CASE NUMBER: 448/95

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between:

ABSA BANK LIMITED : Appellant

AND

IW BLUMBERG & WILKINSON : Respondent

Coram: Mahomed CJ, Smalberger, Harms, Scott et Zulman JJA

Date of Hearing: 24 February 1997 Date of Judgment: 17 March 1997

J U D G M E N T

ZULMAN JA

The respondent, a firm of attorneys, conducted a trust banking account at the appellant bank. The respondent drew two cheques totalling R85 000,00 on the appellant. The cheques were drawn before certain effects deposited to the account were cleared. The appellant honoured the cheques. Subsequently, the effects were not paid. The appellant sued the respondent for payment of the said sum of R85 000,00, interest thereon and costs. Cameron J dismissed the respondent's claim with costs. The judgment is reported in 1995 (4) SA 403 (W). Cameron J, however , granted leave to appeal to this Court.

The appellant was represented at the trial by counsel. Mr I W Blumberg, who at the time of the accrual of the appellant's cause of action conducted the respondent's practice for his own account, appeared in person.

The appellant's main claim, the only claim adjudicated upon at the trial, was based upon an agreement between the parties relating to the conduct of the respondent's account with the appellant. During

the course of argument at the commencement of the trial, the respondent sought leave to file an amended plea. The application was initially opposed, but the appellant subsequently withdrew its opposition.

The appellant closed its case without leading any evidence. Thereafter Blumberg, followed by his secretary, a Mrs Peters, gave evidence on behalf of the respondent. Cameron J dismissed the appellant's claim with costs. He, however, granted leave to appeal to this Court.

It is the appellant's contention in this Court that there are two questions to be decided in this appeal namely:-

1. the manner in which Uniform Rule 22(3) is to be applied and more specifically "whether a denial contained in a different paragraph of the plea can serve to nullify an admission in an earlier paragraph of the plea to be inferred through the application of Rule 22 (3) as a result of the pleader's failure to deny the allegations in the earlier paragraphs," and

2. whether the respondent either pleaded or proved any facts or circumstances disentitling the appellant from debiting the respondent's account with the amount of uncleared effects.

Uniform Rule 22(3) provides as follows:-

"Every allegation of fact in the combined summons or declaration which is not stated in the plea to be denied or to be not admitted, shall be deemed to be admitted. If any explanation or qualification of any denial is necessary, it shall be stated in the plea."

It is to be observed that the rule does not, in its terms, enjoin the pleader to state whether the allegations in the combined summons or declaration are admitted or denied by referring specifically to each and every paragraph of the declaration although this would of course be the usual form which a plea would take (Hlongwane v Methodist Church of South Africa 1933 WLD 165 at 172). It is not impermissible, although of course not generally desirable, for a pleader to deal with an averment in an earlier paragraph in a declaration in a subsequent paragraph of the plea where the plea has failed to specifically deal with the averment earlier. If in the subsequent paragraph the plea then denies the averment contained in the earlier paragraph, it would be artificial to invoke the provisions of Rule 23(3) so as to hold that the pleader must be

taken to have admitted allegations made earlier in the declaration which the plea did not specifically deal with. The plea must be read in its totality and as one composite document. As pointed out by the Court a quo, whilst it is true that Rule 22(3) provides that every allegation of fact "which is not stated in the plea to be denied or to be admitted, shall be deemed to be admitted", this does not mean that the rule should be applied "piecemeal to a party's averments; nor can it be applied so as to deprive a party of a defence which is plainly, though perhaps imprecisely, raised on the pleadings". (4081)

The question, however, is whether, in the instant case, the respondent has set out a defence in the amended plea, even though this defence might have been set out "imprecisely". In order to answer this question it is necessary to examine the pleadings in some detail.

In paragraphs 4 and 4.3 of the particulars of claim the appellant alleges that:-

"4. Die volgende was uitdruklike bedinge met betrekking tot die bedryf van die rekening en/of stilswyende bedinge uit hoofde

van gevestigde bankpraktyk:-

4.1 .....

4.2 .....

4.3 Eiser geregtig sou wees om die onverrekende waarde van tjeks en ander verhaalbare dokumente teen die rekening te debiteer."

The following was pleaded in response thereto:-"3. Ad paragraphs 3 to 4.2

These allegations are admitted. 4. Ad paragraph 4.3:

4.1 The defendant denies that in the present case the plaintiff was entitled to debit the account with the relevant amounts namely R70 000,00 and R15 000,00 respectively. 4.1bis In amplification of the aforesaid denial:

Defendant avers that in permitting him to draw against the said uncleared cheques (on the basis that the said cheques had in fact not been cleared) the Plaintiff gave value therefor and acquired title thereto, thereby rendering it the

holder in due course thereof, with the right to sue the drawer thereof. In the premises the Plaintiff was in law not entitled to debit the Defendant with the face value of the said cheques."

Paragraphs 7.1 and 7.2 of the particulars of claim read as follows:-

"7.1 Die tjeks na verwys in paragraaf 5 supra is mettertyd deur die betrokkene bank onteer. 7.2 Eiser, soos dit geregtig was om te doen, het die onverrekende waardes van die tjeks teen die voormelde rekening debiteer."

The amended plea to these paragraphs is as follows:-

"8. Ad paragraphs 7.1 to 7.2:

At the relevant time the defendant had no knowledge that the cheques were dishonoured by the relevant bank. The defendant denies that the plaintiff was entitled to debit his account with the said amount."

It is also necessary, in assessing the effect of the amended plea, to have regard to certain admissions made by the respondent at a pre-trial conference at which Blumberg represented the respondent.

At the pre-trial conference, the respondent was asked whether it would admit, inter alia, the following allegations in the plaintiffs particulars of claim:-

1. the averments in paragraph 5, to the effect that in August 1992 five cheques drawn on a bank in Swaziland in a total amount of Rl 145 000,00 were deposited for collection to the credit of the respondent's account;
2. the averment in paragraph 6.1 to the effect that before the aforementioned cheques were cleared, the respondent drew cheques in amounts of R70 000,00 and R15 000,00 on the account;
3. the allegation in paragraph 6.2 that the appellant honoured these cheques.

The respondent admitted all of these allegations. The respondent

was also asked specifically whether it would admit that it had no agreement with the appellant entitling it to draw cheques "against uncleared effects". The respondent replied affirmatively to this question.

A proper analysis of the amended plea read in its totality reveals to me that the respondent has admitted the contract relied upon by the appellant in its particulars of claim. The respondent has also by virtue of the aforementioned admissions at the pre-trial conference, admitted that the appellant honoured the two cheques for R70 000,00 and R15 000,00 which make up the appellant's claim for R85 000,00, before the effects totalling Rl 145 000,00 had been cleared, the respondent having no agreement with the appellant entitling the respondent to draw cheques against uncleared effects. This being so the denial in paragraph 4.1 of the respondent's amended plea to the effect that "in the present case the plaintiff was entitled to debit the account with the relevant amounts namely R70 000,00 and R15 000,00 respectively" is not founded upon any material averments of fact excusing the respondent, in the light of admissions made, from liability to the appellant on the agreement pleaded and admitted. The "amplification" in para 4.1bis of the

amended plea takes the matter no further for the respondent.

The fact that the appellant might have permitted the respondent to draw cheques against uncleared effects, despite there being no agreement in this regard, would not excuse the respondent in law from liability to make payment to the appellant. The appellant was perfectly entitled to choose to honour such cheques, notwithstanding the fact that the effects earlier deposited had not been cleared, and to waive any benefit afforded to it in this regard by its agreement with the respondent. It would be strange indeed if it were permissible for a customer of a bank to draw a cheque on the bank, requesting the bank to honour the cheque, and thereafter, when the bank honoured the cheque, despite the absence of an overdraft facility, to then plead that this would have resulted in an overdraft facility which had not been agreed upon. In essence this is precisely what the respondent is contending for. It hardly lies in the mouth of the respondent, who drew the two cheques in question against uncleared effects, albeit contrary to the agreement between the parties, to be heard to complain that the bank should not have honoured the cheques and debited its account. Put differently it is the appellant, so it is suggested, who must bear the loss if the

uncleared effects were not met. This can not be so. (cf Bloems Timber Kilns (Pty]) Ltd v Volkskas Bank Bpk 1976 (4) SA 677 (A) at 687 E-688 C; Trust Bank of Africa Ltd v Wassenaar 1972 (3) SA 139 (D) at 142 G - 143 A and 143 13 - F). As pointed out by Cozens - Hardy M R in Cuthbert v Robarts, Lubbock & Co. [1909] 2 Ch. 226 at p. 233:-

> "If a customer draws a cheque for a sum in excess of the amount standing to the credit of his current account, it is really a request for a loan, and if the cheque is honoured the customer has borrowed money."

(See also Halsbury, 4th ed. vol 3(1), p. 242, para 298, Facet's Law of Banking (10th. ed. p. 183) and Willis Banking in South African Law p 33.) The fact that the respondent's account was a "trust banking account" is irrelevant for this purpose.

The respondent was plainly entitled to plead facts or circumstances disentitling the appellant from relying upon the provisions of the agreement to burden the respondent with liability in the amount claimed. The first question posed by counsel for the appellant does not really arise in the light of the respondent's plea to paragraph 7 of the particulars of claim which did not seek to qualify the admissions contained in paragraph 3, or made at the pre-trial

conference. In paragraph 9 of the appellant's particulars of claim,

and after having set out the basis for its claim, the appellant made

the following averments:-

> "9. In die vooropstelling is eiser geregtig op betaling van die bedrag van R85 000,00 tesame met rente daarop teen 28% per jaar maandeliks bereken en gekaptitaliseer vanaf 26 September 1992 tot datum van betaling maar nieteenstaande aanmaning weier en/of versuim en/of laat verweeder na om voormelde bedrag of enige gedeelte daarvan aan die eiser te betaal."

The amended plea to this paragraph reads as follows:-

"10. Ad paragraph 9:-

> The defendant denies the allegations contained in this paragraph and puts the plaintiff to the proof thereof."

Additionally, the following was pleaded:

"11. The defendant in particular pleads as follows to the plaintiffs allegations:

11.1 A client of the defendant, one A Frank, informed defendant that he would arrange for the direct transfer of large sums of money into the defendant's account;

11.2 The defendant contacted an employee of the plaintiff on or about the 18th August 1992 and was informed that the said account was credited with an amount of R245 000,00 by way of bank transfer. This was confirmed by a print-out obtained from the plaintiff

11.3 On the 19th of August 1992 two further amounts, namely R500 000,00 and R250 000,00 respectively, were transferred to the credit of the defendant's account. The defendant again called for a print-out from the plaintiff dated 20th of August 1992 confirming this.

11.4 Subsequent to the 20th of August 1992 the defendant drew cheques against the account in favour of certain parties as he was instructed to do by his client Mr Frank.

11.5 Subsequent thereto, the plaintiffs manager advised the defendant that the transfers of the amounts into the defendant's account were not cleared. The defendant immediately stopped payment on all the relevant cheques. Except for the two cheques in question all the other cheques were recalled and payment stopped.

11.6 The manager of the plaintiff, Mr Greyling, unbeknown to the defendant the initial deposits had been made to other branches of the plaintiff and then transferred into the defendant's account with the plaintiff. [The sentence being incomplete is incomprehensible to me.] The defendant had no knowledge thereof and had no way of ascertaining these facts."

None of these facts would, in my view, disentitle the appellant, upon the basis of the admitted agreement between the parties, from debiting the respondent's account with the value of uncleared effects when those effects were subsequently not paid. It is of some significance, in this latter regard, that during the course of argument after all of the evidence had been led, the respondent sought to withdraw the admission, made at the pre-trial conference, that there was no agreement between the parties entitling the respondent to draw cheques against uncleared effects. The Court a quo, correctly, refused the application.

14 It is also significant that the respondent did not raise the defence of estoppel in his amended plea to the effect that, notwithstanding the admitted agreement between the parties, the appellant was precluded from holding the respondent liable on cheques which it drew against uncleared effects. Plainly a party wishing to rely on estoppel must plead it and prove its essentials (see for example Blackie Swart Argitekte v Van Heerden 1986 (1) SA 249 (A) at 260 I)

On the basis on the aforegoing analysis of the pleadings I am of the view that the amended plea fails to disclose a defence and is excipiable. Having come to this conclusion it would, strictly speaking, be unnecessary to give consideration to the evidence lead at the trial. In the peculiar circumstances in which the trial was conducted and the fact that the appellant did not take exception to the amended plea, I will consider the evidence led and the conclusions drawn by the Court a quo resulting in the finding in favour of the respondent.

In his evidence-in-chief, amplified by certain questions put to him in cross-examination, Blumberg confirmed in essence, the matters

averred in paragraph 11 of respondent's amended plea. It emerged

> during the course of his evidence, and in response to questions put to him by the Court a quo, that he conceded that he was aware that it was "accepted banking practice" that if a cheque deposited to his bank account was not paid, the bank would be entitled to debit his account with the amount of that cheque. It also emerges from his evidence that he was advised in a letter dated 24 April 1992 written to him by the appellant, long before the dispute in this matter arose, that he was not entitled to draw cheques against uncleared effects and that should he wish to do so he should approach the bank's accountant with a request "to arrange for an immediate clearance". Blumberg's evidence also reveals that he was certainly aware that credits to the respondent's banking account arising from as yet uncleared effects were only provisional and could be subsequently reversed by the appellant. He sought to make something of the fact that he expected the "money" which was to be deposited to the respondent's account by Frank, to be by way of transfer of funds and not necessarily by way of cheques. Nowhere in his evidence did Blumberg suggest that the appellant had been negligent in the matter nor that it had represented to him that credits made to his account could not be reversed by the appellant. Blumberg also gave

evidence to the effect that during August 1992 Frank approached

him and advised him that he was expecting a large sum of money from overseas. He indicated to Blumberg that he wished to invest some of it. The balance was to be applied to discharge Frank's liability to Frank's creditors. According to Blumberg he agreed to act on behalf of Frank in the matter. To this end he furnished Frank with details of the respondent's banking account. Frank told him that a large sum of money which he was expecting to receive from overseas would be transferred directly into the respondent's trust account. Thereafter Frank "called on me to say that the transfer had taken place and the money would be shortly received

in my trust account". Blumberg then went on to state "..... I phoned the bank, or my secretary at the time phoned the bank in question, and was told on the first occasion that no such money was

received. However.....". Blumberg's evidence was then interrupted

by an objection by counsel for the appellant to the effect that he was giving hearsay evidence The learned judge then stated:-

"Mr Blumberg I am allowing you some latitude in view of the fact that you are conducting your own case and in view of what you have told us about your - your deficiency in civil experience, but of course Mr Roos is at - at liberty and I am under a duty at the end of the case to have regard only to - properly admissible evidence - Yes.

But at any event - you formed the impression from what your secretary told you that you were not yet able to draw on the account and you subsequently formed the impression, based on what was told to you, that you could now draw on the account - Well M'lord I was actually standing next to her at the telephone when the call was made to the bank on my instruction.

Yes — And the response was immediately conveyed to her..... M'lord I then, having heard that, requested a print out of my bank statement, which I received and indeed did reflect that the amount had been paid into my account. M'lord the bank statements are on record and the credit is reflected...."

On 21 August 1992, which according to Blumberg was "two days later", Frank consulted with him "and requested me to make out certain payments to certain payees which I did." He was then asked by the appellant bank to call in "and sign a form to purchase certain foreign currency. ... I was given a form and the only aspect which they wanted clarity on M'lord, was whether - or for what purposes the foreign currency was being purchased.....As to a reason as to why I was purchasing the foreign currency and I gave as the reason M'lord on the form that the monies were to be held in a trust account on behalf of a client pending instructions. Even on that occasion M'lord I was not advised in any way that there were effects that were to be cleared .....". Blumberg was thereafter advised by the bank that the initial deposits which had been made at other branches of the appellant bank had been returned unpaid.

He immediately stopped payment on all the cheques that he had drawn but was unable to prevent the cheques of R70 000,00 and R15 000,00 from being paid. The cheque for R15 000,00 was apparently a cheque drawn in favour of Frank himself.

The Court a quo then put the following to Blumberg:-

> "And as I understand it your case is that - that the bank, in paying out your cheques on a credit in your account at a time when the cheques, although received by the bank had not yet been cleared, were taking a risk. — Yes M'lord
>
> And that they advanced you, as though it was cash received, money which had not yet been received as such — That is correct M'lord.
>
> And your case would be, and I expect your argument to be, that the - although the deposit slips say the money is treated as cash only, cheques handed in for collection will be available as cash when paid. In fact in this case the bank did treat the credit in your account as - as cash available for payment by you. - Yes M'lord, except that I never knew they were cheques.
>
> Yes. — If they - I had any idea M'lord that there were cheques involved I would have got a special clearance if I intended to draw on them. Which facility I have used.

In cross-examination Blumberg agreed that there was no indication given to him in the print-out of the bank statement that he obtained whether the transfer to his account from other branches of the appellant bank related to cheque deposits or not.

Counsel for the appellant then put the following question to Blumberg:-

> "Mr Blumberg do you accept that if a cheque is deposited for credit to your account, and is so credited, that if that cheque is not paid when presented for payment, that the bank has the right to debit your account? With the amount of the cheque that has not been paid?"

To which he replied as follows:-

> "Yes that is normal banking practice as such. I - if I deposit any cheques to the credit of my account which are not met then my account is accordingly debited to contra on the initial credit that they have passed."

The Court a quo then sought to clarify Blumberg's answer by putting the following to him:-

> "Mr Blumberg I would like to clarify one thing. Mr Roos asked you whether you accept that if a cheque is deposited for credit to your account, and is so credited but the cheque is not paid, may the bank, in terms of normal banking practice, debit your account for the amount of that cheque. Your answer was yes it would be normal banking practice and then you added that it would be so if you deposited a cheque to your account, the bank could then reverse that -that credit if it proved that the cheque was not - was not honoured. But 1 think Mr Roos wanted to know whether that you concede that it is normal banking practice, not only if you do that, but if anyone else does that. If - if a bank elsewhere, from another branch, pays a cheque which is credited for your account, makes that credit and then - is then subsequently not paid on that cheque, may the bank in that case, when you are not the - depositor, reverse the credit in terms of normally banking practice? — M'lord in other words if - if any person who deposits a cheque to the credit of my account, or to any account ...
>
> Yes ... — To whoever it might be? I - it is accepted banking practice M'lord I am sure that the - any - the returned papers would be debited to the account of the - that

has been credited. Initially."

In an attempt to further clarify the admission made by Blumberg the following exchange thereafter took place between the Court a quo and the witness:-

"Mr Blumberg I also still want to try to understand the admission that you make. When you say that, in terms of normal banking practice they would be entitled to debit your account if the cheque was not honoured? And yet you also maintain that in these circumstances they chose to - to pay out the cheques and that you are not liable? — Yes M'lord. In the normal situation where there is, let us say, my account is not in - in - debited in the situation, let us say there was a - a surplus of funds, irrespective of these transactions, they would be entitled to debit my account if a cheque is returned, for the capital amount of the cheque - that is what I refer to as the normal banking principle. If somebody gives me a cheque which I deposit to my account and if I am still in credit M'lord, and there is no overdraft facility, and I still remain in credit, one would expect that they would be entitled to say they have not received value and it must be passed on to me.

So your admission relates to normal banking practice, and you claim that this, what happened here was not normal banking practice? — No M'lord in fact this was a peculiar banking practice where there was an active duty on the bank to have informed me what clearance would be required, if in fact there was a clearance for an overseas deposit. M'lord in fact that is why a facility is made on - on overseas deposits for - for value date. The time you make the deposit when then - there might be a vary - variance in the exchange rates as such. Because sometimes it takes up to 60 days to clear from an overseas account. But the active duty would then be on the bank to have said to me, Look this is an overseas situation'

You mean foreign? — Yes. A foreign ...

> Swaziland? — A foreign situation, "You cannot draw any monies until we have cleared" And having knowledge that the - the monies were in my account M'lord, I - I would be entitled - they cannot now say that, ' The money was never in your account", and hold me responsible."

Mrs Peters' evidence was to the effect that upon the instructions of Blumberg she telephoned the appellant bank on two occasions to "And out if funds had been placed into his account". On the first occasion she was told that there were no funds. On the second occasion that she telephoned she was told that "the money was in the account". She confirmed Blumberg's testimony to the effect that he was standing beside her when she made the second call. In response to questions put to her in cross-examination, Peters identified the person that she spoke to at the bank as being a Mrs Vermeulen. When asked exactly what question she had put to Mrs Vermeulen the witness responded as follows:-

> "I said, 'Good afternoon, my name is Veena from Mr Blumberg's office', and I gave her the trust account number. I said, 'Can you please tell us if any amounts have been deposited into Mr Blumberg's account'. I do not remember the exact amount but I - I think I did give her the amount, on the first occasion. She then said no there were no such funds.
> And on the second occasion? — On the second occasion the conversation was the same.
> Except that she said yes……— Except that this time she did say yes the money was in the account.
> So she said that there - the money was in the account, it means that there ..... That - that……

> Was a credit on the account……Yes…… There was ---
> For what amount……? --- I am not sure of the exact amount
> but I remember it was over R200 000,00 because it was a very large amount sum of money. Is that all she told you? --- Yes."

I have set out the evidence of Blumberg in some detail since I cannot find any factual basis for holding that he had arrived at any special arrangement with the appellant whereby he could draw cheques against uncleared effects, and most importantly for finding that if such effects were subsequently dishonoured the appellant would not be entitled to debit his account with the amount of such dishonoured cheques. I am left with the distinct impression from his evidence as a whole that Blumberg was very much influenced in his conduct, not by anything that the appellant represented to him, but by his belief, when he accepted Frank's mandate, that Frank was a man of substance. The evidence of Peters does not seem to me to be of any assistance to the respondent's case. All that it amounts to is that she was told by the appellant bank's official that credits had been passed to the respondent's bank account. Blumberg conceded, in effect, that he knew that any credits to the account were merely "provisional credits" and that effects giving rise to such credits had first to be cleared before the credits became "final credits".

In any event all of this is irrelevant since at no stage did the

respondent ever plead an estoppel or seek to further amend his amended plea after he gave evidence as so to allege an estoppel. Even in this Court no attempt was made to amend the defendant's plea to rely upon an estoppel. In addition two important ingredients for a successful plea on estoppel were missing from the evidence. First there was no evidence given indicating that the appellant bank had represented to Blumberg that it would not reverse credits arising from effects which were subsequently unpaid. Second there was no evidence given to suggest that the appellant bank was in any way negligent. (See for example Oakland Nominees (Pty) Limited v Gelria Mining and Investment Co (Pty) Limited 1976 (1) SA 441 (A) at 452 E.)

The Court a quo commenced its judgment with the following

statement:-

> "At issue is a bank's entitlement to reverse a credit it has entered on a customer's account in respect of a cheque deposit when the cheque in question is later dishonoured. The defendant does not contest that in the normal course of banking practice a bank may reverse such a credit. His dispute with the plaintiff turns on the situation where the bank informs the customer that a deposit has been made, the customer does not know that the credit originates in a cheque deposit, and the bank then allows the customer to draw on the strength of, and in reliance, on the credit. On whom should

> the loss occasioned by the dishonoured cheque deposit fall -the bank or the customer?" (405 F-H)

Regrettably there are errors in this statement. First, it was not in issue whether the appellant bank was entitled to reverse a credit that it had entered on its customer's account in respect of a cheque deposit when the cheque in question was later dishonoured. The evidence of Blumberg indicates that he accepted that the appellant bank was indeed entitled to reverse a credit that it had entered in the account emanating from a cheque where such cheque was later dishonoured. This also appears from the second sentence of the above remarks. Second, the way I understand the evidence of Blumberg, he did not dispute the fact that although there had been a deposit made to the respondent's account of which he was informed by his secretary, Peters, and by way of the print-outs that he received, that he was entitled, as a matter of fact, to draw on the strength of such credits. He accepted at all times that such a credit is provisional.

In its judgment the Court a quo referred to representations made by the appellant when it advised Blumberg's secretary that money had been deposited into the respondent's account and that a credit was

subsequently reflected in print-outs. The Court a quo also remarked

as follows during the course of its judgment:-

> "The plaintiff asks the Court to hold that a bank is invariably free to reverse a credit entry it has made in a customer's account, regardless of the customer's good faith, no matter how negligently the bank acted in making the entry, and regardless of whether the customer, in the interim, has acted to his or her disadvantage on the strength of the credit. If this contention is upheld, it will mean that a customer is at risk every time a deposit is credited to his or her account and the bank allows a drawing on the strength of the deposit." (407 H-I) (cf also 411 C and 412 C-E.)

This was not the appellant's case. These remarks and the whole tenor of the judgment of the Court a quo indicate to me that, whilst not saying so in so many words, the Court a quo, approached the matter upon the basis of an estoppel; the estoppel being to the effect that the appellant was estopped from relying upon the terms of its agreement with the respondent because it had made a representation to the respondent, not only that it could draw against uncleared effects, but that if such effects were not cleared it would nevertheless not hold the respondent liable on cheques which it drew against such uncleared affects.

The Court a quo referred with approval to the following statement in Willis (op cit) p 33:-

> "Current practice in banking operations is for a bank to credit a customer's account immediately upon the deposit of funds, even though the payment of cheques in that deposit [has] not yet [been] collected. The bank will then debit the account of the customer in the event of any cheques being dishonoured when sent for collection."

Notwithstanding the acceptance of this proposition the Court a quo

then went on to hold that a bank would not be entitled to reverse a credit entry that it had made to a customer's account where a customer acted in good faith in the interim "to his or her disadvantage on the strength of the credit". It furthermore accepted that had there been "no denial of the plaintiffs pivotal claim that it was entitled to reverse credits made on the basis of uncleared effects," that would "dispose of the defence". As I have sought to indicate, the amended plea read with the admissions made at the pre-trial conference, contained no qualification of the entitlement of the appellant

to reverse credits made on the basis of uncleared effects. In addition, a proper reading of Blumberg's evidence indicates that he did not deny that the appellant was entitled to reverse credits made on the basis of uncleared effects.

The Court a quo considered that where a "bank, not only credits a customer's account with a sum but informs the customer of that

credit, and indeed allows the customer to draw against the credit, it

alters its position in relation to the customer". Flowing from this it seems, although the Court implied that the bank would then be precluded, or more accurately estopped, from relying upon the terms of its agreement with its customer or upon any established banking practice allowing it to reverse provisional credits.

The Court a quo at p 411 C - 412 C referred to the following authorities and textbook in support of its view:- Holland v Manchester and Liverpool District Banking Co (Limited) [1909] 25 Times Law Reports 386, A L Underwood Limited v Barclays Bank [1924] 1 KB 799(CA) at 804-806; R v Bester 1961 (2) SA 52 (FSC) at 56E and at 58A - D; StandardBankof SA Ltd v Minister of Bantu Education 1966 (1) SA 229 (N) at 247A - B and 248 B, Danka v Barclays Bank DCO 1967 (4) SA 291 (T); Westminster Bank Ltd v Zang [1965] 1 All E.R. 1023 (CA) at 1034 CD; Barker, The Principles and Practice of Banking in South Africa (3 ed, 1952) p 17 and Trust Bank of Africa Ltd v Wassenaar (supra) at 142H-143).

These authorities fall into three broad categories. In the first category are cases where a claim for damages is made by a

customer against its bank when the bank dishonours a cheque drawn by the customer. In the second are cases where the bank is a holder for value of a cheque and seeks to hold its customer liable. In the third are cases where estoppel is relied upon by the customer.

Holland's case is an example in the first category. In that case the plaintiff had a savings account with the defendant bank. After examining his passbook, which showed a balance to his credit of seventy pounds, seventeen shillings and nine pence, the plaintiff drew a cheque for sixty seven pounds and eleven shillings in favour of a firm to which he owed that amount. On presentation, the cheque was dishonoured as the actual credit balance was only sixty pounds, five shillings and nine pence, a credit of ten pounds and twelve shillings having been entered by the bank in error twice in the passbook. Although the bank apologised to the plaintiff the payee refused the plaintiff any further credit. The facts becoming known, other creditors also refused him credit. The plaintiff then brought an action for damages. It was against this background that the Court in effect held that where a customer acts in good faith, upon a wrong entry made in a statement or passbook, so altering his position, the banker is estopped from claiming to have the error

adjusted and is liable in damages. (cf Chorley and Smart - Leading Cases in the Law of Banking (6th ed) p 97.) The claim as previously stated was in any event one for damages. This is a far cry from the facts and defence in the instant case. Most importantly it indicates that negligent misrepresentation was an essential ingredient of the claim.

The Danka case is an example in the second category. In that case the plaintiff bank sued the defendant on a cheque drawn by the defendant payable to B who negotiated it to D, who in turn deposited it in his banking account with the plaintiff. The defence raised was that the cheque was given merely to accommodate B, who gave no value therefor, and, on the strength of the denial that the plaintiff was the holder in due course of the cheque, the defendant claimed that he was absolved from liability thereon. The Court, after referring to many of the authorities referred to by Cameron J, held that in considering whether a bank became a holder for value of a cheque deposited by a customer in his banking account, regard should be had not only to the existence or otherwise of any antecedent arrangements between the bank and its customer, but also to the very circumstances of the deposit and withdrawal

under consideration. Thus, though it may not have been the

practice for the bank to allow the customer to draw against uncleared effects, if the bank for once takes a chance and permits the customer to draw against an uncleared cheque deposited in his banking account, then the bank has given value for the cheque and acquires title to the cheque, thereby rendering it the holder in due course of the cheque with the right to sue the drawer of the cheque for the amount of the cheque, even though the drawer may have given the cheque merely in order to accommodate the party to whom it was made payable and who had given no value therefor. In the instant matter no question of antecedent arrangements or special circumstances relating to the deposit by Frank and the drawing of cheques against uncleared effects was relied upon in the pleadings or emerged from the evidence of Blumberg.

The Wassenaar case, to which I have referred in another context, affords an example in the third category. It concerned an application for summary judgment. The defendant submitted that his affidavit disclosed a defence to the claim made on two bases. The first was that he never concluded the contract relied upon by the plaintiff. The second was that the plaintiff was estopped from

claiming on an overdraft in excess of R800,00.

The Court a quo quoted with approval (412A-B) the following

passage in the judgment of Milne J:-

> "It, as a result of some conduct on the part of the bank, the customer believes that his account is in credit and, acting in the faith of such belief, draws a cheque for an amount which would, if that belief were correct, not result in his account being overdrawn, circumstances may well arise when the bank would not be entitled to recover from the customer if it turned out that the effect of meeting the cheque was to overdraw the account." (142H-143)

The passage indicates that Milne J was there considering the

defence based upon estoppel.

Relying on this dictum the Court a quo, stated the following:-

> " The present case appears to me to be an instance of 'conduct on the part of the bank' which causes a customer to believe that his account is in credit. Having acted on the faith of that belief, the contract between the parties does not in the present circumstances permit the bank to hold him liable for its discovery that it should not have permitted him to draw against an uncleared effect". (412C - E)

This passage fortifies my belief that the Court a quo approached the

matter on the basis of an estoppel. It erred in doing so. I repeat that

no estoppel was pleaded and the ingredients for a successful defence of estoppel did not, in any event, emerge from a proper consideration of the evidence led.

In paragraph 8 of its particulars of claim the appellant averred that the applicable rate of interest on debit balances on accounts of the type here in issue was " te alle relevante tye 28% per jaar maandeliks bereken en gekapitaliseer". The respondent admitted this averment in paragraph 8 of its amended plea. Blumberg in his evidence did not query the appellant's right to charge interest if it established its right to claim the capital amount in issue. It however seems to me that upon a proper reading of the averment in question it may well be that the rate of interest would have fluctuated from time to time and that it would be unfair to burden the respondent with interest at a rate of 28% per annum throughout the period. I believe that it would be fair to require the appellant to satisfy the Registrar of the Witwatersrand High Court as to its prevailing rate of interest on overdrawn accounts of the type conducted by the respondent during the period 28 September 1992 until date of

payment.

As to the question of costs it might have been appropriate to have allowed the appellant only costs as on exception in the Court a quo. However in view of the peculiar circumstances of this matter and the course which the proceedings took as a result of the conduct of the respondent I do not believe that this is a case where the appellant's costs should be so limited.

In the result I am of the view that the appeal should succeed.

I accordingly make the following order:-

11.3 The appeal is allowed with costs.

11.4 The order of the Court a quo is set aside and replaced by the following:-

"Judgment is granted in favour of the plaintiff fon-

11.5 Payment of the sum of R85 000,00

11.6 Interest on the aforesaid sum at the plaintiffs prevailing rate of interest from time to time on overdrawn accounts of the type conducted by the defendant as from 28 September 1992 to date of

34 payment, such rate of interest to be established by the plaintiff to the satisfaction of the Registrar of the Witwatersrand High Court.

2.3 Costs."

R H ZULMAN

MAHOMED CJ }
SMALBERGER JA } concur
HARMS JA }
SCOTT JA }