IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number : 117/99

In the matter between :

STELLENBOSCH FARMERS' WINERY LIMITED Appellant

and

APOSTOLOS VLACHOS t/a LIQUOR DEN Respondent

CORAM : NIENABER, MARAIS, OLIVIER JJA, MELUNSKY and NUGENT AJJA

HEARD : 8 MARCH 2001

DELIVERED : 27 MARCH 2001

Sale of business - estoppel - assisted misrepresentation - causation

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JUDGMENT

NIENABER JA/

NIENABER JA :

[1] The appellant, plaintiff in the court below, is a supplier of alcoholic and other beverages to the retail trade. The respondent, defendant in the court below, owned and operated a bottle store under the name of "The Liquor Den" at the corner of Harrison and Wolmarans Streets, Braamfontein, Johannesburg. During the period 1990-1996 the defendant was a long-standing, regular and creditworthy customer of the plaintiff. In December 1995 he was approached by one Greg da Silva to sell the business to a close corporation, Baron Products CC ("BPCC"). The sale for R120 000 was eventually finalised in January 1996. What the defendant neglected to do was to notify the plaintiff (and other suppliers to The Liquor Den) that the business had been taken over by BPCC. BPCC was running it from the same premises and under the same name. It continued to order and the plaintiff continued to supply it with goods on credit. The plaintiff's representative, Cockroft, visited the premises on a more or less regular basis. He was led to believe that Da Silva was the defendant's son or son-in-law and that he was placed in charge of this business to manage it on the defendant's behalf. That was untrue. For a variety of reasons, (the change to the premises, the change in personnel and changes in the pattern of purchases and payments) the plaintiff's credit controller, Mrs Van

Rooyen, suspected that the business may have changed hands. When she spoke to Da Silva on the telephone he identified himself to her under the defendant's name. He reassured her that no change in ownership had taken place. That, strictly speaking, was true since ownership had been reserved to the defendant until the full purchase price had been paid, which had not yet happened. But the implication (that the defendant remained in charge of the business and contractually liable for its debts) was not true. The plaintiff, instead of insisting on either payment on delivery or a new arrangement for extending credit (which, but for Da Silva's reassurances it would have done), continued to supply goods to BPCC on the same grounds as before, until Da Silva in February 1996 claimed a credit of R50 000 which was not due to BPCC and two of its cheques for R30 000 and R29 000 respectively were dishonoured. By then the outstanding debt had ballooned to a figure later agreed to be R205 485,88. Da Silva stripped the premises. He disappeared without trace and without fully paying either the plaintiff (for the sale of the goods) or the defendant (for the sale of the business). The plaintiff thereupon looked to the defendant for payment. To the defendant's plea that the debt was not his the plaintiff raised an estoppel. The Court *a quo* (Solomon AJ sitting in the Witwatersrand Local Division of the High Court) found that the defendant had

been under a duty to the plaintiff to disclose the fact that he was no longer responsible for the debts of the business, but that the plaintiff was induced by Da Silva's deception rather than by the defendant's silence to continue to do business with The Liquor Den on the same basis as before. He said:

> "In all the circumstances I have come to the conclusion that there was not a sufficient causal link between the defendant's failure to disclose the sale of the business and the plaintiff acting to its detriment by extending credit to the business after the sale, but that the plaintiff's loss was the result of the fact that, when Mrs van Rooyen assumed that there had been a change of ownership, Mr Greg da Silva represented that the business had not been sold, and the plaintiff's own negligence in continuing to supply goods on credit despite the numerous warning signs which it received."

The plaintiff's claim was accordingly dismissed with costs. This is an appeal, with the leave of the Court *a quo*, against that judgment.

[2] The defendant purchased the business in 1989 for R230 000. In 1990, at the behest of the plaintiff, he completed and signed a credit application form. It contained a wealth of detail about the business and the defendant's own trading history. Of particular importance is clause (b) which read that the debtor, applying for credit facilities with the creditor:

> "b) Warrant that the above information is true and correct, and undertake to notify the Creditor in writing of any change of details shown above including change of ownership, name or address, and that if I fail to do so I will be responsible for all amounts owing to the Creditor by the new owner;"

This clause formed the basis of the plaintiff's alternative cause of action. According to the plaintiff's particulars of claim the clause incorporated an indemnification which entitled it to hold the defendant liable for the debts of the business incurred after the sale thereof. The defendant's response was that he never read the document or, if he did, that he never appreciated its full legal significance. The Court *a quo* rejected both the plaintiff's reliance on the clause and the defendant's response thereto. Because ownership had been reserved to the defendant in the deed of sale of the business and had not yet passed, the clause, as it stood, did not import liability for the defendant; nor could it be interpreted or rectified as the plaintiff sought to do to give it the wider meaning of "a parting with possession and/or control and/or change of the running of the business". The Court *a quo* likewise rejected the defendant's explanation that he neither read nor understood the document in general or the clause in particular. The correctness of the decision of the Court *a quo* in both directions was not challenged in this Court by either the plaintiff or the defendant and no more need be said about it.

[3] The plaintiff's main cause of action was one for goods sold and delivered. The defendant denied that he ordered the goods or that they were supplied to

him. The plaintiff replicated that the defendant was

> "estopped from denying that the liquor and other beverages were delivered to him or that he did not order and/or receive the goods ...".

The allegations relied on by the plaintiff in support of its replication were that the defendant, by failing to inform the plaintiff of the sale and by allowing BPCC to take possession of the business and to trade under the business name and liquor licence of the defendant

> "held out to the Plaintiff that he was still the owner of the business and/or still in possession and/or control and/or running the business and the Plaintiff continued to believe the same resulting in the Plaintiff continuing to supply goods to the business known as Liquor Den. But for this belief, the Plaintiff would not have continued to supply goods to the business known as Liquor Den on the basis that it did and would have entered into an agreement with the new owner and/or possessor and/or controller and/or operator of the said business on such terms and conditions and with such security as to protect its interests."

The defendant, according to the replication, in effect represented - and was thus precluded from denying - that all goods purchased for The Liquor Den on credit were purchased by or on behalf of the defendant and delivered to him or on his behalf and that the defendant as a consequence remained liable for the payment thereof.

[4] The onus rested on the plaintiff to establish, *au fond*, a misrepresentation

by the defendant and reliance thereon by the plaintiff, which reliance was "the cause of his acting to his detriment" (cf *Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd* 1976 (1) SA 441 (A) 452G; *Quenty's Motors (Pty) Ltd v Standard Credit Corporation Ltd* 1994 (3) SA 188 (A) 198G-199G). Such proof would, in my opinion, include proof that the reliance was not actuated by some external influence or factor other than the defendant's misrepresentation.

[5] As to the misrepresentation itself the Court *a quo* rightly held that the defendant, knowing that the plaintiff was routinely extending credit to The Liquor Den on the strength of his own credit rating, was under a duty to disclose to the plaintiff that he had sold the business and that he was no longer in control thereof:

> "He knew, or should reasonably have known, that if he did not disclose to the plaintiff that he had sold the business, the plaintiff might be unaware of the sale and might continue to supply and deliver goods to the purchaser on credit, believing that it was supplying and delivering such goods to the defendant. In other words he knew, or should have known, that there was a reasonable prospect that the plaintiff would continue to give credit to the business upon the faith that the defendant was still the proprietor and in possession of that business and in ignorance of his having ceased to be such. The plaintiff's failure to inform the defendant of the sale of the business constituted a breach of that duty and, in the result, a misrepresentation that the plaintiff was still the proprietor of the business."

[6] An ancillary point which arises is whether the defendant's misrepresentation did not in truth extend beyond mere silence (pursuant to a duty to speak): more especially, whether the defendant had not connived with Da Silva to create a particular perception which enabled Da Silva to represent himself to the outside world, including the plaintiff, as entitled to trade lawfully under his (the defendant's) liquor licence; a deception to that effect was thus implicit in their transaction; consequently the defendant was himself guilty, like Da Silva, of perpetuating a fraud for which the defendant must assume equal responsibility vis-à-vis the plaintiff.

[7] There are, I think, several answers to this line of thought. Clause 24(a) of the Addendum to the Deed of Sale requires the purchaser to apply for and obtain the necessary consents to trade pending an application for the transfer of the liquor licence and clause 25 provides:

> "The **PURCHASER** shall at its own cost apply for and do all things necessary to obtain the necessary Trading Licences and other Authorities required by the **PURCHASER** to conduct the business."

These clauses in my opinion dispose of the suggestion, not pursued in cross-examination of the defendant, that the defendant acted improperly or with criminal intent in regard to the transfer of his liquor licence. The onus to prove

duplicity on the part of the defendant rested on the plaintiff; and the evidence falls far short of establishing it. And, finally, none of the plaintiff's witnesses testified that this was the reason why credit continued to be granted to the business.

[8] The matter must accordingly be approached, as did the Court *a quo*, on the footing that the defendant, by his silence, was responsible for the impression that he remained in control of The Liquor Den and that all purchases by the business on credit were made as if the business had never been sold. This finding was not challenged on appeal and may therefore, like the defendant's negligence, be taken for granted (cf Rabie and Sonnekus, *The Law of Estoppel in South Africa* 2nd ed 83 85).

[9] It follows that if matters had carried on more or less evenly as before and the plaintiff had continued to grant credit to The Liquor Den after BPCC had effectively taken charge of the business, the plaintiff would have been entitled to hold the defendant liable for the full amount owing if BPCC were afterwards unable to foot the bill.

[10] A similar result would on a similar postulate have followed if the matter had been approached as it was in *Michna (t/a Grecian Pool Health Studio) v Argus Printing and Publishing Co Ltd* 1981(2) SA 848 (T), a decision of

Nicholas J (with whom Grosskopf J agreed), and to which the Court *a quo* referred in its judgment. That was also a case like the present where the defendant, under the trade name of the business of which he was the owner, signed an application for credit (in that case for the placing of advertisements in the plaintiff's newspaper) which was duly granted to him: a year later he sold the business without advising the plaintiff of the sale. The new owner of the business continued to deal with the plaintiff on the same basis as before. Nicholas J extrapolated a principle of the law of partnership (that an ex-partner remains liable to a party who, not having been given notice of its dissolution, continues to do business with the partnership as if the erstwhile partner was still associated with it) to the situation then under discussion. He said at 851F-G:

> "In my opinion there is no difference in principle between the case such as the present and a case of an ex-partner. By the defendant's conduct in continuing, after the sale to Coleman, to represent himself as the owner of the business, the plaintiff incurred loss and it would be unfair that the plaintiff's just ignorance should be a source of loss to it.
>
> I am therefore of the view that both under the principles of estoppel and under the principles of the common law the defendant was liable to the plaintiff."

Nicholas J sought to contrast liability under the common law and liability via the operation of estoppel. Whether such a distinction is meaningful, whether

such a cognate cause of action exists outside the law of partnership and exactly what practical differences there may be between these two manifestations of liability, are matters on which it is not necessary in this case to express any views. The reason is that *Michna*'s case is not in point. It is not in point because there was absent from that case the very complication which is present in this one: namely, the role which Da Silva played in shaping the state of mind of the plaintiff. Once Da Silva had taken over the business matters did *not* continue evenly as before. The crucial question in this case, which did not arise in *Michna*'s case, is whether it was the defendant's initial misrepresentation or Da Silva's later fraud which induced the plaintiff to act to its detriment by extending credit to BPCC in a manner and to an extent it would not otherwise have done and which, in the event, it was unable to recoup from the business.

[11] To resolve that question it is necessary to look a little more closely at the evidence. Cockroft, the plaintiff's representative (referred to by one of the plaintiff's witnesses as the "rep") met Da Silva in December 1995 even before the sale was finalised. Cockroft was unaware that BPCC was purchasing the business. He was led to believe that Da Silva was merely managing it on the defendant's behalf. Da Silva told him in December 1995 that the premises, in anticipation of the business being expanded, would be enlarged and when he

returned during the middle of January 1996 Cockroft noticed that extensive renovations had in the meantime been done. It was during this period that The Liquor Den's purchases from the plaintiff increased dramatically. Whereas the defendant's purchases during the period 1990-1995 were in the order or R5 000 per month, in January 1996 alone R46 000's worth of liquor was ordered from the plaintiff. It was also then, shortly after the middle of January 1996, that Da Silva enquired about a discount on a bulk order on Hunter's Gold which he said was destined for the export market. Cockroft conveyed this information to Mrs Van Rooyen. (She testified that the defendant's credit limit was pegged at R17 500, a fact never conveyed to the defendant.) The large orders placed with the plaintiff together with the fact that Cockroft reported to her that extensive renovations had been effected to the premises, caused her to wonder whether there had been a change in the ownership of the business. If so, it might have a bearing on the plaintiff's own exposure. She discussed the matter with her immediate superior, Mr Pretorius, the plaintiff's credit manager of what was then the Transvaal area. He instructed her to satisfy herself that the business had not undergone a change of ownership or control. This was confirmed by Pretorius in evidence. In the presence of Cockroft Mrs Van Rooyen thereupon telephoned the business. She spoke to someone she believed was the defendant:

> "HOF : Mevrou, verskoon my. Mevrou, het u gevra vir mnr Vlachos en toe het iemand na die telefoon toe gekom? -- Nee, mnr Vlachos het die foon ...(tussenbei)
>
> Of het die persoon gesê dat hy mnr Vlachos is? -- Hy het gesê hy is mnr Vlachos. Hy het die foon geantwoord en ek het gevra om met mnr Vlachos te praat en hy het gesê dit is Vlachos wat praat."

And again:

> "Wat het die persoon vir u gesê of ek is jammer. Wat het u vir hom gevra? -- Ek het vir hom gevra die feit dat hy 'n groter bestel wil neem as gewoonlik, het daar enige eienaarsverandering gebeur. Toe sê hy nee, hulle het net die bottelstoor vergroot en hy het 'n persoon wat 'n uitvoerkontrak met hom het vir wie hy die goedere wil verskaf.
>
> Die veranderings waarvan hy gepraat het, het u geweet waarvan hy praat? -- Op daardie stadium ja, want die verteenwoordiger wat self uitgaan na die bottelstoor was by my toe ek die oproep gemaak het en hy het my vertel van die veranderings."

She reported this conversation to Pretorius. Although the proposed purchases would exceed the limit which the plaintiff had placed on the defendant's credit, a deliberate decision was taken to confirm the proposed transaction. The reason was that the plaintiff, at that time, was more lenient in its approach to the furnishing of credit. She explained:

> "Dit is korrek, maar in 1995/1996 het ons nie dieselfde maatskappy beleid gehad om soos ek reeds gesê het op daardie stadium was ons baie "lenient" met kliënte waar ons dit nie vandag is nie."

[12] I interrupt this résumé of the facts at this point to deal briefly with a submission raised for the first time in argument before this Court by counsel for the defendant, based on the evidence that the plaintiff's attitude at the time was more lenient than later. It was that the plaintiff for purely commercial reasons deliberately closed its eyes to the real chance that the business had in the meantime been sold to Da Silva; and that such knowledge must be imputed to the plaintiff on the basis that a man must be taken to know something if he

> "consciously abstains from doing that which as a matter of business he would do, and abstains because he would rather not know the truth."

(*In re Building Estates Brickfields Company (Parbury's case)* [1896] 1 Ch D 100, 106; *Hartogh v National Bank Ltd* 1907 (2) TS 207, 212; *Grant and Another v Stonestreet and Others* 1968 (4) SA 1 (A) 20F-G). If the plaintiff knew of the sale when as a matter of policy it extended credit to the business, so it was contended, it was relying on that knowledge and not on the defendant's earlier misrepresentation; consequently there was no room for the invocation of estoppel (cf Rabie and Sonnekus, *op cit* 59 61). I cannot agree. In my opinion there is no justification whatsoever for saying that the plaintiff deliberately closed its eyes to the true state of affairs, namely that Da Silva had to all intents and purposes taken over control of The Liquor Den. This was patently not a

case where the plaintiff studiously refrained from learning the truth. The accommodating attitude which the plaintiff exhibited at the time was not a factor which in itself changed the course of events; it merely rendered the plaintiff more susceptible to Da Silva's campaign of misinformation.

[13] To return to the evidence, it is apparent from the analysis of purchases and payments placed before the trial Court that during the period January to February 1996 purchases were made in the sum of R234 724,68. Some payments were also made. But whereas the payments in the past were made timeously this was no longer the case. In particular the payments in respect of the large export order of 14 February 1996 was not made within the agreed time, which prompted Mrs Van Rooyen to telephone The Liquor Den once again, on which occasion she was fobbed off by Da Silva with a somewhat implausible excuse. A payment of R40 000 (incidentally by BPCC) was, however, made on 26 February 1996 whereupon a further large order for R100 812 was executed. On 27 February 1996 The Liquor Den's account was erroneously credited with an amount of R50 000 which Da Silva afterwards falsely claimed enured to the business. Because of the problem with the R50 000 The Liquor Den was placed on a COD basis as from 14 March. Two BPCC cheques of R30 000 and R29 003, respectively dated 18 and 22 March 1996,

were both returned as dishonoured in early April 1996. No further deliveries were made thereafter. The outstanding debt was eventually calculated to be in excess of R200 000.

[14] To sum up this portion of the evidence: the telephone conversation between Van Rooyen and Da Silva took place after Da Silva mentioned the possibility of the large export order to Cockroft (between the middle of January and early February) but before the order was eventually executed on 14 February 1996. Up to the moment of the telephone conversation the defendant would rightly have been held liable for purchases made by The Liquor Den because the plaintiff was clearly still acting on the faith of the defendant's own misrepresentation in not informing the plaintiff of the change of responsibility for the account. But even though the defendant may in principle have been liable for debts incurred prior to that conversation, it happens to be of no relevance in this case. The reason is that if payments subsequently made by The Liquor Den to the plaintiff are appropriated to the earlier debts, as in law they must be, nothing remains owing in respect of purchases made prior to 14 February 1996. The payments made on 26 February (R40 000), 18 March (R30 000) and 22 March (R30 000) far exceeded the sum of the purchases made before 14 February 1996.

[15] The real issue is whether the defendant can be held liable for orders placed and executed after the first telephone call between Van Rooyen and Da Silva had taken place. That call was the watershed for the following reasons:

1. Because of the manner in which the business was conducted after January 1996 the plaintiff became apprehensive that it may have changed hands which, if true, might affect its own ability to recover payments for goods supplied by it on credit.

2. The plaintiff thereupon instituted its own enquiries. Because of Da Silva's impersonation of the defendant these enquiries were deflected to him rather than directed to the defendant.

3. As a result of the false reassurance by Da Silva the plaintiff decided, also as a matter of policy, to continue supplying goods to the business on credit.

4. If it had not been for Da Silva's reassurances given to Mrs Van Rooyen on the telephone some time during late January or early February 1996 the plaintiff would either have imposed its "stop supply" procedure or it would have insisted on a fresh credit application. In that event it would either have agreed new terms or it would have insisted on payment on delivery.

5. Subsequent supplies were accordingly made on the strength of its

own assessment of the situation based primarily on Da Silva's misinformation.

[16] It has been suggested in favour of the plaintiff that Da Silva's own later misrepresentations, enlarging on the defendant's earlier one, could not serve to relieve the defendant of liability; that the defendant's initial misrepresentation remained concurrent and operative throughout and was not overreached by Da Silva's later fraud; in short, that the defendant could not be better off and his accountability not be lessened because Da Silva, exploiting the situation, perpetrated a later and more potent deception on the plaintiff. The defendant's initial misrepresentation, far from being dissipated, therefore remained, so it was said, a concomitant cause which induced the plaintiff to act to its detriment.

[17] I cannot agree. In the first place the so-called "facilitation theory", absent a calculated deception (cf Rabie and Sonnekus, *op cit* 65), has long been discredited in this country (cf, for instance, *Union Government v National Bank of South Africa Ltd* 1921 AD 121 131 138; and *Grosvenor Motors (Potchefstroom) Ltd v Douglas* 1956 (3) SA 420 (A) 425F-H). Thus it was declared by Corbett J in *O K Bazaars (1929) Ltd v Universal Stores Ltd* 1973 (2) SA 281 (C) at 287H-288B:

> "As in the present instance, cases of estoppel by negligence often involve the fraudulent conduct of a third party and the complaint against the person sought to be estopped is that his negligence permitted or facilitated the fraud. In this situation our Courts have

> rejected, as being too broadly stated, the so-called "facilitation theory", viz. that where-ever one of two innocent parties must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it (see *Grosvenor Motors'* case, *supra* at p.425; see also *Connock's (S.A.) Motor Co. Ltd v Sentraal Westelike Ko-operatiewe Maatskappy Bpk.*,1964 (2) S.A. 47 (T) at p.48). It has, on the contrary, been held that such cases must be adjudged by the ordinary general principles relating to estoppel by negligence; and, of course, the fraudulent intervention of a third party is an important factor in determining whether the conduct of the person sought to be estopped proximately caused the other's mistaken belief and resultant loss; and whether this result was reasonably foreseeable (see, e.g., *National Bank* case, *supra*)."

(Cf *Universal Stores Ltd v OK Bazaars (1929) Ltd* 1973 (4) SA 747 (A).)

[18] In the second place the basis for holding liable someone for holding out something is the image he conjured up which prompted the other party to react to his prejudice (cf *Southern Life Association Ltd v Beyleveld NO* 1989 (1) SA 496 (A) 505F-G); if, due to some new circumstance (here, the fraud of Da Silva), a new image is superimposed on the old one and it is the new image to which the other party responds and on which he relies, the original party can no longer be held to it, even if he would otherwise have remained liable (Rabie and Sonnekus, *op cit* 56).

[19] Finally, there is the related and parallel matter of causation. Instances of this kind are typified by Rabie and Sonnekus, *op cit* 19 122 as "cases of assisted misrepresentation". In a passage cited at p 18 from *Cross on Evidence* 6 ed

(1993) this phenomenon is described as:

> "a type of estoppel ... in which the party in whose favour it operates is the victim of a fraud of some third person facilitated by the careless breach of duty of the other party."

Rabie and Sonnekus, *op cit* 122 continue:

> "In cases of this kind difficult questions can arise as to whether the fraud of the intervening party, or the negligence of the owner which facilitated the commission of the fraud, should be regarded as having *caused* the representee to act to his prejudice."

In such situations our courts have chiefly but not exclusively employed the so-called "proximate cause" test (cf *Grosvernor Motors (Potchefstroom) Ltd v Douglas* 1956 (3) SA 420 (A); *Standard Bank of South Africa Ltd v Stama (Pty) Ltd* 1975 (1) SA 730 (A); 1975 (4) SA 965 (A)) or the "real cause" test *(Saambou-Nasionale Bouvereniging v Friedman* 1979 (3) SA 978 (A) 1005E-H) or even the test of foreseeability (*Union Government v National Bank of South Africa Ltd* 1921 AD 121 129 138; *Monzali v Smith* 1929 AD 382 387; *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (WP) Bpk* 1996 (3) SA 273 (A) 288F-G), in order to resolve the problem of whether one party's misrepresentation caused another party to act thereon to his prejudice.

[20] Latterly this Court has on more than one occasion favoured a more flexible test to determine issues of legal (as opposed to factual) causation within the fields of the criminal law (cf *S v Mokgethi en Andere* 1990 (1) SA 32 (A) 39I-41A), the law of delict (*International Shipping Company (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) 700H-701F; *Smit v Abrahams* 1994 (4) SA 1 (A) 15B-18H) and the law of insurance (*Napier v Collett and Another* 1995 (3) SA140 (A) 143E-144F; 146E-J). In *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) at 765A-B it was said that:

> "the test to be applied is a flexible one in which factors such as reasonable foreseeability, directness, the absence or presence of a *novus actus interveniens*, legal policy, reasonability, fairness and justice all play their part."

Quite plainly this does not mean that the tests previously employed in matters of this kind are to be disregarded. It simply means that they should be viewed not in isolation as before but in the context of a broader overall picture which would also include matters of policy and fairness.

[21] There can be little doubt that if the plaintiff had chosen to sue the defendant in delict for the losses it suffered in not being able to recover payment from BPCC, the modern flexible test would have been applicable to determine the issue of legal causation. It is difficult to appreciate why a different test is to

be applied when the same liability is to be determined on the same facts by dint of delictual action rather than of estoppel.

[22] Even so, it is not necessary in this case to decide finally whether the traditional tests of proximate cause, real cause or foreseeability, hitherto applied, have in the context of estoppel been superseded by the more flexible test. It is not necessary to do so for two reasons. In the first place the matter was not properly argued and in the second place I am satisfied that whichever approach is adopted the end result would be the same. On the facts of this case, and for the reasons stated in particular in para 15 above, I am of the firm view that the plaintiff was ultimately induced to act by the lies told to it by Da Silva; that the defendant could not reasonably have anticipated or foreseen that Da Silva would impersonate him in order to capitalize on his credit; and that there are no considerations of policy and fairness, on the broader flexible test, that dictate a different conclusion. In the final analysis the plaintiff relied on and acted to its detriment on the faith of Da Silva's deceit rather than on the defendant's default. I arrive at that conclusion irrespective of the onus. But if the onus is to be considered it would *a fortiori* be decisive against the plaintiff.

[23] The Court *a quo* was accordingly right in concluding that the plaintiff failed to establish all the requirements for a successful riposte of estoppel.

[24] The following order is made:

The appeal is dismissed with costs.

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P M NIENABER

Concur :

Olivier JA
Melunsky AJA
Nugent AJA

MARAIS JA

MARAIS JA: [1] Having initially thought otherwise, I agree that the appeal should be dismissed with costs. I base that conclusion upon a narrow finding of fact and so refrain from assenting to all of the propositions of fact and law in the judgment of Nienaber JA. In my view, it is clear that even although defendant's failure to fulfil his clear legal duty to apprise plaintiff of the true facts was, objectively regarded, reasonably capable of misleading and did in fact initially mislead plaintiff to believe that he remained its customer, the situation changed as time went by. While defendant's continuing failure to fulfil his duty to inform plaintiff of the true state of affairs remained reasonably

capable of so misleading plaintiff, the fact of the matter is that a point was reached when defendant's mere silence ceased to induce plaintiff to believe that it was still its customer. So much was that so that plaintiff set about seeking positive reassurance in that regard. In short, defendant's mere silence alone (or failure to fulfil his duty to speak) was no longer regarded by plaintiff as a sufficient indication that nothing had changed. Objectively regarded, it was. Subjectively regarded by plaintiff, it was not. From that moment onwards the silence of defendant ceased to have the inducing effect upon plaintiff which it had thitherto had, namely, a readiness to supply and extend credit.

[2] Understandably, plaintiff sought positive reassurance on that score and, equally understandably, sought it from defendant himself. Had defendant provided that assurance plaintiff would no doubt have continued to supply as before but the real[1] cause of its renewed belief that defendant was its customer would have been defendant's positive assurance that that was so, not defendant's continuing silence. Defendant would of course have remained liable thereafter. As it happened, plaintiff was given the positive assurance which it wanted but, unbeknown to it, the assurance emanated, not from defendant, but from Da Silva who impersonated defendant. It was that false

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[1] As Jansen JA preferred to call it. See *Saambou-Nasionale Bouvereniging v Friedman* 1979 (3) SA 978 (A) 1005A-F. For myself, I would say the sole cause.

assurance and not defendant's continuing silence (which by then had come to be regarded as equivocal by plaintiff) which caused plaintiff to continue supplying and extending credit.

[3] Unless responsibility for Da Silva's impersonation of him can be laid at defendant's door, the positive assurance so given cannot be raised against defendant to found an estoppel. For the reasons given by Nienaber JA I do not believe it can.

[4] In as much as goods supplied prior to the vital telephone call must be regarded as having been paid for, and liability for goods supplied thereafter cannot be attributed to defendant, plaintiff's claim against defendant must fail.

[5] The narrow finding of fact upon which my conclusion rests makes it unnecessary to deal with the problems which exercised my mind at a time when it seemed to me that defendant's failure to fulfil his duty to inform plaintiff of the changed circumstances was a concomitant cause of plaintiff's belief that defendant was still its customer. Those problems related to such questions as: the validity and appropriateness of attempting to assign differing weights to the causal effect of two factors each of which, objectively regarded, was calculated to mislead (and was therefore material in the sense in which the law uses that

word) and each of which did in fact contribute to the erroneous belief [2]; the causative implications of persistent silence where a duty to speak continues to exist even after another potent causative factor has entered upon the stage and played an inducing role which it would not have been able to play if the duty to speak had been discharged (a problem distinct from, and not to be seen as a mere manifestation of, the unsustainable breadth of the discredited "facilitation" theory); the usefulness or otherwise of the deployment of such epithets as "proximate", "direct" or "immediate" where the premise is that there *are* concomitant causes both of which have had an inducing effect, either singly or

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[2]The problem also arises in the field of contract. In England, in the 7th edition (1969) of Cheshire and Fifoot, *Law of Contract*, the authors state: "The court allows no *post-mortem* examination into the relative importance of the contributory causes, once it is proved that the representation complained of was one of those causes." (At pages 244-5.) In both that edition and the 13th edition (1996) (Cheshire, Fifoot and Furmston's) the following appears:

> "It is clear, however, that the right to relief would be endangered if a defendant were free to evade liability by proof that there were contributory causes, other than his misrepresentation, which induced the plaintiff to make the contract, and that his representation was not the decisive cause. Cranworth LJ asked:
>
> > 'Who can say that the untrue statement may not have been precisely that which turned the scale in the mind of the party to whom it was addressed?'
>
> The courts, therefore, although denying relief to a plaintiff who entirely disregards the misrepresentation, have consistently held that the misrepresentation need not be his sole reason for making the contract. If it was clearly one inducing cause it is immaterial that it was not the only inducing cause. In *Edington v Fitzmaurice*, for instance:
>
> > 'The plaintiff was induced to take debentures in a company, partly because of a misstatement in the prospectus and partly because of his own erroneous belief that debenture holders would have a charge upon the property of the company.'
>
> Thus he had two inducements, one the false representation, the other his own mistake, and on this ground it was pleaded - unsuccessfully - that he was disentitled to rescission." (At pages 244 and 281-2 respectively.)

Whether that approach is compatible with our law and whether, if it is, it is to be confined to the question of the right to resile from a contract and not extended to the doctrine of estoppel, need not be decided.

in combination.[3]

[6] Thankfully, I am spared the necessity of further enquiry by the finding of fact that defendant's silence had ceased to mislead plaintiff by the time the

[3]In Spencer Bower and Turner, *Estoppel by Representation* 3 ed (1977) it is said:

"It has already been pointed out ----- also, that 'immediate', 'direct', or 'proximate' causation, in so far as these epithets suggest the necessity of establishing anything over and above a real causal nexus are misleading and inaccurate. ----- It is not necessary that the representation should be the sole or exclusive cause of the representee altering his position; it is enough that it is *a* cause of his doing so, provided that a real causal nexus is established." (At pages 102-3. See too pages 74-5.)

telephone call was made. On the rock of that factual finding plaintiff's claim must founder.

R M MARAIS
JUDGE OF APPEAL