REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT

JOHANNESBURG

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

4/10/12 .....

**CASE NO: 08/34502**

In the matter between

**PLACECOL COSMETICS (PTY) LTD** **First respondent/Plaintiff**

and

**ABSA BANK LIMITED** **Applicant/First defendant**

**SOUTH AFRICAN REVENUE SERVICES** **Second respondent/second defendant**

**CASE NO: 10/04104**

In the matter between

**ABSA BANK LIMITED** **Applicant/Plaintiff**

and

**UTi SOUTH AFRICA (PTY) LIMITED**
**(MOUNTIES DIVISION)** **Third respondent/Defendant**

**Neutral citation**: *Placecol (Pty) Ltd v Absa Bank Ltd and SARS & Absa Bank Ltd v Mounties* 2012 SA (GSJ)

**Coram**: SATCHWELL J

**Heard: 2nd October 2012**

**Delivered: 4th October 2012**

**Summary:** Defendant in first trial who is plaintiff in second trial brings application for consolidation of two actions; plaintiff's claim in second action is conditional upon finding against defendant in first action; any finding of liability against the defendant in the first trial

would not be binding upon the other defendant in the second trial; two separate trials could result in discordant rulings on fact and law and different orders made; there would be a number of absurdities in the defendant in first trial having to prove the case against itself when it is plaintiff in the second trial; defendant may be found liable in first trial but not liable as plaintiff in second trial resulting in inability to proceed with claim at second trial; consolidation for purposes of trial ordered; both matters to be heard in one trial.

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**JUDGMENT**

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**SATCHWELL J:**

**INTRODUCTION**

[1] This is an opposed application for consolidation of two actions concerning the utilisation of certain cheques. Unusually[1] for such an application it is the subject matter of the disputes, ie the fate of these cheques, which is really the basis for the application. The plaintiffs and defendants are different in each action save that the defendant in one action is the plaintiff in the other. The contractual and delictual issues to be determined in each action differ by reason of the differing relationship between the parties.

[2] Placecol (plaintiff in the Placecol action) drew four cheques to discharge certain tax obligations to SARS (second defendant in the Placecol action). It is common cause that during the lifetime of these cheques they were misappropriated and "cloned" cheques were presented for payment at ABSA (first defendant in the Placecol action) which was both collecting and drawee or paying bank. At some point the cloned cheques were uplifted and the original misappropriated Placecol cheques were reinjected into the system. They were then paid by ABSA as the drawee bank. As a result of this fraud Placecol's banking account has been debited but payment has not been received by SARS.

[3] The Placecol action seeks to hold ABSA liable in contract as drawee bank alleging that ABSA failed to pay the cheques according to their tenor or at all and was thus not entitled to debit Placecol's account. In the alternative, Placecol also seeks to hold ABSA

[1] But see, for instance, the differences in parties, pleadings, issues relevant to only one claim etc in *Beier v Thornycroft Cartage Company* 1961 (4) SA 187 D.

liable in delict as collecting bank alleging it was negligent in the collection of Placecol's cheques contrary to certain restrictive crossings.

[4] ABSA (plaintiff in the Mounties action) utilised UTi ("Mounties") (defendant in the Mounties action) as courier company to transport cheques from the relevant ABSA branch to the clearing house facilities ("IPS"). ABSA claims that the cloned cheques which had been deposited with ABSA were thereafter substituted with the original and genuine Placecol cheques *en route* to the clearing house by Mounties' employees for whose conduct Mounties is vicariously liable. This ABSA action against Mounties is conditional upon ABSA being held liable to Placecol in the first action with ABSA seeking to hold Mounties liable for any loss suffered by ABSA as a result of the Placecol action.

[5] The second or Mounties action is a conditional one. It is predicated upon an adverse result for ABSA in the Placecol action. In the event that Placecol is successful in its claims then ABSA would proceed against Mounties in the second action. In the event that Placecol is unsuccessful in its claims then ABSA need not proceed further against Mounties.

[6] Absa[2] seeks consolidation of the two actions which application is opposed by both SARS[3] and Mounties.[4] Placecol, having initially opposed the application, now abides the decision of the court.

**CONVENIENCE AND PREJUDICE**

[7] The test for consolidation in terms of Rule 11 is that of "convenience" to the parties, witnesses and to the court. The approach of our courts to "convenience" appears to be similar in questions of joinder of parties or actions, separation of issues or consolidation.[5] Convenience, broadly and widely[6] understood connotes "not only facility or expedience or

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[2] First Defendant in the Placecol action and Plaintiff in the Mounties action.
[3] Second Defendant in the Placecol action.
[4] Defendant in the Mounties action.
[5] *Nel v Silicon Smelters (Edms) Bpk en 'n ander* 1981 (4) SA 792 (A); *Rail Commuters' Action Group & others v Transnet Ltd t/a Metrorail & others* 2006 (6) SA 68 CPD; *Mpotsha v Road Accident Fund and another* 2000 (4) SA 696 CPD; *IPF Nominees (Py) Ltd v Nedcor Bank Ltd* 2002 (5) SA 101 WLD.
[6] *Beier supra* 1961 (4) SA 187 D.

ease, but also appropriateness in the sense that procedure would be convenient if in all the circumstances of the case, it appears to be fitting and fair to the parties concerned..."[7]

[8] A distinction is to be drawn between two types of consolidation – "the consolidation of actions separately instituted at the pleading stage and a consolidation of actions separately pleaded merely for the purposes of hearing".[8] To my mind the application in the present matter is for "consolidation of separate actions for the purposes of trial".[9] In *International Tobacco Co v United Tobacco Co* 1953 (1) SA 241 W, the applicant sought to amend its two declarations alternatively to incorporate by amendment the one into the other which the court found would "bring about the joint trial of the actions in what seems to me to be a far more effective manner than would a consolidation of the actions". In *New Zealand v Stone supra*, Corbett AJ (as he then was) commented that the approach in *International Tobacco v United Tobacco supra* exemplified consolidation for purposes of the hearing.

[9] In exercising its discretion in respect of the consolidation for purposes of the hearing, it was held in *New Zealand Insurance v Stone supra* (and since frequently followed) that:

> "...the Court will not order a consolidation of trials unless satisfied that such a course is favoured by the balance of convenience and that there is no possibility of prejudice being suffered by any party. By prejudice in this context it seems to me is meant substantial prejudice sufficient to cause the Court to refuse a consolidation of actions, even though the balance of convenience would favour it."

[10] In exercising its discretion on what is "convenient" the court must have regard to a number of factors including the saving of costs and the avoidance of a multiplicity of actions[10] particularly where there is "the danger of the same questions tried twice with possibly different results."[11]

**Evidence – duplicated or endured**

[11] As I understand the outline of the evidence is that what is common to both actions is that cheques were drawn by Placecol, delivered to SARS, the cheques were removed by

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[7] *Mpotsha supra* 2000 (4) SA 696 CPD at 700I–J.
[8] *New Zealand Insurance Co. Ltd v Stone and others* 1963 (3) 63 CPD.
[9] *Licences and General Insurance Co Ltd v Van Zyl and Others* 1961 (3) D .
[10] *Rail Commuters' Action Group & others v Transnet Ltd t/a Metrorail & others* 2006 (6) SA 68 CPD.
[11] *IPF Nominees supra* 2002 (5) SA 101 WLD.

persons party to the fraud, other cheques in the same amount ("the cloned cheques") were deposited at ABSA to the credit of other accountholders, ABSA then used the services of Mounties to courier the cloned cheques to the clearing house, prior to arrival Mounties' employees removed the cloned cheques and substituted the stolen Placecol cheques made out to SARS, at the clearing house the Placecol cheques were used to debit the Placecol account and make payment to the other and unentitled accountholders.

[12] ABSA maintains that this fraudulent *modus operandi* requires explanation in both actions and that evidence (expert and otherwise) will have to be led by ABSA in response to the Placecol claims and in pursuit of the Mounties claim. Clearly there would be duplication of evidence in the two actions. Part of ABSA's defence also grounds ABSA's claim ie the fraudulent *modus operandi*.

[13] There is one significant issue where it seems to me that all parties have an interest in the evidence – whether or not the misappropriation of the Placecol cheques delivered to SARS was committed by a person(s) in the employ of SARS and whether or not the reinstatement of those misappropriated Placecol cheques were reinstated by Mounties' employees working in concert with SARS employees.

[14] Whether there are two actions or a consolidation there will be inconvenience for all parties of sitting through evidence from time to time which is of no interest or relevance to one or more of them. For example only two of the four Placecol claims (claims A and D) are against ABSA and one of those (claim D) is in the alternative to claims A to C. For example,[12] SARS has no concern with ABSA's contract with Mounties or the actions of Mounties' employees while Mounties has no interest in the contractual responsibilities of a collecting bank to Placecol.

[15] Insofar as there is prejudice in duplication of the evidence in separate actions or in subjection to non-applicable or irrelevant evidence, there are costs involved to all parties. Such inconvenience will occur to all parties whether there are two separate trials or one trial. It would be highly unusual if there was no such inconvenience where a consolidation is ordered. I do not, however, take the view that this constitutes "substantial prejudice".

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[12] There are numerous other instances of issues for determination in the two actions where both SARS and Mounties claim they have no interest.

[16] It remains open to each party, at the appropriate time, to make application for a separation of issues.

[17] There is, of course, no suggestion that ABSA will be unable to meet any of the costs occasioned and for which it is liable.

**Discordant evidence and judgments**

[18] ABSA maintains that it is confronted with the risk that the different courts hearing the two separate actions may come to conflicting decisions. ABSA submits that it will be necessary for any court to be provided with evidence as to the normal and correct process for the passage of a cheque from the time it is deposited at the collecting bank until it is paid by the paying bank. In addition it will be necessary for any court to comprehend the fraudulent *modus operandi* of those involved in the theft and fraud – ranging from removal of the Placecol cheque delivered to SARS, opening of certain accounts at the collecting bank, deposit of other "cloned" cheques at the collecting bank, transport of the "cloned" cheques and substitution therefore with the original Placecol cheques. Such evidence would, argue ABSA, be required in both the Placecol and Mounties actions.

[19] It has been submitted that, on the contrary, the evidence in the Mounties action will be limited to no more than presentation of the judgment in the Placecol action which indicates the findings, the order made against ABSA and thus the resulting loss sustained by ABSA. There will be no need for a second enquiry as to whether or not ABSA was liable to Placecol.

[20] This cannot be correct. ABSA cannot merely rely upon findings made in the Placecol action (both as to fact and credibility as also interpretation of law) to ground its action against Mounties. The Placecol action against ABSA is neither *res judicata*[13] nor issue stopped[14] against Mounties who are not bound by any ruling or decision therein or any order made.

[21] Hypothetically, Mounties would therefore not be precluded from requiring ABSA to prove the Placecol case against ABSA all over again. Such an exercise would come with innumerable difficulties: an about turn in strategy from disputing liability to now proving

[13] See Lawsa Vol 9 paragraphs 623 – 646.
[14] See Lawsa Vol 9 paragraphs 647 – 651.

liability against oneself; reliance upon Placecol witnesses whose reliability or credibility ABSA has previously challenged; the possibility of non-availability of witnesses; the presentation of somewhat different evidence or stress upon different issues or facts; dissimilar understandings of the evidence by the second trial judge; and possibly diverse rulings and orders made.

[22] Not only would such a process lead to possible absurdities. In addition, if the two actions resulted in discordant determinations in the separate courts, ABSA might well find itself liable to Placecol in one court (where Mounties has not been heard) and not liable to Placecol in another court (where Placecol has not been heard). In such eventuality, ABSA would not be able to continue against Mounties since its action against Mounties is conditional upon liability to Placecol.

[23] Such a scenario was discussed in *Rail Commuters' Action Group supra* 2006 (6) SA 68 CPD where it was said (in the context of an application for separation):

> "The relief sought by all the plaintiffs in Part A, if granted, whilst of course not dispositive of their claims for relief in Part B, may well, and probably will, be highly relevant thereto: if, for example, it were to be found by a trial Court that, during a period and at a place germane to one of the plaintiffs' individual claims for damages the first and second defendants, or either of them, had breached their obligations in one or more of the respects alleged in paragraph [1] of the Part A relief, the plaintiff concerned may well wish to rely on such a finding, or on the evidence on which it is based, for the purposes of his claim for damages under Part B. If this is so I have some difficulty in comprehending, if there were to be a separation of trials as sought by the first and second defendants, precisely how evidence given in or a finding made by a trial Court in one trial, in dealing with Part A relief, could be relied on by the parties, or by one or some of them, in a second trial, presumably presided over by a different Judge, in dealing with Part B relief. It must borne in mind that what is sought here is not a separation of issues in terms of rule 33(4), but a separation of trials: if granted, each separate trial would proceed *ab initio* as an entirely separate, distinct and self-contained entity. If a party to such a trial were to seek to rely on evidence given in or findings made by another court in other proceedings, difficult problems relating, eg, to admissibility and to issue estoppel might well arise. Perhaps such problems could be alleviated by prior agreement between the parties to the effect that the evidence led before the first court and its findings thereon, or, perhaps, its findings on certain stated issues, would be admissible and binding on the parties in the separate trial before the second court: however, there is no suggestion on the papers before us that any such agreement has been concluded or even considered, or that it is likely to be."

**Contractual and delictual actions**

[24] It has been argued that the Placecol action relies, in the main, upon a contractual claim which is of such persuasive value that the action is likely to be determined upon that basis. That contractual issue concerns the question of the liability of the drawee bank to the drawer and its entitlement (or otherwise) to debit the drawer's account. On this understanding of the strength of Placecol's contractual claim, it is argued that it is unlikely that the alternative delictual action of Placecol will ever be addressed. It is submitted that this contractual claim would not involve the evidence pertaining to the fraudulent *modus operandi* or the Mounties action at all. Finally, the importance of the contractual issue and the need for legal authority on this contractual point has been stressed.

[25] The difficulty with this argument is several. Firstly, I am not called upon to even venture an opinion on the merits of either action or portion thereof.[15] I cannot possibly assume that the Placecol contractual claim is so persuasive that the Placecol delictual claim will never be considered. Secondly, one is constrained to question why, if Placecol was so confident in the contractual claim, that it pleaded the delictual claim. Third, there has been no separation of issues and no indication that Placecol intends to apply for same. Placecol may lead its evidence on both contractual and delictual claims in whichever order it elects. Fifth, I am not asked to consider the implications of one claim for the entire banking industry merely to consider the convenience of dealing with four contractual and delictual claims in one trial.

[26] It remains open to each party, at the appropriate time, to make application for a separation of issues. For instance, Placecol may apply to separate its contractual claim from its delictual claim. That is their prerogative.

**Joinder and consolidation**

[27] It has been argued that the court, in exercising its discretion, should take into account that ABSA elected to issue a separate summons against Mounties instead of pursuing procedures to join Mounties in the Placecol action.

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[15] See *Mpotsha supra* 2000 (4) SA 696 CPD.

[28] I know of no basis upon which I could or should penalise ABSA for not pursuing the joinder option.[16] An explanation has been given for making this election. The authorities are clear that one is not required to make an election or prohibited from making a particular election[17] and that the approach is more or less the same in both applications – convenience and common sense.

**CONCLUSION**

[29] In the result I am satisfied that there should be a consolidation of the two actions since the balance of convenience favours same and no prejudice suffered by any party is so substantial as to incline me to refuse the application.

[30] I have considered whether or not I should deal with costs now or order that they be costs in the cause. I do not think that costs should be left over for the trial court – that is not the time to sit counting up minutes and hours expended on one claim and not another, that is also not the time to revisit the decision to consolidate.

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**ORDER**

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[31] The application for consolidation of the two actions – Placecol v ABSA Bank Limited and South African Revenue Services (case no: 08/34502)) and ABSA Bank Limited v Uti South Africa (Pty) Ltd (Mounties Division) (case no: 10/04104) is granted. The two actions shall be heard together as one trial.

[32] The applicant is awarded costs, including costs occasioned by the employ of two counsel, the respondents to pay costs jointly and severally, the one paying the other to be

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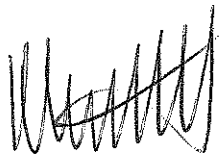
[16] However, see the views of Clayden J in *International Tobacco v United Tobacco supra* at 243F.
[17] *Licences and General Insurance supra* 1961 (3) D; *Nel supra* 1981 (4) SA 792 (A).

absolved, save that Placecol shall only be liable for costs of opposition up to and including the 5th September 2012.

DATED AT JOHANNESBURG ON THIS 4th DAY OF OCTOBER 2012.



**SATCHWELL J**
**JUDGE OF THE HIGH COURT**

**APPEARANCES:**

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|---|---|
| APPLICANT/FIRST DEFENDANT/PLAINTIFF: | A Gautschi SC (with L Grenfell)<br>Instructed by Lowndes Dlamini Attorneys, Johannesburg |
| SECOND RESPONDENT: | P Louw SC (with A South)<br>Instructed by Adams & Adams, Johannesburg |
| THIRD RESPONDENT: | A Sawma SC<br>Instructed by Wright Rose Innes Attorneys, Johannesburg |