 Demonstrably, therefore, there is no contributory negligence attributable to Spar.

99 Further, the court *a quo* erred in coming to the conclusion that claim 4 had prescribed.

**Conclusion**

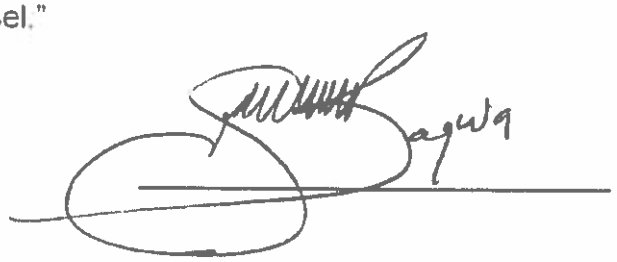
100 Having considered the record of evidence and the submissions by Counsel the following order ensues.

THE ORDER

100.1 The appeal succeeds with costs which shall include the costs of two Counsel together with the costs of applications for leave to appeal in the court *a quo* and the Supreme Court of Appeal.

100.2 The order of the court *a quo* is substituted with the following:

"Plaintiff's claims 1, 2, 3 and 4 against the first defendant are granted with costs which costs shall include the costs reserved on March 2015 and the costs of two counsel."



S. A. M. BAQWA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

SS MADIBA
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

**TLHAPI J**

[101] I have read the judgement of my colleague Baqwa J and regret that I do not agree with the outcome that the appeal be upheld. I align myself with the whole of the judgment of the court a quo, and wish give my view relating to some of the claims as dealt with in such judgment.

[102] I shall further not reiterate the facts which have been properly summarized in the judgement except to recap on what preceded Spar's interaction with the Bank, the first defendant and, to refer to concessions by the witnesses taken into account by the court *a quo*. The *rule nisi* obtained by Spar on 5 March 2010 perfected the notarial bond by initial attachment of the movables of Umtshingo (but not removal), which attachment was executed on 8 March 2010. The rule was returnable on or before 1 April 2010 for Umtshingo to show cause if any that Spar be granted leave to perfect the notarial bond in all respects.

[103] It is common cause that the litigants never got to 1 April 2010 as a result of intervening arrangements of their own making. As I see it, it was not in the interests of both Spar and Umtshingo to close down the running of the businesses. The proposed interim lease agreement was not concluded due to Umtshingo, represented by one Paulo's refusal to have the speed-point deposits re-directed / transferred to the bank Account of Spar despite Spar having taken control of the business, Spar being responsible for procurement of stock and for paying for it. Paulo was indebted to Spar in terms of the franchise agreement and to the bank in respect of its overdraft facilities. The Bank was approached to effect transfer of the monies into Spar's account and its attitude was that they obtain a court order or provide authorization from the account holder.

[104] Mr Vorster contended that the court *a quo* had confused the quasi – vindicatory claim it was supposed to deal with and treated the matter as if it were a contractual claim, thereby disregarding the development of the law of establishing a quasi-vindicatory claim as a cause of action. He relied on *Joint Stock Co Varvarinskoye v Absa Bank Ltd & Others* 2008 (4) SA 287 (SCA) and *McEwen, N.O. v Hansa* 1968(1) SA 465 (AD). Mr Vorster contended that Navsa JA's emphasis in *Joint Stock Varvarinskoye supra* was on knowledge, in that the

bank had knowledge of Spar's perfection of the notarial bond and that Spar was conducting the business for its own account and that sufficed. He contended also that there was no distinction between cash deposits which were deposited into Spar's account and the speed-point deposits which were deposited into Umtshingo's accounts because they were both proceeds generated from 'sales by Spar of its stock purchases'.

[105] Mr Leathern contended that the starting point should be to look to the agreements entered into between the bank and the client, the merchants and bank agreement and the credit card machine agreements. The moment there was an agreement to reconcile the bank accounts in order to determine what each party was entitled to, ownership of the money could not be asserted. In this case he continued, there was no evidence that there was an agreement that anyone other than the account holder or the bank were entitled to the moneys in the account. He contended that in *Joint Stock Varvarinskoye supra* the court recognized the existence of a tripartite agreement between the account holder, the bank and the third party. In *McEwan supra* the account holder agreed to act as agent for the respondent.

[106] Baqwa J is not in agreement that *Joint Stock Varvarinskoye* was correctly applied by the court a quo, when it held that mere knowledge by the bank was not sufficient and by requiring that in order to succeed in a quasi -vindicatory claim in our law, there had to be proof that the Bank and its client had agreed to warehouse the funds on behalf of a third party. He held further that the court a quo had misdirected itself by relying on *Absa Bank v Intensive Air* 2011 (2) SA 275 (SCA) in dismissing the appellant's claims.

[107] In determining the liability of the Bank towards plaintiff the court a quo was called upon to first determine to whom the money belonged to. Fourie J correctly commenced his evaluation by referring to *Standard Bank of South Africa Ltd v Echo Petroleum* 2012 (5) SA 283 (SCA) and *Absa Bank v Intensive Air* 2011 (2) SA 275 (SCA). In my view, although the facts in those cases differ to the present one, they state the law pertaining to the different scenarios where third parties had claimed ownership of monies standing in credit in a bank account and, they are relevant to issue to be determined. It is against this background of the law that this appeal should be dealt with. The following paragraphs in Echo Petroleum *supra*

state the following:

"[27] *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: S v Kearney 1964 (2) SA 495 (A) at 502 H - 503A.*

[28] *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 ..... ...Joint Stock Co, Vervarinskoye v Absa Bank Ltd and Others 2008 (4) SA 287 (SCA) paras 31 – 42.....*

[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 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 Airt Pty Ltd & Others 2011 (2) SA 275 (SCA) at280I – 281B"* (my uderlining)

Para 27 states the general rule, para 28 recognizes the circumstances under which the bank cannot claim ownership to monies in a bank account on the ratio in *Joint Stock Varvarinskoye* and para 31 deals with the position whether knowledge has to be proved on the one hand and on the other whether the bank with knowledge would 'subordinate its interest in the absence of an agreement'.

[108] It is therefore not correct to interpret the judgment in *Joint Stock Varsvarinskoye supra* to mean that knowledge of the bank alone sufficed. In arriving at the ratio in paragraph [31] thereof the court considered the following facts (i) that MDM's account 1313 had been opened with the bank 3 years before the agreement between Joint Stock and MDM (ii) that

the account had been lying dormant for a considerable time (iii) the bank had knowledge of the purpose for which money would be deposited into 1313 (iv) the bank and MDM had agreed that it and MDM would warehouse the money for Joint Stock (v) that MDM would not have control over monies deposited into 1313 and (vi) that payment would be made out of such account subject to a payment schedule which was not within the control of MDM.

[109] Navsa JA stated the following at paragraph [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 agreed to act as the appellant's agent to warehouse the money in 1313. I am disinclined to decide this matter other than on the facts of the present case, namely that the bank had knowledge referred to above which was directly relevant to the claim and defence in the present dispute."*

[110] In my view in *Joint Stock Varvarinskoye supra* the ratio as at paragraph [31] had to be read with the reasons that follow in paragraphs [32]- [39]. On the facts of that case the court was dealing with a quasi-vindicatory claim because there was proof that the bank had knowledge and that the bank had agreed with the accountholder to warehouse the money for a third party. Knowledge by the bank on its own could not have achieved success for the third party.

[111] In *McEwen supra* the account holder Mortimer was the conveyancer who had drafted the mortgage bond agreement. It was held that he was bound by clause 13 of the mortgage bond which required the conveyancer (the account holder) to open a separate account on behalf of the mortgagor for the limited purpose of '(i) payment of interest in terms of the bond and (ii) payment of the accumulation of the balance towards redemption of the loan secured under the bond'. In this instance Mortimer was only an agent whose status as agent for the mortgagor terminated when he was declared insolvent and his trustee had no right to claim monies in this separate account as forming part of the insolvent estate. The mention of

knowledge by the building society was not relevant to the determination of the dispute between the trustee and Mortimer, actually the building society had no interest in the monies in such account and laid no claim to it. My understanding is that knowledge of the building society was referred to on the probability that it would have had knowledge for what purpose and how similar accounts held with it were operated by Mortimer.

[112] In referring to *Intensive Air supra* it is the law relating to the relationship between banker and client regarding ownership of monies in a bank account which is emphasised. It is a relationship between debtor and creditor and the bank's entitlement to set off as against a client's indebtedness. It also acknowledges that despite this relationship the bank and accountholder could alter the relationship by entering into an agreement to benefit a third party on the basis recognized in *Joint Stock Varvarinskoye*.

[113] In dealing with the law applicable to claim 1 at para 43 Fourie J states ' *that 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 monies allegedly belonging to the plaintiff. It is in this sense that it has been referred to as a quasi-vindicatory claim*". It is also against the back drop of the concessions made by the witnesses that the court a quo arrived at its decision as stated in the following paragraphs.

> Mr Du Preez para [23]: " *right from the beginning Paulo refused to give permission that speed point credits may be allocated to Spar. .....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 cash in Umtshingo's bank account. He replied as follows: " there is no agreement that says that restricts him. You are correct."*
>
> Ms Hopley para [29]: *"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 "were trading for our profit and loss". She conceded that she had never considered the possibility that there could have been an overdraft facility in the 323 account. She then referred to this account which had been "blocked" but immediately conceded that "credits would still come in".*

Ms Streicher para 31: *"she explained that they had 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 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".*

[114] In my view as long as there was a debit balance and an overdraft against the account the bank had ownership of monies in the said account and the agreements it had with Paulo remained in place. This could be changed only if Spar complied with the demand by the bank being an agreement or a court order. Mr Lenthern contended that the order the bank was insisting upon was for confirmation of the *rule nisi* to perfect the bond. Appellants failed to obtain a final order which would have kicked in acquisition or control over the accounts as envisaged in clause 9 of the Notarial Bond which provided:

*"For the purpose of sale and conveyances aforesaid the bond operated as an irrevocable power of attorney in favour of the mortgagee or other legal holder of this bond from time to time also empowering the mortgagee or other legal holder of this bond to operate on the banking account of the said mortgagor to take possession of all money standing to the credit of the mortgagor at any bank and also to collect all outstanding accounts ……*

9.2.5

*" After possession have been taken of the said assets it shall have and are hereby given the right of carrying on the said business and continuing the same insofar as we might think it is fit to do."*

As I see it, it suited both parties to conduct themselves outside of the notarial bond. Paulo had an obligation to pay his overdraft and Spar wished to continue to trade, supply stock and trade fore profit but these stances were not without consequences and in my view the bank cannot be held responsible for adopting a stance in order to protect itself

[115] In paragraph 49 of the judgment Fourie J poses a question what would *"the position be if the bank has knowledge of an arrangement between one of its clients (the account holder) and a third party with regard to the latter's right to claim ownership of money i)deposited into the accountholder's account in the absence of an agreement with the bank"* and he finds the answer in paragraph 31 of *Echo Petroleum supra*. I am in agreement with his application of the law espoused in the cases discussed above and his conclusions in paragraphs 50-53 of his judgment. The plaintiff could not prove an agreement between the bank and its client because the attitude of the bank always was for Spar to conclude an agreement with its client or obtain a court order.

[116] Claims 2 and 3 related to accounts 655 and 309.The plaintiff persisted with its argument that the money belonged to it. In paragraphs 8 to 14 above I give reasons why the monies in the accounts which were in overdraft and which accounts had debit balances did not belong to the plaintiff. I hold the same view in respect of accounts 655 and 309 regarding the entitlement by the bank to set-off. The most important factor is that there was no agreement to warehouse the monies deposited into the Umtshingo account. I am also in agreement with the reasons and conclusions reached by the court *a quo* on these accounts, especially as stated in [63] and [64] of the judgement.

[117] I also furnish another reason for dissent. While Baqwa J agrees in paragraph [59] of his judgement, with the authorities dealt with by Fourie J on the correctness of the legal principles to determine the legal duty by the bank, he agreed with Mr Vorster in reliance on *Indac Electronics (Pty) v Volkskas Bank Ltd* 1992 (1) 783(A). I am not in agreement that

Spar is in a similar position as the bank in this case because at 797 A-D is stated that the true owner must establish the following in order to succeed:

> "(i) that the collecting banker received payment the cheque on behalf of someone who was not entitled thereto;
> (ii) that in receiving such payment the collecting bank acted (a) negligently and (b) unlawfully;
> (iii) that the conduct of the collecting banker caused the owner to sustain loses;
> (iv) that damages claimed represent proper compensation for such loss;"

In *Indac supra* the court had to deal with an exception where there had to be a *prima facie* indication of liability based on negligence, which may be rebutted by evidence at the trial, I am not satisfied that Spar has proved that Paolo was not entitled to the money deposited into the Umtshingo accounts because (i) there was no warehousing agreement and (ii) Spar failed to prove that the Bank was negligent and that it acted unlawfully in applying the set-off. I reiterate, on its own version Spar did not follow through with the confirmation of the *rule nisi* which would have placed it in control of the bank accounts; there was an agreement with Paolo that it would continue to pay the speed points into Umtshingo, Spar did not tell Paolo not to use the money. Spar was motivated by reasons of its own by limiting its rights, under the notarial bond and despite requests by the bank to either obtain an order of court or an agreement with Paolo it continued to act contrary to such request to its detriment. In my view the bank did not act negligently or unlawfully and, the dismissal of the action by the court *a quo* was correct.

[118] Lastly, I also wish to state that Mr Lenthern was correct in his submission that reliance on Mavundla J's judgment and on the principle of *res judicata* had no application in this matter. There the bank had no interest in monies standing to the credit balance where no overdraft facility was applicable to enable set off when the application was launched.

[119] In my considered view and for the reasons above the appeal should be dismissed with costs.

TLHAPI VV

(JUDGE OF THE HIGH COURT)

| | |
|---|---|
| Heard on: | 28 November 2018 |
| Judgment delivered: | 23 August 2019 |

Appearances:

| | |
|---|---|
| For the Appellant: | ADV JP VORSTER |
| Instructed by: | MOSS MARSH & GEORGIEV ATTORNEYS<br>c/o WEAVIND & WEVIND INC |
| For the Respondent: | ADV LENTHERN |
| Instructed by: | RORICH WOLMARANS & LUDERITZ ATTORNEYS |