REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(COMMERICAL COURT)

CASE NO: 39633/2014

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

20.17.19
DATE

SIGNATURE

In the matter between:

BLUE FINANCIAL SERVICES LIMITED **Plaintiff**

and

ABSA BANK LIMITED **Defendant**

DAVID VAN NIEKERK

Third Party

J U D G M E N T

UNTERHALTER J

INTRODUCTION

1. Blue Financial Services Limited ("Blue") has instituted an action against ABSA Bank Limited ("ABSA") claiming that ABSA has been enriched in the sum of R35 000 000.00, and that Blue has been impoverished in the same amount.

2. Blue's enrichment action is pleaded in this way. Mr van Niekerk was the chief executive officer of Blue. He was also a customer of ABSA. Mr van Niekerk represented to Blue that he had to his credit in his loan account with Blue an amount of R36 620 008.96 as at 5 March 2009. Mr van Niekerk further represented that he had concluded a loan agreement with ABSA (styled the letter agreement) and had ceded to ABSA, as security for his obligations to ABSA under the loan, his claims on

loan account against Blue. Blue was induced by Mr van Niekerk's representations to accept the credit in Mr van Niekerk's loan account. On 5 March 2009, and upon Mr van Niekerk's instruction and ABSA's demand, Blue paid R35 000 000.00 to ABSA in terms of the cession.

3. This amount was paid by Blue in the *bone fide* but mistaken belief that Mr van Niekerk enjoyed a credit in his loan account with Blue of at least R35 000 000.00 and that Mr van Niekerk could validly cede his claims on loan account against Blue.

4. In addition, Blue pleads that in October 2008, Blue made an offer to acquire the shares of Credit U Group Holdings Limited. In terms of the scheme, Mr van Niekerk, as an underwriter, was obliged to make payments to the shareholders of Credit U and provide independent proof to the Securities Regulation Panel of his ability to do so. Cortex Securities issued a cash security document based on funds derived from Mr van Niekerk effecting single stock futures transactions (" the SSF transactions").

5. Under the derivative rules of application to the SSF transactions, in the event of Mr van Niekerk failing to meet a margin call, Cortex would be required to assume the position of Mr van Niekerk in the SSF transactions. Should Cortex also default, then ABSA would be compelled to do so and make payment of the margin calls.

6. Blue alleges that ABSA knew that Mr van Niekerk could not meet his margin calls. Nor could Cortex do so, which would require ABSA to pay the margin calls, and assume Cortex's position. This would entail the acquisition of a substantial shareholding in Blue and the triggering of an offer to minority shareholders, at

significant cost to ABSA. To avoid this, ABSA and Mr van Niekerk concluded the letter agreement in terms of which ABSA agreed to effect payment of the margin calls within certain share price ranges.

7. Blue then pleads that the letter agreement is not a valid commercial loan because it was not concluded at arm's length; ABSA knew that Mr van Niekerk could not repay the loan and it was not intended that he would do so. Rather, the letter agreement was intended to avoid a margin call default by Mr van Niekerk and its adverse consequences for ABSA. It was simply a means to place Cortex in funds. Accordingly, there is no *causa* for the cession, and the payment of the R35 000 000.00 by Blue to ABSA has unjustly enriched ABSA at Blue's expense.

8. Should it be found however that there was a valid cession and loan, then Blue pleads that there were insufficient funds standing to the credit of Mr van Niekerk's loan account on 5 March 2009 to make the payment of R35 0000 000.00. As a result, there was no obligation upon Blue to pay ABSA, and ABSA was accordingly enriched at the expense of Blue.

9. ABSA raises a number of defences to Blue's claim. First, it pleads that the claim has prescribed. Second, ABSA sets out the agreements concluded between ABSA and Mr van Niekerk, including the letter agreement and cession. ABSA alleges that both Blue and Mr van Niekerk represented that his loan account was in credit and capable of cession. In particular, a letter from Blue's Mr Chittenden dated 19 December 2008 confirmed that Blue owed Mr van Niekerk R36 608 761.00; that the amount was

payable on demand; and that Mr van Niekerk's loan account was unencumbered and capable of cession to ABSA.

10. On 5 March 2009, R35 000 000.00 was received from Blue in discharge of a portion of Mr van Niekerk's indebtedness. ABSA offers a detailed account as to why the loan to Mr van Niekerk was more prudent and beneficial to ABSA than a situation of default. ABSA denies that the loan to Mr van Niekerk was not a valid commercial loan. ABSA denies further that it had any knowledge that there were insufficient funds standing to the credit of Mr van Niekerk's loan account. Nor did it know of any of the representations made by Mr van Niekerk to Blue or have knowledge of their claimed falsity. The R35 000 000 was paid to ABSA in part satisfaction of Mr van Niekerk's indebtedness to ABSA, in consequence of which ,ABSA was not enriched.

11. Finally, by way of an amendment effected to its plea in the course of the trial, ABSA raises an estoppel against Blue. It pleads that, relying upon the representations made by Blue to ABSA that Mr van Niekerk enjoyed a substantial credit in his loan account with Blue, ABSA concluded the letter agreement and cession with Mr van Niekerk. ABSA would not have done so had it known there were insufficient funds standing to the credit of Mr van Niekerk. ABSA acted to its detriment and Blue is thus estopped from denying that there were substantial funds standing to the credit in Mr van Niekerk's loan account.

12. ABSA has joined Mr van Niekerk as a third party. ABSA pleads that in the event that Blue is successful in its claim against ABSA, any such liability was caused by Mr van Niekerk. ABSA, in essence, pleads that if Blue proves that Mr van Niekerk made false

representations to Blue, Mr van Niekerk would have committed a fraud against ABSA and would be liable for breach of warranty. Mr van Niekerk denies any such liability and pleads a compromise with ABSA and an estoppel.

13. I commence with the issue of prescription.

PRESCRIPTION

14. The relevant provisions of the Prescription Act 68 of 1969 (the Prescription Act) are well known. Prescription commences as soon as the debt is due. A debt is due when it is immediately claimable by the creditor. A debt arising from unjust enrichment runs from the date when the debtor receives the benefit to which he or she is not entitled and the creditor acquires the right to claim restitution. Usually, the right to claim restitution is acquired, under the *condictio indebiti,* at the time that the mistaken payment is made. The period of prescription is three years.

15. Section 12(3) of the Prescription Act provides that a debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and 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.

16. The creditor's knowledge has been the subject of definitive interpretation by the courts. In *Gore NO*, it was said that time begins to run against the creditor when it

has the minimum facts necessary to institute the action. Prescription is not postponed until a creditor becomes aware of the full extent of its legal rights, nor until the creditor has evidence that would enable it to prove a case comfortably. However, the knowledge required of the creditor is not mere opinion or supposition, but justified, true belief.[1]

17. Blue's summons was served on ABSA on 31 October 2014. ABSA and Mr van Niekerk plead that, if there was a debt, it became due more than three years prior to 31 October 2014. Blue's plea states that it only acquired knowledge of the identity of the debtor and the facts from which the debt arose in and during November 2013; and it could not reasonably have acquired knowledge of these facts prior to November 2013. *Mr Roux SC* who appears with *Mr Mundell SC* for Blue was more equivocal in his oral submissions and contended that the relevant date, that he was reluctant to specify, went beyond November 2013.

18. ABSA bears the onus of proof on the issue of prescription.

19. ABSA relies upon the testimony of two witnesses called by Blue and documentary evidence to which these witnesses were referred. Mr Hatzkilson is a chartered accountant, a certified fraud examiner, and a director of Horwath Forensics SA (Pty) Ltd. Mr Hatzkilson was called by Blue at the trial as an expert witness. Horwath Forensics was appointed by Blue to undertake a forensic audit in respect of a number of matters concerning Blue's business. It rendered reports to Blue to which Mr Hatzkilson testified.

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[1] *Minister of Finance v Gore NO* 2007 (1) SA 111 (SCA) at [17] and [18]

20. PKF chartered accountants were in 2010 the internal auditors of Blue. In August 2010, Mr Tromp, a chartered accountant in the employ of PKF, was requested by the audit committee of the board of Blue to investigate a number of transactions. Mr Tromp also produced a report and gave evidence at the trial.

21. At the heart of Blue's enrichment action is the payment by Blue to ABSA of R35 million. This payment was made, Blue contends, on the representation of Mr van Niekerk that his loan account was in credit in this amount. Whether that was so is a matter that was considered both by Mr Tromp in his report, as also by Mr Hatzkilson in the Horwath reports.

22. Of particular importance to the investigation of whether Mr van Niekerk indeed enjoyed a credit on loan account are two journal entries posted in Blue's general ledger. The first is a R15 million credit to the loan account of Mr van Niekerk dated 19 December 2008 under the description "*Dave paid African Holdings*". The second is a R20 million credit to Mr van Niekerk's loan account dated 1 February 2009 under the description "*Allocation between AH and Dave*". But for these entries, the loan account of Mr van Niekerk would have been in debit.

23. The question whether these entries were supported by real transactions or were simply journal entries used to fabricate a credit in Mr van Niekerk's loan account formed part of what both Mr Tromp and Mr Hatzkilson investigated at the request of Blue and they reported their findings to the board of Blue. These reports are central to the knowledge that is attributable to Blue, and as a result, forms a central part of

the dispute between the parties concerning whether any debt owed by ABSA to Blue has prescribed.

24. ABSA relies upon the following evidence. At meetings of the board of Blue on 22 February 2009 and 28 August 2009, members of the board, Mr Meehan and Mr Couloubis, both qualified chartered accountants, had questioned the loan accounts.

25. On 18 August 2010, Mr Tromp submitted to the audit committee of Blue's board what was described as a high level review of high value transactions. Among the matters considered in the report is Mr van Niekerk's loan account. The report identifies significant transactions which includes the R15 million entry, but not the R20 million entry. The report observes under recommendations that the loan account "*seems to be very excessive and needs further investigation. We need the sic) have a detail look into these transactions. We strongly believe that this can be performed in-house .....Proposed time spend on the investigation 3 -4 days to issue a detail (sic) report on the transaction.*"

26. Mr Tromp confirmed in his testimony that this was indeed his recommendation. He testified further that it would have been a simple matter to verify the entries that were credited to Mr van Niekerk's loan account by asking the employees of Blue responsible for making the entries.

27. PKF were relieved of their duties. On 26 August, 2010, the board of Blue decided that a forensic audit should be done in respect of the matters referenced in the PKF report, and on 11 October 2010 Horwath Forensics was retained. Horwath Forensics

proposed that it would investigate, among other matters, the major allegations made against Mr van Niekerk and that their report would be suitable for use in criminal and civil proceedings.

28. On 15 February 2011, Horwath Forensics rendered a draft report to Blue. Of particular importance are the following findings. First, that there was a close relationship between Mr van Niekerk and a company, African Holdings, registered in Anguila, such that there was a significant co-mingling of activities between Blue and African Holdings. Second, that , " *There is evidence showing financial manipulation using adjusted journal entries in which African Holdings was utilized as a vehicle for concealing significant payments made by Blue for the personal benefit of Van Niekerk".* Third, referencing the R35 million payment for the benefit of Mr van Niekerk, the draft report considers the two credits to Mr van Niekerk's loan account of R15 Million and R 20 Million. It says of both entries that there is no available documentation supporting the transactions; and that they are non-cash entries in Blue's books as no funds flowed. Without these credits, the balance in Mr van Niekerk's loan account would have been in significant debit. The report concludes on this score: "*Without supporting information proving the flow of funds, these journal entries are seemingly designed to manipulate the accounting records through loan account adjustments."*

29. In August 2011, Horwath Forensics submitted its final Phase 1 report. There is considerable overlap between this report and the earlier draft. In the executive summary it is said that the summary outlines important facts along with key findings. Among these findings are the following. First, that source documentation was lacking

to conceal the true nature of certain key transactions to avoid detection and scrutiny. Second, that there was collusion between Mr van Niekerk and accounting and legal personnel to enable spurious journal entries to be made. Third, as a result of the lack of available supporting documentation, additional forensic procedures were undertaken. Fourth, a number of questionable transactions were effected by using African Holdings as a vehicle to perpetuate "*schemes of arrangement* ". Fourth, that civil claims would need to be instituted against Mr van Niekerk and related parties to recover funds lost due to these schemes. The schemes include reference to possible fraudulent activity and "*corporate malfeasance* ".

30. The final report says much of what was contained in the draft in respect of what it describes as the R35 million payment for Mr van Niekerk's benefit. The two entries of R15 million and R20 million are located as debits in the African Holdings loan account, and specifically, as payments. But no evidence could be found to support such payments. A spreadsheet was located setting out transaction activity in African Holdings in the period July 2007 to May 2009. The spreadsheet does not reflect the R35 million payment by Mr van Niekerk to African Holdings, or part thereof. The report concludes: "*again, an indication that these were purely book entries designed to manipulate the van Niekerk loan account in order to have a balance sufficient enough from which to offset the R35 (sic) payment by Blue to ABSA.*"

31. On 29 November, 2013, Horwath provided a draft memorandum to Blue's attorneys. Its purpose was to provide information to the external auditors of Blue for their consideration in connection with the current financial statements and related

disclosures. The memorandum is concerned with the R35 million paid to ABSA. It sets out the basis as to how African Holdings was used to make the payment possible. The analysis and conclusions mirror those reflected in the two earlier reports. The memorandum emphasizes this: "*Without supporting information proving the flow of funds, these round amount) journal entries are seemingly designed to manipulate the accounting records through loan account adjustments ".* The memorandum concludes that apart from offences under the Prevention of Organised Crime Act, "*civil law remedies are indeed available to Blue, to be explored for the recovery of losses. These may be initiated by means of a claim, based on inter alia, an action for undue enrichment*".

32. ABSA submits that prescription began to run against Blue four days after receipt of the PKF report, being the estimate of time Mr Tromp gave for the purpose of determining whether there was supporting documentation for the suspect transactions.

33. This position is more exacting of what was required of Blue than the law requires to avoid prescription. True enough, the PKF report had identified the loan account entries as seemingly excessive and both the report and Mr Tromp in his testimony said that the entries could be further investigated in a short period of time by taking up internal enquiries within Blue.

34. However, the analysis reflected in the report appears very much to be a first look to identify transactions that warranted further investigation. When compared with the detailed investigation and work that was undertaken by Horwath Forensics, the PKF report did not contain the necessary facts to have brought the enrichment action against ABSA. Nor is it clear to me (given the incidence of the onus) that 3 – 4 days of further work would have done so. Such further work may have shown that Blue personnel could not properly account for the entries and documentary support was lacking.

35. But there are gaps in the PKF report that are material. Mr Tromp was concerned with the extent of the substantial transactions reflected in the loan account of Mr van Niekerk. But he had not understood the relationship between Mr van Niekerk and African Holdings; he had not even identified all the entries that contributed to the credit on loan account that permitted of the R35 million payment. Nor had he yet identified the R 35 million payment and the debit to Mr van Niekerk's loan account. Nor did the report connect the systemic aspects of what had occurred within the management of Blue, by means of which payments were made. Given the extent of the work that is revealed in the Horwath reports and what is there uncovered, it seems most unlikely that three or four days would have yielded the identity of the debtor and the facts from which the debt arises.

36. A reading of the Horwath reports in 2011 reveals a very different picture. Salient features of those reports have already been summarized. The reports identify the payment of R35 million to ABSA as part of a fraudulent scheme for the benefit of Mr

van Niekerk. The use of African Holdings as the vehicle to perpetrate this scheme is made plain. Detailed treatment is given to the payment of R35 million and the journal entries in the loan accounts of African Holdings and Mr van Niekerk. The two transactions posting credits to Mr van Niekerk's loan account of R15 million and R20 million are analysed in detail and found to be purely book entries so as to manipulate Mr van Niekerk's loan account in order to retain a sufficient balance to offset the payment of R35 million by Blue to ABSA. The reports find no evidence of any flow of funds to support the transactions and no supporting information. The reports are based on extensive work over many months to interview persons with knowledge of Blue and its business; as also upon extensive documentary evidence. The reports find that that irregular transactions resulted from deliberate manipulation by a number of identified senior personnel in Blue. The irregular transactions were not isolated instances of wrongdoing but were what Mr Hatzkilson described as "*a total fraud* ".

37. The question is this: upon the submission of the Horwath reports to Blue in February 2011 and August 2011, was Blue placed in a position to identify ABSA as the debtor and the facts from which the debt arises or could Blue have done so by exercising reasonable care?

38. Blue contends that it lacked the requisite knowledge at this point in time and could not have secured it by exercising reasonable care. It relies firstly upon the fact that the two transactions posted to Mr van Niekerk's loan account for R15 million and R20 million (henceforth "the contested transactions") lacked documentary support. The contested transactions were suspicious and appeared to indicate manipulation. But

what had not been done was to obtain and consider the bank accounts of Mr van Niekerk and African Holdings which would have shown whether there was a flow of funds. Mr Hatzkilson, under cross examination on the point, said that the contested transactions could be legitimate and that without looking at the bank statements of Mr van Niekerk and African Holdings to ascertain whether there was a flow of funds, "*I could not definitively conclude* ".

39. This position is not persuasive. First, a fair reading of the Horwath reports does not indicate significant reservations concerning the irregularity of the contested transactions. The contested transactions are considered to be part of a pattern financial manipulation in Blue, orchestrated by an inner circle of senior persons in the company. As to the absence of documentary support for the contested transactions, the reports say expressly that source documentation was lacking to conceal the true nature of certain key transactions. The forensic investigation went to great lengths to procure and review an extensive documentary record, but could still find no supporting documentation to substantiate the contested transactions. The August report says of the contested transactions that there is no documentation at Blue to demonstrate a flow of funds and concludes: "*This is a non-cash entry in Blue's books as no funds flowed*". The August report finds further support for this conclusion having located a spreadsheet from the imaged hard drives of Mr Smit setting out transaction activity in African Holdings over the relevant period. The spreadsheet contains no reference to the R35 million paid by Mr van Niekerk or any part thereof. (see paragraph 7.4.2 of the report)

40. This absence of documents after detailed investigation is consistent with the reports' conclusion that documentation was lacking so as to conceal key transactions. And this concealment is said to apply to the payment of R35 million to ABSA. (see paragraph 3.6)

41. Nor are the reports framed so as to suggest any conviction that the contested transactions may be legitimate and that procuring the bank statements of Mr van Niekerk and African Holdings is necessary so as to determine the matter. A fair reading of the reports indicates that the absence of supporting documents proving the flow of funds is evidence of the manipulation of the loan accounts. Nor is the conclusory observation that civil action would need to be instituted against Mr van Niekerk and others to recover funds hedged about with any caveat as to the further documentary evidence that would still need to be procured (see paragraph 3.1).

42. As the chronology shows, Blue brought its action without procuring the bank records that Mr Hatzkilson says would have been definitive of whether the contested transactions were legitimate. The sequence of events is as follows. The August report references further investigation as to a criminal investigation, but not as to the need for such investigation in respect of civil claims based on the findings of the reports. On 13 January 2013, Blue sent a letter of demand to ABSA alleging that the R35 million paid to ABSA was neither owing nor payable. In November

2013, Horwath provided a draft memorandum to Blue's attorneys. But, as Mr Hatzkilson recognized, the memorandum contained no new facts. Summons was issued and served on 31 October 2014. The bank statements that are contended to have such importance were sought by way of discovery, and disclosure was in part secured by way of orders made by this court.

43. In my view, Blue did not need to access the bank statements of Mr van Niekerk and African Holdings in order to have the minimum facts necessary to institute the action for enrichment against ABSA. It did launch the action without such access. And Blue says in its plea to prescription that it only acquired knowledge of the identity of the debtor and the facts from which the debt arose in and during November 2013. Blue did not have the bank statements in November 2013. Nor, on the evidence before me, did it have knowledge of necessary facts in order to institute its action in November 2013 that it lacked in August 2011. The 2013 memorandum added nothing to the facts. Mr Hatzkilson referred in his evidence to the bank statements as allowing of definitive conclusions concerning the contested transactions. But that is not the relevant legal standard. As *Gore No* makes plain, a creditor cannot await evidence that would allow it to prove a case comfortably.

44. I therefore find that the bank statements were not necessary facts, the absence of which, prevented Blue from knowing the facts from which its action arises.

45. Blue contends further in resisting prescription that the need for the bank statements fell away when Mr van Niekerk disclosed through the expert report of Mr Strydom (and in his own witness statement) filed in these proceedings that the

credit of R35 million in the loan account of African Holdings had been ceded to Mr van Niekerk by African Holdings. This permitted Blue to shift its case from the question as to whether there was a flow of funds in respect of the contested transactions, to the question as to whether three amounts standing to the credit of African Holdings in its loan account with Blue were in fact credits.

46. This does not assist Blue. That Mr van Niekerk in trial proceedings puts up a different explanation for the R35 million standing to the credit of his loan account simply gives rise to an issue to be determined at trial. That Blue on the basis of Mr Hatzkilson's evidence seek to demonstrate the falsity of Mr van Niekerk's explanation provides no basis to conclude that Blue did not have knowledge of the necessary facts from which it claim arises. Blue instituted its action on the basis that the entries in Mr van Niekerk's loan account have no foundation. The Horwath reports provide a detailed analysis as to why this is so. The claim by Mr van Niekerk that the credit is supported by a cession never recorded in the financial records of the company is simply a defence that Blue had to meet, and did so.

47. But whether Blue had the requisite knowledge at the relevant time is not tested by whether an opposing party puts up a version that was not hitherto known by Blue. It could hardly be otherwise, for then a debt would not commence to run until after summons was issued, thereby eviscerating the extinction of debts by prescription.

48. Blue relies upon the evidence of Mr Hatzkilson that, at the time the reports were submitted, he had conveyed to Blue that the contested transactions were suspicious but could be legitimate. This issue assumed some importance in the

cross-examination of Mr Hatzkilson. Mr Hatzkilson had made notes in the course of the days over which he gave evidence. He took these notes into the witness box. ABSA's counsel sought to see the notes. A number of references in the notes were directed to observations as to his level of confidence in the findings of the reports and the feasibility of legal action. Mr Hatzkilson was criticized by counsel for ABSA as showing a want of independence in seeking to assist Blue to resist the case of prescription.

49. I need make no findings on this score. I have already given a detailed account of the Horwath reports. Those reports, fairly read, do not give expression to reservations as to the facts and analysis set out in the findings and conclusion that indicate a want of knowledge on the part of Blue, after the submission of the reports, as to the facts necessary to bring the action. That Mr Hatzkilson, as a thorough forensic auditor, expressed the view that his findings are not infallible and could be capable of contradiction by evidence not available to him (and not likely to be, given that Mr van Niekerk had proven uncooperative) may exhibit the prudence of any professional asked to express a view. It does not afford proof that the reports did not provide a very full account of the facts for the conclusion that the contested transactions do not support the credit in Mr van Niekerk's loan account.

50. Nor can any imprecision as to the nature of the legal claim assist Blue. The law is clear. Knowledge of the legal rights that a creditor may enjoy arising from the facts is not relevant. Hence, the fact that it is only in the November 2013

memorandum that an enrichment action is referenced is of no moment. The legal implications of the facts giving rise to the claim do not signify.[2]

51. Finally Blue contends that ,at the time that the Horwath reports were provided to Blue, Blue did not know the identity of ABSA as the debtor, nor of the factual existence of the security cession that Mr van Niekerk had concluded with ABSA. I do not find that this is so. First, the Horwath reports make extensive reference to the payment of R35 million by Blue to ABSA for the benefit of Mr van Niekerk. The reports state that on 5 March 2009, Blue paid R35 million to ABSA, relating to amounts owing to ABSA in respect of Mr van Niekerk's single stock futures position (see paragraph 7.4.2). Second, the letter written by Mr Chittenden as the Financial Director of Blue on 19 December 2008 to ABSA refers to the letter agreement concluded between Mr van Niekerk and ABSA, and acknowledges that Mr van Niekerk had undertaken to cede his claims on loan account against Blue *in securitatem debiti* . Mr Chittenden then makes a number of undertaking to ABSA in the letter concerning the loan claims. Mr Chittenden gave evidence at the trial and confirmed he had written the letter and that he knew that ABSA was going to advance a loan to Mr van Niekerk. Third, Blue pleads that on 5 March 2009 it paid R35 million to ABSA in terms of the cession *in securitatem debiti,* strongly suggestive of the fact that it knew of the cession at the time of the payment since this was the basis upon which ABSA claimed payment. Fourth, Blue does not say when it learnt of the cession *in securitatem debiti* that then placed it in a position to know that Mr Van Niekerk and ABSA had concluded such a cession.

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[2] *Van Staden v Fourie* 1989 (3) SA 200 (A)

52. For these reasons I find that Blue indeed knew of the existence of the cession at the time that it made payment to ABSA of the R35 million But in any event ,Blue could have learnt of its existence by exercising reasonable care at the time that the Horwath investigations were undertaken, and certainly by no later than August 2011. Horwath Forensics clearly interviewed many people with knowledge of the transaction. There is no reason to think that, whatever the lack of co-operation of Mr van Niekerk and others ,they would not have confirmed the existence of the cession. A simple letter of enquiry to ABSA would have put the matter beyond question. I find also that Blue knew the identity of ABSA as the debtor certainly by no later than August 2011, but in fact at the time that the payment of R35 million was made to ABSA by Blue.

53. In my view, ABSA has made out its case that Blue's claim has prescribed. Blue's claim for enrichment rests on the claim that it made payment to ABSA of R35 million in the *bone fide* but mistaken belief that Mr van Niekerk had a credit on loan account with Blue in at least that amount. The Horwath reports provide the necessary facts as to why Mr van Niekerk enjoyed no such credit, and hence Mr van Niekerk could not cede a claim on loan account that he did not have. Blue had this knowledge at the very latest when it received the August 2011 report from Horwath in that month. It also then knew of ABSA as its debtor, as also of the cession *in securitatem debiti* in terms of which it had made payment to ABSA.

54. It follows that that ABSA's special plea of prescription is upheld and Blue's claim is dismissed for this reason.

THE ENRICHMENT CLAIM

55. My holding that Blue's enrichment claim has been extinguished by prescription puts an end to Blue's case. However, in the event that this matter proceeds further, I consider whether Blue's enrichment claim can succeed.

56. Blue's enrichment action rests upon two claims. First, Blue says that when it paid ABSA R35 million it did so pursuant to a security cession that Mr van Niekerk had concluded with ABSA in respect of Mr van Niekerk's claims on loan account against Blue (" the security cession "). However, Mr van Niekerk had no such claims on loan account at the time Blue made payment. Hence, there was nothing that Mr van Niekerk could cede, Thus, Blue owed no debt to ABSA, as it had no debt owing to Mr van Niekerk on loan account. The payment of R35 million therefore enriched ABSA at the expense of Blue, which was impoverished thereby. I shall refer to this claim as "the loan account claim ".

57. The second claim made by Blue is that there was no valid loan made by ABSA to Mr van Niekerk. The letter agreement between Blue and ABSA does not constitute a valid loan because it was not concluded at arm's length, ABSA knew Mr van Niekerk could not repay the loan and it was never intended that he would do so. The letter agreement was simply a mechanism by which ABSA could place Cortex Securities in funds so as to avoid Cortex Securities declaring a margin call default under the derivative rules of application to single stock future trades.

58. Mr van Niekerk had effected a single stock future transaction and failed to meet the margin calls that fell due. ABSA sought to avoid the adverse consequences to it as the clearing member under the rules should Cortex default. To achieve this end, ABSA sought to place Cortex in funds. There was no valid loan made by ABSA to Mr van Niekerk, the true intent of the letter agreement was to permit Mr van Niekerk to act as a conduit for the flow of funds to Cortex Securities. There was no valid loan, and hence no valid *causa* for the security cession. For this reason too, the payment made by Blue to ABSA was not made pursuant to a valid cession, and hence ABSA was enriched, at Blue's expense, which was impoverished thereby. I shall call this "the invalid loan claim".

59. It was recognized by all counsel who appeared for the parties that Blue's enrichment action had to be considered in the light of the holding of the Supreme Court of Appeal in *Lombard*[3]. In *Lombard,* the court affirmed the defence of *suum recipit.* In essence, a creditor is not enriched when a debt owed to her is discharged by payment. Manickum, an employee of Lombard, had fraudulently procured the payment by Lombard of more than R2 million into Manickum's current account. Manickum transferred amounts from her current account to other accounts so as to reduce or extinguish various of her debts, including her home loan and credit card account. Lombard sought to recover from the two banks the monies that

[3] *Absa Bank Limited v Lombard Insurance Co Ltd* 2012 (6) SA 569 (SCA)

Manickum had transferred in respect of her indebtedness to these banks. The appeal court rejected Lombard's claims. Manickum made the payments intending to discharge her indebtedness, in whole or in part. The banks were not enriched because the monies transferred were used to discharge or reduce debts owing to the banks. Manickum was enriched, and Lombard's cause of action lay against her.

60. In *Moore*[4], the Constitutional Court affirmed the holding in *Lombard:* a thief who pays her own debts with stolen funds extinguishes those debts, provided the creditor who receives and accepts payment is innocent. Payment of another's debt, even by a thief with stolen funds, extinguishes the debt. And further, payment is generally a bilateral act involving the co-operation of the payer and payee. But our law does not require the consent of the debtor in order that a debt may be paid. A debt may be discharged by a third party, even without the authority or consent of the debtor.

61. Blue contends that its enrichment action is distinguishable from the holding in *Lombard.* Blue says that when it paid ABSA it did so in terms of the security cession. The payment was made to discharge Blue's supposed indebtedness to Mr van Niekerk on loan account. The security cession simply made ABSA Blue's creditor, as the cessionary of Mr van Niekerk's claim against Blue. Blue's payment to ABSA was not a payment of Mr van Niekerk's debt to ABSA arising from ABSA's loan to Mr van Niekerk, nor was it intended to be. In sum, Blue's payment

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[4] *Absa Bank Limited v Moore 2017 (1) SA 255 (CC)*

discharged Blue's indebtedness to Mr van Niekerrk, but not Mr van Niekerk's indebtedness to ABSA. Hence, if in fact Blue owed nothing to Mr van Niekerk on loan account, the payment to ABSA did indeed enrich ABSA and impoverish Blue.

62. The security cession concluded between ABSA and Mr van Niekerk provides that as security for the performance and discharge by Mr van Niekerk of his present and future obligations to ABSA, Mr van Niekerk pledges and cedes, *in securitatem debiti* in favour of ABSA his right, title and interest to the ceded interests, being Mr van Niekerk's present and future claims held on loan account. In the event of default by Mr van Niekerk, ABSA may exercise all the rights attached to the ceded interests. Pursuant to the exercise by ABSA of such rights, ABSA may apply any amounts received by ABSA to the payment of Mr van Niekerk's obligations in respect of the secured obligations, which include the letter agreement concluded between ABSA and Mr van Niekerk.

63. The question that arises is this: when Blue paid ABSA did it simply discharge the debt owing to Mr van Niekerk on loan account, as Blue contends? As *Moore* makes plain, our law recognizes that a debt owing by A to B may be discharged by C, whether or not A is aware of the payment and consents to it. Accordingly, although Blue is not a party to the letter agreement in terms of which ABSA made loans to Mr van Niekerk, no disability attaches to Blue making payment in partial discharge of Mr van Niekerk's liability to ABSA under these loans.

64. What is required, again as *Moore* explains, is a bilateral act as between the payer and the payee to make the payment. And this, following *Lombard,* is a question as to whether the payer intended to discharge a particular debt and the payee to receive such payment.

65. There is no reason of principle why Blue, in paying ABSA R35 million, could not simultaneously have been discharging its liability arising from Mr van Niekerk's loan account and Mr van Niekerk's liability to ABSA in terms of the letter agreement. This is precisely the commercial utility of a security cession. ABSA, as cessionary, enforces the right to payment against Blue, and thereby enforces its security so as to secure payment of the debt owing to ABSA by Mr van Niekerk. Blue's payment to ABSA discharges (in whole or in part) two debts: the loan account debt owing to Mr van Niekerk and Mr van Niekerk's liability to ABSA in terms of the letter agreement.

66. The only issue that remains is whether this was what Blue and ABSA intended when Blue made payment of the R35 million to ABSA. There can be little doubt as ABSA's intentions. These are manifest from the letter agreements and the security cession. Should Mr van Niekerk be in default, ABSA was entitled to exercise its rights under the security cession to obtain payment from Blue, so as to discharge (in part) Mr van Niekerk's liability to it. And when Mr van Niekerk did default and ABSA called upon Blue to make payment in terms of the security cession, there can be little doubt that ABSA intended that the payment would be used in reduction

of Mr van Niekerk's debt to ABSA in terms of the letter agreements, consolidated under the Facilities Agreement.

67. But what of Blue's intent? Mr Chittenden was called as a witness by Blue. He signed the letter, dated 19 December 2008, as the Financial Director of Blue that was sent to ABSA. The letter is headed "Loan Account Acknowledgement". It references the letter agreement between ABSA and Mr van Niekerk and ABSA's agreement to make certain variation margin payments on behalf of Mr van Niekerk in respect of futures contracts acquired by Mr van Niekerk. The letter acknowledges that Mr van Niekerk has undertaken to cede *in securitatem debitii* his claims on loan account. A number of representations are then made concerning the amount of the loan claims; that they are payable on demand, not subordinated, nor encumbered; and that the loan claims are capable of cession to ABSA and nothing would prevent ABSA from exercising rights under the cession.

68. In his testimony, Mr Chittenden, admitted the contents of the letter, though he had not himself verified the amount owing to Mr van Niekerk on loan account by Blue. Under cross examination, Mr Chittenden confirmed that he knew that Mr van Niekerk had a liability to ABSA in respect of a loan ABSA was to make to Mr van Niekerk. He confirmed also that Blue represented to ABSA that Mr van Niekerk had loan claims of a value in excess of R36 million.

69. Mr Chittenden was also referred to correspondence that had taken place by e mail between Mr Smit, a director of Blue, and various employees of ABSA dated 19 December 2008. Mr Smit references discussions with Mr van Niekerk concerning

margin requirements. Mr Smit confirms that Blue will issue a letter confirming ABSA's loan, acknowledge the cession and "*undertake to make payment to ABSA as opposed to Dave*". Mr Murgatroyd of ABSA responds raising concerns as to Mr van Niekerk's "*futures position* " and proposes a solution that on the assumption Mr van Niekerk's loan claim exceeds the margin requirement, then Mr van Niekerk should cede his loan claims to ABSA. Although Mr Chittenden did not have sight of these e mails, it appears from the exchange of e mails that this is the negotiation from which the letter ultimately sent by Mr Chittenden arose.

70. Mr Chittenden's letter of 19 December 2008, his testimony and the background to this letter in the e mail exchange make it plain that Blue understood that Mr van Niekerk was to secure a loan from ABSA in the event that he could not meet the margin calls in respect of his futures contracts; that ABSA required a security cession to secure its liability in the event of default by Mr van Niekerk; and that ABSA required confirmation of the relevant details of Mr van Niekerk's claims on loan account and that these were capable of cession and would serve as adequate security.

71. When ABSA called upon Blue to make payment of the R35 million in terms of the security cession, Blue knew that it was making payment so as to permit ABSA to exercise its security and thereby discharge some portion of Mr van Niekerk's liability to ABSA. Blue was not simply paying a cessionary to discharge its own debt, ignorant of the reason that ABSA had procured the security cession and was seeking payment. On the contrary, Blue had a full understanding that the security

cession was required by ABSA to secure Mr van Niekerk's liabilities to ABSA. With this knowledge, Blue's payment to ABSA was clearly made with the intent to permit ABSA to discharge Mr van Niekerk's indebtedness to ABSA.

72. There is a further reason as to why Blue was no stranger to the commercial arrangements between Mr van Niekerk and ABSA. It is common ground that Blue concluded a transaction to acquire the shares of a company, Credit U Holdings Limited, under a scheme of arrangement. Mr van Niekerk was one of the principal underwriters under the scheme obliging him to purchase Blue shares from Credit U shareholders. To finance these purchases, Mr van Niekerk traded single stock futures on the derivatives market. Depending on the movement of the Blue share price, Mr van Niekerk was required to make margin payments. The Blue share price went down, hence his exposure and that of ABSA should Mr van Niekerk or Cortex Securities default.

73. Mr Hatzkilson confirmed the truth of his expert reports when he gave evidence. His supplementary report dated 28 October 2018 references Mr van Niekerk's single stock futures trading. This report attaches an e mail from Mr Smit to Mr van Niekerk on 19 December 2008, making various proposals as to how a deal might be struck with ABSA so as to avoid a default in respect of Mr van Niekerk's single stock futures exposure. What was then agreed with ABSA so as to avoid a default, as we have seen, was the letter agreement and security cession, undertaken with Blue's active involvement. Whatever its probity, there was clearly no separation between securing Mr van Niekerk's position and the position of Blue, in all

likelihood because of the desire to preserve the Credit U transaction. That Blue must have intended by its payment to ABSA to discharge Mr van Niekerk's liability to ABSA is clear, in the light of Blue's role in assisting to secure the agreements between ABSA and Mr van Niekerk.

74. Once, as I find, Blue did intend by paying ABSA R35 million to discharge Mr van Niekerk's debt to ABSA, the holding in *Lombard* is dispositive of the loan account claim. The court heard the detailed evidence of Mr Hatzkilson as to why Mr van Niekerk did not enjoy a credit on loan account at the time that the security cession was concluded, nor when the R35 million was paid. That evidence was clear and convincing. The small number of concessions exacted under cross examination by the third party, did not change the soundness of Mr Hatzkilson ultimate conclusion – that Mr van Niekerk had no claim against Blue on loan account.

75. This was the central feature of Blue's case. It provided the foundation for the proposition that if Mr van Niekerk had no claim against Blue, he had nothing to cede to ABSA, and hence the payment to ABSA of R35 million had no legal basis.

76. However, following *Lombard,* the payment by Blue, pursuant to a cession that had ceded nothing to ABSA, does not entail that ABSA was enriched by the payment. Provided, as I have found, that Blue intended to pay ABSA so as to extinguish Mr van Niekerk's debt to ABSA, the payment simply discharged that debt. ABSA clearly intended to receive this payment in discharge of Mr van Niekerk's debt to ABSA. There is no suggestion or evidence that ABSA knew of the deceptions

attributed to Mr van Niekerk concerning the manipulation of his loan account. Before the payment, ABSA was owed R35 million by Mr van Niekerk, an asset by way of a book debt ; after the payment the debt was discharged and ABSA held the R35 million. One asset is exchanged for another. There is no enrichment. And I do so find. The loan account claim cannot succeed.

77. Nor in my view can the invalid loan claim. As the evidence recounted above makes clear: Mr Chittenden knew that ABSA was to advance loans to Mr van Niekerk and Mr Smit, also a director of Blue, fully appreciated this. Indeed it was upon Mr Smit's initiative that a means was found by which ABSA would assist to avoid a default. The letter sent by Mr Chittenden reflects that the security cession was intended to provide ABSA with security for its loan to Mr van Niekerk, and for that reason ABSA sought undertakings from Blue as to Mr van Niekerk's loan account.

78. Blue has not put up evidence to show that the letter agreements and Facilities Agreement between ABSA and Mr van Niekerk were not truly intended as loan agreements. Nor has Blue shown that the loans and the security cession were sham transactions.

79. On the pleadings, ABSA offers a full account as to why it extended loans to Mr van Niekerk. ABSA did not call witnesses in support of its pleaded case. But, given the onus on this issue, it was not required to do so. It was for Blue to show that the loans were simply a conduit for the payment of funds to avoid default, in circumstances where ABSA knew that Mr van Niekerk could not repay the sums

advanced and it was not intended that he would. The evidence led at trial did not establish this.

80. The evidence of Mr Chittenden and Mr Hatzkilson did nothing to advance this case. Rather Mr Chittenden confirmed his understanding that ABSA was to give a loan to Mr van Niekerk. Mr Hatzkilson was led in evidence as to Mr van Niekerk's net asset position at the time ABSA extended the loans to him. Mr Hatzkilson testified that Mr van Niekerk still held a nett asset position of some R 100 million. The greater part of this was premised on the value of his shareholding in Blue. But this evidence does not suggest that ABSA, at the time it extended the loans to Mr van Niekerk, knew that Mr van Niekerk could not pay the loans back, because Mr van Niekerk, in fact ,had a substantial nett asset position. The matter was simply not further explored in the evidence.

81. It was for Blue to show that the loans granted by ABSA were not intended as such. Blue has not done so on the evidence led at trial. Nor has it shown that ABSA and Mr van Niekerk were not parties at arm's length when the loans were concluded. Again the matter was simply not traversed in the evidence. From the documents that were referenced, while ABSA and Mr van Niekerk may both have wanted to avoid a default, they did so for their own reasons, and ABSA required in its own interests that Mr van Niekerk enter into loan agreements and provide security for the loans – a standard feature of commercial dealings at arm's length.

82. The invalid loan claim cannot succeed and I do so find.

83. In the light of these findings, it is unnecessary to traverse ABSA's contentions as to estoppel.

CONCLUSION AND COSTS

84. I have found that Blue's enrichment action falls to be dismissed. First, the action has been extinguished by prescription. Second, the action fails on its merits.

85. Counsel were in agreement that the costs should follow the result, and that the employment of two counsel are warranted.

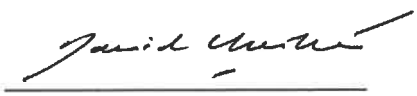
86. Mr van Niekerk, as the third party, submitted that Blue's conduct warranted a special order as to costs. Mr van Niekerk complains that the pleaded case of Blue, and what was required by way of preparation for trial in consequence, went considerably wider than the case put up at trial. This is however not an uncommon feature of trials, where the parties narrow issues and are encouraged to do so. It is then said that no relief was sought directly against Mr van Niekerk and yet the proceedings were a "proxy war "against him, fought with inadequate disclosure. It seems more likely that no claim was made against Mr van Niekerk by Blue because it apprehended it was unlikely to obtain satisfaction of any judgment obtained against him. This is the more so since Blue clearly apprehended the importance of *Lombard* and that its recourse lay in the first place against Mr van Niekerk. The manner in which Blue dealt with disclosure was a matter for interlocutory relief

which figured significantly in the case management of this matter. Finally, Mr van Niekerk complains that Blue should not have resisted the separation of the prescription issue. These are judgments of convenience. The prescription issue is much bound up with an understanding of the subject matter of the Horwath reports. It is not clear that separation would have assisted to determine the prescription issue, without duplication if the defence had failed.

87. I do not find a basis to make the special order as to costs that is sought by Mr Niekerk.

In the result I make the following order:

1. The Plaintiff's claim is dismissed
2. The Plaintiff is ordered to pay the costs of the Defendant and the Third Party, including the cost of two counsel.



Unterhalter J

Judge of the High Court

DATE OF HEARING: 02 – 13 September 2019

DATE OF JUDGMENT: 20 September 2019

Appearances:

For the Plaintiff: Advocates Roux SC and Mundell SC instructed by MAP Attorneys

For the Defendant: Advocates Ludertiz SC and Mafukidze instructed by Webber Wentzel

For the Third Party: Rome SC and Hoffman instructed by Assheton – Smith Incorporated