THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 1334/2019

In the matter between:

FIRSTRAND BANK LIMITED **APPELLANT**

AND

THE SPAR GROUP LIMITED **RESPONDENT**

Neutral citation: *FirstRand Bank Limited v The Spar Group Limited* (1334/2019) [2021] ZASCA 20 (18 March 2021)

Coram: CACHALIA, DAMBUZA and MAKGOKA JJA and SUTHERLAND and UNTERHALTER AJJA

Heard: 9 November 2020

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, and by publication on the Supreme Court of Appeal website and release to SAFLII. The time and date for hand down is deemed to be 10h00 on the 18th day of March 2021.

Summary: A bank which is aware that funds deposited by a third party into its client's bank account to which the client has no legitimate claim may not appropriate such funds on the premise that the client has a claim to the funds and use them by way of set off to discharge the client's debt to the bank – A bank which is aware that a third party has deposited funds into its client's bank account and is aware that the client has no legitimate claim to the funds is under a duty to take steps to prevent harm to the third party by way of the misappropriation of those funds by its client – the bank's failure to prevent harm to the third party renders it a co-wrongdoer with the client for the theft.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Baqwa J, Madiba J concurring and Thlapi J dissenting sitting as court of appeal):

The appeal is dismissed with costs including the costs of two counsel.

JUDGMENT

Sutherland and Unterhalter AJJA (Cachalia, Dambuza and Makgoka JJA concurring)

Introduction

[1] This case is about banks, their customers, and third parties who have put money into the customers' accounts. It considers two interrelated questions. First, can a bank set off the customer's debts to the bank against amounts standing to the credit of a customer, if the bank knows that a third party has a claim to these funds? If not, what claim does the third party have against the bank? Second, does the bank owe a legal duty to the third party if the bank allows the customer to utilise the money deposited by the third party into the customer's account, if the bank knows the customer has no valid claim to those funds?

[2] The respondent, Spar Group Ltd (Spar), conducts business as a franchisor of the Spar brand of retail grocers and the Tops brand of liquor vendors. Spar fell into a dispute with one of its franchisees, Umtshingo Trading 30 (Pty) Ltd (Umtshingo),

whose controlling mind was Mr Arnaldo Paolo (Mr Paolo). The Umtshingo business, in terms of the franchise agreement, operated three outlets. For each outlet, Umtshingo kept a bank account with the appellant, Firstrand Bank Ltd, which trades as First National Bank (FNB or the Bank), at its Nelspruit branch. One outlet, a grocer, styled Bella Donna Kwik Spar, was owned by a close corporation, Central Route Trading 30 CC (Central Route), the sole member of which was Mr Paolo. Despite this distinct corporate identity, the franchise agreement regulated all three outlets as a single business conducted by Umtshingo, and Central route 30 CC was, *de facto*, a division of the whole business – Umtshingo. Its account, in the name of Central Route, was referenced as 323. The other two outlets were liquor stores, Bela Donna Tops, whose account was referenced as 656, and Sonpark Tops, whose account was referenced as 309. These latter two accounts were held in the name of Umtshingo.

[3] Spar held a notarial bond over the assets of Umtshingo. Umtshingo defaulted on its obligations under the franchise agreement. In consequence, Spar obtained a provisional order from the local magistrates' court perfecting its security. The terms of the notarial bond permitted Spar to take over the Umtshingo businesses and run them for its own account. Armed with the provisional order, Spar confronted Mr Paulo with the stark option of closing the shops or allowing Spar to trade for its own account in terms of a 'short term business lease', during the interim period, until a final order to perfect the bond was granted. Mr Paolo was keen to avoid closure, supposedly to escape a loss of business reputation, and acquiesced, save in one important respect, to the terms of a draft agreement which regulated this arrangement. The single reservation was that Mr Paolo refused to de-link the speedpoint credit card devices of the stores from the bank accounts of Umtshingo. It is this resistance that is the *fons et origo* of the controversy in this case.

[4] Spar ran the outlets on the terms of the unsigned draft agreement and in the course thereof, credited the stock on hand to Umtshingo and brought in new stock. Cash receipts were deposited into a Spar account. However, the speedpoint credit card devices in use, which facilitated electronic deposits of revenue directly into Umtshingo's designated accounts, remained in use. Spar continued to allow revenue earned from its trading to be deposited into these three accounts, albeit reluctantly, whilst taking several steps to try to get Mr Paolo to consent to a change or to get FNB to redirect the revenue to a Spar account. Spar's failure to achieve either of these objectives resulted in substantial sums flowing into Umtshingo's accounts.

[5] Mr Paolo therefore retained control over the accounts and, during the period of Spar's trading, effected substantial disbursements out of two of these accounts, namely account 656 and account 309. Moreover, the debit balances (in respect of Umtshingo's overdraft liability, its debts to FNB in respect of a loan and a guarantee paid by FNB to Spar) in two of the accounts, ie account 323 and account 309, were purportedly extinguished by FNB applying set off against the credits in these accounts that derived from the revenue generated by Spar and deposited into the accounts.

[6] The upshot was that Spar contended that FNB ought not to have allowed disbursements to be made at Mr Paolo's behest because Umtshingo had no rightful interest or claim to the funds, and that FNB, furthermore, was not entitled to set off Umtshingo's debts in respect of which Spar had a quasi-vindicatory claim.

[7] The four claims made by Spar were as follows:

(a) Claim 1: R1,343,422.92 used by FNB to discharge the overdraft in account 323.

(b) Claim 2: R2,039,948.68 disbursed by Paulo from account 655.

(c) Claim 3: R1,358,890.90 disbursed by Paulo from account 309.

(d) Claim 4: R898,744.92 used by FNB to discharge the debts due to it by Umtshingo. FNB alleged that this claim had prescribed by the time that it was added to the other claims, by way of an amendment made by Spar to the pleadings on 6 March 2013.

[8] FNB's defence was that it had lawfully appropriated the sums claimed because these were amounts due and payable to FNB. It was common cause that Umtshingo was indebted to FNB in the amounts alleged by FNB and that FNB did not obtain the permission of Spar to effect the set off of Umtshingo's indebtedness to the Bank. The quantum of Spar's claims was not in dispute.

[9] The issues that therefore arose for decision were these:

(a) Was FNB entitled to set-off the credits that derived from the funds deposited into the accounts by Spar against Umtshingo's debts owing to FNB?

(b) Was FNB liable in delict to Spar for the losses it suffered when Mr Paulo caused sums to be withdrawn from these accounts, which funds derived from deposits into the accounts by Spar, and to which neither Mr Paulo, nor Umtshingo, had any rightful interest or claim?

(c) Had Claim 4 prescribed?

[10] Spar sued FNB in the Gauteng Division of the High Court. At the conclusion of the trial, claim 4 was dismissed because it was held to have prescribed, and the other three claims were dismissed on the basis that FNB had not done anything to incur liability to Spar. On appeal to the full court of the Gauteng Division, these results were reversed by a majority decision. Spar was held to have proven its case in respect of all four claims. The dissenting judgment endorsed the trial court's

holding, but did not deal with the prescription issue. It is the majority judgment of the full court that is on appeal to this Court.

[11] To make sense of the evidence that gave rise to the issues, it is necessary first to examine the course of events in some detail. The only witnesses to testify at trial were three Spar employees. Much of what occurred was contemporaneously captured in prolific correspondence, among the several actors and their attorneys. The evidence adduced, some six years after the events, was often little more than a running commentary on the correspondence and a spirited but valueless exchange with counsel about the what-ifs of those events.

The narrative of material events

[12] The appropriate place to begin is on 1 February 2010. Umtshingo was in financial trouble. On that date it reached agreement with FNB to reorganise its credit facilities to alleviate the distress. Umtshingo was granted a loan of R2.1m. Central Route was granted an overdraft of R200,000. These arrangements were concluded between FNB and Umtshingo. Spar was neither privy thereto, nor informed of these facts. In addition, FNB, on Umtshingo's behalf, had provided Spar with a performance guarantee of R400,000, an additional burden on the business, if it were to be called up.

[13] Spar held a general notarial bond over the assets of Umtshingo. Spar, in response to a default by Umtshingo, which was in arrears in the sum of R2,539,408.14, on 5 March 2010, obtained a provisional order, perfecting its security. On 8 March 2010, Spar took physical control of the business. The return

day was 1 April, 26 days hence. This date, as it turned out, was extended and then again extended.

[14] Spar, as a consequence of assuming beneficial control over the trading activities of Umtshingo, registered the Umtshingo businesses for VAT and became liable as a vendor. Mr Paolo was asked to authorise a delinking of the speedpoint credit card devices from Umtshingo's accounts so that the revenue would flow to a Spar account. Mr Paolo refused to do so because he intended to challenge the provisional order, although the terms of the 'short term business lease' held out no ultimate harm to his interests, as it provided for the net profit made by Spar to be credited against Umtshingo's indebtedness to Spar, regardless of the final outcome of the application to perfect the notarial bonds. FNB also refused to change the bank account linked to the speedpoint devices, unless Mr Paulo agreed thereto, or a court order was presented to it. Of course, until the provisional order perfecting the bond had been made final, there was no relevant order to present to FNB. What, then, was to regulate affairs in the interim?

[15] Axiomatically, Spar risked the revenue of its own trading being diverted. This was obvious because Mr Paulo alone could exercise control over the Umtshingo accounts. This was appreciated by Spar's management. Rob McLagan, the Branch Manager of FNB, Nelspruit, got wind of the takeover before any formal communication from Spar. On 9 March, he emailed Lorraine Hopley, Spar's Lowveld Divisional Credit Manager to ask what was afoot. Ms Hopley replied to Mr McLagan that Spar had 'perfected [its] notarial bond on an urgent basis'. Further, she stated that the three outlets were henceforth to be run by Spar for its own account. She reminded Mr McLagan of the R400,000 guarantee that would be called up as soon as the final order was to hand. She expected the order to be obtained in 'early

April'. Also, she expressed scepticism that Mr Paolo was 'likely to survive', financially, alluding to the prospect of the liquidation of Umtshingo.

[16] Mr McLagan was alarmed. FNB was then exposed in respect of account 323 in the amount of R1,343,422.92 and in respect of account 309 in an amount of R292,140.84.[1] Mr McLagan thereupon asked why the notarial bond was invoked because, as regards FNB, Umtshingo was not delinquent. Hours later, Ms Liezel van der Walt, Spar's accountant,[2] emailed FNB to ask for a change to the bank details and requested that she be informed of the bank's procedure so as to achieve this result. She alluded to two earlier instances, Longtom Spar and Silinda Spar, where, similarly, the businesses had been taken over by Spar, during an interim period until a final order was granted, and, as her email implied, FNB had changed bank accounts in those instances. The implication was conveyed that there was an expectation by Spar that such a change would be straightforward. It is not clear whether the two examples alluded to were businesses that banked at the Nelspruit branch of FNB of which, therefore, that branch would have had knowledge or whether they were examples of which it was taken for granted that the Nelspruit branch would have had knowledge because of the ostensibly informal relationship between Spar and FNB. Spar was itself a client account-holder of FNB at its Durban branch, a relationship which Spar thought was pertinent to its dealings in matters such as this.

[17] Mr McLagan alerted his senior staff to the Spar takeover. He had also spoken to Mr Paolo who had questioned the legitimacy and the legality of the court order

[1] The scale of the exposure compared to what was arranged on 1 February 2010 is unexplained.
[2] Ms Van der Walt was Mrs Streicher by the time she testified. Her name by which she was known at the time of the events is retained.

obtained from the magistrate.[3] Significant for the controversy, Mr McLagan noted his concern that '. . . we sit with an account where there is no income to service our facility'. Ms Grobler, the FNB Risk Manager, warned that because the client could no longer trade, '. . . we cannot allow any debits against the accounts'. Ms Grobler made two further remarks. First, she stated that she was irked by Spar acting against a franchisee without telling FNB, which was not in line with 'a franchise arrangement' between FNB and Spar. Plainly, she understood that a risk to FNB by a potential default of a client because of action taken by Spar was an event of which she expected prior notification. This suggests that Spar routinely knew with whom its franchisees banked and exchanged information about them. Second, she announced that she would take up this dissatisfaction with Spar's Franchise Specialist, Ms Ash Sodha. Ms Grobler reported the next day to Mr McLagan:

'I spoke to Ash . . . regarding our dissatisfaction surrounding the way Spar deals with distressed franchisees where FNB is also involved as a credit provider. . . The bank (who has marked unsecured facilities for the specific franchisee based on the Spar model) is then left with an unsecured exposure and no business to service the [debt?]'[4]

Plainly, the principal concern of the several FNB officials was the bank's risk.

[18] Meanwhile, Ms Hopley was in earnest pursuit of Mr Paolo's consent to delink the speedpoint credit card devices. On 11 March 2010, she emailed Mr Paolo's attorney, having previously sent a draft lease agreement for signature. She had also been present on 8 March when the seizure of the business was effected. At that time, she had spoken to Mr Paolo and his attorney about the 'short term business lease'. The draft agreement contained a consent to change the bank account. She warned Mr Paolo that a delay could result in the closure of the stores. In similar vein, on

[3] In due course Mr Paulo's skepticism about the perfection order was proven correct because it was dismissed on the grounds that the court that ordered it had no jurisdiction to do so.

[4] The last word of the sentence is obscured in the document in the record.

19 March 2010. Ms van der Walt emailed FNB with reference to an earlier oral request made on 12 March, reiterating the requirement to change the account. She also furnished the new proposed account details.

[19] It is notable that in this email from Ms van der Walt the three outlets were expressly mentioned and her request to change the details of the bank account was couched as if a *single bank account* was in issue. It is common cause that at this time Spar was unaware that there were three distinct bank accounts; that FNB had not divulged their existence; and that Spar was under the incorrect impression that all revenue was being channelled into the 323 account. FNB's failure to alert Spar is a central aspect of the dispute.

[20] Four days later, on 23 March 2010, Ms van der Walt was still chasing after a change of the bank accounts. She undertook to provide a copy of the provisional order which she hoped would be 'sufficient proof' to have the bank account details changed. She supplied the provisional court order. Soon afterwards, she reported to Ms Hopley that FNB had insisted on a final order and that a request to change the details would only be considered thereafter. Ms Hopley then emailed Mr McLagan. She stated that the predicament was plain: if the account was not changed, the revenue would have to be refunded to Spar. She then asked:

'Please can you at least give me the assurance that [Paolo] does not have access to this money in the interim as he will have to pay us back irrespective of what happens on 1 April. If necessary, could you put a hold on this money in the account until the matter is resolved.'

[21] Mr McLagan answered:

'The belladonna *account has been frozen* and only pre-funded cheques are being paid. Pre-funded means a deposit out of the *client's own external funds*. . . .' (Emphasis added.)

[22] What was meant by client's 'own external funds' was not further elaborated upon. However, it may be reliably surmised that such a remark could not have been understood to include the revenue generated by Spar. The theme of a 'frozen' account came up again in relation to some cash takings that were deposited, mistakenly, into the 323 account. On 31 March, Ms Hopley raised this error with McLagan and asked that the sum be transferred to Spar's account, alternatively, to 'freeze' the sum pending the final court order. Mr McLagan refused. On 31 March he emailed Ms Hopley to advise that this could not be done without Paulo's consent. He added:

'I do reiterate that the account is frozen and no day-to-day payments are permitted without prior approval or against confirmation of a specific deposit from Paulo to cover the payment.' (Emphasis added.)

These assurances by Mr McLagan were significant communications and are pertinent to understanding Spar's conduct in tolerating the revenue flows into Umtsthingo's accounts.

[23] At about this time, the exact time being uncertain, Spar put up a sign in the outlets saying that credit card payments would not be accepted. Mr Paolo objected and insisted the ban be lifted, supposedly to preserve his business reputation. Spar acquiesced. Nevertheless, the saga of Mr Paulo's refusal to change bank accounts persisted, with his attorney as spokesman. On 7 April, the attorney, in an email to Spar's attorney, claimed that Mr Paolo's continued refusal was based on FNB's insistence. This finger-pointing between Mr Paolo and FNB continued.

[24] On 24 May 2010, Spar called in the R400,000 guarantee from FNB. This triggered an email from Mr McLagan to Mr Paolo, bemoaning the delays in finalising the perfection order. Significantly, he stated:

'The fact that Spar Group has taken over the daily management of the franchisee and the business is for all intents and purposes no longer under your control, the bank is currently extending facilities to an entity with no trading capability. This position in itself holds risk for the bank due to the absence of a business case to support the lending.' (Emphasis added.)

Mr McLagan thereupon noted an exposure of R575,334.13 on the Central Route account 323. He demanded a reduction of R100,000 per month. In respect of the Umtshingo accounts, he demanded rectification of the default on the loan in a sum of R21,802.23 by 31 May. It is significant that at this date, two and a half months after Spar had taken over the outlets, the exposure of FNB on account 323 had reduced from R1,343,422.92, on 10 March, to R575,334.13. The only, and obvious, source of funds to reduce this exposure was the earnings of Spar.

[25] Not unsurprisingly, Spar was interested from the outset to know the state of 'the account'. Mr McLagan refused to disclose any details. On 27 May 2010, he emailed Ms van der Walt and said this:

'The speedpoint monies are banking into the account which is currently blocked. Unfortunately I am unable to give you details on the amount or balances in the account in terms of client confidentiality until a final order is granted and we are instructed to do so in terms of the law.' (Emphasis added)

Significantly, Mr McLagan alluded to 'the account', singular, thereby concealing the existence of two other accounts into which Spar-generated revenue was steadily flowing, and leaving Spar under the impression only one account existed.

[26] On 2 June 2010, a communication from FNB's Manager, Customer Service, Speedpoint, in the Corporate and Commercial Banking office in Pretoria, to Mr McLagan, advised him of Spar's request to change the bank accounts. Mr McLagan queried the legitimacy of this request. Mr McLagan then emailed the Risk Manager, Ms Grobler, to question whether Spar could just introduce new

speedpoint accounts '. . . while the business is still technically that of Mr Paolo?' He opined that despite Spar running the store, Mr Paolo should consent or an 'order of court should be perfected'. This view was then backed up by Ms Grobler, acting on the advice of 'Corrie', that no amendments should be made without Paolo's consent or pursuant to a court order.

[27] Shortly thereafter, on15 June 2010, Ms Hopley sought clarity that the account had been frozen from 8 March and not 24 March. Mr McLagan evaded a direct answer. He stated that he had no formal notification on 8 March. He omitted reference to the email of 10 March notifying him of Spar's takeover. On 17 June, Ms Hopley reminded Mr McLagan of the 10 March communication. Mr McLagan again evaded an answer. He regurgitated his stock reply about being unable to do anything until a final order was presented. He added that on 10 April, a month after his first knowledge of the takeover, all limits on the account, ie, making payments from the account dependent upon external sources, had been lifted. Moreover, he added:

'We have no control over credit balances which the client is able to transfer.'

[28] The very next day 18 June 2010, Spar's attorney ceased to beg Mr Paolo to consent to an account change, more than three months after first asking. An urgent application was threatened. Mr Paolo's attorney again obfuscated and blamed the bank for the refusal and alleged FNB required nothing less than the final order. An urgent application to freeze the account was then launched. A provisional order was granted on 24 June 2010 and confirmed on 27 July 2010.

[29] Mr Paulo's attorney, on 25 June 2010, was quick to point out to FNB that the order to freeze mentioned only the 323 account. Thus, the other two accounts were

not to be frozen. On 28 June 2010, Mr McLagan sought advice whether he should unblock the other two accounts. Ms Grobler then told him to lift the block on these accounts:

‘ . . . although we suspect that Spar intended for all the proceeds of the Spar and the 2 Tops outlets to be frozen, the order specifically mentions that a hold is to be placed on funds flowing into that one account.’

To FNB’s knowledge therefore Spar remained ignorant that there were three accounts, and despite the acknowledgement by Ms Grobler of Spar’s misapprehension, a deliberate decision was taken that no disclosure be made to Spar.

[30] Ultimately, the provisional order perfecting the bond was not confirmed.

[31] On 25 October 2010, about eight months after the takeover of the business, a demand was made by Spar to FNB to pay the moneys that Spar had earned whilst trading. The letter of demand conveyed that even then Spar was under the mistaken impression that all the revenue from all three outlets was being channelled into one account. Mr Paulo also claimed the credit balance in this account.

[32] After further ruminations, FNB accepted it was in the position of a stakeholder and thereupon itself on 24 February 2011, three months after the demand had been made, initiated an application to obtain an order of court to pay the sum in account 323 to Spar. In the argument advanced on appeal, on behalf of FNB, it was submitted that because the account in issue, account 323, was in the name of Central Route, Umtshingo Trading (Pty) Ltd was not a party. This sophistry is, of course, literally correct, but substantively a misrepresentation of the true relationship between FNB and Umtshingo.

[33] Central Route was deregistered on 24 February 2011.

[34] On 10 March 2011, a month after FNB launched the interpleader application, the Managing Director, Spar Lowveld, addressed yet another request to FNB to cancel several speedpoint devices. There is an oblique allusion to Ms van der Walt being aware by this time that Mr Paolo must have been operating more than one account. On 11 March 2011, Spar's attorney tackled Mr Paolo's attorney with the accusation of Mr Paolo diverting money from the two Tops outlets to 'another account or accounts under his control'. The generalised tenor in which these allegations was articulated indicated that Spar knew no details and had surmised the diversion of funds, possibly from reading the 323 account statement, disclosed in FNB's interpleader application and realising that substantial sums were not accounted for. Mr Du Preez, the Divisional Financial Director, Lowveld Spar, deposed to an answering affidavit in which he stated that it was only in the course of this interpleader application that Spar learned that there had been credit card revenue diverted from the two Tops stores ' . . . to an account other than the frozen account' (ie Account 323). This information could only have been derived from the contents of FNB's founding affidavit and Mr Paolo's answering affidavit. Mr Paolo had alluded to the two Tops accounts (albeit giving the wrong account number in one case, '988', instead of 309) in his answering affidavit dated 15 June 2011. An order directing FNB to pay over the money was eventually given on 23 March 2012.

[35] The liquidation of Umtshingo took place on 6 August 2012. On 10 August 2012, the three outlets ceased to trade.

[36] On 22 January 2015, in replying to a Rule 35(3) notice, FNB's attorneys provided details of account 309. This was when Spar first learned of the 309 account

and of the transactions that had occurred. It promptly caused an amendment to be made to its pleadings in the form of claim 4.

Analysis of Claims 1 and 4

[37] FNB's professed entitlement to claim set off is the appropriate starting point of the analysis. It is a durable proposition of our law that when the customer of a bank deposits money into their account, the money becomes the property of the bank. The bank enjoys a real right of ownership. In the usual case, the deposit gives rise to a credit balance in the account of the customer and a personal obligation owed by the bank to its customer to pay the credit balance, together with interest, if agreed.[5]

[38] The ownership by the bank of deposits made into an account by a customer is of systemic importance to the banking system. Deposits made into the accounts of customers are pooled so as to permit the bank, in turn, to grant credit and make loans. The bank is the economic intermediary that secures savings and enables borrowing. Central to this function is the recognition of the bank's ownership of the deposits made with it and the bank's right to extend loans without reference to the customers who made such deposits. Were it otherwise, absent customer consent, the bank's loans would be akin to theft.

[39] The personal obligation of the bank to pay the balance standing to the credit of the customer may be discharged by payment to the customer, payment to persons designated by the customer, or set off. Set off comes about when two parties are mutually indebted to one another, and both debts are liquidated, due and payable. The bank may set off a customer's indebtedness to the bank against that customer's

[5] *ABSA Bank Bpk v Janse van Rensburg* 2002 (3) SA 701 (SCA) at 709A-B; *Dantex Investment Holdings (Pty) Ltd v National Explosives (Pty) Ltd (In Liquidation)* 1990 (1) SA 736 (A).

claim against the bank, arising from deposits made by the customer and standing to their credit. Put simply, the bank may set off the credit and debit balances of the same client. These claims are then extinguished.

[40] Set off, like payment, extinguishes a debt, but does so reciprocally – one debt extinguishes another. Set off is not an appropriation of property. The operation of set off and the FNB's reliance upon it cannot be characterised as an issue as to whether FNB lawfully appropriated the property of Spar. Rather, the issue is whether FNB could set off Umtshingo's indebtedness against the credit balance in Umtshingo's accounts, arising from the deposits made into those accounts by Spar.

[41] There is no dispute as to Umtshingo's indebtedness to FNB. That much was common ground. The question is whether FNB was indebted to Umtshingo. It will ordinarily be the case that, when the customer of a bank makes a deposit into their account, it is an incident of the contract between the bank and its customer that the bank has an obligation to pay its customer the credit balance arising from the deposit made. The customer enjoys a personal right to payment from the bank.

[42] However, this is not invariably the case. The customer may be acting as the agent of a third party, permitting the third party to utilise the account. The third party may make a deposit into an account, whether in error or by arrangement with the account holder, to which the third party enjoys an entitlement. Here, the money, once deposited, is no less the property of the bank. The origin of the deposit is not relevant to the assumption of ownership by the bank.

[43] Who then acquires the personal right to the credit arising from the deposit? One answer is provided by an agreement subsisting between the bank, the customer

and the third party depositor, in terms of which deposits made into the account give rise to an obligation by the bank to pay any credit thereby accruing in the account to the third party. In such a situation, the bank cannot set off the indebtedness of its customer to the bank against the bank's indebtedness to the third party. No mutuality exists, the debts are not due as between the same parties.

[44] What then occurs if there is no such agreement as between the bank and the third-party depositor? Does the knowledge of the bank that a third party has deposited money into a customer's account, to which the customer has no claim, give rise to any right enjoyed by the third party to payment of this money from the bank? And if so, what right would that be?

[45] These questions gave rise to the different interpretations of *Joint Stock*[6] that divided the courts below. On one interpretation of the majority judgment in *Joint Stock*, agreement and knowledge were used interchangeably, but the true *ratio* of the majority judgment was that the claim of the third party rests upon agreement with the bank. So understood, *Joint Stock*, on its facts, simply recognised that where the bank owes a personal obligation to the third party to pay the credit balance accruing from the third party's deposits, the bank cannot set off its customer's indebtedness to the bank against the bank's debt that is due to the third party. The other interpretation of *Joint Stock* is that it went further and recognised that the bank's knowledge of the entitlement of the third party, rather than its customer, to the funds credited to the account may give rise to a right enjoyed by the third party to payment from the bank.

[6] *Joint Stock Co Varvarinskoye v ABSA Bank Ltd and Others* [2008] ZASCA 35; 2008 (4) SA 287 (SCA).

[46] This difference of interpretation, pertinent for the resolution of the case before us, is best approached in the following way. The evidence at trial clearly established that Spar had, for its own benefit, assumed control of the trading activities of Umtshingo's businesses. Whatever reservations Mr Paolo may have expressed as to the perfection of Spar's notarial bond, he plainly acquiesced in the arrangement that Spar take over the running of the businesses, at least until his reservations were finally determined by a court. It follows that moneys deposited into the accounts of Umtshingo were the proceeds of Spar's trading activities to which Umtshingo had no claim.

[47] Although the deposit of the proceeds of these businesses into the accounts of Umtshingo gave rise to credits in the accounts of Umtshingo held with FNB, this did not mean that Umtshingo had a claim against FNB for the amounts standing to its credit. In *Perry NO*[7] stolen money was deposited into a Nedbank account. Schutz JA explained that, by operation of law, ownership of this money passed to Nedbank and could not be claimed by way of the *rei vindicatio.* However, the mere fact that the customer's account had been credited with the stolen money did not mean that the customer (and thief) had a claim against Nedbank for payment of the amount standing to his, ostensible, credit.

[48] The same position arises when funds are paid into a bank account in error. The customer into whose account an amount is paid in error has no entitlement to the funds credited to that account.[8] And an appropriation of the funds by such a customer, with knowledge that they were not entitled to deal with the funds, would amount to theft.

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[7] *First National Bank of Southern Africa Ltd v Perry NO and Others* 2001 (3) SA 960 (SCA).
[8] *Nissan South Africa (Pty) Ltd v Marnitz NO and Others* 2005 (1) SA 441 (SCA) paras 25 and 26.

[49] Umtshingo had no entitlement to the funds paid into the accounts held with FNB. Those funds were the proceeds of the business conducted by Spar for its own benefit. At a minimum, FNB knew that this was so. In these circumstances, Umtshingo enjoyed no personal right against FNB to the funds credited to its accounts that derived from Spar's deposits.

[50] Once that is so, it follows that FNB cannot contend that Umtshingo's indebtedness to the Bank was set off against FNB's indebtedness to Umtshingo because FNB owed no such debt to Umtshingo. FNB's defence of set off must therefore fail.

[51] What then is the basis upon which Spar enjoyed a claim to the funds credited to the Umtshingo accounts in respect of which FNB cannot rely upon set off? In both *Joint Stock*[9] and *Nissan*[10] it was common ground that if no person had an interest or claim to the money credited to the account, other than the party in the position of Spar, then that party was entitled to payment from the bank.

[52] There are two central conclusions to be found in *Joint Stock*[11]. First, there is no inflexible rule that only an account holder may assert a claim to money held in their account with a bank. Second, the following conclusion was reached, '[n]or does the proposition that money deposited in an account becomes the property of a bank, necessarily militate against a legitimate claim by another party'.

[53] Both propositions are borne out by a well-established authority. As to the first proposition, there are a variety of circumstances in which persons other than the

[9] At para 42.
[10] Supra, para 27.
[11] At para 31.

account holder may claim payment from the bank of the credit balance in an account. That entitlement may arise in different ways. As already indicated, when stolen money is deposited into an account or a deposit is made in error, the account holder is not entitled to claim the credit balance. The person from whom the funds originated may do so.

[54] So too, in *McEwan*[12] where an agent deposited the money of his principal into an account, upon the insolvency of the agent, the agent's trustees had no claim to the balance in the account, the claim lay with the principal. In *Dantex*[13], the court recognised that an agreement might regulate the use of an account and the entitlements of an account holder to the use of credits in the account. These cases were traversed in *Joint Stock.*

[55] The cases also make it plain that there is no inconsistency in recognising that money deposited with a bank becomes the property of the bank and that persons enjoy personal rights against the bank to the credit balance on account deriving from the deposit made. What has sometimes created ambiguity is the description of an account holder 'owning' the moneys deposited into an account. That is not so. The bank is the owner of the money deposited, save only in the rather special case, cited in *Dantex,* that the depositor of money, deposited as a corpus and held separately, may vindicate the money.[14] However, the money deposited with the bank gives rise to personal rights in respect of the credit that is thereby created in the books of the bank.

[12] *McEwen NO v Hansa* 1968 (1) SA 465 (A).
[13] *Dantex Investment Holdings (Pty) Ltd v National Explosives (Pty) Ltd (In Liquidation)* 1990 (1) SA 736 (AD) at 749H – 750A.
[14] J Voet *Commentarius ad Pandectas* (2012) para 20.4.13.

[56] Once this distinction is recognised, two questions arise. What is the nature of the personal right against the bank, and enjoyed by whom? In the standard case, the customer deposits money into their account and has a personal right against the bank to be paid the credit reflected on the account (with interest, if agreed) or otherwise to direct the bank as to who should be paid. The personal right is an incident of the contract that subsists between the customer and the bank.

[57] However, as may be observed from the cases to which we have referred, the personal right to claim against the bank may not be enjoyed by the customer. The customer may be the agent of a principal in respect of the account, and the principal will then have the claim. Or the bank, the customer and a third party may have an agreement as to the rights of the third party to the use of the account and the credit balance on account. On one interpretation, *Joint Stock* is such a case.

[58] More difficult is the position in a case such as the present where there is no privity as between FNB and Spar, nor is it claimed that Umtshingo was acting as the agent of Spar. On the evidence, however, Spar and Umtshingo had agreed that Spar was entitled to the proceeds of the businesses that it was running. Spar was entitled to these moneys and deposited them with FNB. The evidence also amply demonstrated that FNB knew of Spar's entitlement to the moneys deposited. In these circumstances, Umtshingo had no right to claim the credits arising from these deposits. And, as set out above, FNB could not apply set off.

[59] What rights, if any, does Spar have against FNB? It was submitted that *Joint Stock* may be understood on the basis that FNB's knowledge of Spar's entitlement to the funds founds Spar's claim against FNB. This is not the correct way to interpret the holding in *Joint Stock.* It is not the knowledge of a bank that

gives rise to the rights of the third party. It is the consequences of such knowledge that matters. Once it was apparent to FNB that its customer had no entitlement to the moneys deposited, two consequences, traversed above, follow. First, the customer, Umtshingo, had no claim against FNB in respect of the credit reflected in the accounts. Second, FNB could not apply set off, as there was no mutuality of debts as between FNB and its customer.

[60] FNB was the owner of the funds deposited. Could FNB enjoy the benefit of that ownership, without any duty to account to Spar, absent an agreement between FNB and Spar? *Joint Stock* answered this question in the negative. It did so on the basis set out in *Nissan.*[15] If the customer was not entitled to claim from the bank, then the third party was entitled to do so. The basis of that entitlement was explained in *Nissan.*

[61] In *Nissan*, the appellant, in error, paid a substantial amount of money into the account of Maple which was duly credited. Maple was not entitled to the funds. Maple had no claim against the bank in respect of the funds. In *Nissan*, as also in *Joint Stock*, it was accepted by counsel that, if the customer had no claim, the appellant was entitled to payment. The basis of that acceptance in *Nissan* derives from the decision of this court in *Perry NO*, a case of the deposit of stolen funds into a bank account. The bank became the owner of the funds deposited. The bank resisted payment to the cessionary, who had taken cession of the claim from the person originally entitled to the funds deposited. The bank was not obliged to make payment to its customer because the funds deposited were stolen. As a result, the

[15] *Joint Stock* para 42; *Nissan* paras 25-27.

bank was enriched, and an enrichment action lay against it, in particular the *condictio ob turpem vel iniustam causam.*

[62] In *Perry NO*, the funds deposited were stolen. In *Nissan*, the funds were deposited in error. The court in *Nissan* nevertheless required that, since the account holder credited with the deposit had no claim against the bank, payment must be made to the appellant who had paid in error. To do otherwise would permit of the unjustified enrichment of the bank. In *Joint Stock*, as in the present case, the funds deposited were neither stolen, nor deposited in error. The funds were deposited pursuant to an arrangement between the bank's customer and the third party. Yet in *Joint Stock*, the court reached the same conclusion as did the court in *Nissan:* the bank owed a duty to pay the third party. That is so on the basis of the same underlying principle recognised in *Perry NO.* Since the bank incurred no liability to its customer, without an obligation to pay the third party, who had the original entitlement to the funds deposited, the bank would be unjustly enriched.

[63] It must be acknowledged, as *Perry NO's* case illustrates, that there is no small measure of difficulty in determining what *condictio* would be of application. But the general principle is clear. Once the bank has no liability to its customer in respect of the deposits made, the bank is enriched. The bank owns the deposits, and its assets have increased at the expense of the third party, whose funds were deposited. The third party is thereby impoverished. Absent an order upon the bank to make payment to the third party, the court would countenance the bank's unjust enrichment. The recognition of this unjust state of affairs has led our courts to recognise a remedy against the bank to pay to the third party the amount standing to the credit of its customer's account, as was done in *Joint Stock.* That remedy is, in this case, appropriate too.

[64] Lastly, Spar described its claim as quasi-vindicatory. That characterisation should be avoided. The Bank is the owner of the funds deposited. Spar's rights are not proprietary in nature. They are founded upon quite different legal principles, as set out. If Spar's rights were quasi-proprietary, an entirely different set of issues would become relevant. Not least, how a quasi-proprietary right could prevail over the Bank's ownership of the moneys deposited.

[65] For these reasons, the appeal must fail in respect of claims 1 and 4.

Analysis of Claims 2 and 3

[66] The core facts pertinent to these claims are these. It is common cause that during the period of Spar's trading, it generated revenue which, through the credit card speedpoint channel, was electronically deposited into both accounts 655 and 309. Similarly, it is common cause that Mr Paolo caused disbursements out of these accounts of, respectively, R2,039,948.68 and R1,358,890.00. Umtshingo was liquidated and Central Route was deregistered. Spar could not recover its losses from Umtshingo.

[67] The basis for Spar's claim against FNB was described in the pleadings as a duty of care owed by FNB to take reasonable steps to protect Spar from loss as a result of Paulo withdrawing funds from the accounts. It is more accurately described as a legal duty. The plea denied the existence of such a duty. In the alternative, FNB pleaded that if such a claim is competent, and if FNB was in some degree negligent and that FNB's negligence was causally connected to the harm suffered, Spar too was negligent.

[68] The cause of action is predicated upon the legal duty of FNB to prevent Mr Paulo, as the controlling mind of Umtshingo, from making disbursements from Umtshingo's accounts, into which Spar had deposited the funds generated by it.

[69] Whether such a legal duty exists must commence with a consideration of the position of Mr Paulo. The evidence at trial supports two factual propositions, already addressed in the consideration of claims 1 and 4. First, Mr Paulo entered into an arrangement with Spar that permitted Spar to run the Umtshingo businesses for Spar's benefit. Consequently, Mr Paulo knew that the proceeds of the businesses deposited into the Umtshingo accounts with FNB were Spar's funds, and Umtshingo had no entitlement to these funds. Second, FNB knew of the arrangement between Umtshingo and Spar, and knew also that Umtshingo (and hence Mr Paulo) had no entitlement to the funds deposited.

[70] When Mr Paulo made disbursements from Umtshingo's accounts, his conduct amounted to theft. In *Nissan*,[16] this court explained that an account holder has no entitlement to a credit resulting from a mistaken transfer into his bank account. Should the account holder, well knowing that the credit is not due to him, appropriate the amount credited to his account by withdrawing funds, the account holder is guilty of theft.

[71] Mr Paulo knew that the funds deposited by Spar were the proceeds of the Umtshingo businesses to which Umtshingo had no claim. That was the arrangement he had struck with Spar. He knew, as a result, that Umtshingo had no claim to the credits generated by the deposits made by Spar into the accounts. Mr Paulo

[16] *Nissan* para 25.

nevertheless made disbursements from the accounts. Mr Paulo thereby appropriated the funds, knowing that neither he, nor Umtshingo, were entitled to the funds. Mr Paulo stole the funds.

[72] The issue that arises is whether FNB's knowledge that Umtshingo had no entitlement to the funds deposited by Spar, and nevertheless permitted Mr Paulo to make disbursements from the accounts, gave rise to any liability by FNB to Spar in delict. Clearly, since the actions of Mr Paulo amounted to theft, Spar had a cause of action against Mr Paulo and Umtshingo. The disbursements were wrongful. But Umtshingo was in liquidation, and Mr Paulo, no doubt, had no assets to satisfy any claim that Spar might have made against him. Whether FNB can be held liable for the wrongful conduct of Mr Paulo, depends upon whether FNB was a joint wrongdoer.

[73] This issue was determined in *Yorkshire Insurance Co Limited*,[17] recently affirmed in this court in *Breetzke*.[18] In *Yorkshire Insurance Co Limited*, Harris, a professional trustee and liquidator, paid cheques in respect of estates under his administration into his personal bank account and stole the money. A delictual action was brought against the bank. Greenberg J held that Harris, in drawing the cheques, for an unauthorised purpose, commenced the process of misappropriation. The bank honoured the cheques, knowing that Harris had no right to draw them. The bank was a party to Harris' unlawful conduct, and hence a joint wrongdoer.

[74] *Breetzke* concerned a breach of trust. Wallis JA expressed the principle thus:

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[17] *Yorkshire Insurance Co Limited v Barclays Bank (Dominion, Colonial & Overseas)* 1928 WLD 199.
[18] *Breetzke and Others NNO v Alexander NO and Others* [2020] ZASCA 97; 2020 (6) SA 360 (SCA).

'Where the execution of a breach of fiduciary duty involves or requires the involvement or participation of a third party, and that third party has knowledge that the transaction in question involves a breach of fiduciary duty, it seems to me clear that the legal convictions of the community demand that the third party share the liability of the person breaching the fiduciary duty. That is not because they owe a similar duty to the injured party, but because by aiding, enabling or facilitating the breach they are themselves equally responsible for the injury caused to, or loss suffered by, the injured party.'

[75] Although Mr Paulo's disbursements from the accounts were not a breach of fiduciary duty, they were plainly wrongful. The Bank enabled Mr Paulo's conduct by allowing him to operate the accounts, well knowing that Umtshingo had no claim to the credits reflected in the accounts. Indeed, the Bank had assured Spar that the Bank had frozen the one account of which Spar had knowledge. The Bank was a joint wrongdoer owing a legal duty to Spar.

Contributory negligence by Spar?

[76] Did Spar blunder culpably? With hindsight, Spar, doubtless, appreciated that it could not rely on FNB to make proper and open disclosure, nor rely on FNB's assurances. The notion of Spar's contributory 'negligence' is ironic because nothing FNB did was as a result of negligence. Its conduct, as traversed above, was throughout, deliberate and partisan in its own interest. From the outset Spar wanted the accounts changed. It was blocked by both Mr Paulo and FNB who passed the blame to each other. The deliberate misleading of Spar by FNB about the truth of what was happening is the single most important fact to explain Spar's conduct. Spar relied on FNB's assurances of 'the account being frozen' which was a misrepresentation. This conduct by FNB lies at the core of its culpable facilitation of the theft by Mr Paulo.

[77] When Spar was told that the limits on the only account it knew of, account 323, were lifted, it reacted immediately by an urgent application to freeze the funds. The contention that Spar should have done so sooner ignores the context. FNB officials discussed the misapprehension of Spar which their own conduct had brought about and resolved to preserve Spar's ignorance. There is no merit in the submission that Spar was contributorily negligent in circumstances that were created by FNB's conscious preference of its own interests, and cynical obfuscation of critical facts which render FNB a joint wrongdoer with Mr Paulo. Fault cannot be founded on the premise that a person could have avoided a loss, by its own timeous volition, if at the relevant time, it was not unreasonable for the person not to have taken that step. To argue that Spar could have been 'more careful' is a misdirected perspective. In this context the argument was advanced that the speedpoint devices should have been removed. However, this ignores the fact that Mr Paolo prevented that from happening. Spar's conduct was not, in these circumstances, negligent nor a contributing cause of its loss.

[78] Moreover, as the details of FNB's conduct as a joint-wrongdoer with Mr Paulo make plain, it is incongruent to construe Spar's conduct, as described, as being negligent in relation to the culpable conduct of a joint wrongdoer.

[79] For these reasons, the appeal must be dismissed in respect of claims 2 and 3.

Analysis of the prescription argument: claim 4.

[80] The formulation of claim 4 was introduced by an amendment in July 2015. The reaction of FNB to that was to plead prescription, the claim relating, of course, to events in 2010 to 2011. The stance of FNB is not that Spar knew of the claim in

2010 or 2011. FNB accepts, as it must, that Spar was ignorant until 2015. Instead, it seeks to avoid liability by pleading that Spar could have learned of its claim, at the latest, in 2011 by using reasonable care. This dispute therefore is informed by s 12 of the Prescription Act 68 of 1969 which provides:

'(1) Subject to the provisions of subsections (2), (3), and (4), prescription shall commence to run as soon as the debt is due.

(2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.

(3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.

(4) . . . .'

[81] Spar alleges that FNB, within the meaning in s 12(2), prevented Spar from learning of the debt. The debt in question, it must be emphasised, is the consequence of the purported set off by FNB in respect of credits in account 309. It was by this act that FNB became a debtor of Spar. The debt is the sum of R898,744.92 by which FNB had been enriched and Spar impoverished between March 2010 and 8 May 2010 as a result of FNB's purported set off. To know of the 'debt' it would have been necessary to know that (1) an identifiable sum of money purportedly set off, (2) from an identifiable account (3) by an identifiable person.

[82] The trial court held that Spar had the necessary minimum knowledge of this debt by June 2011 because at that time Mr Paolo had made the affidavit alluded to in the traverse of the facts.[19] A deficit in the funds in account 323 the statements of which account were disclosed in the interpleader application would, so the trial court

[19] See above, para 33.

held, have indicated that, when compared to the takings, money was missing. The court held that the revelation of two other accounts, but not account 309, should have prompted further and better enquiries by Spar. The key argument advanced on behalf of FNB is that Ms Hopley should have demanded further bank statements in 2011. However, this submission is meritless. There was no reasonable prospect of those statements being forthcoming because of the obdurate stance of both FNB and of Mr Paolo. The so-called 'concession' relied on from Ms Hopley that no 'investigations' were carried out by Spar, takes the matter no further because of FNB's stance.

[83] The majority of the full court disagreed that Spar could have learned of the debt at that time, and correctly so. It addressed specifically the notion that Spar could have used rule 35(12) in the interpleader application to access account 309. The full court correctly observed that account 309 was not mentioned in the affidavit of Mr Paolo, although he had referred to account 655 and to account '988', the latter being a dormant account and of no relevance to the case. Thus, no demand to access account 309 could have been made.

[84] As a result of the deliberate non-disclosure by FNB, even during the early stages of litigation, Spar had been misled to believe that Mr Paulo had disbursed money in the sum of R2,331,324.33, the amount initially claimed in claim 3. Only after the 2015 discovery of account 309 did it become evident that the 'missing money' had not been filched by Mr Paulo, but that FNB had purported to effect a set off, as it had in respect of account 323. It was impossible for Spar to identify FNB as a debtor until that information was disclosed. The amendment effected was to reduce the quantum in claim 3 and claim against FNB in claim 4.

[85] These circumstances were a direct result of FNB's wilful non-disclosure. FNB's plea initially filed in August 2013 made reference to account 988, a dormant account, thereby perpetuating the misrepresentation. A request for discovery made by Spar in November 2013 was answered only in August 2014. Account 988 was not discovered by FNB in response to that request. On a further demand for better discovery, eventually the existence of account 309 was revealed in 2015. A plainer illustration of the circumstances contemplated in s 12(3) would be hard to unearth. Accordingly, the claim had not prescribed.

[86] In summary, the law is as follows:

(1) Where a deposit, to the knowledge of the bank, is made into the bank account of a customer to which the customer has no entitlement, the bank cannot set off its customer's indebtedness to the bank against the credit in the customer's account deriving from such deposit. The third party whose moneys were deposited enjoys a claim against the bank for the amount so credited.

(2) A customer, with no entitlement to moneys deposited into their account, who knows that they enjoy no such entitlement, may not make disbursements from the account in respect of credits deriving from these moneys. To do so amounts to theft. A bank that knows that its customer enjoys no such entitlement and nevertheless permits its customer to make disbursements in these circumstances renders itself a joint wrongdoer. As such the bank owes a legal duty to the third party who was entitled to the moneys deposited and suffers loss as a result of the customer's disbursements.

[87] FNB wrongly misappropriated the funds as averred in claims 1 and 4 and is liable to pay Spar the amounts pleaded.

[88] FNB wrongly allowed Paolo to misappropriate funds from the accounts as averred in claims 2 and 3 and is liable to pay Spar the amounts pleaded.

[89] Accordingly, the appeal must fail.

[90] The costs of Spar, including the costs of two counsel should be borne by FNB, and having regard to the issues debated, should include the costs of two counsel.

The order

The appeal is dismissed with costs including the costs of two counsel.

Roland Sutherland
Acting Judge of Appeal

David Unterhalter
Acting Judge of Appeal

Appearances

For the Appellant:	D M Leathern SC (with him P A Swanepoel SC)
Instructed by:	Rorich Wolmarans & Luderitz, Pretoria
	Symington De Kok, Bloemfontein
For the Respondent:	J P Vorster SC (with him F P Strydom)
Instructed by:	Moss Marsh Geogiev, Mbombela,
	Weavind & Weavind, Pretoria,
	Peter Skein Attorneys, Bloemfontein.