THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

In the matter between

Appeal Case No: A483/2014

Trial Case No: 12415/2011

KERNSIG 17 (PTY) LTD **APPELLANT**

and

ABSA BANK LTD **RESPONDENT**

Coram: BOZALEK, ROGERS & MANTAME JJ

Heard: **27 & 28 JULY 2015**

Delivered: **2 SEPTEMBER 2015**

JUDGMENT

ROGERS J (BOZALEK & MANTAME JJ conc):

Introduction

[1] The appellant ('Kernsig') was the plaintiff and the respondent ('Absa') the defendant in the court quo. Kernsig claimed damages of R1 507 268,90 arising from a payment which it made to Absa in that amount on 27 June 2009. The claim for damages was based on fraud (delict), alternatively negligence (in breach of an alleged contractual duty of care), alternatively a contravention of s 38 of the Companies Act 61 of 1973. There was a further claim for damages of R2 million arising from alleged dishonesty in prior proceedings between the parties.

[2] Davis J dismissed Kernsig's claims with costs. Kernsig appeals to a full bench with Davis J's leave.

[3] Mr DB du Preez SC leading Mr PI Oosthuizen appeared for Kernsig in the appeal (different counsel acted in the trial). Mr Vivier appeared for Absa in the appeal, as he did at the trial.

The factual background

[4] Mr JA Greyling and his wife Mrs GJ Greyling, who are married in community of property, settled on the farm Karoovlakte during 1976, having inherited it from Mrs Greyling's late father. Subsequently Mr Greyling and his son, Mr PJ Greyling, formed a partnership to conduct farming operations on Karoovlakte ('the partnership'). Like Davis J and the witnesses, I shall, to avoid confusion, refer to the son as 'Jannie', meaning no disrespect thereby. The partnership traded under the name Karoovlakte Boerdery. Mr Greyling was the active farmer. Jannie practised as an advocate in Pretoria. Mrs Greyling did the books. The partnership had its bank account with Absa's Vredendal branch. Their relationship manager as from 2000 was Mr J Brand ('Brand '). The security held by Absa included covering mortgage bonds over Karoovlakte. By March 2001 there were six such bonds totalling R940 000.

[5] The partnership's facilities with Absa comprised an overdraft and a term loan. The last approved overdraft facilities were those set out in Absa's letter dated 23

August 2003. In terms thereof the approved overdraft was R525 000 reducing to R450 000 by 30 April 2004. The facility was subject to review on 15 August 2004.

[6] Kernsig was incorporated during January 2002. Its shareholders were Mr Greyling and Jannie. During August 2004 Mr and Mrs Greyling transferred Karoovlakte to Kernsig and the latter by endorsement became the mortgagor under the six bonds. Kernsig signed an unlimited suretyship for the partnership in favour of Absa.

[7] The 2004 and 2005 seasons in the area were bad. By mid-2005 the partnership was in straitened financial circumstances. Mr Greyling was advanced in years. The partnership owed Absa about R1 million. The overdraft component of the debt, so far from being reduced to R450 000, had increased, and stood by early September 2005 at more than R700 000. Brand was constantly phoning Mrs Greyling about the state of the overdraft. The Greylings made certain proposals to Absa, involving a temporary increase of R200 000 in the partnership's facility to give them time to sell the farm free from pressure. The bank rejected the proposals, at which point Brand intimated that Absa intended to 'repossess' the farm on 12 October 2005, ie to foreclose .

[8] The Greyling's daughter and Jannie's sister, Ms GJ Visser ('Visser'), was a practising attorney in Somerset-West. She knew a Mr LP Barnard ('Barnard'), also an attorney (they had done articles together, they had been in partnership for a while and he was currently an associate of hers, sharing premises and a secretary). Barnard and his wife displayed an interest in buying the farm. On 6 September 2005 Mr Greyling and Jannie concluded an agreement with the Barnards in terms whereof they sold their shares in Kernsig to the Barnards for R1,4 million ('the September contract'). Barnard was the draftsman of the contract. The contract described Kernsig as trading as Karoovlakte Boerdery. Its assets were said to include various movables as per an attached schedule (no schedule was attached to the version produced at the trial).

[9] An amount of R150 000 was payable on approval of a loan supposedly specified in clause 3.1 though the loan in question was not specified there or

elsewhere. The balance was payable with interest over 12 years to be secured by properties owned by the Barnards in Wilderness.

[10] Clause 14.3 specified the following as a suspensive condition:

'Die koper neem al die finansiële verpligtinge en verbande van die maatskappy oor, huidiglik ongeveer R1 000 000.00 en die huidige aandeelhouers word vrygestel as borge vir die finansiële bankverpligtinge.'

[11] Jannie testified that the effect of this condition was to increase the price to R2,4 million. It was he who gave Barnard the estimate of R1 million. It seems that the loan, upon the approval of which the amount of R150 000 was payable, was intended to be a loan which would enable the Barnards to give effect to clause 14.3. The manner in which the said loan was to be obtained is contentious. Kernsig's case was that the Barnards personally had to obtain the loan. As a fact, what happened was that Barnard asked Absa to grant Kernsig a ten-year term loan of R1,1 million which would be applied to extinguish the partnership's obligations to Absa.

[12] Barnard, together with members of his family and a company in which he was interested, was an existing Absa client but did not know Brand. After concluding the September contract, Barnard introduced himself to Brand in order to discuss the proposed loan. On 22 September 2005 Brand presented Barnard's application to Absa's Commercial Credit Services ('CSS') in Cape Town. According to the application, the Barnard group already had facilities of R1 068 330 with Absa. The new facility of R1,1 million for Kernsig would increase the group's facilities to R2 168 330. The application was presented on the basis that the term loan would be secured by the six existing bonds over Karoovlakte and a seventh bond to be registered of R200 000.

[13] On 28 September 2005 CCS, in the person of Mr AJ Marais ('Marais'), approved the loan. The approval specified inter alia that the Barnards should sign suretyships for Kernsig and that the partnership's debt should be discharged from the loan proceeds.

[14] There is a dispute as to whether Barnard was authorized to represent Kernsig in seeking the loan. Among the disputes is whether there existed an authorizing resolution dated 22 September 2005, signed by Mr Greyling and Jannie. If the resolution existed, Absa was unable to find it.

[15] On 28 September 2005 Brand phoned Mrs Greyling to tell her the 'good news' that Barnard's application had been approved. The Greylings say that they understood this to mean that loan finance to the Barnards personally had been approved. On 1 October 2005 the Barnards took possession of the farm, by which stage they had paid the deposit of R150 000.

[16] On 30 November 2005 Mr Greyling, Jannie and the Barnards concluded a contract in substitution of the previous one ('the November contract'). Visser testified that this was done on the auditor's advice, because the first contract had failed to take into account that the Absa debt was in the name of the partnership and that the movables were owned by Mr Greyling personally. The price for the shares was now R2 million. (Presumably there was a separate sale between Mr Greyling and the Barnards for the movables.) The November contract recorded that R150 000 had already been paid. The balance was to be discharged as follows: (i) as to R1 137 750, by the taking over of all the liabilities of Kernsig to the Land Bank (R57 500) 'aook die verbande wat oor die eiendom van die maatskappy geeregistreer is in naam van Karoovlakte Boerdery' (R1,080 250); (ii) as to R712 500, by 12 annual payments to be secured over the Wilderness properties. Clause 14.3 contained the following suspensive condition:

'Die koper neem al die finansiële bankverpligtinge en verbande van [Greyling] en [Jannie] te Absa Bank tot die bedrag van R1 080 123 ten opsigte van die venootskap Karoovlakte Boerdery, oor.'

[17] On 8 December 2005, and pursuant to the CSS approval, a loan contract in Kernsig's name was signed, Barnard purporting to represent the company. The loan of R1,1 million was to be paid off over ten years. The loan contract's heading stated that Barnard was representing Kernsig pursuant to a directors' resolution taken on 22 September 2005.

[18] On 9 December 2005 Absa gave effect to the loan by entries in terms whereof the partnership's total liability to Absa of R1 079 096 was extinguished and a principal debt in the same amount debited to Kernsig in terms of the new loan contract. Absa notified the partnership in January 2006 that its liabilities to Absa had been settled in full.

[19] Absa gave effect to the loan as aforesaid even though one of the conditions of the new loan, registration of a further bond of R200 000, had not yet been fulfilled and was in the event never fulfilled. On 13 October 2005 Brand had instructed a conveyancer, Mr SC Nell ('Nell'), to attend to the registration of this further bond and to the cancellation of the Land Bank bond pursuant to Barnard's purchase of the company. He asked Nell to inform him once the client (ie Kernsig) had signed the necessary power of attorney. Nell forwarded the conveyancing documents to Visser on 21 November 2005 for signature by Mr Greyling and Jannie, who were still Kernsig's directors. Jannie refused to sign the documents in the form presented. He prepared his own resolution dated 29 November 2005 which authorised Barnard to apply on behalf of Kernsig for a 'further loan' of R200 000 and to sign all necessary documents in connection with the registration of the required security subject to the condition that Barnard comply in full with the terms of the sale agreement. If he did not, he was to be personally liable to repay the money to Absa; Kernsig and its directors were on no account to be liable.

[20] The purpose of this further bond is a point of contention. Jannie testified that Brand told him that Barnard wanted an additional loan of R200 000 for improvements but that Absa was not willing to lend more money to Barnard personally. Brand's version is that the further bond was simply to comply with the conditions of approval for the new term loan.

[21] Be that as it may, on 6 December 2006, nearly a year later, Nell emailed Visser to say that the bank was insisting that he register the further bond but that the resolution of 29 November 2005 was subject to the condition that Barnard comply with the sale agreement. Nell asked Visser whether there had been compliance and whether the Kernsig shares had been transferred.

[22] There was no response from Visser. The shares had not in fact been transferred to the Barnards. Barnard had refused to sign documents for the registration of the mortgage bond over the Wilderness properties. According to Visser, Barnard complained that some vineyards had died and others had not been planted. Jannie and his father brought an application to compel registration of the Wilderness bonds which Barnard opposed. The dispute had not been finalised when, in February 2008, the Barnards abandoned the farm. According to Visser, the Barnards had paid the two annual instalments for 2006 and 2007. Mr Greyling and Jannie treated the Barnards' abandoning the farm as a repudiation which they accepted, thereby cancelling the sale. The Barnards disappeared. Visser speculated that they may have decamped to Ireland.

[23] During May 2008 Kernsig sold the farm to another buyer for R1,41 million, with possession to be given on 1 July 2008. In anticipation of this sale, Visser wrote to Absa on 5 May 2008, recording that Barnard had repudiated and seeking Absa's undertaking that the bond registered over the property would be cancelled without liability on Kernsig's part. (Visser testified that she was referring to the new bond of R200 000 which she thought had been registered. This was challenged in cross-examination. It was put to her that she must have been referring to the covering bonds.) On 13 June 2008, and following the sale, she sent a further letter which now referred in terms to the covering bonds. (Visser testified that she believed these bonds to have a nil balance. She was again challenged on this in cross-examination.)

[24] Brand resigned from Absa's employ in August 2008. Although Visser suggested that he left under a cloud, Barnard was not cross-examined to that effect.

[25] On 27 June 2008 Absa's attorneys, Heyns & Partners Inc ('Heyns'), responded to Visser's letters, stating that payment of R1 254 597,18 together with interest from 25 June 2008 was required to procure cancellation of the bonds. Visser replied on 30 June 2008 that Kernsig had no knowledge of the specified account (which turned out to be the term loan of December 2005) and that the two accounts previously held by Kernsig (the overdraft account and the old term loan) had a nil balance. She said that, if Absa had granted Kernsig other facilities, she required to

know who the applicant had been and by what authority the application had been made.

[26] There having been no response from Absa for several weeks, Kernsig launched an urgent application on 17 July 2008 for hearing on 24 July 2008 in which it asked that Absa be ordered to cancel the bonds. Absa opposed, relying on the loan contract of December 2005. In reply Kernsig said that this was the first time it had heard of the alleged loan contract. Kernsig denied that Barnard had been authorized to represent it. Kernsig denied that the sale contract had envisaged that the company itself would seek finance, alleging that such an arrangement would have contravened s 38 of the Companies Act.

[27] The application was argued before Meer J on 9 October 2008. The learned judge raised with counsel whether the factual dispute regarding Barnard's authority should not be referred to oral evidence. Absa's counsel had no objection but Kernsig's counsel (not its present counsel) elected to argue the case on the papers. On 30 October 2008 Meer J delivered judgment, dismissing Kernsig's application with costs on the basis that there was a genuine factual dispute on Barnard's authority.

[28] Kernsig applied for leave to appeal. One of the points raised was that the term loan contract relied upon by Absa, if concluded, contravened s 38. Kernsig did not contend that Meer J had erred in finding that there was a genuine factual dispute regarding Barnard's authority. On 14 November 2008 Meer J granted leave to appeal to a full bench.

[29] Kernsig preferred not to await the outcome of the appeal before transferring the farm to the buyer, since the latter was threatening cancellation. On 19 June 2009 Visser wrote to Heyns proposing (i) that Absa furnish settlement figures for the alleged bond liability; (ii) that Visser's firm would give an undertaking to pay that amount upon transfer of the farm; (iii) that Absa furnish a written undertaking to repay the money if Kernsig was successful in the full bench appeal or in any further appeal to the Supreme Court of Appeal ('the SCA'); (iv) that if Absa was successful in the appeal, Kernsig would pay Absa's taxed costs on demand. She concluded:

‘Ons klient is van opinie dat die eindresultaat vir u klient in bostaande omstandighede dieselfde sal wees as sou u klient genoodsaak sou wees om die eiendom terug te neem indien ons klient die bestaande koopkontrak moet kanselleer en daar dus geen nadeel vir u klient bestaan nie.’

[30] Heyns replied on 19 June 2009 accepting the proposals. Heyns inter alia gave the undertaking that Absa would repay Kernsig in the circumstances specified in Visser’s letter, adding: ‘Ons bevestig derhalwe dat beide partye uitvoering sal gee aan die uitspraak van of die volbank of die Appèlhof’.

[31] On 27 June 2009 Visser paid Absa from her trust account the specified settlement figure of R1 507 268,90 and also paid an amount of R81 332,60 to the Land Bank which held a first mortgage bond in respect of its claim.

[32] The full bench appeal was heard in January 2010. The full bench delivered judgment on 8 February 2010, upholding the appeal on the s 38 point and substituting for Meer J’s order an order requiring Absa to cancel the bonds.

[33] Absa petitioned the SCA for special leave to appeal which was granted on 20 May 2010. The only point argued in the further appeal was s 38 of the Companies Act. On 31 May 2011 the SCA upheld Absa’s appeal and reinstated Meer J’s dismissal of Kernsig’s application. It did so on the basis that the s 38 point had not been properly raised in the trial court and that it could not be said that all the evidence relevant to the issue was before court.

[34] On 22 June 2011 Kernsig issued summons in the present case. The trial ran before Desai J over six days during May and September 2012. Owing to ill-health Mr Greyling did not testify. Kernsig’s witnesses were Jannie, his mother and Visser. Absa’s witnesses were Brand, Marais, various other bank officials and the conveyancer Nell. The case was then postponed to 4 December 2012 for argument. Desai J became indisposed and the parties agreed to argue the matter before another judge. Davis J heard argument on 17 January 2014 and delivered judgment on 17 March 2014. The present appeal is with his leave.

The pleaded claims

[35] Kernsig's claim 1 is for damages in the amount of R1 507 268,90, based alternatively on fraud, negligence and s 38 of the Companies Act.

[36] The pleaded fraud case, which is delictual, is in summary the following. As at December 2005 Kernsig was an existing Absa customer, with Mr Greyling and Jannie as its directors. Barnard had no authority to represent Kernsig. Brand was aware of these facts. Kernsig's purported application for a loan, the approval and implementation thereof, and the use of the covering bonds as security for the loan, were done by Brand and Barnard in a fraudulent way and with the intention to defraud Kernsig. The result was that on 27 June 2009 Kernsig had to pay Absa R1 507 268,90 in order to obtain cancellation of the bonds, something it did under protest and with reservation of its rights. Kernsig thus suffered damages in the said amount.

[37] The alternative case based on negligence, which is for breach of contract, is in summary that it was a tacit or implied term of the banker/customer relationship between Absa and Kernsig that the bank would not act negligently and to Kernsig's prejudice. Absa acted negligently in regard to Kernsig's purported application for a loan, the approval and implementation thereof, and the use of the covering bonds as security for the loan, because it failed to take any or proper steps to ascertain Barnard's authority, to direct queries to Kernsig's directors or to inform them of Barnard's application. The result was that on 27 June 2009 Kernsig had to pay Absa R1 507 268,90 in order to obtain cancellation of the bonds, something it did under protest and with reservation of its rights. Kernsig thus suffered damages in the said amount.

[38] The further alternative case based on s 38, which does not depend on a finding that Barnard was not authorized, is in summary the following. Absa knew of the terms of the share sale agreement and that the Kernsig loan would be applied to pay a portion of the purchase price. Kernsig's purported application for a loan, the approval and implementation thereof, and the use of the covering bonds as security for the loan, having been done to enable the Barnards to buy the shares in Kernsig,

contravened s 38. The purported loan of December 2005 was thus a nullity. However, because Absa refused to cancel the covering bonds, Kernsig on 27 June 2009 had to pay Absa R1 507 268,90 in order to obtain their cancellation, something it did under protest and with reservation of its rights. Kernsig thus suffered damages in the said amount.

[39] Kernsig's claim 2 concerns Absa's conduct in the previous litigation. Kernsig complaint is in summary the following. In its answering papers in the previous case Absa alleged, with reference to its records, that there existed a resolution by which Kernsig's directors had authorized Barnard to obtain the loan of December 2005. Absa also attached the loan contract, the heading of which referred to an authorizing resolution dated 22 September 2005. No such resolution existed. Absa's contrary allegation was false and was made to mislead the court. If Absa had not made the dishonest allegation, Meer J would have decided the application in favour of Kernsig. Because Absa perverted the course of justice, Kernsig suffered damages of R2 million. (At a pre-trial meeting Kernsig said that the figure of R2 million was an estimated amount. The actual damages were the costs incurred by Kernsig in the trial court, the full bench and the SCA. As noted, the parties agreed to separate merits and quantum in relation to claim 2.)

The pleaded defences

[40] In regard to claim 1, Absa denied that Barnard had lacked authority, pleading that he had actual or ostensible authority to represent Kernsig. Absa denied that Kernsig was a customer of the bank before the conclusion of the loan agreement but admitted that it was a tacit term of the new term loan that Absa would not act negligently in the execution thereof. Brand's alleged fraud was denied as was the allegation that Absa had been negligent.

[41] Regarding s 38, Absa denied that the proceeds of the loan were to be used by Kernsig to fund a part of the purchase price of the shares or to assist the Barnards in buying the shares. Absa denied that its loan to Kernsig was void by virtue of s 38.

[42] Absa pleaded, further, that Kernsig made the payment of 27 June 2009 pursuant to an agreement recorded in Visser's letter of 12 June 2009 and Heyns' reply of 19 June 2009 ('the June 2009 agreement'). In terms thereof the money was only repayable if Kernsig ultimately succeeded in the appeal, which it did not. Absa alleged that it was a tacit or implied term of the June 2009 agreement that, if Kernsig ultimately failed in the appeal, it would not be entitled to recover the money on any grounds. There was a general denial that Kernsig had suffered damages.

[43] In regard to claim 2, Absa denied that there had been no resolution authorising Barnard to represent Kernsig or that it had perverted the course of justice. Absa denied the alleged damages.

The court a quo's judgment

[44] Davis J dismissed claim 1 on the basis that, even if one assumed all else in its favour, Kernsig failed to prove its damages. The argument which he upheld, and which Mr Vivier repeated before us, was in essence the following. If Kernsig was not bound by the loan contract of December 2005 (either because Barnard lacked authority or because the loan contract was void in terms of s 38), Kernsig would then have been bound as surety and co-principal debtor for the partnership's liability to Absa which existed immediately prior to the implementation of the purported loan. Kernsig's financial position thus did not change for the worse.

[45] In the course of his judgment, Davis J found that by December 2005 Absa had called up the partnership's facilities. Even if this had not been done formally, the partnership would have understood that Absa was requiring repayment. In Davis J's view there could be no other explanation for the proposals which Mr Greyling made to Absa in mid-2005. Because the partnership's debt had become due and payable, Kernsig's accessory liability as surety was also due and payable as contemplated in clause 8 of the mortgage bonds.[1]

[1] Clause 8 provided that the secured amount would become due and payable inter alia if Kernsig failed to satisfy any obligation or liability on due date.

[46] In regard to claim 2, Davis J considered that, even if Absa had disclosed in the earlier proceedings that it could not find in its records a resolution dated 22 September 2005, there would have still been a factual dispute as to Barnard's authority, as indeed there still was during the trial in the present case. Since Kernsig elected to argue the application on the papers, Absa's alleged lack of candour in its opposing papers did not affect the outcome.

[47] On appeal Kernsig assails Davis J's reasoning on the damages issue and contends that the issues he left undecided should be resolved in its favour. Absa supports Davis J's reasoning and submits in any event that the claims were rightly dismissed on the other grounds raised by Absa.

Claim 1

Cause of action misconceived

[48] In my view, claim 1, as a claim for damages, is misconceived. Kernsig's claim has as its premise that Kernsig was not indebted to Absa in respect of the loan contract, either because Barnard lacked authority or because the loan was void in terms of s 38. This being so, Kernsig is said to have suffered damages because in June 2009 it paid an amount which it did not owe.

[49] If Kernsig had no indebtedness to Absa, how could the circumstances in which the purported loan contract came into existence and its purported implementation be an event causing Kernsig damages? If Kernsig suffered a 'loss', it was because it made payment to Absa in June 2009, and that is indeed the pleaded case. If Kernsig is right that it had no indebtedness to Absa, it could have suffered no loss prior to 27 June 2009, because ex hypothesi there was no liability negatively affecting its patrimony.

[50] The critical event was thus Kernsig's decision to pay the alleged claim on 27 June 2009. Kernsig made payment knowing (on its view of the facts) that Barnard had not been authorized to conclude the loan contract and that the purported loan violated s 38. There was no fraud, negligence or other illegality which induced the

payment. If Kernsig had been content to await the outcome of litigation, its only potential loss was if a sale of the farm after the completion of litigation yielded less than the sale which was on the table in June 2009. There was no pleaded case along those lines.

[51] The position confronting Kernsig in June 2009 was not novel. To remove an immediate obstacle, Kernsig wanted, if possible, to make provisional payment of a disputed debt pending resolution of the dispute, on the basis that it could recover the payment if the dispute was resolved in its favour. The legal position in such circumstances was laid down in the majority judgment of Nienaber JA in *Commissioner for Inland Revenue v First National Industrial Bank Ltd* 1990 (3) SA 641 (A). Ordinarily a person who pays a disputed debt without reservation is not entitled to recover the money because, there being no error, the condictio indebiti is not available. However, our law allows a condictio where payment has been made in circumstances similar to those described in English law as 'duress of goods'. Such a payment is regarded as not being voluntary. (For convenience I shall refer to this as the extended condictio.) Payment of a disputed debt might also be made under an arrangement in terms whereof the recipient agrees to make a refund in specified circumstances.

[52] Nienaber JA said (at 649G-J) that the word 'under protest' when making payment might, depending on the circumstances, fulfil one or more of several functions: (i) The words may serve as confirmation that the payment in the broad sense is not voluntary or is in the narrow sense being made under duress. The failure so to stipulate might support an inference that the payment was voluntary or that there was no duress. (ii) The words may serve to anticipate or negate an inference of acquiescence, lest it be thought that, by paying, the alleged debtor was conceding the quantum or validity of the claim. In these circumstances the reservation does not create a new cause of action but serves to preserve and protect an existing one. (iii) The words may serve as the basis for an agreement between the parties as to what will happen if the contested issue is resolved in the alleged debtor's favour. In such circumstances the agreement indeed creates a new and independent cause of action.

[53] Kernsig pleaded that the payment of 27 June 2009 was made 'under protest and with reservation of all its rights'. This is inaccurate. The terms on which the payment was made were set out in the correspondence previously mentioned.

[54] Be that as it may, Kernsig did not bring claim 1 within the scope of any of three possibilities mentioned in *First National Industrial Bank*. As to the first possibility, it is unnecessary to explore the scope of the extended condictio. This is because Kernsig did not plead a condictio. Its claim was for delictual damages.

[55] The court raised with Mr du Preez, during his argument in chief, the question whether, particularly in the light of the *First National Industrial Bank* case, Kernsig's formulation of the claim as one for damages was not misconceived. Mr du Preez asked to be permitted to deal with the issue in reply, at which point he submitted that it was open to us to uphold Kernsig's appeal on the basis of the condictio recognised in *First National Industrial Bank*. I do not think that this shift in stance should be permitted so late in the day. If the claim had been pleaded as a condictio, Absa would have been entitled to plead non-enrichment, in respect of which it would have borne the onus (*African Diamond Exporters (Pty) Ltd v Barclays Bank International Ltd* 1978 (3) SA 699 (A) at 713 *in fine*). Given the frame of the pleadings, Absa was not called upon to deal with non-enrichment.

[56] Furthermore, the question whether Kernsig made payment under pressure qualifying as duress for purposes of the extended condictio is not straightforward, and we have not had the benefit of full argument thereon. The extended condictio could perhaps in principle come into play where a mortgagee refuses to agree to cancellation of the mortgage except on payment of an amount disputed by the mortgagor, with the result that the latter cannot deal in his property except by paying the disputed amount under protest. Assuming that to be so, the facts of the present case are somewhat removed from the case supposed. Kernsig chose to negotiate the terms under which payment would be made. The question whether Kernsig would in any event have felt under compulsion to make payment under protest if Absa had rejected Visser's proposal was not explored in the evidence.

[57] As to the second of Nienaber JA's three possibilities, Kernsig did not, immediately prior to the payment, have an existing claim for damages, because, as I have explained, it had suffered no loss. A reservation of rights could not have created a cause of action for damages.

[58] As to the third possibility, there was indeed an agreement pursuant to which the payment was made. However, it is not an agreement whose terms need to be inferred from the general words 'under protest'; the terms were quite specific, being recorded in an exchange of correspondence between the parties' attorneys. Be that as it may, Kernsig did not allege a contractual entitlement to recover the money. Indeed, Kernsig did not even mention the exchange of correspondence in its particulars of claim.

[59] The fraud and negligence which Kernsig alleged to found its supposed damages claim were in truth irrelevant to any legal remedy it had. The alleged fraud and negligence concerned Barnard's authority. If Barnard lacked authority to represent Kernsig, any fault on Absa's part in treating him as authorized had no bearing on Kernsig's financial position, for the simple reason that Kernsig was not responsible for any debt purportedly incurred by Barnard in its name. If Absa wished to hold Kernsig liable, it was for Absa to prove Barnard's actual or ostensible authority. Things only changed when Kernsig wanted to have the bonds cancelled without awaiting the outcome of litigation. This brought into play the principles set out *First National Industrial Bank*.

[60] It is also difficult to understand on what basis the alleged contravention of s 38 could give rise to a damages claim. If the transaction contravened s 38, Kernsig's answer to Absa's claim was that the alleged loan contract was a nullity.

[61] One may speculate why Kernsig pleaded claim 1 as a damages claim. Kernsig's legal representatives may have feared that a repayment claim based simply on Barnard's lack of authority or the s 38 contravention, and the resultant absence of an indebtedness on Kernsig's part, would have been met by a plea that the claim was barred by the June 2009 agreement or that the issue was res judicata.

Whatever the reason, the claim for damages was in my view misconceived for the reasons previously stated.

Did Kernsig suffer damages?

[62] If the claim for damages was not in principle misconceived, I think Davis J was right to find that Kernsig failed to establish that it suffered a financial loss.

[63] It is necessary to remind oneself of the essence of the pleaded case, namely that Kernsig suffered a loss in June 2009 by paying an amount which it did not owe. The supposed relevance of Brand's alleged fraud or negligence was simply that, but for such fraud or negligence, Absa would not in June 2009 have been claiming that there was a liability which Kernsig needed to settle before it could obtain cancellation of the bonds.

[64] Whether the alleged fraud or negligence caused Kernsig to suffer loss requires one to determine what would probably have happened if Brand had not acted fraudulently or negligently - ie the difference between Kernsig's actual position as a result of the delict and the hypothetical position that would have obtained had the delict not been committed (*Transnet Ltd v Sechaba Photoscan (Pty) Ltd* 2005 (1) SA 299 (SCA) para 15; Van der Walt & Midgley *Principles of the Law of Delict* 3rd Ed para 143). The main difference between the parties on this issue in the court a quo and before us is whether or not, in the hypothetical position, one should regard Kernsig as liable to Absa as surety for the partnership's debt. Kernsig's case is that the partnership's debt was settled in December 2005 and that this fact cannot be thought away in the hypothetical position. If that is correct, Kernsig's damages would, as Kernsig asserted, be represented by the money it paid in June 2009.

[65] In contending that the settlement of the partnership debt was unaffected in the hypothetical position, Kernsig's counsel put the principles of privity of contract at the forefront of their argument. They submitted that Davis J had fallen into error by failing to distinguish between Kernsig's purported loan liability to Absa and the discharge of the partnership's liability to Absa. The fact that the purported loan contract with Absa was not binding on Kernsig (either because of Barnard's lack of

authority or the s 38 contravention) did not mean that the partnership's liability to Absa had not been extinguished in December 2005. They submitted that the proceeds of the unauthorized loan discharged the partnership debt, 'because a debt-extinguishing agreement, like any other agreement, may be concluded expressly or tacitly' and 'an acceptance thereof is evidenced by the corresponding credit and its non-reversal'.[2]

[66] This argument cannot be sustained. It is Kernsig's own case that, if Brand had not been guilty of the alleged fraud or negligence, the purported loan contract would not have been concluded. On the facts of the present case, thinking away the purported loan contract must inevitably be accompanied by thinking away the settlement of the partnership debt, because the latter would not have occurred but for the former. Kernsig's argument treats what happened as equivalent to (i) the payment of money by Absa to Kernsig in terms of the purported loan contract and (ii) the subsequent payment of the proceeds by Kernsig to Absa in discharge of the partnership's liability, these being independent matters. But this is not what happened. The loan proceeds were not placed at Kernsig's disposal. At least from the perspective of Absa and Barnard as the purported representative of Kernsig, all that happened was that Kernsig, which had hitherto been a surety for the partnership, became the principal debtor for the amount previously owed by the partnership, such primary indebtedness now regulated by the term loan contract in substitution of the terms which had hitherto prevailed between Absa and the partnership. No money changed hands. The substitution of Kernsig as the principal debtor was achieved by book entries. (Although not put in this way in the evidence, counsel agreed in argument that this is what had happened. There is certainly no evidence that cash was put at Kernsig's disposal.)

[67] Furthermore, the 'debt-extinguishing agreement', in the circumstances of the present case, would have had to be Kernsig's supposed payment of the loan proceeds to Absa with the intention of discharging the partnership's indebtedness. Apart from the fact that Kernsig in fact made no such payment, Kernsig's allegation that Barnard lacked authority to represent Kernsig demonstrates that Kernsig could

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[2] Para 6.8 of Kernsig's heads, citing *Absa Bank Ltd v Lombard Insurance Co Ltd* 2012 (6) SA 569 (SCA) para 18.

not have been party to a debt-extinguishing agreement. On Kernsig's main case, Barnard was not authorized to represent the company in receiving the loan proceeds or applying them in payment of the partnership's indebtedness. And on Kernsig's alternative s 38 case, Kernsig's purported payment to Absa in discharge of the partnership's indebtedness was void since it amounted to the giving by Kernsig of financial assistance to the Barnards in connection with a purchase of the Kernsig shares.

[68] In the circumstances, it is divorced from reality to speak of a debt-extinguishing agreement. One cannot drive a wedge between the arrangement by which Kernsig purportedly became the principal debtor and the arrangement by which the partnership was released from liability. Kernsig's contention that Absa was not entitled in December 2005 to debit Kernsig as the principal debtor for the amount hitherto owed by the partnership necessarily meant that the corresponding credit in favour of the partnership could not stand. Absa would not have allowed the one without the other.

[69] Immediately prior to the events of December 2005 Kernsig owned the farm but was liable as a surety to Absa in the amount of R1 079 096 (and was also liable to the Land Bank for R57 750). It is irrelevant to my mind whether or not the partnership's debt to Absa had been called up. It is enough that the partnership owed the money and that Kernsig was jointly and severally liable as surety. (To the extent relevant, the evidence supports a conclusion that the partnership debt was due and payable by the last quarter of 2005. Its overdraft facility had expired in August 2004. The overdraft had increased far above the last approved limit of R450 000 as at 30 April 2004. Absa had rejected the Greylings' proposals of mid-2005 and informed them that it would proceed with foreclosure on 12 October 2005.)

[70] It follows that the essential premise of Kernsig's case on damages was flawed. In the hypothetical position, Kernsig would as at December 2005 have been liable as surety for the same amount as was debited to it in terms of the purported new loan. Its hypothetical patrimonial position could not be assessed in disregard of this suretyship liability.

[71] Of course, it does not necessarily follow from this conclusion that Kernsig's hypothetical patrimonial position as surety would have been the same (ie as onerous) as its actual patrimonial position following the payment in June 2009 of its purported liability as principal debtor in terms of the new loan contract. If the partnership debt had not been discharged in December 2005, and if Kernsig as surety had eventually settled the partnership debt in June 2009 (instead of paying the purported debt under the new loan contract), the amount owing in June 2009 might have been more or less than R1 507 269. That would depend on the interest rate applicable to the partnership debt as opposed to the interest rate payable by Kernsig in terms of the new loan. If one were to apply the interest rate of 10,5% specified in the new loan to the partnership debt, the latter would have exceeded R1 507 269 by June 2009. The partnership debt, one can deduce from the documents, would have attracted interest at a higher rate, since the facility letter of August 2003 specified a rate of 1% above prime for the approved facility and up to 8% above prime for excesses,[3] whereas Kernsig's new term loan was priced at prime.[4]

[72] It might be said that, but for Brand's alleged fraud or negligence, Kernsig would have made alternative arrangements to settle the partnership debt, and would thus not have incurred interest from December 2005 to June 2009. Indeed, in their heads of argument and oral submissions Kernsig's counsel submitted that their client should at least be awarded damages equal to the difference between R1 137 750 (the sum specified in clause 3.2 of the November contract) and R1 507 269. Another possibility dealt with in argument was that, but for Brand's alleged fraud or negligence, the partners might have made alternative arrangements to settle their debt, as a result of which Kernsig would not have been called upon to settle the partnership debt at all. Yet a further possibility which I could mention is that, even if Kernsig had been required to settle the partnership debt (whether in December 2005 or June 2009), Kernsig as surety would have had a right of recourse against Mr Greyling and Jannie as principal debtors. If that right of recourse were fully recoverable, it might be false to equate Kernsig's pre-existing position as surety with its subsequent position as principal debtor.

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[3] Record 8/665.
[4] See the pricing column at record 8/694.

[73] The difficulty I have with these hypothetical possibilities is that they do not constitute Kernsig's pleaded case nor represent what Kernsig set out at the trial to prove. Kernsig's case was simply that its pre-existing liability as surety was irrelevant because the partnership liability had, come what may, been settled. If that premise is wrong, the alternative hypotheses justifying damages depended on proof as to what would probably have happened if the sale to the Barnards had been aborted in September 2005 following compliance by Brand with his alleged duties. Kernsig did not plead or set out to prove what would probably have happened in this eventuality. There was no evidence as to the true value of the farm, something which may have been relevant in the light of the Barnards' subsequent complaints. There was no evidence as to the state of the market in late 2005.

[74] However, and even if we were entitled to go into these matters with reference to the fragmentary evidence bearing upon them, I am not satisfied that Kernsig proved that the most probable scenario was one in which Kernsig would not ultimately have borne the cost of meeting the debt. They had been under financial pressure for some time yet no earlier sale of their shares or of the farm was concluded. The Greylings accepted Barnards' offer with alacrity, despite what strikes one as the relatively disadvantageous feature that a substantial part of the price was payable over 12 years. This does not suggest a strong selling market in the latter part of 2005.

[75] In order for Mr Greyling and Jannie to have settled the partnership debt without recourse to Kernsig, they would have needed to find a cash buyer for their shares. A purchase of the shares would not have been an attractive option for a notional buyer. Such a transaction carries with it the risk of undisclosed liabilities. Furthermore, if a purchaser had bought the shares rather than the farm, he would, because of s 38 of the Companies Act, not have been able to use the farm as security for any finance he needed to fund the purchase. That was precisely where, according to Kernsig, the Barnards and Absa went wrong.

[76] A more plausible transaction would have been the sale by Kernsig of the farm. However, the Greylings did not have time on their side. In the hypothetical scenario, Brand would have told them in mid-September 2005 what the Barnards

were trying to do. Even if the sale to the Barnards could then promptly have been aborted without any delaying disputes from the Barnards' side, it is difficult to imagine that an alternative sale of the farm could have been achieved by 12 October 2005, the foreclosure date threatened by Absa. It thus seems as likely as not that there would have been a forced sale at the bank's instance. It is difficult to say with any confidence how much would have been realised for the farm in a forced sale in late 2005, since there was no evidence directed to that question. One does not know whether such a sale would have realised, net of legal costs and auction charges, more or less than the amount Kernsig actually obtained by way of the May 2008 sale, namely R1,41 million.

[77] However, and regardless of the price Kernsig would have achieved for the farm in late 2005, Kernsig could not have given transfer without settling the partnership debt, since only by so doing could it procure cancellation of the bonds. It follows that on this scenario Kernsig would as surety have paid the partnership debt. The question then becomes whether Kernsig would have exercised a right of recourse against Mr Greyling and Jannie and whether they would have been good for the money. It is common cause that the partnership as such was unable to repay Absa and would thus also have been unable to repay Kernsig. Jannie said that his father personally had no other assets (ie apart from the farm) from which to pay Absa.

[78] As to Jannie's own financial position, he practised as an advocate in Pretoria. There was no realistic prospect of his buying the farm. His sister put the chances of such a purchase at nil. Whether he could have afforded to buy the farm is unclear. At one point in his evidence he said he might have been able to do so. Later he testified that in a discussion with Brand in June 2005 the latter asked why he did not buy the farm. Jannie replied that he could not afford to do so since he had just taken out a substantial bond with Absa in Pretoria. Jannie testified that Brand's reaction was to ask why Jannie assumed that Absa would not grant him another bond. In cross-examination Jannie said that he would have had to borrow the money but was creditworthy. Brand testified that Jannie told him that he had recently got divorced and that his financial position was poor. Brand said that the bank could never get Jannie to furnish his financial statements. It was put to Brand in cross-examination

that Jannie had got divorced in 1998. For the rest, Kernsig's counsel did not explore with Brand whether Jannie would have qualified for a further loan. One must bear in mind that, in the hypothetical scenario under consideration, Jannie could not have used the farm as security for a loan, since the farm would have been sold to a third party.

[79] But in any event, and on the facts of the present case, the notion that Kernsig would have enforced a right of recourse has an air of unreality about it, given that the partnership was in financial difficulty and that the partners, as Kernsig's sole shareholders, were able to determine whether or not Kernsig would exercise against themselves the right of recourse which in strict law it had. Mr Greyling could not repay anything and Jannie would have had to borrow money to do so. The overwhelming probability is that Kernsig would have suffered the loss of paying the partnership debt without recourse.

[80] In short, Kernsig's approach to damages amounts to this, that the company and its shareholders should be allowed to be in the position of having resold the farm for R1,41 million without the burden of the partnership debt, in circumstances where the farm was on the probabilities the only source from which the partnership debt could have been discharged. If it be assumed that the price of R1,41 million achieved in May 2008 was the price the farm would have realised in a forced sale in December 2005, Kernsig and its shareholders, viewed collectively, would – if they were awarded damages in the present case – receive R1,41 million without deduction, whereas in December 2005 they would only have received about R310 000 (R1,41 million minus the partnership debt of R1,1 million). On top of this windfall, they get to keep the Barnards' deposit of R150 000 and the two annual instalments totalling about R120 000 and whatever was paid for the farm movables. Perhaps the Greylings could have got more for the farm in December 2005 than R1,41 million. They may believe that the farm's value suffered because of the passing of time and mismanagement by the Barnards, and that they have thus not in truth made a windfall. However, that was not the case pleaded or proved.

Barnard's authority

[81] In view of the above conclusions, it is not strictly necessary to deal with the other issues relating to claim 1. However, in case the matter should go further it might be desirable to state our opinion on two of these other issues, namely Barnard's authority and s 38, particularly since a large part of the hearing in the court quo and in the appeal was devoted to the authority issue.

[82] As to Barnard's authority to represent Kernsig, I agree with Mr Vivier that in the particular circumstances of this case the onus rested on Kernsig to prove that Barnard lacked authority. This is a consequence of the manner in which Kernsig framed its claim, namely as one for damages. Its case was in essence that Absa, represented by Brand, knew that Barnard lacked authority (fraud) or could by taking reasonable care have established that Barnard lacked authority (negligence). On the assumption that a claim for damages was not altogether misconceived, Kernsig undoubtedly bore the onus of proving the alleged fraud or negligence. It could not discharge that onus without proving that Barnard in fact lacked authority. Otherwise, as the Appellate Division observed in a different context, the onus of proof in respect of the same factual matrix would rest simultaneously on the plaintiff and the defendant.[5]

[83] In my view, the answer to the question whether Barnard had authority depends on whether Mr Greyling and Jannie signed a resolution dated 22 September 2005. The critical question is thus whether Kernsig proved that such a resolution was not signed. It is a perplexing issue. The court is faced with two conflicting versions. Brand said that he drafted the resolution, discussed it with Jannie telephonically and with Mr Greyling in Vredendal on 22 September 2005 and obtained their approval. He then sent it to Pretoria for signature by Jannie. When the resolution arrived back in Vredendal, Mr Greyling came in to sign it. Jannie denied having signed any resolution apart from the one he drafted on 29 November 2005. Visser said she had no knowledge of any such resolution and that Jannie and her father would not have signed it without referring it to her.

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[5] *S v Barnard* 1986 (3) SA 1 (A) at 8E-I.

[84] The manner of resolving factual disputes arising from irreconcilable versions was stated thus by Nienaber JA in *Stellenbosch Farmers' Winery Group Ltd & Another v Martell et Cie & Others* 2003 (1) SA 11 (SCA) para 5:

'To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the *onus* of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.'

[85] Apart from the fact that Davis J did not deal with the disputed authority, he did not have the benefit of seeing the witnesses. The impression made by the witnesses and their demeanour are thus not available to assist in resolving the factual dispute.

[86] In regard to the inherent probabilities, the aspects raised by Kernsig in favour of its version include the following: (i) Absa failed to produce the resolution. Although the fire in August 2009 which destroyed many of Absa's records might have been an explanation for such failure at the trial, it could not explain Absa's failure to attach the resolution to the opposing papers filed in July 2008. The inference is that the resolution never existed. (ii) In terms of the sale agreement, it was the Barnards, not Kernsig, who had to take over the partnership debt. (iii) Since the Greylings wished

to be completely free of the Absa debt, it would not have made sense for them to permit Kernsig to be used, at least not prior to the transfer of the shares to the Barnards. (iv) Given how cautious Jannie was in drafting the resolution of 29 November 2005, it is unlikely that he would have signed an unqualified resolution authorising the term loan.

[87] As against this, Absa points to the following: (i) Since an authorising resolution was a standard requirement, and since its existence needed to be verified by officials other than Brand, he would not have promoted the new loan in the absence of a resolution. (ii) Brand had nothing to gain by supposedly defrauding Kernsig or his employer into thinking that a signed resolution existed when to his knowledge it did not. (iii) Contemporaneous internal bank emails show that a signed resolution dated 22 September 2005 indeed existed. (iv) The Greylings did not insist, in late 2005/early 2006, that the covering bonds be cancelled. This showed, so it was argued, that they knew that the bonds had to remain in place to secure the new term loan.

[88] Absa's inability to produce the resolution is an important point in Kernsig's favour. However, the matter must be considered in the light of all the evidence. Many of Absa's records were destroyed in the well-known fire of August 2009. As to the earlier litigation, Kernsig's application was brought as one of urgency. Absa's attorney in the litigation, Mr AZ van der Merwe, testified that the challenge to Barnard's authority came in the replying affidavit and that he was not able to procure a copy of the resolution from his client in the period which intervened between the filing of the replying affidavit (19 September 2008) and the hearing before Meer J (9 October 2008). He confirmed that he himself never saw the resolution.

[89] As to the fact that the sale agreement required the Barnards, not Kernsig, to take over the partnership debt, and that the Greylings wished to be completely free of the Absa debt, I suspect that all of this might have appeared much more plainly and forcibly to Jannie and his sister when things went wrong in February 2008 than it did at the time the Barnards applied for the new term loan in September 2005. The context of the Barnards' loan application to Absa was the September contract, not the November contract. The later version was executed on the advice of Kernsig's

auditor after he pointed out that the Absa debt was in the name of the partnership and that Mr Greyling, not Kernsig, owned the movable assets. Although the September contract is not a model of clarity, Barnard appears to have drafted it in the belief that Kernsig was the principal debtor in respect of the amounts secured by the bonds. The company was described as trading as Karoovlakte Boerdery. Clause 14.3 required the Barnards to procure the release of Mr Greyling and Jannie as sureties for the company. (In his oral evidence Jannie said that he had signed surety inter alia for Kernsig.) The agreement made provision for the sale of farming movables supposedly belonging to Kernsig. Barnard could only have come under the misapprehension that Kernsig was the primary debtor by virtue of his discussions with Jannie. The latter signed the September contract without demur.

[90] It thus appears quite possible that Jannie, and thus the Barnards, may have been under the misapprehension, in September 2005, that the Absa debt was in Kernsig's name and that Jannie and his father were liable for it as sureties. If that was Barnard's belief, it is not at all surprising that he should have made the new term loan application in Kernsig's name. The purpose of clause 14.3 was to disclose that Kernsig had an estimated liability of R1 million and to require the Barnards to procure the release of Mr Greyling and Jannie as sureties for that debt. By obtaining a new term loan for Kernsig, the Barnards put Kernsig's debt on a satisfactory footing from their perspective as its new controllers (they would not have wanted to buy a company whose overdraft was immediately payable) and at the same time obtained Mr Greyling and Jannie's release (since their suretyships were not among the securities required for the new loan). If Jannie was likewise under this misapprehension, I do not find it altogether implausible that he would have signed a resolution authorising the new loan. Kernsig would not have been undertaking a new debt; its existing debt would simply be reorganised, and he and his father would be released (as indeed happened).

[91] By 29 November 2005, when Jannie drafted the resolution of 29 November 2005, he seems to have become apprehensive that something might go wrong with the Barnards. They had not yet signed the documents for registering the bonds over the Wilderness properties. The qualified terms of the later resolution might have been designed to place pressure on the Barnards. The inferences to be drawn from

the document are somewhat equivocal. Mr Vivier suggested that the reference to an 'additional' loan showed that Jannie was aware of the existing approved loan, namely the new term loan. Jannie testified that, according to Brand, the purpose of the R200 000 loan was for improvements. The loan was 'additional' in the sense of being additional to the loan which, so he believed, the Barnards (not Kernsig) had already obtained for R1,1 million. This was challenged in cross-examination. He was taken to his replying affidavit in the earlier proceedings where, in answer to an allegation by the bank that the additional bond of R200 000 had been required because the existing bonds were not sufficient to cover the whole of the partnership debt, Jannie said that Kernsig had no details regarding the further loan and did not know whether it related to discharging the partnership debt.

[92] The existence of a resolution dated 22 September 2005 is supported by certain contemporaneous documents. On 8 December 2005 Ms le Roux, an Absa official in Cape Town whose responsibilities included the compiling of loan contracts, emailed Brand's assistant in Vredendal, Ms Kotze, attaching the draft loan contract and asking Kotze to add by hand, in the heading of the contract after the words 'kragtens 'n direksiebesluit', the further words 'geneem op 22 September 2005'. Le Roux testified that these words had to be added by hand because the electronic template did not have enough space for the insertion. She said that, if the borrower was a company, she had to be given a signed resolution and that she would not have asked Kotze to make the insertion unless she (Le Roux) had seen a signed resolution with that date. Kotze confirmed that she would not have sent the loan approval to Le Roux without a signed resolution.

[93] After the contract (including the said insertion, made by Kotze) had been signed in Vredendal by Barnard and the bank officials, it was sent electronically back to Cape Town where Ms Bridgens, who was responsible for validation, had to satisfy herself that everything was in order. On 9 December 2005 she emailed Kotze, stating that the loan contract 'and resolution' were 'in order'. She noted, however, that the bank's records did not reflect the powers of the directors. She asked Kotze to forward to her a copy of Kernsig's memorandum and articles of association so that she could update Absa's records. She also said that she would need a letter from the attorneys confirming that the further covering bond for

R200 000 had been registered. The proceeds of the loan were not to be paid out until these matters had been attended to.

[94] The loan was in fact implemented without registration of the further bond for R200 000. However, the emails written by Le Roux and Bridgens and Kotze's handwritten insertion provide strong contemporaneous evidence that a directors' resolution authorising the loan contract and bearing the date 22 September 2005 existed. Unsurprisingly Le Roux, Bridgens and Kotze could not independently recall the resolution but it is improbable that they would have acted as they did if there was not a resolution purporting to have been signed by Mr Greyling and Jannie, who were the persons reflected in the bank's records as the company's directors. Kernsig's main criticism was directed at Brand. The Cape Town officials were strangers to the parties involved and would have had no reason to allow Absa to commit itself to a loan contract which was not supported by a directors' resolution.

[95] If Le Roux, Bridgens and Kotze saw a signed resolution, acceptance of Kernsig's version would entail that the signatures of Mr Greyling and Jannie were forged. Brand would on this hypothesis have had to be a party to the forgery, because his version as to how the resolution came to be signed did not leave open as a possibility that someone else, for example Barnard, had forged the signatures and duped Brand. A finding of forgery against Brand would be a very serious matter, as is the fraud alleged by Kernsig. Although such conduct in a civil case need only be proved on a balance of probability, the court takes into account that conduct which is immoral or criminal is inherently less probable than conduct which is not (*Gates v Gates* 1939 AD 150 at 155), so that fraud is not 'lightly inferred' (see *Loomcraft Fabrics CC v Nedbank Ltd & Another* 1996 (1) SA 812 (A) at 817G-H).[6] Brand had no particular reason to advance Barnard's interests at the expense of his employer (the bank) or at the expense of Mr Greyling and Jannie. He had no existing relationship with the Barnards. Brand seems to have been fairly sympathetic to the plight of Mr and Mrs Greyling. He may well have wanted the transaction to go through so that they could be relieved of the partnership debt. However, any attempt on his part to trick his employer into believing that Barnard

[6] See also, eg, *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 27.

was authorized to represent Kernsig would have been foolhardy. The officials in Cape Town would have expected to see an authorising resolution; that was standard procedure.

[96] Kernsig argued that Brand presented the loan application in a misleading fashion so as to conceal from the Cape Town head office that Barnard himself did not qualify for a loan in his own name given his personal financial position. This argument is without merit. The application was clearly presented as an application in Kernsig's name, albeit as part of the Barnard group. Marais confirmed that he understood it as such.

[97] Jannie's evidence as to when, in the context of the Barnard transaction, the covering bonds would have been cancelled was not altogether consistent. However, I do not think that much can be inferred from the Greylings' failure promptly to insist on the cancellation of the bonds. If they genuinely believed that the liability to Absa had been discharged and were unaware of the new term loan, the continued existence of the bonds would not have prejudiced them.

[98] As noted, Brand claimed to recall certain details of the circumstances in which the alleged resolution of 22 September 2005 was signed. Although Kernsig's counsel submitted that there were discrepancies between Absa's trial particulars, what was put to Jannie in cross-examination and what Brand testified, his version was in general consistent, namely that he spoke with Jannie and Mr Greyling on 22 September 2005, that he sent the resolution to a nearby Absa branch in Pretoria, that the signed resolution was received back at Vredendal in an envelope; and that Mr Greyling then called at the Vredendal branch to sign. Kernsig's counsel submitted that Brand's version as put to Jannie was to the effect that Jannie was leaving town on holiday whereas Brand later testified that Jannie was supposedly on his way to visit a family member who was ill. Both reasons seem to have been true: Jannie testified that on the morning of 22 September 2005 (a Thursday) he and his family left Pretoria to travel to Springs to visit a family member who was unwell, that early the following morning he drove his family to Margate for a holiday, and that he flew back to Pretoria on Monday 26 September 2004, leaving again on Wednesday for a golf trip. Brand did not say that the resolution was in fact signed on 22

September 2005 – he said that he inserted that date because it was the date on which he spoke with both directors and obtained their approval. The resolution might have been signed by Jannie a few days later. It is not unknown, though obviously undesirable, for resolutions to bear dates differing from the actual date of signature. According to Jannie, for example, his father only signed the resolution dated 29 November 2005 sometime in December.

[99] I do not wish to suggest that it is more likely that Jannie would have lied about the resolution than Brand. As I have said, the whole issue is perplexing. The incidence of onus is in my view decisive. Kernsig did not in my opinion prove on a balance of probability that the resolution was not signed.

Section 38 of the Companies Act

[100] I can deal more briefly with the alternative basis of claim 1, namely the alleged contravention of s 38 of the old Companies Act. Section 38(1), in the form in force at the relevant time, read thus:

'No company shall give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares of the company …'

[101] The statutory prohibition comprises two main elements, namely (i) the giving of financial assistance and (ii) the purpose of such assistance. In the latter regard, it is the direct object of the assistance which is crucial. Financial assistance given for a legitimate direct object is not rendered unlawful merely because such financial assistance was incidental to or had some connection with a purchase of shares (see in general *Lipschitz NO v UDC Bank Ltd* 1979 (1) SA 789 (A) at 799A-F and 804D-805B; *Gardner & Another v Margot* 2006 (6) SA 33 (SCA) para 47).

[102] The loan contract between Absa and Kernsig, while not itself the giving of financial assistance within the meaning of s 38(1), might nevertheless have been unlawful on common law principles if its purpose was to enable Kernsig to give financial assistance in contravention of s 38(1) (Christie *The Law of Contract in*

South Africa 6th Ed at 399-401). The first question is thus whether Kernsig gave the Barnards unlawful financial. This must be decided on the basis that Kernsig was duly represented by Barnard. Kernsig, represented by Barnard, knew that in terms of the November contract the Barnards had to take over the partnership's indebtedness to Absa. Although Kernsig was already liable as a surety, its conduct in accepting liability as the primary debtor constituted the giving of financial assistance. Effectively Kernsig rather than the Barnards paid this part of the purchase price, and that was Kernsig's direct purpose. Mr Vivier's argument, which focused on Absa's purpose, misconceived the enquiry by focusing on Absa rather than Kernsig.

[103] The next question is whether the loan contract between Absa and Kernsig was invalid because its purpose was to enable Kernsig to do something unlawful. Absa knew about the sale of the shares and that the loan contract was directed at enabling the Barnards, through Kernsig, to obtain the partnership's release. Not only was Absa aware of such purpose; it controlled and gave effect to the purpose by crediting the partnership and debiting Kernsig. Indeed, it was a condition of the loan that the proceeds should be so applied. The loan contract could not have been performed except in a manner which involved illegality.

[104] I thus consider that the loan contract was unlawful. But this does not in itself give Kernsig a claim for damages. The legal effect of s 38 (apart from criminal liability) is to render invalid the giving of financial assistance. The section does not confer a right of action for damages. Conceivably a person who has caused a company to give unlawful financial assistance may be delictually liable for damages thereby caused to the company but the company would then have to allege and prove that the person acted with dolus or negligently and in breach of a legal duty owed to the company. Kernsig did not allege that Absa acted fraudulently or negligently in Kernsig's giving of unlawful financial assistance. Brand and Marais were not cross-examined as to their knowledge of s 38. And I am by no means satisfied that a company is entitled to expect its bank to advise it on the potential application of s 38.

Claim 2

[105] I do not think the second claim has any merit. I accept that, when Absa filed its answering papers in the previous case, it was aware that it had not as yet been unable to locate the resolution of 22 September 2005. The resolution would have been attached if it had been found. It would obviously have been better for Absa squarely to state that it could not locate the resolution but Meer J was most unlikely to have been misled. In any event, it cannot be said that she would have found in Kernsig's favour if Absa had expressly stated that the resolution could not be found. Absa would still have alleged, as indeed it did in the trial, that such a resolution had been signed. In para 21 of her judgment Meer J said that Absa's failure to annex the resolution did not negate the factual disputes. Even after all the evidence in the present case, it has been no easy matter to decide whether or not the resolution was signed.

Conclusion

[106] For these reasons the appeal is dismissed with costs.

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BOZALEK J

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ROGERS J

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MANTAME J

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