REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO 1866/2003

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

9 May 2012 FHD VAN OOSTEN

In the matter between

UNION FINANCE HOLDINGS (PTY) LTD	**APPLICANT**
and	
BEULAH EVELYN BONUGLI NO	**FIRST RESPONDENT**
CHRISTOPHER STEVEN BONUGLI NO	**SECOND RESPONDENT**

J U D G M E N T

VAN OOSTEN J:

[1] This is an application for leave to introduce certain conditional counterclaims under Rule of Court 24(1). The applicant is the defendant and the respondents the plaintiffs in the main action. I shall adhere to their nomenclature as in the action. The plaintiffs are the trustees of the Rivonia Trust (the trust). The trust, since 1997, operated a loan account, in the nature of an ordinary cheque account, with the defendant. In 2003 the

plaintiffs instituted action against the defendant for payment of certain debits the defendant had allegedly incorrectly made on the trust's account, during the period from 31 January 2000 to 31 December 2005. The relief sought in the summons is firstly, for a declarator that the debits were incorrectly passed and that the trust is not liable to the defendant for the amounts of the debits, secondly, for an order directing the defendant to reverse the debits and pass corresponding credits for the amounts of the debits and, thirdly, for payment of the total amount of R77 113 759.50, interest thereon and costs.

[2] The pleadings exchanged between the parties are voluminous. The pleadings at this stage of the proceedings consist of the plaintiff's' amended particulars of claim, the defendant's amended plea, the plaintiffs' amended replication to the defendant's amended plea and the defendant's amended rejoinder to the plaintiffs' amended replication. Discovery of documents was made but no trial date has yet been allocated.

[3] This brings me to the facts relied on by the defendant in support of the present application. After delivery of its plea the defendant instructed new attorneys of record, who perused and analysed the documents in the provisional trial bundles prepared by the plaintiffs. At their request a further search for documents was conducted and new documents came to light which were added to the exiting trial bundles. The exercise led to the discovery of "new facts" that were regarded as relevant to the defendant's plea. By now sixty bulky lever arch files await scrutiny for trial purposes. An attempt was made to introduce the new matter by way of an amendment to the plea, which was opposed by the plaintiffs, on the basis that the new matter could and should have been introduced by way of a separate action or counterclaim. The application for amendment came up for hearing before Wepener J, who upheld the plaintiffs' contention, and dismissed the application with costs. Some nine months later the defendant launched an application in terms of rule 24(1), similar to the present application, but it was withdrawn after the filing of the plaintiffs' answering affidavit in that application. The present application was launched on 21 February 2012 and is opposed by the plaintiffs.

[4] The proposed conditional counterclaims which the defendant seeks to introduce are fully set out in draft form, which is attached to the notice of motion. The claims consist of

four separate claims and are based on the defendant's alleged incorrect accounting. A restructure of the trust's account is claimed by the reversal of a large number of credits and debits, resulting in new and increased debits of some R3m more than the amount of the initial debits, and further includes other amounts which had not before been debited to the account. For its entitlement to claim those amounts the defendant relies on enrichment (the *condictio indebiti* alternatively the *condictio sine causa*) and, in the alternative, certain implied or tacit terms of the agreement between the parties, to which I shall revert. The proposed counterclaims involve several millions of rand and, if successful, having regard to the domino effect on interest accumulations, would substantially reduce the plaintiffs' claims.

[5] In *Lethimvula Healthcare (Pty) Ltd v Private Label Promotion (Pty) Ltd* 2012 (3) SA 143 (GSJ) para [8], I held that in order to succeed in an application under rule 24(1), the applicant is required to show a reasonable and acceptable explanation for the lateness of the introduction of the proposed counterclaim and secondly, an entitlement to institute the proposed counterclaim. The first requirement has not been seriously challenged and I am satisfied that the defendant's explanation for the lateness is reasonable and acceptable. The application turns on the second requirement, and in particular, the question of prescription.

[6] The core issue raised by the plaintiffs is that the conditional counterclaims have become prescribed. Before I deal with it any further, it is necessary to decide whether prescription can be raised in these proceedings, being interlocutory in nature. The defendant with reliance on the judgment of Viljoen J (as he then was) in *Rand Staple-Machine Leasing (Pty) Ltd v ICI (SA) Ltd* 1977 (3) SA 119 (W) submitted that the defence of prescription can only be raised by way of a special plea in the main action and therefore not in an interlocutory application as the plaintiffs have done. In *Rand Staple-Macine* the learned Judge in dealing with an application for an amendment with reference to the proceedings envisaged in s 17(2) of the Prescription Act 69 of 1969, (the Prescription Act), held that prescription could only be raised in main proceedings, such as trial proceedings, and not in intermediate or interlocutory proceedings. The judgment has not been referred to in subsequent cases dealing with this aspect. The opposite view was expressed by Foxcroft J, in *Grindrod (Pty) Ltd v Seaman* 1989 (2) SA

347 (C), where in regard to an application for amendment, the learned Judge held that prescription could be raised, either if it was common cause or in situations where the claim or right to claim would be "known to have prescribed". The last mentioned phrase is a quotation from the judgment of Flemming DJP, in *Stroud v Steel Engineering Co Ltd and another* 1996 (4) SA 1139 (W) 1142, where the leaned Judge, in regard to an application to amend by substituting the existing cause of action with a new cause of action, held that "it would make no sense to permit a claim which is known to have prescribed". I prefer, and agree with, the approach adopted in *Grindrod* which, as correctly pointed out by counsel for the plaintiffs, is in line with the judgment of the Supreme Court of Appeal in *Associated Paint & Chemical Industries (Pty) Ltd t/a Albestra Paint and Lacquers v Smit* 2000 (2) SA 789 (SCA) para [9] where Grosskopf JA, in regard to an opposed application for amendment, remarked:

> 'By raising the question of prescription in his opposing affidavit the defendant, in my view, complied with the provisions of s 17(2) of the Prescription Act 68 of 1969.'

The judgment in *Rand Staple-Machine* therefore, has been overruled, at least by implication, and can no longer be considered as binding authority. It follows that the defendant's objection cannot be sustained and that the issue of prescription was properly raised in these proceedings.

[7] Counsel for the defendant submitted that the issue of prescription requires the hearing of evidence concerning the date on which the debts became due, having regard to the s 12(3) of the Prescription Act. The question arising would then be when the defendant would have acquired "knowledge of the identity of the debtor and of the facts from which the debt arises". I am unable to agree. The issue of prescription was properly raised by the plaintiffs in the answering affidavit. The defendant chose not to respond to most of those allegations at its peril (see *Lombaard v Dropprop CC* 2010 (5) SA 1 (SCA) para [18] – [24]). There are accordingly insufficient facts before me to persuade me to refer this aspect for the hearing of oral evidence.

[8] Finally, the defendants, relying on s 13(2) of the Prescription Act, contended for reciprocity of the debts relied upon in the proposed counterclaims, which would result in those debts not having prescribed. It is at the outset necessary to consider the nature of

the debts that are the subject of the proposed counterclaims. The parties are not *ad idem* as to the terms of the agreement that governed their contractual relationship: the plaintiffs rely on an oral loan agreement whereas the defendant places reliance on an implied agreement. The difference, such as there may be, can for present purposes be left aside: the *Plascon-Evans* rule requires me to approach the issue on the basis as alleged by the defendant (the defendant's agreement). In essence the defendant's agreement, as does the agreement relied upon by the plaintiffs, provides for the restructuring and recalculation of the loan account by the reversal of certain entries. In this regard the defendant relies on the following "implied alternatively tacit terms" of the agreement: firstly, "that amounts incorrectly debited or credited to the loan account should be reversed" and secondly, "that in the event of incorrect debits passed to the loan account having to be reversed, credits which represent a partial recovery of each of the sais debits, should also be reversed" (the implied terms).

[9] It is not open to doubt that all entries made on the loan account are embraced by the laws of set-off, resulting from the nature of the account, which was operated as a current account, where payments were effected by means of debits or credits from time to time (see *South African Metropolitan Life Assurance Co Ltd v Ferreira* 1962 (4) SA 213 (O) at 217B-C). The defendant contends that the debts (*ie* the debits and credits which also constitute "debts" for purposes of the Prescription Act) which are the subject matter of the proposed conditional counterclaims, arise from the very same agreement relied upon by the plaintiffs and, accordingly, constitute reciprocal debts as contemplated in s 13(2) of the Prescription Act. On the basis that the debts arose from the same agreement, I turn now to consider the issue of reciprocity, having regard to the exact correlation of the obligations between the parties and in particular the intention of the parties to the agreement (see *Man Truck & Bus (SA) (Pty) Ltd v Dorbyl Ltd t/a Dorbyl Transport Products and Busaf* 2004 (5) SA 226 (SCA) para [12]; *Minister of Public Works & Land Affairs v Group Five Building Ltd* 1996 (4) SA 280 (A) 288E).

[10] Section 13(2) of the Prescription Act provides as follows:

> *'A debt which arises from a contract and which would, but for the provisions of this subsection, become prescribed before a reciprocal debt which arises from the same*

> *contract becomes prescribed, shall not become prescribed before the reciprocal debt becomes prescribed.'*

The "contract" referred to in the sub-section, applied to the present application, as I have already indicated, is the defendant's agreement. It provides for rights and obligations and was therefore rightly described as a bilateral agreement. In *Ese Financial Services (Pty) Ltd v Cramer* 1973 (2) SA 805 (C) at 809D, Corbett J (as he then was) dealt with the question of reciprocity of obligations in bilateral contracts, and concluded that for "*reciprocity to exist there must be such a relationship between the obligation to be performed by the one party and that due by the other party as to indicate that one was undertaken in exchange for the performance of the other ...*". In *Rich and Others v Lagerwey* 1974 (4) SA 748 (SCA) 761H-762A Wessels JA, approved the above *dictum* of Corbett J, and added thereto:

> *'Whether 'such a relationship' does exist, will depend on the terms of the particular contract under consideration...Common sense would seem to indicate that inter-dependent promises are prima facie reciprocal, unless a contrary intention clearly appears from a consideration of the terms thereof.'*

In *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) at 418B, Jansen JA, dealt with the principle as follows:

> *'By kontrakte wat oor en weer regte en verpligtinge skep, is dit basies 'n kwessie van uitleg of die verbintenisse so nou saamhang dat die wederkerigheidsbeginsel geld. (Vgl, bv, W Pauw Observationes Tumultuariae Novae Band 2 te 774; Ese Financial Services (Pty) Ltd v Cramer 1973 (2) SA 805 (K) te 809H-811A; Rich and Others v Lagerwey 1974 (4) SA 748 (A) te 761E-762A.'*

(Van der Merwe Van Huyssteen Reinecke Lubbe *Contract General Principles* 3rd ed 388)

[11] Applied to the facts of the present matter and leaving aside the *exceptio non adimpleti contractus,* the implied terms provide for the situation where incorrect entries in the loan account require to be reversed. Once shown to be incorrect entries, they, in any event, *ex lege,* are subject to reversal in order to reflect a correct statement of the account. The implied terms, properly analysed, provide for exactly that. The mere fact of a reversal

resulting from incorrect entries, as has now been pleaded in the proposed counterclaims by way of implied terms of the agreement, does not alter the real nature of the rights and obligations concerning the incorrect entries. I am unable to find inter-dependency of obligations in the strict sense, once a reversal of the debts arises (*Grand Mines (Pty) Ltd v Giddey NO* 1999 (1) SA 960 (SCA) 967C-E), nor can it be said that a relationship thereby exists between the parties, which is of such a nature, as to indicate that the one was undertaken in exchange for the other. It is true that a correction will result in a reversal but that, as I have indicated, flows from the mistaken entry and not the nature of the relationship between the parties. I accordingly conclude that reciprocity of debts has not been shown and that s 13(2) of the Prescription Act does not apply.

[12] A period of more than three years having elapsed from the date on which the debts became due until this application was launched; the defendant's proposed counterclaims have accordingly become prescribed (see *Associated Paint & Chemical Industries* supra). The application must therefore fail.

[13] In the result the application is dismissed with costs, including the costs consequent upon the employment of two counsel.

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANT	***ADV DE VAN LOGGERENBERG SC*** ***ADV J MALAN***
APPLICANT'S ATTORNEYS	***ROUTLEDGE MODISE INC***
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RESPONDENTS' ATTORNEYS	***TUGENDHAFT WAPNICK BANCHETTI***
DATE OF HEARING	***24 APRIL 2012***
DATE OF JUDGMENT	***9 MAY 2012***