REPORTABLE

IN THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

Case No: 294/99

In the matter between:

SOUTH AFRICAN EAGLE INSURANCE COMPANY LIMITED
Appellant

and

NBS BANK LIMITED
Respondent

CORAM: **NIENABER, MARAIS, SCHUTZ, NAVSA JJA *et* FRONEMAN AJA**

HEARD: **21 AUGUST 2001**

DELIVERED: **28 SEPTEMBER 2001**

JUDGMENT

MARAIS JA

MARAIS JA:

[1] The background to the claims which were dismissed in the Court *a quo* and are the subject of this appeal appears in broad from the judgment of this Court in NBS Bank Limited v Cape Produce Company (Pty) Ltd and Others (Case No 281/99) and I shall not repeat it. I shall refer to the case as the Cape Produce case. The appeal in that case was argued the day before the appeal in

this case was argued. It goes without saying that the evidence adduced in either of the cases cannot be taken into account in deciding the other but the broad background described in the judgment in the Cape Produce case is common to both cases and is also established by the evidence led in the present case.

[2] Appellant is a short term insurer which invests large sums of money for which it has no immediate need. It frequently invests by depositing money with banking institutions at agreed interest rates. Sometimes the sums deposited are repayable on call; sometimes they are deposited for fixed periods. Respondent is a banking institution.

[3] On 19 April 1996 appellant drew a cheque for R5 million in favour of respondent. It was crossed and marked "not transferable" and "not negotiable" and deposited to the credit of respondent's account at First National Bank. It was alleged by appellant that it was intended to be a fixed deposit with respondent for a period of six months at an interest rate of 15%, the interest payable upon maturity. On the face of the cheque appeared the words "being Fixed Dep 6 Mnths @15%". On the same day Mr Assante, in his capacity as branch manager of respondent's Kempton Park branch, wrote to appellant on an NBS Bank letterhead in these terms:

"Dear Sir,

FINANCE – R5000 000,00

> We hereby confirm that NBS Bank Ltd guarantees to repay the sum of R5000 000,00 (Five Million Rand) on 23 October, 1996 to SA Eagle Insurance Co Ltd upon presentation of this letter."

The letter was handed to Ms Pollock, an employee of appellant's, when she handed over appellant's cheque to an intermediary for delivery to respondent. A further letter bearing the same date and signed by Assante in his capacity as branch manager was also delivered to appellant. The details are unimportant. What is of importance is that it related to the interest component of the deposit and is headed "confirmation of your investment" and the opening sentence is "Thank you for investing with us." On 23 October 1996 respondent repaid the capital sum of R5 million to appellant by drawing two cheques for R3,5 million and R1,5 million respectively and paying them into appellant's bank account. On the same date respondent drew a further cheque for R376 090,34 for the interest owing to appellant and paid it into appellant's bank account. A deposit slip reflecting that these cheques had been paid into that account was sent to appellant. I shall call this the first transaction.

[4] On 8 May 1996 appellant drew a cheque for R5 million in favour of respondent. It was crossed in the same manner and was credited to respondent's account. It was intended by appellant to be a fixed deposit with respondent for 12 months at an interest rate of 15.10% p a. On the face of the cheque appeared the words "being Investment @ 15.10%." In exchange a letter

dated 7 May 1996 in identical terms to the first of the two letters mentioned in para [3] (save that the date of repayment was to be 7 May 1997) was given to appellant. A document broadly similar to the second of the letters referred to in that paragraph and headed “confirmation of your investment” was also delivered to appellant. It was unsigned but was on NBS Bank stationery. This was the second transaction.

[5] Three more transactions took place in substantially the same manner. The third was on 10 June 1996 and involved a deposit of R10 million. The fourth was on 21 November 1996 and involved a deposit of R5 million. The fifth was on 5 December 1996 and also involved a deposit of R5 million. The relevant documentation was fundamentally the same as in the first two transactions. I shall return later to such variations as there were.

[6] As happened in the Cape Produce case, the sums invested by appellant and deposited in respondent’s bank account found their way into the corporate saver account of Nel, Oosthuizen & Kruger (“NOK”) and thence to third parties. Appellant has been paid the interest due in respect of the second, third, fourth and fifth deposits but has not been repaid the invested capital. It was that, and *mora* interest thereon, for which it sued in the Witwatersrand Local Division of the High Court. It failed in its claim. Hence this appeal with leave granted by the learned trial judge, Van Oosten J.

[7] A number of alternative causes of action were pleaded by appellant in

respect of each of the four transactions. In the view I take of the matter it is necessary to consider only two of them. The main claim in each case was based upon the alleged existence of an oral agreement between appellant and respondent in terms of which appellant agreed to deposit the relevant sum of money with respondent's Kempton Park branch for a specified period at an agreed interest rate and respondent undertook to repay the capital together with the interest thereon on the date of maturity of the investment. Respondent was alleged to have been represented by one Jones and/or by one Bradley and/or by Assante. The alternative claim in each instance was based upon the letters of "guarantee" signed by Assante, a prototype of which I have quoted in paragraph [3]. They were said to constitute acknowledgments of debt upon which appellant was entitled to sue.

[8] The trial judge found that neither of those causes of action had been established. As to the oral contracts pleaded, he assumed in appellant's favour that those who purported to act on its behalf had its authority to do so, but held that none of the persons alleged by appellant to have had authority to represent respondent, and to have done so by concluding such contracts, did in fact have such authority or did in fact enter into such contracts. While accepting that appellant's representatives intended to so contract, he concluded that no one purporting to represent respondent "subjectively intended to conclude an agreement of investment by which the [respondent] would be bound". That, so

he continued, precluded a finding that there had been a "direct meeting of minds ('wilsooreenstemming')". An alternative contention advanced by appellant, namely, that there was at least an objective appearance of consensus for the existence of which respondent was responsible, was rejected both because the pleadings were thought not to provide an adequate foundation for the contention and because those responsible for creating the appearance of consensus were not actors whose conduct could be laid at respondent's door.

[9] An additional reason given by the trial judge for the dismissal of the contractual claim was appellant's failure to plead or prove that NOK had respondent's authority to accept deposits on its behalf from investors intending to invest with it (as opposed to NOK) and that in as much as the cheques were delivered by persons acting as appellant's agents, not to respondent, but to NOK by whom "they were deposited directly into [respondent's] bank account as an investment by NOK for the credit of their Corporate Savers' account with [respondent]," the consequence was that "consensus *ad idem* was never reached."

[10] In dealing with the claims based on the alleged acknowledgments of debt signed by Assante, the trial judge assumed in appellant's favour, but without deciding, that the terms of the letters were sufficiently clear to constitute acknowledgments of debt. However, he dismissed the claims on four grounds. The first was that appellant had neither pleaded nor proved "an acceptance of the

acknowledgments of debt" *animo contrahendi*. The second was that it had been formally admitted by appellant that Assante had neither express nor implied authority to sign an acknowledgment of debt on behalf of respondent. The third was that a resort by appellant to estoppel in its replication could not succeed because there was no evidence of any representation made by respondent to appellant that Assante was authorised to sign an acknowledgment of debt. The fact that Assante was respondent's branch manager was considered, in itself, to be of no consequence. The fourth ground was that the defence of *non causa debiti* was available to respondent as there was no agreement of investment with it and therefore no indebtedness to which the acknowledgment of debt could have applied. In this Court counsel for respondent supported these findings and sought to provide yet further fortification for them.

[11] The alleged contracts.

The first contention here was that the evidence did not establish that the persons named by appellant in its particulars of claim as having represented appellant and respondent respectively did in fact have any dealings with one another which could be said to have culminated in the coming into existence of the oral contracts pleaded. Alternatively, so it was argued, they had no authority to enter into the contracts.

[12] The next contention was that in so far as appellant sought to rely upon agreements constituted by conduct or "a doctrine of quasi-mutual assent", it was

not open to it to do so, first, because no such case had been made in the pleadings and secondly, because there was no evidence to support it. It was submitted that there was no evidence that appellant placed any reliance upon any conduct of Assante (still less of respondent) in issuing the written guarantees because those who were alleged by appellant to have contracted with respondent on its behalf (Mr Lober, appellant's investment manager, and Ms Pollock, appellant's investment administration clerk) did not do so. Lober was unaware of the existence of the guarantees until December 1996. Ms Pollock had simply received the guarantees and filed them away. Alternatively, it was argued that even if there had been reliance upon the guarantees issued by Assante, that would not have availed appellant because it was admitted that he had no authority, express or implied, to issue them and the doctrine of quasi-mutual assent cannot be invoked by reason of the conduct of an admittedly unauthorised representative of one of the parties to the putative transaction. Reliance upon conduct by the principal (respondent) is essential and no such conduct had been pleaded or proved.

[13] Next it was contended that even if the existence of the contracts had been established, appellant had not performed its obligation under the contracts and could therefore have no claim against respondent. Appellant's obligation was to deposit the relevant sum with respondent at its Kempton Park branch. It was submitted that it had failed to do so in that the cheques intended for the purpose

were not delivered to respondent at its Kempton Park branch but diverted by persons for whose conduct respondent was not responsible to NOK and deposited in respondent's bank account not by appellant but by NOK. It was argued that there was no evidence that Assante knew of those deposits, or gave any instructions as to how they were to be dealt with, or that, if he did, he had any authority from respondent to do so.

[14] The alleged acknowledgments of debt.

The first contention raised by respondent relates to the true interpretation of the relevant documents. It was submitted that there is no express acknowledgment of an existing indebtedness by respondent and that, at best, the document adverts to the indebtedness of some undisclosed third party. The use of the word "guarantees" is the foundation for the submission.

[15] The second contention echoed the finding of the Court *a quo* that, if they were acknowledgments of debt, they were not accepted by appellant *animo contrahendi* prior to respondent's repudiation of Assante's authority. The factual basis for the submission was that appellant's board of directors were unaware of the letters. So was its managing director, Mr Martin. Lober made the four investment decisions which give rise to these claims on the strength of what he had been told by Jones, an intermediary, and not on the strength of any of Assante's letters of which he too was unaware. Neither he nor Martin expected to receive any such letter. Ms Pollock received the letters only after

each of the investment decisions had been made and simply filed them away without any intention of "accepting" the acknowledgements of debt which, in any event, she had no authority to do.

[16] The third submission was that, as the Court *a quo* found, there was no *causa debiti* for the acknowledgements of debt, appellant having failed to prove the existence of the underlying contracts of investment.

[17] Before dealing with the issues raised I must sketch the specific circumstances in which the payment into respondent's bank account of the cheques drawn by appellant came about. Mr Jones was an accountant in private practice. He was the brother-in-law of Martin (appellant's managing director). While Lober was away on leave Jones telephoned Martin during April 1996 and told him "that NBS was looking for some money". He was asked to fax to Ms Pollock details of the investment opportunity and he did so. His letter dated 18 April 1996 reads:

> "Dear Miss Pollock
>
> **Re: NBS Bank**
>
> We confirm that client required R2 mil – R5 mil tomorrow and is offering the following:
>
> (Details were set out of the interest rates offered for deposits for 6 months and 12 months respectively.)

Kindly contact Tiny Jones ---------- or Steve Swanepoel ---------- in this regard. ----------“

[18] Martin was shown the letter by Ms Pollock. He authorised Ms Pollock to deposit R5 million with respondent for six months at an interest rate of 15% per annum and he endorsed the letter to that effect. She requisitioned an appropriate cheque drawn in the manner described earlier. Mr Bradley, a broker, arrived to collect the cheque bearing the letter of guarantee described in para [3]. She read the letter and was satisfied that it was “a confirmation, a guarantee that NBS would repay a capital amount of R5 million on 23 October at maturity”. She knew Assante who had telephoned her on a previous occasion to obtain appellant’s banking details so that respondent could repay appellant a previous deposit which had matured. She handed Bradley the cheque. It was deposited, as it had to be because of the manner in which it had been drawn and crossed, in respondent’s bank account but it was then credited in respondent’s books of account to NOK’s corporate saver account. Ms Pollock subsequently received the further letter referred to in para [3]. In due course both the capital and the interest were paid to appellant by cheques drawn on respondent’s bank account.

[19] On his return from leave Lober was told of that transaction. Prior to receipt by appellant of the payments of capital and interest referred to in para [18] appellant purported to make two more investments with respondent. Two more were made thereafter. On each of these four occasions Jones approached Lober to enquire whether appellant had any money which it wished to invest. He told Lober that the money could be placed with either the NBS or Syfrets (another well-known financial institution) and gave details of the rates on offer. The *modus operandi* followed thereafter remained essentially the same. However, in all four instances a further document was sent to appellant. It was also a document headed "confirmation of your investment" but it was not signed by Assante. Nor did it relate to the capital sum deposited by appellant. It related to the interest component of the deposit. I should explain here that the nominal rate of interest payable upon the deposit was credited to appellant in advance so that appellant would enjoy the benefit of interest upon interest for the period of the deposit. This particular document was the confirmation of the investment of that nominal interest. In each instance it ended with the statement:

> "This confirmation is null and void unless validated below by an NBS terminal.
> ----------"

In each instance there appeared below the broken line in an obviously computer terminal-generated format details of the investment of the interest component of the deposit. In two of the four instances there were additional letters of "confirmation of your investment" signed by Assante which were in similar terms to those referred to in para [3].

[21] Some attempt was made by respondent to rebut appellant's assertion that it believed itself to be contracting with respondent. The argument rested upon the same kind of considerations as were relied upon for the same proposition advanced in the Cape Produce case. In addition, there was reference to a previous transaction between the parties involving a third party (referred to as the Federal Credit transaction). That transaction, so it was argued, amounted to appellant investing its money with a third party via respondent and it was suggested that appellant had done essentially the same here. Notwithstanding these considerations and for substantially similar reasons to those given in the Cape Produce judgment I consider it to be in the highest degree unlikely that appellant would have been content to lend millions of rands to a third party whose identity was entirely unknown to it. The evidence given by those who testified on appellant's behalf was inherently probable and it is abundantly clear that they genuinely thought that the investments were being made with respondent and that, objectively regarded, they had good reason to believe that those purporting to represent respondent saw the matter in the same light.

[22] However, it is equally clear that the high command of respondent was unaware of what was being done in its name. Respondent's stance is that it did not in fact or in law contract with appellant; that any contrary belief which appellant may have had was not brought about by the doing of anybody for whose actions it (respondent) can be held accountable; that the sums of money deposited in its bank account were not deposited by appellant in performance of the contracts of deposit but by third parties for the credit of NOK; that it (respondent) did not accept the deposits as having emanated from appellant but from NOK; that it was contractually obliged in terms of the corporate saver scheme to pay out the funds standing to the credit of NOK's account when requested to do so by NOK; and that it had paid out those funds in good faith and could not be required to, in effect, pay them out again to appellant. That respondent finds itself faced with these claims entitles it to considerable sympathy but that is of course not conclusive of the issues raised.

[23] The contracts of deposit.

Some preliminary observations need to be made. Assante was joined in the litigation as a third party by respondent. So too were Bradley and Stephenson. They were brokers to whom Ms Pollock had handed the cheques and from whom she received the written "guarantee" signed by Assante. By consent, the actions against them were separated and postponed *sine die*. None of them testified in this action.

[24] The probabilities are overwhelming that Assante was the instigator of the overtures made by Jones to appellant and that he intended to create the impression that appellant would be investing with respondent. His contemporaneously given letters of "guarantee" were obviously designed to foster that impression. He plainly purported to speak for respondent and it is neither here nor there which particular representative or representatives of appellant's it was who may be said to have concluded the contracts. It is as plain as a pikestaff that, objectively regarded, they were concluded.

[25] Respondent's attempt to confine appellant strictly to its characterisation in its pleadings of the contracts as oral and as having been concluded by the persons named in the particulars of claim is not, in my opinion, justified in the circumstances of this case. The requests for trial particulars filed by both parties were extensive and the replies given fleshed out the respective stances of the parties in considerable detail. It became quite apparent during the trial that appellant's case upon the contracts rested upon a mosaic of letters, telephone calls, conversations, and conduct. Some of the actors named in the particulars of claim such as Jones, Lober and Ms Pollock were involved throughout all four transactions. Some played an overt role in some of the transactions but not in others. Thus, Bradley delivered Assante's letter of "guarantee" and collected appellant's cheque in two of the transactions. Stephenson did so on the other two occasions. Assante was the *eminence gris* throughout. Whether the

objectively plainly discernible resultant contractual consensus is rightly described as constituting an oral contract (in contradistinction to one in writing) or, more accurately, as being partly oral, partly in writing, and partly tacit in so far as elements of the apparent consensus rested on conduct, is of little moment. Respondent was not prejudiced by such broadening of the issues as occurred. They were fully canvassed at the trial. The entire premise upon which the trial was conducted by respondent was not that there were no contracts of deposit at all, but that they were not with respondent, and if they purported to be, they were not binding upon respondent because of an absence of authority on the part of those who purported to represent respondent.

[26] I have borne in mine that respondent was armed with a formal admission by appellant that Assante had no actual authority (express or implied) to issue the "guarantees" which he did and that he knew it. It is also true that the evidence established that he had no authority to contract in the terms alleged by appellant. However, it does not follow from either that he did not purport to do so on respondent's behalf. A distinction must be drawn between a case in which an unauthorised person does not even purport to contract on behalf of a principal with a third party, and a case where he or she does so purport. In the first class of case the absence of authorisation is irrelevant; there is simply no contract either seemingly or in truth. In the latter class of case, there is seemingly a contract but in truth none because of the lack of authority. Where,

as here, the initial question being addressed is whether the contracts of deposit were seemingly concluded, the fact that Assante had no authority to conclude such contracts is only relevant to the enquiry to the extent that it might throw some light on whether it is probable that he would have purported to contract. But the lack of authority is in itself inconclusive as to whether he purported to contract. Nor, as I see it, does it avail respondent to say that even if there was seeming contractual consensus, it was not its conduct which gave rise to the appearance of contractual consensus but Assante's. When the question of Assante's ostensible authority to contract is considered respondent will of course be entitled to raise that contention.

[27] The reason for the distinction is this. Where two parties negotiate with one another directly and not through representatives they will be bound if, objectively regarded, they appear to have reached contractual consensus. That one or other of the parties did not subjectively intend to do so will not matter. The objective theory of our law of contract dictates that result. Each party is entitled to rely upon the objective manifestations of consensus which emanate from the other. And where each party is responsible for those which emanate from him or her it seems right that such should be the result. However, where one of them purports to be acting in a representative capacity but has in fact no authority to do so, the person whom he or she purports to represent can obviously not be held bound to the contract simply because the unauthorised

party claimed to be authorised. That person will only be held bound if his or her own conduct justified the other party's belief that authority existed.

[28] Did respondent hold Assante out as having authority to accept deposits of the magnitudes here involved on the terms on which they were accepted? That is of course a question of fact to be decided on a balance of probability. It is not reducible to the question, posed *in vacuo*, of whether a branch manager of a business has apparent authority to bind the business nor is it a question which lends itself to a generalised answer. The branch manager of a fast food outlet cannot be regarded, simply because of his appointment as such, as having been held out by the proprietor of the chain of outlets as having authority to open a new branch, to buy or hire premises for it, or to engage staff for it. That is because these activities are so patently not within the ordinary purview of such a manager. On the other hand, the manager of a business the sole activity of which is the buying and selling of used motor vehicles may well be justifiably thought to have been empowered by the proprietor to negotiate purchases and sales for that is the manager's publicly proclaimed *raison d'etre*. (*Reed N.O. v Sager's Motors (Pvt) Ltd* 1970 (1) SA 521 (R., A.D.)) In each case, it is the particular facts which will provide the answer.

[29] Here we have this situation. Respondent is a well-known financial institution which conducts business countrywide through a network of branches in South Africa's cities. It became known to the public at large as a building

society which had existed for many years before its reincarnation as a bank. Its activities remained fundamentally the same thereafter. It solicited funds from the public on which it paid interest. It lent money to the public in return for the payment of interest. Much of that lending was on the security of mortgage bonds registered over property which had been acquired by the borrower and paid for with the money borrowed. It advertised extensively. The very essence of its business was borrowing (for that is what the provision of savings accounts, the acceptance of deposits of money on call or for fixed periods, and the like amount to in law) and lending money. The establishment of branches was plainly to facilitate convenient access by the public to it as an institution and to encourage the public living in the area concerned to make use of conveniently situated branches. These branches were the public face of the institution and they were intended by respondent to be so regarded. There was no suggestion by respondent that its branches were not intended to be available to the public for certain classes of lending and borrowing and that it made that generally known. There was no publicly proclaimed or advertised policy of dealing with transactions of a particular magnitude only at its head office. The branches were held out by respondent as the places to which anyone wishing to deposit money with it could and should repair. The branch manager was held out to be the person clothed with the most authority at a branch by his very designation as branch manager. Inherent in all that is that branch managers were being held

out as authorised to accept deposits whatever their magnitude.

[30] Indeed, particulars for trial furnished by respondent make it clear that Assante, as branch manager, did in fact have authority to accept deposits of more than R1 million. It is true that his authority to do so was qualified in that he could do so "only on [respondent's] quoted terms for deposits of R1 million or less" and that he "was obliged to report any deposits of more than R1 million to [respondent's] treasury department at its head office in Durban". But these were limitations and obligations of which prospective depositors would be unaware and the central fact remains that he was in fact permitted and authorised to deal with the public in accepting deposits of the magnitude here in question and to communicate to them the terms upon which such deposits would be and were accepted. Having actually clothed him with general authority to represent to the public that he spoke for it in accepting deposits, respondent cannot shelter behind the fact that he exceeded limitations placed upon the precise extent of his authority in doing so, or the fact that he failed to report the deposits to the treasury department, or that he failed to follow internally prescribed standard procedures, or to use its standard documentation. (Cf *National and Overseas Distributors Corporation v Potato Board* 1958 (2) SA 473 (A) at 479C-480E.)

[31] In the nature of things it will seldom, if ever, be the case that, where no actual authority exists, but the principal is held to be liable on the basis of ostensible authority, the principal's holding out of the agent's authority will have

extended to each and every term of the contract which the agent has purported to conclude. It is sufficient for successful invocation of the doctrine that the conduct of the principal was such as to entitle the party concerned to believe that the person purporting to act on the principal's behalf was authorised to transact a contract of the kind in question.

[32] Appellant, through its functionaries, accepted that Assante was authorised to accept these deposits by virtue of the circumstances sketched above and respondent created those circumstances. Its belief was reasonable. It was reasonably foreseeable that, on the strength of those circumstances, members of the public would assume that Assante had authority to accept deposits of this kind. Assante must therefore be held to have had respondent's ostensible authority to conclude the contracts of deposit.

[33] The argument that those who purported to make these deposits on appellant's behalf have not been shown to have had authority to do so must be rejected. The evidence of Martin and Lober was that appellant's board of directors had approved recommendations by the investment committee of appellant regarding the limits to be set upon how much money could be placed with particular banks and that, provided the investment manager operated within the parameters set by the board, he could use his discretion. That evidence could not be seriously challenged and it is clear that the deposits made with respondent did not exceed those parameters.

[34] The contention that respondent did not receive the deposits from appellant because they were diverted and credited to NOK's account requires consideration. It seems to me to be unsound. There can be no talk of appellant's cheques having been stolen before respondent, through its bank, could collect the proceeds of them, or of the proceeds being stolen before respondent had received them. The cheques had been drawn in such a way that no one other than respondent could present them for and obtain payment. They were crossed, marked "not negotiable" and "not transferable", and made payable to respondent. They were deposited in respondent's bank account; the proceeds were collected by respondent's bank and credited to respondent's account. As a fact, therefore, respondent received the deposits from appellant and from no one else. Respondent proceeded to credit NOK's Corporate Saver account with an equivalent sum of money because NOK claimed (falsely) that the proceeds of the cheque were intended to be invested with it. That is respondent's misfortune, not appellant's. Neither appellant's cheque nor appellant's money was stolen. If anything, it was respondent's money (or, more accurately, respondent's bank's money) that was stolen from it by false pretences. (Cf *R v Stanbridge* 1959 (3) SA 274 (C) at 277F-279E.)

[35] In my view appellant's claims based upon the oral contracts of deposit should have been upheld

[36] <u>The alleged acknowledgments of debt</u>.

Are the letters indeed acknowledgments of debt which can ground an additional independent cause of action? On the face of them they are just that. (*Adams v SA Motor Industry Employers Association* 1981 (3) SA 1189 (A) at 1198A-1199C.) They use the words "confirm" and "repay" which connote both an existing indebtedness and that respondent is the debtor. The document is invested with more significance than a merely confirmatory letter or a receipt for its presentation is required when repayment is made. These factors outweigh the use of the potentially ambiguous word "guarantees". It is a word which, while often used in the context of guaranteeing the performance of a contractual obligation by a third party, is also frequently used as a synonym for "warrants" or "undertakes". In the entire context of these letters in which no reference at all is made to any third party, the latter meaning is clearly the meaning intended to be conveyed. That being so, the documents are acknowledgments of debt which can independently ground a cause of action. (*The Law of Negotiable Instruments in South Africa*, 5 ed, Cowen and Gering, p 28 n 97.)

[37] The submission that the acknowledgments of debt had not been accepted *animo contrahendi* by appellant cannot be upheld. They were delivered to appellant against delivery by appellant of its cheques. Ms Pollock had been instructed to attend to the implementation of the agreements of deposit on appellant's behalf. Her evidence was that she read the letters, found them to be in accordance with what had been agreed, and filed them. The clear implication

is that, if they had not been, she would have queried them. They were obviously filed for future use when the deposits fell due for repayment. The cheques were thereafter permitted to be paid (in the sense that payment of them was not stopped by appellant) and, in so far as acceptance may have been necessary (as to which see *Volkskas Spaarbank Bpk v Van Aswegen* 1990 (3) SA 978 (A) at 985F-986D), it is idle to suggest that there was no acceptance by respondent of them as acknowledgments of debt.

[38] It is so that Assante had no actual authority (express or implied) to issue the letters and that he knew that, but the question whether he had ostensible authority to do so remains. For the reasons given earlier in this judgment when the contracts pleaded were considered, I conclude that he did have ostensible authority to issue and sign the letters. That seems to me to be a necessary and inescapable consequence of the finding that he had ostensible authority to accept the deposits. To conclude that he had ostensible authority to bind respondent by contracting to accept a deposit but none to undertake to repay it in writing amounts to unjustifiable hairsplitting.

[39] The final contention, namely, that no underlying *causa debiti* existed for the acknowledgments of debt, must, in my view, also fail. The onus of establishing that no antecedent *causa debiti* existed was upon respondent. To hold otherwise would render appellant's right to rely upon the written acknowledgments of debt as an independent cause of action nugatory. Not only

has it failed to discharge that onus, but, as I have found earlier in this judgment, appellant has proved the contrary. Appellant was therefore also entitled to succeed in its claims on the strength of the acknowledgments of debt.

[40] The appeal is upheld with costs, including the costs of two counsel. The orders of the Court *a quo* are set aside and the following orders are substituted for them:

1. Defendant is ordered to pay to plaintiff:

1.1 R5 million and *mora* interest thereon at the rate of 15,5% per annum from 9 May 1997 to date of payment;

1.2 R10 million and *mora* interest thereon at the rate of 15,5% per annum from 11 June 1997 to date of payment;

1.3 R5 million and *mora* interest thereon at the rate of 15,5% per annum from 22 November 1997 to date of payment;

1.4 R5 million and *mora* interest thereon at the rate of 15,5% per annum from 6 December 1997 to date of payment.

2. Defendant is ordered to pay the costs of the action, including the costs of two counsel.

R M MARAIS
JUDGE OF APPEAL

NIENABER JA)
SCHUTZ JA)

NAVSA JA)

FRONEMAN AJA) CONCUR