

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 74870/2019

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

14 AUGUST 2020

In the matter between:

SPAR GROUP LIMITED

Plaintiff

And

ABSA BANK LIMITED

Defendant

Delict - common law developed to extend a legal duty to banks to avoid economic loss to a third party not to reverse EFT payments without doing more.

Where bank has a discretion to reverse a payment, it has a legal duty to a beneficiary/payee of an EFT payment to verify, or to make enquiries, or to investigate, or to inform or report instructions given by its customer -particularly compelling where suspicious or unusual circumstances present giving rise to a reasonable doubt about whether the instructions had been given lawfully and/or in good faith and/or for the reasons advanced by its customer.

JUDGMENT

KATHREE-SETILOANE J,

- [1] The plaintiff, Spar Group Limited ("Spar") claims payment of R2 464 856.32 from the defendant, ABSA Bank Ltd ("Absa") as a consequence of certain reversals of debit order payments effected by Absa which had previously been credited to Spar's bank account held with First National Bank ("FNB").
- [2] From 25 May until 3 July 2009, Trifecta Trading 61 (Pty) Ltd, trading as Atterbury SuperSpar ("Trifecta"), a retail customer of Spar, made certain payments to Spar by Electronic Funds Transfer ("EFT") in terms of a written debit order instruction which Trifecta gave in favour of Spar. Trifecta held an Absa bank account.
- [3] During the period 1 to 8 July 2009 Absa reversed nine of the above-mentioned payments, and as a result, Spar's account with FNB was debited and Trifecta's account with Absa was credited in the total

sum of R 2 464 856.32. The reversals took place between 2 and 37 days after the relevant payment dates. As a result of the reversals, Trifecta's overdraft debt with Absa was settled to the extent of the credits.

- [4] Spar alleges, in its particulars of claim, that it was subsequently unable to obtain payment of the sum of R2 464 856.32 from Trifecta and seeks to hold Absa liable for payment of this amount. Spar claims damages in delict for the recovery of pure economic loss. Absa denies liability and that Spar was unable to obtain payment from Trifecta.

Background

- [5] Spar conducts a wholesale business. It supplies merchandise including groceries to retailers who do business under the "SPAR" banner. Spar's business and its relationship to retailers is a "franchise type" one. Trifecta was one of its retailers. It owned and managed the Atterbury SuperSpar at the Atterbury Value Mart, in the east of Pretoria.
- [6] Spar sells its goods to retailers on credit. Spar provides the retailers with weekly statements. The terms of credit require the retailers to make payment of the amounts reflected on the weekly statements within a period of either 19 or 31 days from the date of each weekly statement. These statements are sufficiently detailed to enable the retailers to easily identify all the deliveries made during the particular week on which the statement is based. Retailers may purchase merchandise directly from Spar's distribution centres and/or from other suppliers. Merchandise that Spar supplies to the retailers from its distribution centres are referred to as "warehouse transactions". The merchandise that retailers purchase from other suppliers are for Spar's account. They are referred to as "dropshipments". The retailers pay Spar for this merchandise in due course.
- [7] The retailer has up to 19 days from date of statement (for warehouse transactions) or 31 days from date of statement (for dropshipment transactions) to check the statements for accuracy and to raise a complaint (this procedure is regulated contractually) regarding short delivery, or quality of goods etc. before payment is to be made.
- [8] Trifecta applied for a credit facility with Spar. In respect of the credit sought, it offered security by way of a suretyship given by its only shareholder and director, Mr Tobie Schoeman ("Mr Schoeman"), and a bank guarantee for R600 000.00, to be given by its bank, Absa. Although Trifecta's application for a credit facility was successful, Spar sought additional security which it established by way of a general notarial bond for R1.5 million over all Trifecta's movable property. This notarial bond was registered on

31 October 2005. Spar subsequently obtained more security and a second general notarial bond for R2 million was registered on 7 September 2006.

- [9] Spar obtains a debit order instruction or authority from each retailer in order to ensure prompt payment. The debit order instruction which Spar receives, enables it to withdraw money from the retailer's nominated bank account every Wednesday and Friday. These debit transfer transactions are known as the "pull" transactions.¹ Trifecta provided Spar with a debit order instruction on 24 August 2005. Its salient terms were as follows:

'I/we hereby request, instruct and authorise you to draw against my/our account with the abovementioned bank [Absa], variable amounts for payment of weekly purchases due in respect of dropshipment and warehouse transactions on the Monday and Wednesday of each and every week. All such withdrawals from my/our bank account by you shall be treated as though they had been signed by me/us personally.

'I/we understand that the withdrawals hereby authorised will be processed by computer through a 'Payment and Collection System'² known as PACS, and I also understand that the details of each withdrawal will be printed on my bank statement or on each accompanying voucher.

...

This authority may be cancelled by me/us giving you thirty days' notice, in writing, sent by prepaid registered post. I/we understand that I/we shall not be entitled to any refund of amounts legally owing to you, which you have withdrawn while this authority was in force.'³

- [10] According to Spar's records, payments collected from Trifecta were, from time to time, returned to Spar unpaid. This became more prevalent towards the end of 2008, albeit that two debit order payments were returned unpaid "payment stopped" on respectively 8 March 2007 and 25 February 2008. Four payments were returned "payment stopped" on, respectively, 23 July, 27 August, 8 October and 19 November 2008. This continued into 2009 and by 11 May 2009, a further six debit order payments had been returned "payment stopped". Seven returns "not provided for" occurred in the period from 4 May 2009 to 19 June 2009. By the end of May 2009 Trifecta was R3 336 488.26 in arrears on its warehouse account and at least R1 167 355.91 on its dropshipment account. By the end

¹ Before electronic banking and debit orders became prevalent, Spar agreed contractually with its retailers to provide it with a cheque book of blank cheques made out to Spar and signed by the retailer. This enabled Spar to fill in the amount on the cheque and present it for collection. There are indications in the case law that a debit order is in the nature of an electronic cheque.

² A "Payment and Collection System" is described later in the judgment.

³ Emphasis added.

of June 2009, before the reversals at issue herein had occurred, Trifecta owed Spar R6 951 298.07 on the two accounts in aggregate. Trifecta, in addition, owed Spar a further sum exceeding R5 million.

- [11] Absa was, apart from Spar, Trifecta's other substantial third party creditor. Absa provided overdraft facilities of R2 million to Trifecta.
- [12] Spar, despite the debit order payment returns, continued to supply merchandise to Trifecta on credit by way of warehouse deliveries and dropshipments until June 2009, while still attempting to make twice a week recoveries via the EFT Debit Pull payment system. This was because Trifecta was in financial difficulties and wanted to sell the Atterbury Superspar. Spar, in assisting to facilitate the sale, took the view that the best option was for the business to be sold as a going concern, as this would retain its identity as a Spar retailer.
- [13] Mr Schoeman brought a buyer to the table who offered a purchase price of R8 million. Spar rejected the purchaser but introduced Mr Schoeman, in June 2009, to Mr Giannacopoulos, whose company, Tayegetos Supermarket (Pty) Limited ("Tayegetos"), was willing to buy the business for a purchase price of R5 million. Mr Schoeman was left with no choice but to accept Tayegetos' offer to purchase the business. Trifecta and Tayegetos concluded an agreement of sale on 18 June 2009. The agreed purchase consideration was R5 million in respect of the goodwill and equipment of the business, payable on Monday, 29 June 2009, plus the value of the stock-in-trade to be determined on Sunday, 28 June 2009, by a joint stocktaking, payable in three monthly instalments from the end of July 2009.
- [14] Tayegetos took possession of the business, on Monday 29 June 2009, and started trading as a Spar retailer for its own account. Trifecta's stocktaking provided a figure of R2.8 million for the stock. However, on Tayegetos calculation it was R2.1 million and it refused to accept the R2.8 million stock-figure. This led Mr Schoeman to believe "... that I have paid much too much for the stock that was apparently in my business". In other words, he believed that Spar was not entitled to the payments from Trifecta's account which, in the recent past, Spar collected via the EFT payment system.
- [15] Mr Schoeman telephoned Mr BW Botten ("Mr Botten"), who at the time was the Provisional Managing Director of the North Rand Division of Spar, to complain. Mr Botten, however, advised him to accept the figure. On the basis of his unhappiness at the stock value which Tayegetos was prepared to pay, he telephoned Ms Claire Koen ("Ms Koen") at the Centurion branch of Absa, where Trifecta's account was based, and conveyed to her that "there was a huge problem with the values of the stock and deliveries" and instructed her to "send back as many debit orders as the system would allow her to do".

- [16] Trifecta's bank statement for Tuesday, 30 June 2009, the day on which Mr Schoeman spoke with Ms Koen, shows a credit of R297 783.76 under the caption "*Acb debiet terug*". This related to a Spar initiated EFT debit pull transaction on the account on the previous day, 29 June 2009. Mr Schoeman's instruction to Ms Koen, resulted in Absa processing returns of 9 payments that had been collected by Spar from Trifecta's bank account through the EFT Debit Pull payment system, via Bankserv. The R297 783.76 first credited to Trifecta's account in this regard reflected as a debit on Spar's account with FNB on 1 July 2009 under code "04", i.e. "*payment stopped*". Two further prior EFT debit pull debits on Trifecta's account were also returned on 30 June 2009. The one, for R222 247.04 related to a debit against the account on 25 May 2009 and the other, for R295 568.42 to a debit on 1 June 2009. These were returned to Spar's account under code "34", i.e. "*Authorisation cancelled*".
- [17] Three further EFT debit pull debits were returned from Trifecta's account on the following day, 1 July 2009. These were for R295 568.42, R109 708.17 and R311 875.03. These related to prior EFT debit pull transactions initiated by Spar and debited on Trifecta's account on 8 June 2009, 12 June 2009 and 15 June 2009, respectively. These payments were returned under return code "34" "*Authorisation cancelled*".
- [18] Two further prior debits for R249 418.60 and R434 533.98 respectively, were returned from Trifecta's account on 2 July 2009. These related to prior EFT debit pull transactions initiated by Spar and debited on 22 June 2009 and 26 June 2009, respectively. The payments were returned under return code "34" "*Authorisation cancelled*".
- [19] The final return, for R361 765.56, related to a Spar initiated debit on Trifecta's account on Friday, 3 July 2009. It was returned on Tuesday, 7 July 2009. The return reflected on Spar's FNB account on Wednesday, 8 July 2009 (within four business days of the action date) under code "04", "*payment stopped*". These codes in respect to all nine reversal incorrectly refer to the nature of the returns which were neither "authorisation cancelled" nor "payment stopped".
- [20] It is common cause that Mr Schoeman did not provide Trifecta's instructions to Absa in writing. Ms Koen (who did not testify) confirmed, in an affidavit dated 22 June 2012, that Mr Schoeman's instructions were not given in writing, but were given telephonically. She stated that she acted on the basis of the "written authorisation that Trifecta had given to Absa to act on Mr Schoeman's telephonic instructions". The document referred to is the "Mandate and Indemnity in Respect of E-mail, Faxed and/or Telephone Instructionss (ACBB) which Trifecta gave to Absa. Absa had consulted with Ms Koen but elected not to call her to testify at the trial.

- [21] Spar caused summons to be issued against Trifecta and Mr Schoeman on 3 July 2009. The claim was for the sum of R7 653 284.63 relating to overdue dropshipment and warehouse accounts at that time. Mr Schoeman was cited as surety and co-principal debtor. Spar also launched an urgent application to perfect its notarial bonds on the basis that Tayegetos, who had been in possession of the business since 29 June 2009, had cancelled the agreement of sale and that the business would, shortly, revert to Trifecta. Trifecta opposed the application and it was struck from the roll for lack of urgency. Trifecta disputed that Tayegetos was entitled to cancel the agreement of sale.
- [22] Spar and Trifecta reached a settlement on 17 July 2009. Tayegetos, Mr Schoeman and Interactive Trading 351 (Pty) Ltd (“Interactive Trading”)⁴ were also party to the settlement. The settlement agreement reinstated the agreement of sale, now for the purchase price of R7.1 million, which included the stock. It recorded Trifecta’s indebtedness to various creditors: Spar for an agreed R14.7 million, Mr Schoeman for R6 million, Interactive for R2.8 million, Absa for R1.5 million and miscellaneous creditors for R1 million.
- [23] In terms of the settlement agreement the proceeds of the sale of the Atterbury Superspar were divided up. Spar received the full face value of its notarial bonds in the amount R3.5 million. Spar also received the benefit of the bank guarantee for R600 000.00 issued by Absa pursuant to the agreement between Spar and Trifecta in 2005. The remaining R3.6 million of the purchase price of the Atterbury Superspar was distributed among the notional “concurrent” creditors, including Spar, on the basis of a notional dividend of 16.44 Cents in the Rand, providing Spar with further recovery of R1 743 000. Interactive’s share of R450 000 was also retained by Spar on the basis that it sold Mr Schoeman’s suretyship to Interactive, and would withdraw the action that it had instituted against Trifecta and Mr Schoeman.
- [24] The balance of R1 407 000 was to go to Trifecta’s attorneys for distribution among the remaining creditors, including Absa and Mr Schoeman (the latter for some R993 000). Mr Schoeman accepted full responsibility to settle the remainder of Trifecta’s Absa account, as well as to settle with any of the miscellaneous creditors who refused to accept the notional “dividend”. Trifecta’s overdraft with Absa was settled in full on 23 October 2009 and its overdraft facility was cancelled.
- [25] On 27 July 2009, Spar’s attorneys wrote to FNB demanding that FNB credit its account with the R2 464 856.32 representing the aggregate of the nine EFT Debit Pull transactions that had been returned. Further correspondence between FNB and the attorneys followed, culminating in a letter dated 18 September 2009, in which FNB reported the results of its investigations into the matter to

⁴ Mr Schoeman was a director and shareholder of Interactive. It was a creditor of Trifecta.

Spar, as follows: “FNB therefore did not debit the Spar account without Spar’s authority but rather the debit was actioned by Absa acting on its client’s instruction, through the EFT system”.

[26] On 13 July 2010, Spar wrote a further letter to FNB demanding payment and stating that it regarded the dispute resolution in terms of clause 17 of the CAMS Agreement (which it had entered into with FNB)⁵ as inappropriate, for purposes of the dispute that had arisen. It sent a copy of this letter to Absa. It also sent a letter to Absa demanding payment of the sum at issue, and recording that, failing payment, it intended launching application proceedings against Absa and FNB. Spar, eventually, sued only Absa.

[27] Although the issue of whether the nine payments in question were owed by Trifecta to Spar was originally disputed, it became common cause as Spar’s witness, Mrs CJ Swanepoel (“Mrs Swanepoel”), who was called to prove the debt owed by Trifecta to Spar, was not cross-examined on it. It is also common cause that Absa did not provide Spar with prior notice before effecting the reversals. Nor did it obtain Spar’s consent to do so. It is likewise common cause that Mr Schoeman did not cancel his debit order instruction.

[28] Spar called the following witnesses: Mr Botten (Provisional Managing Director: North Rand Division of Spar), Mrs Swanepoel, the Credit Control Supervisor in the Debtor’s Department: North Rand Division of Spar in 2009, and Dr GTD Holtzhausen (“Dr Holtzhausen”), a banking expert. Absa called the following witnesses: Mr CJ Erasmus (“Mr Erasmus”), a payment specialist expert employed by Absa and Mr Schoeman (Managing Director of Trifecta).

Issues for Determination

[29] Although Spar relies, in its particulars of claim, on both a delictual claim against Absa for damages for the recovery of pure economic loss and a quasi-vindictory claim – at the hearing, it relied only on the delictual claim for damages against Absa as the banker of Trifecta. Spar and Absa do not stand in a banker / customer contractual relationship. FNB, through which the debit order collections were processed, was Spar’s banker.

[30] This matter concerns a novel issue of delictual liability resulting from a bank’s wrongful and negligent conduct in the reversal of EFT payments collected by debit order. The primary issues that arise for determination are whether: (a) a legal duty rested on Absa to act reasonably towards Spar and whether Absa breached that duty; and (b) Spar’s interests should be accorded judicial protection against Absa’s conduct in this particular type of situation.

⁵ The CAMS Agreement will be dealt with more fully later in the judgment.

Regulatory Framework

- [31] Absa submits that its defences to Spar's claim have to be understood against the backdrop of the Payment Association of South Africa ("PASA") Rules and the concept of a payment system, more particularly, the payment system that exists in terms of the EFT Debit Pull PCH Agreement ("the Debit Pull payment system"). PASA is an association of banks operating in the country that regulates the participation of its member banks and other role players in the various payment systems that, collectively comprise the South African National Payment System.
- [32] Spar collected payments from Trifecta's Absa account in terms of the: (a) National Payment System Act, No. 78 of 1998; (b) "Payment Clearing House Agreement for the Clearing of EFT Debit Payment Instructions ("EFT Debit Pull Agreement"); (c) Rules Governing the Clearing of Debit and Credit Electronic Funds Transfer Payment Instruction ("EFT Rules").
- [33] The South African National Payment System is "a set of instruments, procedures and rules that allow consumers, businesses and other organisations to transfer funds, usually held in an account at a financial institution to one another."⁶ The South African Reserve Bank Act⁷ mandates the South African Reserve Bank ("the SARB") to oversee the regulation of the National Payment System and ensures its safety, soundness and efficiency.⁸ The National Payment System Act⁹ ("the NPS Act"), in turn, provides the framework for the SARB's management, administration, operation, regulation and supervision of payment, clearing and settlement systems in South Africa.¹⁰ The NPS Act defines a "payment system" as "a system that enables payments to be effected or facilitates the circulation of money and includes any instruments and procedures that relate to the system". The Debit Pull payment system is a "payment system" as defined. The SARB document entitled "Oversight of the South African National Payment System" ("Oversight Brochure") describes the significance of the National Payment System in the following terms:¹¹

⁶ South African Reserve Bank: Starter Pack for Participation within the National Payment System (2009) p. 943.

⁷ No. 90 of 1989.

⁸ Section 10(1)(c) of the South African Reserve Bank Act, 1989 provides that the SARB may perform such functions, implement such rules and procedures and in general, take such steps as may be necessary to establish, conduct, monitor, regulate and supervise payment, clearing or settlement systems.

⁹ No. 78 of 1998.

¹⁰ The SARB's role in this regard is specified in various sections of the NPS Act (see ss 3, 4A, 6, 10 & 12). Section 12 provides for the SARB to issue legally binding directives regarding a payment system or the application of the provisions of the NPS Act.

¹¹ Oversight Brochure at para 1. Mr Erasmus, Absa's expert witness, confirmed the contents of the Oversight Brochure in evidence.

'A payment system, as defined by the Bank for International Settlements (BIS), consists of a set of instruments, banking procedures and interbank funds transfer systems that ensure the circulation of money.

A national payment system is one of the principal components of a country's monetary and financial system and is, therefore, crucial to a country's economic development, since almost all economic transactions involve some form of payment. Payment and settlement systems thus play a crucial role in a market economy, and central banks have always had a close interest in them as part of their responsibilities for monetary and financial stability.

Well-designed and managed payment systems help to maintain financial stability by preventing or containing financial crises, and help to reduce the cost and uncertainty of settlement, which could otherwise act as an impediment to economic activity. Financial instability may be characterised by banking failures, intense asset price volatility, interest and exchange rate volatility, liquidity problems, and systemic risk, which are often manifested in the disruption of the payment and settlement system.

Payment systems not only entail payments made between banks, but encompass the total payment process, including systems, mechanisms, institutions, agreements, procedures, rules and laws. Modern payment systems also involve the settlement of substantial trade in financial instruments such as bonds, equities and derivatives.'

- [34] The EFT PCH Debit Pull Agreement and Payment Clearing House ("PCH") Agreements and Clearing Rules issued by PASA ("EFT Rules") were agreed to and issued under the auspices and authority of PASA. All payment systems are governed by PCH Agreements and EFT Rules issued by PASA. The rules are required to be equitable, fair and transparent in terms of the National Payment System Act.

EFT Debit Pull Transaction

- [35] The Oversight Brochure defines an Electronic Funds Transfer or "EFT" as a "...computer-based systems used to perform financial transactions electronically".¹² EFT payments are governed by two distinct payment clearing house agreements governing respectively, the inter-bank clearing of EFT credit payment instructions and the inter-bank clearing of EFT debit payment instructions. EFT credit transactions are cleared in terms of the "Payment Clearing House Agreement for the Clearing of EFT Credit Payment Instructions". The Oversight Brochure explains that an EFT credit occurs "... whenever a customer of a bank issues a payment instruction to his or her bank via various delivery channels to make an electronic payment to a third party, accepting that such payment will not be made immediately, but either later that day or on a future date".¹³ These transactions are also referred to as "credit push transactions", as it is the bank's customer that initiates or "pushes" the payment from its account for the credit of the account of the intended beneficiary.¹⁴

- [36] By contrast, an EFT debit, with which we are concerned in this matter, is "a facility in terms of which somebody can collect money from another person's bank account, without that person having to do

¹² Oversight Brochure, fn 9.

¹³ Oversight Brochure, fn 28.

¹⁴ See Oversight Brochure, fn 18.

anything other than to give that person written or recorded voice approval to do so". EFT debit transactions are processed inter-bank (in the case where the user and the payer are customers of different banks participating in the relevant clearing house) in terms of the EFT Debit Pull PCH Agreement. Transactions in terms of which such payments are obtained are also known as "EFT debit pull transactions", as these transactions are initiated by the user that "pulls" a payment, i.e. a debit, from the paying bank account by instruction to the paying bank issued through the banking system, which payment is then eventually credited to the user's bank account. This gives rise to a debt that the paying bank (Absa in this case) owes the user's bank (FNB in this case) that is, after being netted off against other transactions between the participating banks in any given clearing cycle, settled through the "South African Multiple Option Settlement" or SAMOS settlement system at the SARB, by book entry in the SARB's accounting system.¹⁵

EFT Debit Pull Agreement and the EFT Rules

[37] As members of PASA, FNB and Absa were bilaterally bound to each other in terms of the Debit Pull PCH Agreement.¹⁶ Absa and FNB bound themselves to the legal instruments referred to in clause 5 of the EFT PCH Debit Pull Agreement (this included the EFT Rules and applicable conventions relating to clearing and settlement as may be or become applicable to PASA and its members. Absa was the paying participant and Trifecta was the payee,¹⁷ while FNB was the collecting participant¹⁸ and Spar was the beneficiary.¹⁹

[38] The EFT Debit Pull PCH Agreement has to be read in conjunction "Rules Governing the Clearing of Debit and Credit Electronic Funds Transfer Payment Instructions" ("EFT Rules"). Since the rules are amended from time to time, two versions of the EFT Rules applied at the time of the reversal of the nine payments. The first was version 2009/1 which came into effect on 1 April 2009, and the second was the 2009/2 version which came into effect on 1 July 2009. I will deal further with the two versions of the EFT Rules and their applicability to the respective reversals later in the judgment.

¹⁵ Schedule 2 of the EFT Debit Pull PCH Agreement specifies its scope under the heading "Payment Instructions and Transactions Governed by this Agreement". It states that: "[o]nly EFT debit payment instructions issued by a participant in the PCH or by its customer, and EFT debit payment instructions issued in respect of the return of such EFT debit payments where same are unpaid, may be cleared through this payment clearing house."

¹⁶ Clause 3.1 of the agreement provides that: '3.1 The parties, by entering into this contractual relationship, hereby establish and become participants in the PCH, and agree that the rights and obligations contemplated herein shall govern the clearing of EFT debit payment instructions between them'

¹⁷ Clause 2.2.20 of the EFT PCH Debit Pull Agreement.

¹⁸ Clause 2.30 of the EFT PCH Debit Pull Agreement.

¹⁹ Clause 2.2.3 of the EFT PCH Debit Pull Agreement.

EFT Debit Pull Agreement and reversal of payments

[39] A debit pull instruction that a user submits to Bankserv will in the usual course, once processed through the system, give rise to a credit (or, more likely, part of a credit) on the user's bank account. Such a credit is not final. Paying banks may, in specified circumstances, reverse a debit entry on the payer's account by passing a credit. The return of EFT debit pull transactions by paying banks is underpinned by clause 14.4 the EFT Debit Pull PCH Agreement which reads:

“14.4 The participants agree to conform to the following principles:

- 14.4.1 Any EFT debit payment instruction delivered by a collecting participant to a paying participant will contain information adequate to enable the payer to identify the payment.
- 14.4.2 Notwithstanding the risk borne by the collecting participant as contemplated in clause 5.2.1, the paying participant is obliged to accept for processing in accordance with the clearing rules all EFT debit payment instructions sent to it by the collecting participant. For the purposes of this clause 'processing' includes all validation and other procedures, but excludes any obligation on the paying participant to ensure that the payment instruction is fulfilled in accordance with the mandate information provided by the payer. If these procedures are not successful, the paying participant is obliged to return the EFT debit payment instruction to the collecting participant.
- 14.4.3 Where payment has been made by the paying participant and the payment is subsequently (at any later time) refused or objected to by the payer on the grounds that the payment was unmandated or, if mandated, was made contrary to the mandate information, the paying participant is obliged to return the EFT debit payment instruction to the collecting participant.
- 14.4.4 The risk of non-payment due to customer error should ultimately be carried by the respective customers of the participants, and not by the participants themselves. To assist the collecting participant in managing the risks contemplated in clause 5.2.1, a returned transaction should be accompanied by information adequate for the collecting participant to advise the intended beneficiary of the identity of the intended payer, as well as the reason for the return and, unless inappropriate, to transfer the risk of non-payment to the intended beneficiary or, in certain circumstances, indirectly to the intended payer.
- 14.4.5 ...²⁰

How the Reversal Happens

²⁰²⁰ Own emphasis.

- [40] It is Absa's case that a paying bank (Absa) will pass instructions regarding the reversal on to the user's bank (FNB) via Bankserv and the user's bank (FNB) will then debit the user's account.²¹ Dr Holtzhauzen, however, questioned the accuracy of this conclusion in his expert report when he explained that because the whole process was automated, FNB did not debit Spar's account. He stated that the user bank (FNB) merely stands as a functionary in the established system. It does not have any say or control over whether or not to apply a debit to an account where a reversal has been processed by a paying bank (Absa) - this all takes place by way of an exchange of data packages which automatically process debits and credits on the relevant accounts.
- [41] Indeed, as I understood the testimony of Mr Erasmus, he rebutted Absa's version that it was FNB that applied the debit to Spar's account in the reversal process, in explaining that when the debit order payment is processed by way of the pull transaction, there is no human intervention at all, and that exactly the same automated process is followed, in reverse, after the payer (Trifecta) instructs its bank (Absa) to effect the reversal. I accordingly accept Dr Holtzhauzen's evidence that reversals take place as part of a system-driven process which occurs by way of a series of codes passed between the banks' systems. The reversals and the resulting debits to Spar were actioned by Absa through the EFT system. FNB played no direct role in effecting the reversals.

The CAMS Agreement and the FNB User Manual

- [42] The EFT Rules require that participating banks conclude "user agreements" with their customers who wish to collect payments by way of EFT debit pull transactions. The CAMS Agreement served as the "user agreement" between Spar and FNB.²⁰ They entered into the CAMS Agreement in 2004. In terms of schedule 5 to the CAMS Agreement, FNB undertook to provide an "Online Collection Service" to Spar, encompassing the transmission of EFT debit pull transaction instructions received from Spar to Bankserv. In terms of clause 1.3.2 of schedule 5 to the CAMS agreement, Spar undertook to FNB:

'... to refund to the Bank or Customer's Bank, as the case may be, any and all amounts paid to the Users in respect of any such debits if the Customer at any subsequent time disputes

²¹ Settlement of the debt arising between the user's bank and the payer's would again have taken place at the SARB, on the instructions of Bankserv.

²⁰ Since the CAMS agreement was signed in 2004 between FNB and Spar, its terms are not ad idem with the operation of the EFT Debit Pull payment system and EFT Rules that applied in 2009. This presumably stems from whatever the rules and practices were at the time that the CAMS agreement, a standard form document, was drafted. Clause 14 of the CAMS agreement, entitled "Compliance with the User Manual", however, provides that:

"The parties shall adhere to the rules, standards and procedures governing the operation of the System as published in the relevant User manuals and any amendments thereof as notified in writing to the Users from time to time. The Bank shall make itself available to discuss the consequences of such amendments with the Users."

the validity of the transaction, provided that the Bank or the Customer's Bank has given the Users notice of its intention to reverse the credit concerned, or it has, in respect of debts less than R500 000,00, within 30 days after processing reversed such credit and in the case of debit exceeding R500 000,00, within 4 (four) days after processing reversed such credit.'

FNB's EFT User Manual is dated 22 July 2008 ("the FNB User Manual").²¹ Its purpose is "to guide FNB Users/Clients who are registered as direct submission Users with Bankserv and who utilise the Electronic Funds Transfer service." Spar was familiar with the FNB User Manual as FNB had provided it with a copy.²² Paragraph 3.4 of the FNB User Manual specifies, among other things, under the heading "Mandates for Debits" that:

"Mandates are revoked under the following conditions:

- Stop payment;
- Direct Instruction from the customer to the User;
- Terminated services;
- Changes to the conditions under which the mandate was given;
- If the debit order is unpaid on two consecutive occasions;
- Account closed."

[43] Paragraph 3.9 of the FNB User Manual entitled "Disputed Transactions (Debits or Credits)" states that:

'The Customer has the right to dispute the transaction/s. Disputed items occur when a customer declared a dispute with his/her Bank in relation to payment instruction which has been posted to his/her account. Disputed items fall in two categories namely:

Where the dispute is lodged within 40 calendar days of action date.

Where the dispute is lodged after 40 calendar days of action date.

Within 40 calendar days:

²¹ Appendix C to FNB's EFT User Manual lists the "*Reason Codes for Return Transactions*". In doing so, it specifies the categories under which paying banks return EFT debit pull transactions to users' banks. Returns are identifiable in relation to numerical codes that serve to inform the user's bank, as well as the user, of the reason for the return of the transaction. A distinction is drawn, among others, between "Unpaid Reason Codes" and "Disputed Transaction Codes". An EFT debit pull transaction would, for example, be returned as an "unpaid item" by the paying bank under code 02 if the payer does not have sufficient funds available in its account or a sufficient credit facility to meet the payment. A further basis upon which a previously processed EFT debit pull transaction can be returned to the user's bank as an "*unpaid item*" is under code 04 signifying "Payment stopped (by A/C holder)". "Disputed transaction Codes" apply when the payer has objected (to its bank) to a payment on the grounds that the payment was unmandated or contrary to the mandate information (as contemplated in terms of clause 14.4.4 of the EFT Debit Pull PCH Agreement). Code 30 signifies "no authority to debit"; code 32 "debit in contravention of payer's authority"; code 34 "authorisation cancelled" and code 36 "previously stopped via stop payment advice".

- When a customer disputes a transaction within 40 calendar days after the action date, the transaction will be returned electronically (immediately) to the User's nominated account for one of the following reasons:
 - o The transaction is not mandated/ he/she did not authorise the payment.
 - o The transaction is in contravention of the mandate.
 - o The mandate for the transaction has been cancelled.
 - o The transaction has been previously stopped via a stop payment advice.

After 40 calendar days

- o When the dispute is lodged later than 40 calendar days after action date the customer's bank shall give the User's bank 30 days written notice to that affect. If the User's bank fails within such period to prove to the satisfaction of the customer's bank the validity of the relevant authorisation then the customer's bank shall immediately reverse the debit to the User's account.
- o In the event where the User holds an electronic mandate participant Banks will not be involved with any process to prove the existence of that mandate to their customers.
- o In the event of an entry, being reversed by a customer's bank other than in compliance with the aforesaid notice provision then the customers bank shall forthwith reinstate such payment instruction upon resubmission thereof by the User's bank to the customer's bank, without prejudice to the customer's bank to revert to the above procedure on the prescribed basis.
- o Participating Banks cannot become involved in a dispute between their client and a User.

Delictual Claim

[44] In order to succeed in its delictual claim, Spar must prove conduct, wrongfulness, fault, causation and damages.²³ Although physical injury to a person or property is prima facie wrongful or unlawful, negligent conduct causing pure economic loss is not.²⁴ Spar must, therefore, demonstrate that policy considerations require that it should be recompensed by Absa for the loss suffered as a result of its reversal of the nine EFT payments made by Trifecta to Spar in the present case.²⁵

Conduct

²³ *Odinfin (Pty) Ltd v Reynecke* 2018 (1) SA 153 (SCA) par 12.

²⁴ *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) SA 150 (SCA); *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2014 (2) SA 214 (SCA); *Itzikowitz v ABSA Bank Limited* 2016 (4) SA 432 (SCA) par 8; *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015 (1) SA (1) (CC).

²⁵ *Steenkamp N.O. vs Provincial Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA) par 1.

[45] The requirement of conduct is uncontentious as it is common cause that Absa, acting unilaterally and without the concurrence of Spar, reversed the nine payments totalling R2 464 856.32 with the effect that the monies were removed from Spar's bank account with FNB.

Wrongfulness

[46] The question of wrongfulness has proved to be one of the most complex and illusive issues in our jurisprudence. Setting the boundaries of delictual liability for pure economic loss (i.e. loss without injury to person or property) has caused our courts much concern. In claims for pure economic loss the defendant will be held liable if it is established that the possibility of loss of this nature was reasonably foreseeable to him, and that in all the circumstances of the case he was under a legal duty to prevent such loss.

[47] In the context of pure economic loss, wrongfulness is usually determined by asking whether the defendant owed the particular plaintiff a legal duty not to cause patrimonial loss. Ultimately, the question is whether it would be reasonable to impose liability on a defendant for damages flowing from specific conduct that caused pure economic harm, assessed on the basis of considerations of public and legal policy in accordance with constitutional norms.²⁶ This must be determined by carefully balancing identifiable norms against each other, rather than an intuitive reaction to a collection of arbitrary factors.²⁷

[48] Each case must be assessed on its own facts and merits, with primary weight being laid upon the policy of the law. The court must consider whether, paying due and proper regard to the notion of justice and the interests of the litigants balanced against the community as a whole, it is socially desirable to impose liability in the particular circumstances.²⁸ The enquiry "focuses on conduct" and "whether the policy and legal convictions of the community, constitutionally understood, regard it as acceptable."²⁹ This requires the making of a value judgement. It is, however, important to recognise that the potential considerations of policy would not, on their own, be conclusive. Nor is it possible to attempt to define exhaustively the factors which would give rise to a legal duty, as new situations not previously encountered are bound to arise and societal attitudes are not immutable.³⁰

[49] Spar contends that Absa owed it a legal duty of care and should have taken steps (that it contends a reasonable banker would have taken) to prevent Spar from suffering economic loss arising from the

²⁶ *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2014 (2) SA 214 (SCA) para 21.

²⁷ *Minister of Safety and Security v van Duivenboden* 2002 (6) SA 431 (SCA) para 21.

²⁸ *Zimbabwe Banking Corporation Limited v Pyramid Motor Corporation (Pvt) Limited* 1985 (4) SA 553 (ZS) at 564 C - D.

²⁹ *Loureiro and Others v Imvula Quality Protections (Pty) Ltd* 2014 (3) SA 394 (CC) para 53.

³⁰ *E Abrahams & Co v Gross and Cohen* 1991 (2) SA 301 (C) at 309.

nine payment reversals. Absa counters this with the contention that the EFT Debit Pull PCH Agreement and the EFT Rules operate on the inter-bank agreed basis that a payer can, without providing a reason, cause a debit to be returned to the user's bank by stopping payment timeously. Such returns have to be effected within four business days of the actioning of the debits. If a payer disputes the user's authority, returns occur without reference to the user or the user's bank up to 40 calendar days after the payment had been actioned. Even subsequently there is a risk, albeit a diminished risk, that the user's authority can be disputed. The implication of Absa's argument is that within the first 40 days the debit order payment remains conditional, because of the right contained in the EFT Rules and EFT User Manual for the customer of the paying bank to give a "un-pay" instruction to the paying bank.

[50] It is, however, Spar's contention that Absa was under a legal duty to take reasonable steps to avoid patrimonial loss to it, when exercising its discretion to decide whether or not to reverse the payments. It argues that even if Absa was obliged to follow the EFT Rules, it had to adopt additional measures to avoid the harm which was so obviously foreseeable for Spar. The question that arises, however, is whether a paying bank in the position of Absa owes a person who is not its customer, but is the beneficiary/payee of an EFT payment, a duty of care to avoid economic loss to such beneficiary/payee by the negligent reversal of the EFT payment.

Debit Order Instruction

[51] In a debit transfer or debit order transaction, the authority of the debtor's bank (Absa in this case) to debit its account rests on the debit order instruction or mandate which the user (Spar) receives from the payer (Trifecta). Needless to say, without it, a debit order transaction cannot take place. What is a debit order instruction? A signed debit order instruction, such as the mandate in this matter, is a contract which allows a party to enter payment instructions into the inter-bank EFT payment system on behalf of the account holder.³¹ The party in possession of the mandate, such as Spar in this instance, can then either load payments directly into the EFT payment system via Bankserv or can instruct their own bank to process such payments. In this case, Spar instructed FNB to process the payments from Trifecta pursuant to the debit order instruction.

[52] In terms of the debit order instruction which Trifecta gave to Spar, Trifecta agreed that all withdrawals from its bank account by Spar shall be treated as though they had been signed by Trifecta

³¹ Evidence of Dr Holtzhausen. See also clause 2.2.8 of the EFT Debit Pull PCH Agreement defines an 'EFT debit payment instruction' to mean "an electronic payment instruction to a paying participant to make a payment, issued by the collecting participant or by its customer on behalf and ostensibly under the mandate of the customer of a paying participant.

personally.³² Trifecta's right to cancel the authority was subject to Trifecta giving Spar 30 days' notice, in writing, sent by pre-paid registered post. Trifecta, therefore, clearly understood and agreed that it shall not be entitled to any refund of amounts legally owing to Spar, which Spar had withdrawn while the debit order authority was in force.

[53] Central to Absa's case, is the allegation that Trifecta had conveyed to Absa (in the person of Ms Koen) that the debit order instructions were invalid and not authorised. Unfortunately, the evidence does not bear this out. Crucially, Ms Koen was not called by Absa to testify, despite the fact that she had deposed to an affidavit on behalf of Absa on 22 June 2012, in which she says that Mr Schoeman had telephonically instructed her to make the reversals. It turns out that Absa's legal representatives had consulted with Ms Koen, but elected not to call her to testify.

[54] A further defect in Absa's pleaded case is that its factual witness, Mr Schoeman, testified that he did not convey to Absa that the debit order transactions had been invalid and unauthorised, but rather that he had instructed Ms Koen telephonically "to send back as many debit orders as the system would allow her to do." In cross-examination, he testified that he did not specifically focus on any particular debit order payment and accepted that he had given a so-called "shotgun instruction" to reverse everything that is capable of being reversed. In addition, when asked in cross-examination whether he told Ms Koen in the telephonic conversation that there was a dispute about stock, he responded by saying that: "I did tell her there was a dispute of stock and that was the reason why I asked her to send back these debit orders". However, on being asked: "[Did] you tell her in respect of which payments that had already been collected by Spar there was a dispute, his answer was "No -- I did not. She did not know that? --No". Predictably, Mr Schoeman accepted that the effect of his reversal instruction was that Trifecta, in effect, recouped payments in excess of R2.4 million. Whereas the dispute he raised regarding the value of the stock, only related to approximately R700 000.00.

[55] Spar urges the Court to draw an adverse inference from Absa's failure to call Ms Koen to testify. Indeed, given the circumstances of this case and, in particular, the weight of Mr Schoeman's evidence referenced above, it was expected of Absa to call Ms Koen to testify. What I infer from its failure to do so, is that although Ms Koen was able to give material evidence, her evidence would have been

³² Absa pleaded that Trifecta did not have the intention to make payment of the nine payments in question (with the implication that those payments did not, as a matter of law, take place). This defence has fallen away rightly so, as there was no suggestion in the evidence of Mr Schoeman, who at all relevant times represented Trifecta, that Trifecta did not have the intention to make payment of the nine payments. He, in fact, acknowledged in his testimony that, in terms of the debit order instruction, Spar had an "open cheque" to take an amount according to what they perceived the value of that order was. The debit order instruction given by the Trifecta to Spar made it clear that Trifecta need not have knowledge of, or concur in, the payment being effected.

damaging to Absa's case. Thus, the net effect of Absa's election not to call Ms Koen to testify, is that there is no evidence to support its allegations that Trifecta had conveyed to Absa that the debit order transactions were neither valid, nor authorised.

[56] Mr Schoeman's evidence that there was no specific instruction relating to any of the nine payments in issue, but simply a blanket instruction to reverse all payments capable of being reversed, destroyed Mr Erasmus' expert testimony that Absa was under an obligation, in terms of the banker and customer relationship and the EFT Rules, to reverse the nine debits after it had obtained instruction to do so from Trifecta. Since his evidence was based on the assumption that Trifecta had given instructions to Absa (Ms Koen) to reverse the nine payments specifically, he had to concede that Absa was under no such obligation. Moreover, in terms of clause 9 of the Mandate and Indemnity in Respect of E-mail, Faxed and/or Telephone Instructions which Trifecta gave Absa, Trifecta agreed "that Absa would not be obliged to act in response to any telephonic instruction for any reason whatsoever and that Absa's decision to act or not to act on such instruction is entirely at its (Absa's) own discretion".

[57] Consistent with this approach, is Dr Holtzhausen's testimony that where the debit order payment has already been made at the time when the instruction to reverse is given, human interference would be necessary to effect the reversal and a credit manager at the bank (in this case Absa) would have a discretion whether to reverse the payments or not. It is clear from this that Absa was not obliged to effect the reversal of the nine payments on instructions of Mr Schoeman.

[58] On this point, Dr Holtzhausen added that the Code of Banking Practice, which reflects conduct to be expected of reasonable and prudent bankers, affirms in accordance with sound banking practice, that a debit order is to be cancelled by written notice to a third party in the position of Spar.³³ Both Dr Holtzhausen and Mr Erasmus (Absa's expert witness) were in agreement that, that which is common knowledge in the banking industry is reflected in the PASA website under "consumer information guidelines". Commenting on an extract from these guidelines on, *inter alia*, the process to be followed for disputing unauthorised debits, Dr Holtzhausen testified that it was sound banking practice to require the customer who wishes to dispute an unauthorised transaction, first to have recourse to the party in the position of Spar in whose favour the debit order was signed. He also confirmed that it was sound banking practice to require that such customer may only approach his or her own bank (Absa in this case) to dispute the debit order if the first course of action (i.e. the approach to Spar) was unsuccessful.³⁴

³³ Clause 9.4.1 of the Code of Banking Practice provides that a customer "must cancel a *debit order* by providing written or other appropriate notification to the third party whom you authorized to make the deductions (ie. the party in the position of Spar).

³⁴ Dr Holtzhausen also confirmed that it was consistent with the requirements that such customer identify himself or herself by means of an identification document, and should also present the debit order mandate if possible.

- [59] Mr Erasmus agreed, under cross-examination, that “at least certain portions of the Code of Banking Practice accords with good banking practice”, *inter alia*, the provision that a debit order must be cancelled by providing written or other appropriate notification to the party in the position of Spar. However, when confronted with the logical implications of the Code of Banking Practice, he attempted to describe it as being purely informational. That this did not signify its purport, was made clear by Dr Holtzhausen, who confirmed that banking practice is governed by a number of statutory instruments, inter-bank agreements, the Code of Banking Practice and other instruments such as the EFT Rules. He said that the Banking Association of South Africa ("BASA") produced a Code of Banking Practice which is subscribed to by most of the banks in South Africa. Although subscription to the Code is voluntary and therefore not enforceable as a legal rule, Absa has pledged its commitment to the Code of Banking Practice. Having done so, Absa endorsed the Code as representing the standard of practice expected of a banker. Mr Erasmus ultimately accepted that employees of Absa should be alive to, and aware of, the Code of Banking Practice when accepting instructions to reverse debit order payments. This means that Ms Koen ought to have asked Mr Schoeman for proof that Trifecta had notified Spar in writing that he was cancelling the debit order.
- [60] Mr Erasmus also conceded that PASA informed bank customers through its guidelines (referred to above) that, if they wanted to dispute transactions, their first recourse is to the party in Spar's position, and only if this course of action has proved to be unsuccessful, may the customer approach its bank to dispute the order. He accepted, under cross-examination, that when Mr Schoeman of Trifecta had approached Ms Koen, she should have indicated to him that he could only approach her if he had already taken the matter up with Spar. He also conceded that Ms Koen would have been aware that the standard debit instruction has a clause requiring cancellation only upon thirty days written notice and that, in terms of the PASA guidelines referred to above, she should have asked Mr Schoeman whether he had a copy of the mandate available.
- [61] Dr Holtzhausen testified that in practice, a debit order instruction is usually cancelled before a disputed payment is processed from the account holder's account. Commenting on the debit order instructions (specifically during the period April 2009 to July 2009), Dr Holtzhausen confirmed, in his evidence in chief, that all banks, at the time, were exposed to debit order instructions and would have had working knowledge of its essential terms.
- [62] He was of the view that the instruction to reverse payments which have already been processed is unusual and may give rise to suspicion of irregular activity. He said that, despite Absa alleging that it received instructions from Trifecta at the end of June 2009, a dispute existed and that payments should be reversed, Absa still allowed various transactions to be processed from

Trifecta's account, the last of which (item 9 on annexure B to the pleadings) was paid to Spar on 3 July 2009, which was subsequent to the alleged cancellation of the retailer's authority. He said that if the cancellation of the authority was indeed valid at the time, and Absa had followed standard protocols subsequent thereto, no further payments could have been processed by Absa from Trifecta's account.

[63] He said, over and above that consideration, and given the obvious risk of financial harm to Spar, Absa should also not have given effect to the alleged instructions if the objective facts and circumstances were such as to call for an investigation or verification, for example, if the instruction on the face of it was not lawful or was not given for *bona fide* purposes. The considerable lapse of time of itself created the risk that Spar would have continued to supply goods to the retailer on credit in the belief that it was being paid.

[64] He said that the banks have protocols in place, for steps to be taken if an account holder acts suspiciously, *inter alia*, where debit orders are involved. In his opinion, a bank's representative who thinks that there may be any suspicious activity involving debit order payments, has a positive obligation to report such activity to his or her superior with a view to investigating such conduct. He was further of the view that multiple reversals of EFT debit order payments constitute suspicious activity by an account holder. On this aspect, he emphasised that the banks have recognised the risk involved in these instances and have, as a result, put in place a measure, that every reversed payment must be accompanied by a specific instruction – record of which should be retained by the bank in question.

[65] He testified that standard banking practice is for a bank always to request a written or electronically recorded instruction from their client, before processing any reversal at the instance of the client. He explained that, in terms of the EFT Rules in effect during the period April 2009 to 30 June 2009, only written reversal instructions were accepted. And despite their amendment from 1 July 2009 onwards, the banks almost uniformly still required written reversal instructions from their clients before processing any reversal. He said that once a payment has been reversed due to cancellation of the authority, no further debit orders can be processed from the account in question, to the recipient in question, until a fresh debit order instruction has been executed. He was of the opinion that the processing of further debit orders by a creditor would, in itself, be suspicious in light of the client's notification of cancellation of the debit order instruction.

[66] Mr Erasmus was constrained to concede that Absa would have been aware of the general content of debit order instruction in question, as its formulation was very similar to Absa's one. He nevertheless

maintained that, on the strength of the Debit Pull Agreement and the EFT rules, Absa was permitted and obliged to give effect to Trifecta's reversal instructions. In retort, Spar contends that neither the Debit Pull Agreement nor the EFT Rules should have any effect in determining Spar's claim against Absa, because the Debit Pull Agreement is an agreement between the banks only and Spar is not a party thereto. Likewise, so it contends, the EFT Rules are made by PASA whose members are only banks.

[67] The evidence of Dr Holtzhausen is instructive on this aspect. According to him, the Debit Pull Agreement and the EFT Rules relied upon by Absa are made "by the banks, for the banks". External parties, such as customers of the banks, generally have no knowledge of the contents of the inter-bank agreements and the EFT Rules, which are usually closely guarded and are not disclosed by the banks.³⁵ Mr Erasmus agreed in the experts' joint statement. It is, therefore, common cause that although the EFT Rules have contractual force between the participating banks, they are not intended to create enforceable rights for their respective clients.

³⁵ Notably, Mrs Swanepoel, who was employed by Spar (North Rand Division) in 2009 as the Credit Control Supervisor in the Debtor's Department testified that she was not aware of the EFT Rules – neither the 1 April 2009 version nor the 1 July 2009 version.

EFT Rules on reversal of payments

[68] However, to the extent that Absa contends that the EFT Rules are applicable, it is important to deal upfront with why its reliance on them is ill-conceived. The EFT Rules which were effective until 30 June 2009 and which covered items 1 to 8, alternatively 1, 2 and 8 on Schedule B, are:

(a) Clause 2.16 which defines “item” to mean the same as transaction.

(b) Clause 2.42 which defines “disputed item” to refer to:

“an item which the customer declares in writing that:

1. He/she did not authorise the drawing in question; or
2. The drawing is in contravention of his/her authority, or
3. He/she has instructed the user to cancel the authority.”
[emphasis added]

(c) Clause 3.1.4.2.1 provides:

‘A customer’s authority shall only be regarded as being in dispute if he/she declares in writing that:

1. He/she did not authorise the drawing in question; or
2. The drawing is in contravention of his/her authority, or
3. He/she has instructed the user to cancel the authority, or
4. He/she has stopped payment of the instruction.’

(d) Clause 3.1.4.2.3 reads as follows:

‘If a Homing Bank [Absa] receives a complaint from a customer about an allegedly unauthorised payment instruction to the customer homing account the Homing Bank is entitled to act as follows:

- (1) If the complaint is lodged within forty days after Action Date it must reverse the debit immediately to the user’s nominated account.”

On reading clause 3.1.4.2.3 in the context of clause 3.1.4.2.1, it is clear that the complaint must be in writing.

- (e) Clause 3.1.11 entitled “Processing of disputed items including fraudulent payment instructions that have entered the clearing environment and which are identified after payment” reads as follows:

‘3.1.11.1 Disputed items must be returned to the Collecting Participant [FNB] ...

3.1.11.2 An item may be declared a disputed item if one or more of the following reasons are valid:

1. The transaction is not mandated or authorised.
2. Transaction is in contravention of the mandate or authority.
3. The mandate or authority for the transaction has been cancelled.
4. The transaction has been previously stopped via a stop payment advice.”

[69] The EFT Rules which came into effect on 1 July 2009 contain provisions identical to those in clauses 2.16, 2.4.2, 3.1.4.2.3, 3.1.11 and 3.1.11.4 of the earlier version referred to above. The only material amendment was effected to clause 3.1.4.2.1 which reads as follows:

“If a Homing Bank receives a complaint from a customer about allegedly unauthorised payment instruction to the customer homing account the Homing Bank is entitled to act as follows:

If the complaint is lodged within forty days after the Action Date it must reverse the debit immediately to the user’s nominated account ...”

[70] Despite the amendment of clause 3.1.4.2.1 which, in its prior form, provided that “a customer’s authority shall only be regarded as being in dispute if he/she declares in writing that...”, the definition of disputed item in clause 2.4.2 has not been amended. A “disputed item” remains “an item which the customer declares in writing” to be in dispute.

[71] This definition creates an insurmountable challenge to Absa’s case, as its defence is not that the reversal instructions were received by the retailer in writing or that the disputes were communicated in writing. Its case is that it received oral instructions from Trifecta advising that a dispute existed with Spar regarding the amounts of the nine payments, and requesting that they be reversed. Thus, Absa’s principle defence that it was obliged and entitled to act as it did in terms of the EFT Rules is unsustainable on a proper construction of the EFT Rules.

[72] The reversals were not effected in accordance with the EFT Rules or the EFT Debit Pull PCH Agreement relied upon by Absa, as the pivotal requirement that a dispute must be declared in writing was not complied with. Crucially, Mr Schoeman's communication, on the strength of which Ms Koen effected the reversals, was made telephonically and not in writing. Moreover, any dispute purportedly raised by Mr Schoeman was not valid as it did not comply with clause 3.1.11 of the EFT Rules because it was not based on any of the four specified reasons, namely that the payments to be reversed had: (a) not been mandated or authorised; (b) been made in contravention of the mandate or authority; (c) been made in terms of a mandate or authority which had been cancelled; or (d) been previously stopped via stop payment advice.

[73] Mr Erasmus also agreed that in terms of the EFT Rules which applied with effect from 1 April 2009, Absa was not obliged to reverse the debits in question as contended for in his expert summary, because the rules required a written instruction, whereas the instruction in question was given telephonically. Thus, as alluded to above, Absa's pleaded case that Mr Schoeman had conveyed to Ms Koen on three separate occasions, being on or about 30 June 2009 and 1 and 2 July 2009, that he disputed the validity of the debit order transactions, was also not borne out by the evidence of Mr Schoeman. Put simply, the evidence does not establish that any of the reversals were effected on the basis of disputed authority, contemplated in clause 3.1.11 of the EFT Rules. Mr Erasmus, accordingly, accepted that, on the common cause facts no dispute, as envisaged in the EFT rules of 1 April 2009, came into being in respect of the debit order payments in question. Absa was, accordingly, not entitled under the EFT Rules or EFT Debit Pull PCH Agreement to reverse the nine payments in issue in this matter.

Policy Considerations

[74] Thus having regard to the facts of the case, the Court must decide whether as a matter of policy Absa should be held liable for the economic loss claimed by Spar. Policy considerations applicable to the recognition of a legal duty on a collecting bank towards the owner of a stolen or lost cheque, have application here.³⁶ I now turn to these considerations.

Potential Multiplicity of Actions and Indeterminate Liability

[75] Concerning the potential of multiplicity of actions and indeterminate liability, Absa contends that once an obligation is recognised for an outsider to a contractual obligation, to conduct itself without negligence in relation to the purely economic interests of another legal subject

³⁶ *Indac Electronics (Pty)Ltd v Volkskas Bank Ltd* 1992 (1) SA 783 (A).

arising from that party's contract with a further legal subject, the spectre of a multiplicity of actions and indeterminate liability will loom large. I disagree. It is common cause that the loss in the present case is finite and limited to the nine payments which were reversed by Absa. The number of potential plaintiffs is also limited, as Spar is the only plaintiff. It is also clearly identifiable. The objection of limitless or indeterminate liability does not arise. Potential claims will arise separately from each other and relate to specific conduct of a bank.³⁷

[76] Absa's floodgates argument is unsustainable for the further reason that it is clear from Mrs Swanepoel's evidence, that contrary to her experience where debit order payments are reversed between 2 to 4 days, this was the first time in her twenty-two years of working for Spar, that debit order payments were reversed after such a long lapse of time.³⁸

The Plaintiff's Vulnerability to Risk and Ability to Protect its Own Interests in the Circumstances

[77] This enquiry relates to whether a plaintiff could not reasonably have avoided the risk of economic harm by other means. A finding of non-vulnerability on the part of the plaintiff is an important indicator against the imposition of delictual liability on the defendant. *In Country Cloud Trading CC v MEC, Department of Infrastructure Development*,³⁹ the SCA recognised that "[i]f the plaintiff has taken, or could have taken steps to protect itself from the defendant's conduct and was not induced by the defendant's conduct from taking such steps, there is no reason why the law should step in and impose a duty on the defendant to protect the plaintiff from the risk of pure economic loss". The plaintiff's vulnerability to harm from the defendant's conduct is thus a prerequisite to imposing a legal duty.⁴⁰

[78] Absa's point of contention is that Spar, of its own volition, chose to use the EFT Debit Pull payment system as the means to obtain payment, twice a week, for variable payments due to it. In doing so, Absa contends that Spar committed itself to an expressly specified contractual relationship with FNB in terms of the CAMS Agreement, which was subject to FNB's EFT User Manual. Absa submits that both the User Manual and the CAMS Agreement unequivocally pointed out the possibility that EFT debit pull transactions could be reversed at

³⁷ *Indac Electronics* at 798 D – E.

³⁸ Dr Holtzhausen also testified that in the ordinary course payment reversals occur in the first four days.

³⁹ *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2014 (2) SA 214 (SCA) at par 30 (referred with approval to the dictum of McHugh J in *Perre v Apand (Pty) (Ltd)* (1999) 198 CLR 180 (HCA) at par 118).

⁴⁰ *Country Cloud* (SCA) at par 30.

the payers' behest without much ado, a substantial period after the action date. Absa, furthermore, argues that Spar could have avoided the risk altogether if it opted to use, the EFT Credit Push payment system where the receipt of payments are final and irrevocable or, a "signed cheque book method" which would have eliminated the risk of payments being returned over a period beyond a couple of days.

[79] It is clear from its terms that, as a party to the CAMS Agreement, Spar accepted the risk that, if a payer objected to a payment debited against its account on the grounds that it was unmandated or was made contrary to mandate information or that the mandate was cancelled, the paying bank will be obliged to return the payment to the user's bank. In other words, it assumed the risk of payment reversals where the retailer disputed the transaction on permissible grounds. As with the EFT Rules, the FNB User Manual contemplates that before a payment is reversed, it will be disputed in writing by the customer for one of the following reasons: (a) the transaction is not mandated as he/she did not authorise the payment; (b) the transaction is in contravention of the mandate; (c) the mandate for the transaction has been cancelled; (d) the transaction has been previously stopped via a stop payment advice. As I have already found, Mr Schoeman did not, in writing, dispute any one of the nine transactions within 40 calendar days after the action date of the transactions. He simply instructed Ms Koen, telephonically, to reverse as many payments as was possible. By the same token, I reject the argument that Spar could have avoided the risk altogether if it opted to receive payments through the EFT Credit Push payment system or "the signed blank cheque book." The risk of reversal in circumstances where Absa was not entitled to reverse the payments, is not what Spar consented to.

[80] Spar's vulnerability to the risk of economic loss is established on the evidence. Since the nine reversals took place without Spar's knowledge or consent, there were no protective measures available to it. In the circumstances, it was not in a position to take steps to protect itself from Absa's negligent conduct in reversing the nine payments.

The Social and Economic Costs of Imposing Liability

[81] Absa contends that the fundamental premise that underpins the EFT Debit Pull payment system, contemplated in terms of the EFT Debit Pull PCH Agreement and the EFT Rules, is that the participating banks should not become involved in or become party to disputes between payers and users about their contractual rights and obligations, i.e. whether payments debited against payers' accounts were actually due and payable or not. It argues that the banks adopted that premise for obvious reasons – if a customer complains to a bank

that a debit on its account is unauthorised, the bank has to reverse the debit, unless it can show that the debit was authorised. Absa argues that if the banks have to, with a view to protecting the interests of users, to satisfy themselves across the board of the validity of complaints made by payers about the validity of debit order debits on their accounts, the convenience and facility of operation of the EFT Debit Pull payment system will be undermined and the costs of making it available will escalate; costs that will ultimately fall to the public at large. Absa seeks to persuade the Court that it would be unreasonable to expect of banks to employ substantial resources to establish systems to undertake investigative and adjudicative functions, in respect of the receipt of instructions from a payer countermanding payment on a permitted ground, as banks are ill-suited to do so - hence the principle that if disputes arise between payers and users, transactions should be returned to their origin.

[82] Absa's seeks once again to obfuscate the true nature of its negligent conduct in this matter. I reiterate, Absa (through the person of Ms Koen) did not receive an instruction/s from Mr Schoeman countermanding payment, of the nine debit pull transactions, on permissible grounds. His instruction was unlawful and invalid and Absa was under no obligation to act in accordance with it. Absa was, furthermore, under no obligation to act, and should not have done so, as Ms. Koen had not obtained written instructions from Mr Schoeman to reverse any of the nine payments.

[83] In relation to the contention advanced by Absa that the banks do not involve themselves in disputes between their customers and third parties, Mr Erasmus conceded that Ms Koen would not have involved Absa in any dispute between Trifecta and Spar if she had asked Mr Schoeman whether he had a copy of the mandate available or whether he had first taken up the matter with Spar. It is, furthermore, clear that if she had said to Mr Schoeman, on the second or third occasion that he had phoned her, that it is strange that he was now disputing nine payments to a value of R2.5 million and that some of these payments had been made weeks ago, she would not have been initiating a dispute between Trifecta and Spar.

[84] There was no obligation on Absa to reverse the nine payments on the instructions of Mr Schoeman. A prudent banker in the position of Absa would have first established from Mr Schoeman whether the mandate was cancelled. It was open to Absa to take this protective measure in order to establish whether the mandate had been cancelled by Trifecta, and to place the funds in a suspense account, pending resolution of any dispute which may have arisen.⁴¹ Concerning this question, Mr Erasmus conceded that it would have been possible in

⁴¹ See: *Spar Group Limited v Firstrand Bank Limited* (Case No. A145/17) GPD, 23 August 2019.

2009 for Absa to reverse the debits in question to a suspense account, and that if this was done, the reversals would not have been final. He agreed that this would not lead to the collapse of the EFT payment system.

[85] In relation to the question of the ease with which the protective measures could have been implemented, it would have been fairly easy for Ms Koen to request Mr Schoeman to provide proof that the mandate had been terminated in writing. She would have been aware that the mandate required termination by 30 days' notice in writing. Although Absa denied that it had sight or possession of the debit order authority which Trifecta signed, Mr Erasmus accepted, under cross-examination, that Absa knew that such a debit order instruction was essential for pull transactions to be effected, and that the terms of the debit order instructions would in all likelihood be similar, if not identical, to Absa's own specimen form. Moreover, Mr Erasmus did not indicate that there would be any particular difficulty in placing the funds in a suspense account. Erasmus, nevertheless, ventured the opinion that if a duty of care to investigate suspicious debit order payment reversal instructions is to be imposed on banks that are participants in the EFT system, to investigate whether their customer's dispute in relation to the transaction is a valid one, and to consider the potential impact that reversal of prior debits on their customer's accounts might have on the clients of other banks, with whom they have no agreement or banker client relationship, the EFT system will not be able to operate. He, however, conceded that this proposition was based purely on his understanding of the EFT Rules which make no mention of a duty of care to a third party.

[86] On the question of the likelihood of success of such protective measures, it is clear from Mr Schoeman's evidence that he had not cancelled the mandate in writing. In the light of this, it is obvious that he would have been unable to produce proof that he had cancelled the mandate in writing.

[87] It is obvious that the protective measures outlined above, could have been taken by Ms. Koen without any appreciable cost to Absa. I, therefore, remain unpersuaded that the financial and social consequences of imposing liability on Absa will be associated with any particularly onerous burden on either itself, its customers, or the the public at large.

Are There are any Considerations of Equity, Fairness and Policy which Favour a Denial of the Remedy?

[88] I am aware of no considerations of equity, fairness and policy that favour a denial of the remedy. Of particular relevance to the question of whether to extend a duty of care to a third

party not to reverse EFT payments without doing more, is the decision of *Peterson and Another NNO v Absa Bank Ltd*,⁴² where the court recognised that a bank has a legal duty to avoid loss to customers and third parties when opening and subsequently monitoring bank accounts.⁴³ The development of the law to extend a legal duty to avoid economic loss to a third party not to reverse EFT payments without doing more, would not be out of step with the law as it currently stands.

[89] The policy considerations relied upon by the courts in finally recognising that the collecting banker owes the true owner of a cheque a legal duty are of assistance in the present context. All the considerations taken into account in *Indac*,⁴⁴ for recognising a legal duty on the collecting banker vis-à-vis the true owner of the cheque apply directly, or at least by way of analogy, to the present case. As is the case in relation to a cheque, there is an ever present risk that payment can be obtained by an unlawful possessor with relative ease. Hence the need for protection in the case of the true owner of a cheque. In the present case, it was not disputed that the banking business takes place in a high risk milieu in which the risk of patrimonial loss to, *inter alia*, third parties remains a constant concern.⁴⁵ Pertinently, in relation to the facts of the the present case, is Mr Erasmus' acknowledgement that a substantial risk existed that a debtor in financial trouble, as in this case, could easily raise a bogus dispute as a pretext for giving instructions to reverse debit order payments. This underscores the need for the legal protection of the interests of a third party, beneficiary/payee of an EFT payment, in the position of Spar.

[90] It is also not an insubstantial consideration that at the time of the reversals Trifecta was in debit with Absa by virtue of the substantial overdraft facilities it enjoyed. The net effect of Absa's reversal of the debit order payments in favour of Spar was to prefer Absa, as a creditor of Trifecta above Spar, by reason of the reduction in Trifecta's indebtedness to Absa as a result of the crediting of the reversed entries to Trifecta's account with Absa. Tellingly, Absa was putting pressure on Mr Schoeman to settle Trifecta's R2 million overdraft. In an e-mail to Spar, on 1 July 2009, under the caption "Absa Bank", he states: "I informed you that Absa has become jittery and was in the process of placing increased pressure on me to settle the R2 million overdraft in full. I have noted today that they have sent back more debit orders... ." Under cross-examination, Mr Schoeman indicated that his relationship manager at Absa had conveyed this to him, on 1 July 2009, when it became clear that the purchase

⁴² *Petersen and Another NNO v Absa Bank Ltd* 2011 (15) SA 484 (GNP).

⁴³

Indac Electronics (Pty) Ltd v Volkskas Bank Limited 1992 (1) SA 783 (A).

⁴⁴ *Indac* at 798 G – H and see 800 G – J.

⁴⁵ *Indac* at para 57.

price of R5 million from the sale of his business had not been paid. The funds from the sale of the business were to be used to settle the overdraft.

[91] As I see it, this is not a case where Absa acted legitimately and with *bona fides*. It is about imposing a legal duty on Absa where there was no justification for the reversals under the EFT Debit Pull PCH Agreement nor the EFT Rules. It is of particular concern that Absa benefitted directly from its non-compliance. A bank is, in general, not obliged to blindly follow its customer's instructions given pursuant to a banker-customer relationship. In a situation where a bank has a discretion to reverse a payment as Absa did in this case, the bank would have a legal duty to a beneficiary/payee of an EFT payment, such as Spar, to verify, or to make enquiries, or to investigate, or to inform or report instructions given by its customer. This would be particularly compelling where there are suspicious or unusual circumstances, such as we have here, giving rise to a reasonable doubt about whether the instructions had been given lawfully and/or in good faith and/or for the reasons advanced by its customer.

[92] Absa, in my view, had a legal duty in the circumstances of the present case to establish whether the debit order instruction had been cancelled in order to avert financial loss to Spar, which was reasonably foreseeable if the instructions to reverse the nine transactions were to be carried out. Even though Absa did not have a contractual relationship with Spar, it assumed a legal duty to Spar (as beneficiary/payee) to exercise its discretion, on the question of reversing the nine payments, in a manner that would not facilitate the breach of Trifecta's obligations to Spar.

[93] The weight of the policy considerations that I have considered, compel me to conclude that that Absa had a legal duty to prevent economic loss to Spar through its' negligence. In reversing the nine payments Absa breached the legal duty it owed to Spar. Absa conduct was accordingly wrongful and unlawful.

Negligence

[94] In *Kruger v Coetzee*⁴⁶ this court articulated the proper approach for establishing the existence of negligence as follows:

'For the purposes of liability *culpa* arises if -

⁴⁶ *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-H; *Langley Fox Building Partnership (Pty) Ltd v de Valence* 1999 (1) SA 1 (A) at para 12; *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd* 2000 (1) SA 827 (SCA) par 21 where it was emphasised that the true criterion for determining negligence is whether in the particular circumstances the conduct complained of falls short of the standard of the reasonable person.

- (a) a reasonable person in the position of the defendant -
 - (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
 - (ii) would take reasonable steps to guard against such occurrence;
and
- (b) the defendant failed to take such steps.'

[95] Negligence must thus be evaluated in light of all the circumstances. Since it is the plaintiff who bears the onus of establishing the defendant's negligence on a balance of probabilities, to succeed it must show that the defendant failed to adopt the standard of skill, care and diligence which one would expect from a reasonable prudent banker. The standard against which the conduct of the defendant must be assessed is not the highest level of competence achievable by a banker but is the degree of skill that is reasonable, having regard to the general level and skill and diligence possessed and exercised by members of the banking profession.⁴⁷ The question then is whether a reasonable banker would have foreseen the damage and taken steps to avoid it.

[96] Dr Holtzhausen testified that the banking business takes place in a high-risk milieu in which the risk of patrimonial loss to, *inter alia*, third parties remains a constant concern. He said that if a bank's representative believes that there may be any suspicious activity involving debit order payments, he or she has a positive obligation to report such activities to his superiors at the bank with a view to conducting an investigation. His testimony on these two aspects was not seriously contested. He furthermore testified that the "*cluster of reversals*" forming the subject matter of this case was suspicious activity by Trifecta, and contrary to the previous conduct on Trifecta's account. He was of the opinion that a reasonably prudent banker in the position of Absa would reasonably have foreseen financial harm to Spar, as the beneficiary of an EFT debit transfer, if it were to execute any instructions received from the retailer, to reverse a debit transfer, and it subsequently transpired that the reversal instructions were given erroneously or in bad faith. The party to be adversely affected by the requested reversal would be restricted and immediately identifiable, namely Spar. Furthermore, the risk of financial loss to Spar in circumstances where the retailer had sold its business and its bank account with Absa was in debit, was relatively certain or very likely.

[97] Dr Holtzhausen was, furthermore, of the opinion that a reasonable banker in the position of Ms Koen would have verified whether the debit order instruction had in fact been cancelled

⁴⁷ *Powell and Another v Absa Bank Ltd t/a Volkskas Bank* 1998 (2) SA 807 (SE) at 819C-820C.

by requesting proof of its cancellation and, pending verification of the veracity of the reversal instructions, not given effect to the instructions to reverse any of the transactions, in order to guard against the occurrence of foreseeable harm to Spar.⁴⁸ In his view, a reasonable banker in the position of Absa would have, in evaluating the reversal instructions of Mr Schoeman, taken into account the following considerations:

- (a) the ever present risk that payment reversal instructions can be given by an unscrupulous debtor with relative ease, and that the banker's failure to act in a reasonable manner can result in a loss for the third party creditor;
- (b) that a considerable period of time had elapsed from the date of payment until the date of the reversal instructions should have aroused suspicion;
- (c) that the value of the individual transactions, as well as the combined value was such that the instructions required verification;
- (d) that Mr Schoeman had provided no grounds for the belief that Trifecta was not owing the amounts in question to Spar;
- (e) that Absa enjoyed a discretion to execute Trifecta's instructions in terms of the Mandate and Indemnity in Respect of E-mail, Faxed and/or Telephone Instructions (ACBB);
- (f) the precarious financial position of Trifecta and that Absa was pressurising it to settle the overdraft;
- (g) that the probable consequence in the absence of taking precautionary measures would be serious in that the amounts involved were material and significant;
- (h) not having been informed of or consented to the reversal instructions, Spar was not in a position to protect its own interests; and

⁴⁸ While Dr Holtzhauzen accepted that the risk referred to would also be present in every case where there is a reversal on the basis of disputed authority, the evidence did not establish that any of the reversals were effected on the basis of disputed authority.

- (i) that Absa had the means to avert the risk, and such precautionary measures were not costly and could be implemented with relative ease.⁴⁹

[98] Needless to say, despite Absa foreseeing the economic loss that Spar would suffer by exercising its discretion in favour of reversing the nine payments, it failed to take any of the reasonable steps mentioned above. Absa was negligent in the manner in which it managed the affairs of Trifecta's account in circumstances where harm to a third party, such as Spar, was reasonably foreseeable. Crucially, Trifecta's statements of account indicate that there were adequate funds available to meet each of Spar's debit orders when they were processed. There was also no written or recorded instructions in Absa's possession to confirm or verify that the reversal instructions were properly given by Trifecta or its representative.

Voluntary Assumption of Risk

[99] Absa's submissions under this head is a repetition of its earlier argument that Spar, as a corporate entity, must have had knowledge of the inherent risk that utilising the EFT Debit Pull payment system encompassed, and that in opting for the convenience of the system, Spar assumed and accepted the risk that payments could be returned to it on the basis of instructions from retailers to their banks that Spar had not been entitled to debits "pulled" from their accounts, even if payment had actually been due. That assumption of risk, so it argues, negated any potential wrongfulness on the part of paying banks, including Absa, acting on the instructions of their Spar retailer customers, for failing to take steps to protect Spar's purely economic interests.

[100] Absa bears the onus to prove the special defence of voluntary assumption of risk. I am, however, of the view that it has failed to do so.⁵⁰ As repeatedly stated in this judgment, the risk that Spar assumed in electing to use the EFT debit pull payment system to collect payments from its retailers, is not the risk that eventuated. That risk was created by Absa's wrongful and unlawful conduct in reversing the nine payments that were credited to Spar's bank account without complying with the Rules.

Contributory Fault

⁴⁹ Although Absa cross-examined Dr Holtzhauzen on this aspect of his expert testimony, Absa did not present any cogent evidence to counter his opinion. Dr Holtzhauzen's evidence on this aspect stands uncontested. Mr Erasmus, did not, in his expert report, address the conduct to be expected of a reasonably prudent banker when effecting the reversals of debit order payments.

⁵⁰ *Castell v De Greef* 1994 (4) SA 408.

[101] Absa contends that by continuing to grant substantial credit to Trifecta when it already owed Spar a large sum in unsecured credit, Spar failed to take reasonable precautions to protect its own economic interests, but exposed itself to vulnerability that payments debited against Trifecta's account could be returned on a basis that the EFT Debit Pull payment system permitted and would then be irrecoverable.

[102] There is no merit in this argument as the evidence clearly indicates that the nine reversals were not made for reasons that were valid and lawful as contemplated in the EFT Rules, the EFT Debit Pull PCH Agreement or the FNB User Manual. That there were a series of payment returns prior to the reversal of the nine in question, is also not an indication of Spar's contributory fault. Those reversals (which comprised mostly stop payments and debit order cancellations) were made within the permissible bounds of the instruments referred to above. In these circumstances, it cannot be said that Spar contributed to the loss it suffered as a result of Absa's negligent reversal of the nine payments credited to Spar's bank account.

Causation and Loss

[103] Lastly, in so far as causation is concerned, it is not in dispute that as a result of Absa's reversal of the nine payments by Trifecta to Spar, Trifecta's debt to Spar increased by the same amount. It is also not disputed that Spar eventually only recovered R1 743 000.00 of the R11 200 000.00 unsecured debt which Trifecta owed to it.⁵¹

[104] Absa, however, contends that Spar has advanced no evidence to prove that it was unable to make recovery of the sum at issue in these proceedings. It argues that Spar, in any event, did make recovery of 16.44 Cents in the Rand (in respect of what it claims from Absa) and it could have made recovery of at least another R993 000.00 from Mr Schoeman.

[105] Relying for support on the cases of *Minister van Veiligheid en Sekuriteit v Japmoco BK h/a Status Motors*⁵² and *Afrisure CC and Another v Watson and Another*,⁵³ Spar maintains that it was not obliged to prove that it was unable to recover the full sum of its damages (or part thereof) in issue, from Mr Schoeman or Trifecta in these proceedings. It argues that the fact that it may have a claim in contract against Mr Schoeman (as surety) and/or Trifecta for payment of the sum in question or part thereof, does not extinguish or reduce its claim for damages against Absa.

⁵¹ Clauses 3.5 and 3.7.2 of the Settlement Agreement between Spar, Trifecta, Tayegetos Supermarket, Mr Schoeman and Interactive Trading 351 (Pty) Ltd t/a Total Elardus Park ("Interactive")

⁵² *Minister van Veiligheid en Sekuriteit v Japmoco BK h/a Status Motors* 2002 (5) SA 649 (SCA) paras 18-22.

⁵³ *Afrisure CC and Another v Watson NO and Another* 2009 (2) SA 127.

[106] In *Japmoco*, Nienaber JA concluded, in a dissenting judgment, that multiple claims for the same damage or part thereof do not result in a mutual erasing of claims.⁵⁴ There, a second-hand car dealer claimed damages from the Minister of Police, arising from the conduct of policemen who provided false clearing certificates for stolen vehicles without which the vehicles could not be registered and resold. Eight of the vehicles were sold to a second-hand car-dealer (Pro-fit), who in turn sold them to Japmoco. Japmoco then onsold seven of the vehicles at a profit to various members of the public. All eight vehicles were later seized by the police. Six of the seven purchasers held Japmoco liable in terms of his common-law implied warranty against eviction, and Japmoco was forced to compensate each of them by repaying the purchase price. Japmoco brought a claim in delict against the Minister of Police for repayment of the purchase price which Japmoco had paid to purchasers of the stolen vehicles. In addition to this claim, Japmoco also had a claim for payment of contractual damages against Pro-fit for breach of its common law warranty against eviction of the vehicles, and a delictual claim against the policemen (“the thieves”). One of the questions that arose was whether the Japmoco’s claim against Pro-fit extinguished the claim that he had against the Minister of Police and/or the thieves. Nienaber JA concluded that it did not as multiple claims in respect of the same damage (or part thereof), do not result in the mutual erasing of the claims. In doing so, he endorsed the decision of the SCA in *Nedcor Bank Ltd t/a Nedbank v Lloyd-Gray Lithographers (Pty) Ltd*,⁵⁵ where Scott JA observed:

“The argument advanced on behalf of Nedbank was in essence the following. In determining the loss suffered by the respondent in consequence of Nedbank’s wrongful conduct, the right of the respondent to recover damages from S was an asset in the respondent’s estate. Accordingly, so it was contended, the respondent’s claim against Nedbank fell to be reduced by the value of that right and as it was accepted that S had the financial means to satisfy the claim in full, Nedbank was not indebted to the respondent.

...

Assuming the bank and the thief to have been jointly and severally liable, the plaintiff would have been entitled to sue either wrongdoer for the full amount....if for purposes of determining the plaintiff’s loss his right of recovery against the other wrongdoer had to be taken into account, it would follow that, if both had financial means, each when sued could point to the plaintiff’s right to recover from the other so that the plaintiff could recover from neither. Quite clearly, once it is accepted that the full amount is recoverable from any one wrongdoer, the plaintiff’s right to sue any other wrongdoer must be disregarded when determining his loss.”

[107] Although Nienaber JA concluded that the same line of reasoning applied, he accepted that the Minister of Police and Pro-fit were not liable in solidum (jointly and severally) to Japmoco as it would have been able to recover more from Pro-fit than from the Minister of Police but the central principle applies, namely that if a buyer has a contractual claim against his seller

⁵⁴ *Japmoco* at para 21.

⁵⁵ *Nedcor Bank Ltd t/a Nedbank v Lloyd-Gray Lithographers (Pty) Ltd* 2000 (4) SA 915 (SCA) at 920G-H.

for his eviction, it is not an impediment to the buyer's delictual claim against the thief who sold the item to the seller. Nienaber JA, however, went onto hold that where the buyer (who was evicted) receives money from either the thief or the seller in reduction of his delictual or contractual claim, that payment must be taken into account.⁵⁶ The majority in *Japmoco* did not concur with the judgment of Nienaber JA on the following limited basis:

"The wrongful acts at issue caused the respondent [Japmoco] to purchase the motor vehicles and its conclusion of those contracts is the source of the loss for which it now seeks to hold the police liable. The contracts of purchase incorporated a right of action against the seller in the event of it being evicted which depending upon the financial standing of the debtor, might be capable of being converted into money thereby avoiding any loss.

The question is whether the value of that right of action (assuming that it is established) must be taken into account in determining whether the respondent suffered damages. I do not think that *Nedcor Bank t/a Nedbank v Lloyd-Gray Lithographers (Pty) Ltd* 2004 (4) SA 915 (SCA) answers that question, either directly or by analogy. The case considered the position of concurrent wrongdoers in delict who are jointly and severally liable (in solidium) for the loss that they have caused, and the reasoning is not necessarily applicable to the present problem."

[108] Five years later, the SCA in *Afrisure* endorsed the dicta referred to above in both *Japmoco* and *Nedcor*, albeit in the context of a guarantee. Brand JA stated there:

"With reference to the guarantee, the argument advanced by the appellants was in essence, the following: the claims which Publiserve raises against the appellants are also claims which it would potentially have against Medhealth, since each each of the payments to Afrisure relied upon was made with the knowledge and consent of Medhealth as administrator of the scheme. By providing the R10 million guarantee, so the argument went, Medhealth had indemnified Publiserve from any loss it might have sustained as a result of these payments and in consequence Publiserve has suffered no actual loss.

This argument is unsustainable. In my view it has already been answered in this Court in *Minister van Veiligheid en Sekuriteit v Japmoco* ...paras 18-25. What the answer amounts to is this. Insofar as Medhealth was not a proved wrongdoer against Publiserve and the guarantee may have been given, not to avoid any existing liability, but in order to protect the reputation of Medhealth, the payment under the guarantee would be regarded as *res inter alios acta* (see eg *Japmoco* para 24; *Santam Versekeringsmaatskappy Bpk v Beyleveldt*...) In the event, such payments would in law not be deductible from the amount owing by appellants. But even if Medhealth could be regarded as a jointwrongdoer against Publiserve and therefore liable *in solidium* with the appellants, the guarantee in itself will not entitle the appellants to any credit. It is true that Medhealth's obligation under the guarantee constitutes an asset in the Publiserve estate. Nonetheless, that asset, unaccompanied by actual payment, cannot as a matter of principle, be taken into account in determining the liability of the appellants. Only actual payments would perform this function (see eg *Japmoco* para 21)."

The SCA concluded by stating that the underlying reason for this principle appears from the statement of Scott AJ in *Nedcor* at 921E-G which is quoted above.

[109] Returning to the facts of this case, Absa and Mr Schoeman (as surety) are concurrent wrongdoers. If Mr Schoeman is sued by Spar, he would be liable *in solidium* for damages in

⁵⁶ *Japmoco* at para 21.

the same amount as Absa (joint and several liability). That the claim against Mr Schoeman (as surety) would be contractual, and the claim against Absa is delictual, is irrelevant. The principle in *Japmoco* and *Nedcor* (which was endorsed unanimously by the SCA in *Afrisure*) would apply. Hence, that Spar may also have contractual claims against Mr Schoeman (as surety) will not stand in the way of Absa's delictual claim currently before the Court for the full amount owing, as a result of its negligent conduct in reversing the nine payments. Since the full amount is recoverable from Absa, Spar's right to sue any other wrongdoer must be disregarded when determining its loss.

[110] The question that I turn to now, is whether the settlement amount paid to Spar, pursuant to the Settlement Agreement between Spar, Trifecta, Tayegetos, Mr Schoeman and Interactive that was concluded on 17 July 2009, would reduce Spars' damages claim against Absa. The events leading up to the settlement are outlined earlier in the judgment, so I do not repeat them. Mr Botten who negotiated and signed the agreement, on behalf of Spar, explained the rationale for the settlement in his evidence in chief. His testimony on this aspect is uncontested as he was not cross-examined on it. In essence, the purpose of the settlement agreement was to keep the sale of the business alive. It took the form of an "an informal distribution scheme" to settle the claims of the creditors. The settlement agreement recorded that Trifecta was indebted to Spar in the total agreed amount of R14 700 000.00 of which R4 100 000.00 was secured. Ultimately, Spar only received R1 743 000.00 of the unsecured debt of R11 200 000.00 from Trifecta, which included the value of the nine payments that were reversed by Absa.

[111] In the premises, the settlement agreement does not pose an impediment to Spar recovering the full amount of its damages from Absa. So too is the question of whether Spar may have a contractual claim for damages against Trifecta and Mr Schoeman for the shortfall, as that must be disregarded in determining Spar's loss.

[112] The last argument raised by Absa is that if payment 1 to 7 in Spar's schedule of reversals had not been effected, Trifecta's Absa account would have been pushed beyond its overdraft limit and payments 8 and 9 would, as a matter of probability, have been returned "not provided for" in any event. I dismiss this contention out of hand as Absa has led no evidence to prove it.

[113] For all these reasons, I consider Spar to have proved its delictual claim against Absa for pure economic loss on a balance of probabilities.

Order

[114] In the result, the Defendant is ordered to pay the Plaintiff:

- (i) The amount of R2 464 856.32;
- (ii) Interest *a tempore morae* at the rate of 15.5% per annum on the amount of R2 464 856. 32 from the date of service of this summons until date of payment in full;
- (iii) Costs of the action which are to include the costs of two counsel.

F KATHREE-SETILOANE
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Counsel for the Plaintiff: Mr JP Vorster SC with Mr FP Strydom

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Counsel for the Defendant: Mr F Barrie SC with Mr C.Bothma

Instructed by: Edward Nathan Sonnenbergs Inc

Date of Judgment: 14 August 2020