THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Case no: 433/2000

REPORTABLE

In the matter between:

VEREINS-UND WESTBANK AG	Appellant
and	
VEREN INVESTMENTS	First respondent
IRVINE INTERNATIONAL TRADE FINANCE (PTY) LTD	Second respondent
LESLIE COHEN NO	Third respondent

Before: Nienaber, Streicher, Cameron and Mthiyane JJA and Heher AJA

Appeal heard: 5 March 2002

Judgment: 2 April 2002

Payment – Method of discharging debt – Subsequent approval of creditor critical in validating even a method of payment that debtor may unilaterally have chosen

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JUDGMENT

CAMERON JA:

[1] On 27 February 1991 Nedcor Bank Ltd (as it is now known) ('the local bank') issued a letter of credit for $434 782,61 in United States currency in favour of a German supplier in Hamburg, Boli GMBH ('the German supplier'). The letter of credit stated that it was available after 360 days with a German bank, which is the present appellant ('the German bank'). The local bank issued the letter of credit on the application of South African buyers, whose ultimate interests are represented in this appeal by the three respondents. It is unnecessary to detail their involvement, and for convenience I refer to all of them as 'the South African buyers'. The South African buyers supplied, and the local bank still holds, the then Rand equivalent of the dollar drawing (R1 119 356,60).

[2] In March 1991, shortly after the letter of credit was issued, the German supplier entered into a transaction with the German bank in terms of which the latter paid it a discounted amount on the letter of credit. The German bank did so on the basis of commercial invoices and a forwarder's bill of lading that purported to conform with the documentation itemised in the letter of credit. These documents it forwarded to the local bank. Later it placed on record with the local bank that it expected payment of $434 782,61 on 22 February 1992 (the due date for payment).

[3] By the time the due date arose, however, a dispute had arisen about the shipment of the goods. The South African buyers contended that the documentation was forged, that the goods had never been shipped, and that the local bank was neither entitled nor obliged to pay out on the letter of credit. The German bank contended that despite these assertions it was entitled to payment. The local bank sought a direction from the South African Reserve Bank (SARB), which ruled that the funds 'must be paid into an account blocked in terms of

Regulation 4(2) of the Exchange Control Regulations[1] until such time as the matter has been clarified satisfactorily'.

[4] This the local bank did. On 24 February 1992 it informed the German bank that 'We have credited the amount of USD 434 782,61 into a blocked account in your good bank's name being in terms of the SA Reserve Bank directives and in settlement of our obligation under this letter of credit. Please be guided accordingly.' The local bank also sent the German bank a 'credit transaction advice' notifying it that 'We have credited your currency account as follows: Drawing under letter of credit 862241/08/91 Value ben[eficiary]: Boli GMBH. USD 434 782,61'.

5] There matters remained for some eight weeks, until the SARB informed the local bank that the funds had been unblocked. On 28 April, the local bank advised the German bank of this, but also informed it that a High Court application was pending to prevent it from releasing the funds. Within hours of the account being unblocked, the South African buyers obtained before Schutz J in the Johannesburg High Court an interim order attaching the sum of R1 119 356,80 plus interest in the hands of the local bank. The order interdicted the local bank from dealing with the amount and directed that it be

1 Exchange Control Regulations in terms of the Currency and Exchanges Act 9 of 1933 (Government Notice R1111, Government Gazette Extraordinary 123 of 1 December 1961, as subsequently amended). Regulation 4 deals with 'Blocked Accounts'. Reg 4(2) provides that whenever a person in the Republic is under a legal obligation to make a payment to a person outside the Republic but is precluded from effecting the payment as a result of any restrictions imposed by or under the regulations, 'the Treasury may order such person to make the payment to a blocked account'.

paid into a special interest-bearing account pending an action by the South African buyers against the German supplier, the German bank and the local bank. The local bank thereupon transferred the amount into an account in the name of the Sheriff of the Court. The trial action envisaged before Schutz J was launched; its outcome is still pending. The local bank at a later stage closed the Sheriff's account and

transferred the money into an 'interdicted' account in the German bank's name. That is still the position.

[6] On the extended return day of the rule nisi, in November 1992, Goldblatt J after hearing argument discharged the orders Schutz J had granted, but substituted in their place the following:

> 'In the event and to the extent that [the local bank] has not yet discharged all of its obligations in terms of the letter of credit 862241/08/91 it is hereby interdicted from discharging such obligations pending the final determination of the action [by the South African buyers].'

[7] The German bank thereupon instituted the present proceedings. In them, it seeks to isolate from the outcome of the pending trial action the fate of the money the local bank paid into the account in its name on 24 February 1992. It does so by claiming a declaratory order based on what it contends is the proper interpretation of Goldblatt J's order. It seeks a declaration that the local bank 'has discharged its obligations in terms of the letter of credit', and an order that it pay the sum of US $434 782,61 to it. The local bank, though cited as first respondent in the proceedings, did not defend them and was not a party to the appeal either to the Full Court or to this Court.

[8] Marais J heard the German bank's application in October 1993. He dismissed it. He held that while the local bank's intention had been to effect payment to the German bank and to discharge its obligations in terms of the letter of credit, it was necessary for the German bank expressly or tacitly to accept the unilateral payment into the account created in its name, and to communicate this to the local bank. This had not been properly established on the affidavits. In granting leave to appeal to the Full Court in February 1994, however, Marais J noted that affidavit evidence in the interim proceedings before Goldblatt J purporting to establish such acceptance, which the parties had agreed could be treated as evidence before him, had not been relied on nor drawn to his attention.

[9] The matter first came on appeal before the Full Court in April 1997, and was eventually disposed of in May 2000, when the German bank's appeal was dismissed. Stegmann J (Schabort and Labuschagne JJ concurring) held that anterior to the question whether the local bank had discharged its obligations under the letter of credit was the question whether it had any such obligations. The Full Court therefore focussed on the local bank's liability under the letter of credit in terms of international trade law. It held that fraud on the part of the German supplier had been sufficiently established so as to exonerate the local bank from any liability under the letter of credit. There could therefore be no question of its having 'discharged' any obligation on 22 February 1992, and consequently no payment had been effected. The letter of credit was moreover not intended to be negotiable in the sense of conferring on the German bank a better title than the party to the alleged fraud, the German supplier. The appeal was therefore dismissed. In September 2000 this Court granted the German bank's petition for special leave for a further appeal.[2]

[10] Before this Court the German bank's principal argument was that the local bank had made an effective payment by depositing the funds into an account in its name. Mr Wallis, who appeared at the hearing, sought to locate this argument in a reading of the Exchange Control Regulations ('the regulations'). I have some doubt whether the solution lies in their application, but on the view I take it is not necessary to decide the effect of the regulations. Mr Wallis also did not persist in seeking a declaration that the local bank had discharged its obligations under the letter of credit, conceding that it was unnecessary to the main thrust of the relief the German bank sought. For reasons that will appear, this course was in my view wise, since the local bank's obligations, and the German bank's entitlements, under the letter of

credit are best decided in conjunction with the other matters to be determined at the trial action pending between the parties. What is at issue before this Court therefore is solely the German bank's entitlement, as between it and the local bank, to the money credited to an account in its name in February 1992.

[11] The local bank's act, at the behest of the SARB, in unilaterally creating an account in the name of the German bank, and crediting it with the dollar amount at issue, clearly did not by itself effect payment to the German

2 [2] In terms of section 20(4)(a) of the Supreme Court Act, 59 of 1959.

bank. This is for two reasons. First, the established view is that payment is a bilateral act which, in the absence of contrary agreement, requires the cooperation of debtor and creditor.[3] The second is that the account was blocked under the regulations. The payment accordingly did not place the dollar amount at the disposal of the German bank. In other words, the German bank did not gain the untrammelled power to dispose immediately, as cash in its hands, of the funds transferred. There is no specifically South African authority for this second proposition, but it accords with common sense that for effective payment to occur the payee must in the absence of contrary agreement acquire 'the unfettered or unrestricted right to the immediate use of the funds in question';[4] otherwise the payment is inchoate.

[12] Did these two features of the local bank's conduct, in unilaterally creating an account to which the German bank did not have access, prevent its actions from constituting a payment to the German bank? The answer depends on whether the German bank's response was sufficient to convert a unilateral and inchoate payment into effective payment. Though the general rule is that the means of payment must be determined by agreement between the payer and payee, it is clear that unilateral conduct on the part of the debtor in purporting to effect

payment, if subsequently accepted by the creditor, is effective to discharge the debt. Thus should the debtor unilaterally pay a stranger to the contract, if the creditor later ratifies and approves the action, this constitutes a valid payment, and is considered valid from the moment of payment (and not from the moment of ratification and approval).[5]

3 *Volkskas Bank Bpk v Bankorp Bpk (h/a Trust Bank)* 1991 (3) SA 605 (A) 612C-D (Hefer JA).

4 *A/S Awilco v Fulvia SpA Di Navigazione (The Chikuma)* [1981] 1 All ER 652 (HL) 656*d*-657*g*, [1981] 1 WLR 314 at 320, per Lord Bridge.

5 *Wessels' Law of Contract in South Africa* 2ed (1951) by AA Roberts vol II para 2206, invoking Pothier *Treatise on the Law of Obligations or Contracts* para 492 ('A payment to a person who has neither quality nor power to receive, becomes valid, … by a subsequent ratification and approbation by the creditor … Ratifications, having a retrospective effect, according to the rule *ratihabitio mandato comparatur*, … the payment is regarded as valid from the time of making it. Therefore, if a person engages as surety for my debtor, with a condition that his engagement shall continue no longer than the 1st of January 1750, at the end of which time he shall be *pleno iure* discharged and acquitted; the payment by him in the course of the year 1749, to a person who had no power from me will be valid and he will have no right to demand a repetition, although I did not ratify the

[13] It follows that the unilateral nature of the local bank's conduct cannot thwart its payment to the German bank, provided that the German bank subsequently approved that conduct. The same principle must apply, in my view, to the fact that the account was blocked. If the German bank accepted the credit to the account opened in its name as a payment to it, the fact that the funds were not placed at its disposal cannot prevent a payment from being effected. The principle already cited applies equally: subsequent approval is effective to validate the payment from the time when it was originally made, even though the payee did not have access to it.

[14] But there is a third aspect. The local bank did not divest itself of the dollars in question. It did not pay a third party. What it did was to make an entry in its own books in favour of the German bank. It is well established that in our law, apart from statute, a solitary act by

someone in opening a separate bank account in the name of another and depositing money in it does not confer any special title on the person named.[6] This is because the person opening the account cannot by unilateral act deprive him- or herself of title to the money. The application of the principle is even more evident when a bank opens a separate account in another's name, not with another bank, but with itself. It was as if the local bank had a separate safe – the very circumstance van den Heever envisaged in *ex parte Kelly*[7] – and placed in it a package containing the dollars and marked with the name of the German bank. Its solitary act in so sequestering a portion of its

payment till 1750, the time in which he would have ceased being my debtor if he had not paid; for by the retrospective effect of my ratification, the payment becomes valid, from the day on which it was made; and it was made at a time when his obligation subsisted. … Upon the same principle, if I owe a hundred pounds to Peter and Paul, as creditors *in solido*, and I pay that sum in the first place to a person who receives it for Peter, without any power from him, and afterwards pay it a second time to Paul, the validity of the payment made to Paul will depend on Peter's ratification; the first payment will be valid, if ratified by Peter; the second void, as being payment of a debt already discharged; if Peter does not ratify the first, it will be void, and the second good.').

6 *Ex parte Kelly* 1942 OPD 265, per van den Heever J, applied in *Dantex Investment Holdings (Pty) Ltd v National Explosives (Pty) Ltd (in liquidation)* 1990 (1) SA 736 (A) and *De Freitas v Society of Advocates of Natal and another* 2001 (3) SA 750 (SCA).

7 1942 OPD 265 at 272.

property was ineffective to confer any title on the German bank. To this extent the South African buyers are correct in contending that the mere fact that the local bank earmarked funds in an account specially designated for the German bank did not constitute an effective payment to it.

[15] The question this appeal raises, however, is whether the German bank's subsequent acceptance of the local bank's actions changes the position also in this respect. The evidence is the following. The local bank created the account in the German bank's name in February. In April, the order of Schutz J interdicted it from paying out the money. In resisting the confirmation of that order, the German bank in June 1992 lodged affidavits answering those filed by the South African buyers. In them, its vice-president and assistant general counsel made the following averments. (a) He denied the South African buyers' assertion that because the funds had been blocked under the regulations the local bank had made no payment to it. (b) He endorsed the local bank's attitude, namely that it was obliged to make payment to the German bank of the funds credited to the account in question. (c) He asserted that the South African buyers had

no title to the money credited to the account. (d) He stated that the local bank had 'paid out' the moneys in question to the German bank 'by depositing them into an account created' in its name.

[16] After the South African buyers filed their replying affidavits, the German bank in August 1992 filed supplementary affidavits. Its vice-president again deposed to an affidavit. He asserted that the local bank's conduct 'quite clearly constituted a payment' to the German bank in terms of the letter of credit and that the local bank had complied with its obligations under the letter of credit. The South African buyers filed further affidavits in reply. Thereafter, the German bank's South African attorney filed an affidavit attaching a deposition from one of the local bank's senior managers. This affidavit described the general procedure of the local bank in dealing with letters of credit. Regarding its actions in February, the senior manager

testified as follows:

> 'When the letter of credit was … submitted to [the local bank], it recognised its obligation to pay out in terms thereof. It performed such obligation by purchasing foreign currency (US dollars) in the required amount and by depositing such foreign currency into a blocked account in the name of the [German bank].'

[17] The order of Goldblatt J followed, and thereupon the present proceedings. In them, as already indicated, the German bank (through the same official) asserts not only its entitlement to the money the local bank paid into an account in its name, but claims that the local bank is 'obliged to pay such moneys to [the German bank] who is its customer'. It further claims that it was 'entitled to draw upon that account, in accordance with the normal relationship between the banker and its customer'. It asserted that the local bank's documents relating to the creation of the account 'indicate a clear intention on the part of [the local bank] to discharge its obligations under the letter of credit in that manner, and that has been accepted by (the German

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bank) as performance by [the local bank] of its obligations under the letter of credit'. It goes on to state:

> 'Once [the German bank's] account was credited, the normal relationship of banker and customer arose between [the local bank] and [the German bank] respectively in relation to those funds, and [the local bank] was obliged to deal with those funds in accordance with [the German bank's] instructions (subject only to such restrictions as may have been imposed by exchange control regulations).'

[18] In answer, the South African buyers' affidavits stated 'that these submissions are not supported by the facts when one has regard to the totality of the circumstances', and asserted that 'the mere fact that an account is opened and credited does not … indicate the creation of a normal relationship of banker and customer' as contended. They also denied 'the arrangement as

alleged' by the German bank, and disputed that it was 'entitled to accept what really amounts to a self-serving interpretation of a series of transactions where its own version is that it was not fully aware of all the material facts and particularly of the fraud'.

[19] Whatever the parties' differing contentions about the legal position, the South African buyers' averments clearly contain no denial that as a matter of fact the German bank accepted what the local bank had done as payment to it of the sum it claimed and that it did so before the order of Goldblatt J. There was indeed no reason for the South African buyers to deny that fact. A senior official, duly authorised to depose on its behalf, had conveyed the German bank's stance, which was that it accepted what the local bank had done as a payment to it. This was authoritatively established before the interdict of Goldblatt J. At no time before or since then has the local bank disputed that it made payment to the German bank or that the German bank was entitled to accept what it had done as payment. Any attempt by the South African buyers to dispute these facts would have lacked a plausible foundation. Marais J in my respectful view therefore erred at first instance in considering that the German bank's acceptance of the

local bank's payment had been insufficiently established on the affidavits.

[20] What is the resulting position in law? It seems to me that the answer has been clouded by the South African buyers' determination these long years to thwart the local bank's consistent assertion that it has in fact paid the German bank. It deseves emphasis, again, that the local bank has never retracted the clear statements in its communications of 24 February 1992 that it had made a payment to the German bank in discharge of the letter of credit. A further portion of the affidavit of the local bank's senior manager (referred to in para 16 above) was later retracted, but not so as to put in issue the local bank's claim that it had performed its obligation to the German bank by crediting the blocked account. Of course the local bank had its own reasons for wishing to pay the German bank on the date the letter of credit specified. These emerge from its correspondence with the SARB, where it recorded that

it was –

'in a precarious situation in that it would appear that we are legally obliged to make payment on 22 February 1992 in terms of the letter of credit. In addition, non-payment would seriously affect this Bank's long term relationship with the correspondent bank in Germany.'

[21] The local bank's view of its legal obligations was of concern to the South African buyers only insofar as that might have led it to try to debit their account. But its commercial interest in maintaining a good relationship with the German bank, long-term or otherwise, was emphatically no concern of theirs at all.

[22] It is correct that in claiming payment the German bank, echoing the formulation of Goldblatt J, sought also a declaration that the local bank had discharged its obligations under the letter of credit. To the extent that the grant of such a declarator may have implied or entailed that the local bank was in consequence entitled to debit the funds the South African buyers had provided, their anxiety may have been

understandable. But the German bank sought no relief directly against the South African buyers, while against the local bank it quite clearly sought no relief in relation to the source of the funds it claimed. So long as it receives payment, it is indifferent as to whether the local bank is entitled to debit the South African buyers. That issue stands for determination at the trial, and as mentioned, the German bank did not in this Court persist in seeking the declarator. Its object was to secure payment of the dollars from the local bank, which does not oppose its attaining that object. And given the attitudes that both payer and payee have adopted, that object does not depend on establishing as between them the validity of the *causa* underlying the payment.

[23] Indeed, the local bank has conspicuously refrained from defending or participating in the proceedings despite the German bank's assertion both that it has discharged its obligations under the letter of credit and that it has thereby made an effective payment to it. The local bank can therefore hardly complain if the German bank receives an order only for payment, which is less than the sum of the relief whose grant it did not oppose at all.

[24] All this in my view enables one to see without intervening obstruction that nothing precluded the local bank, as between it and the German bank, from effecting a valid payment on 22 February 1992 of the dollars credited to the blocked account in the name of the latter. The proposition this case illustrates is that parties to a debt-discharging transaction may agree to any means of discharge. The proposition it establishes is that subsequent ratification approval by the creditor validates any method the debtor may unilaterally have chosen to effect the discharge, even if that method fails to place the performance at the immediate disposal of the creditor, and even if that method fails to sequester the performance effectively from the debtor's own assets. The proposition it underscores is that the creditor's subsequent approval should always be decisive.

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[25] The parties to the debt-discharging transaction at issue here agreed, albeit by the subsequent approval of the creditor, to the manner and means of payment. The manner was by payment into an account held by the debtor in the creditor's name. The means was by the creditor becoming a customer of the local bank for the limited purpose of the account the debtor specified by name and number. The local bank's unilateral conduct in opening the account in the German bank's name constituted at the very least an offer to the German bank to become its customer for the similarly limited purpose of dealing with the amount credited to the account, once the obstruction to such dealing had been removed. That offer the German bank clearly accepted before the order of Goldblatt J.Its contention, in opposing the confirmation of the interim order Schutz J had granted, that the local bank had 'paid out' the moneys to it 'by depositing them into an account created' in its name was therefore correct, since that very contention formally (albeit subsequently) approved the local bank's conduct, and hence sealed the debt-discharging agreement.

[26] The Full Court in my respectful view consequently erred in not concentrating on the issue of payment as between the only parties to that transaction, namely the two banks. The issue it focussed on, wrongly in my view, namely the local bank's obligation under the letter of credit, and its

attendant entitlement or otherwise to debit the South African buyers' account, remains for determination at the pending trial. For the present the German bank's claim to the moneys deposited in its name must, for the reasons I have set out, be vindicated.

[27] In the court of first instance, Marais J reserved all the costs for the pending trial. That costs order must in my view yield to the conclusion here reached.

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1. The appeal therefore succeeds with costs, including the costs of two counsel.
2. The order of the Full Court is set aside.
3. In its place, there is substituted:

'The appeal succeeds with costs, including the costs of two counsel. The order of Marais J is set aside. In its place there is substituted:

(a) The first respondent is directed to pay the applicant the sum of US $ 434 782,61 together with such interest as has accrued thereon from 24 February 1992 to date of payment.

(b) The second, third and sixth respondents, jointly and severally, are ordered to pay the costs of the application, such costs to include the costs of two counsel.'

E CAMERON

JUDGE OF APPEAL

STREICHER JA)
MTHIYANE JA) CONCUR
HEHER AJA)

NIENABER JA :

[28] I have had the benefit of reading the judgment prepared by Cameron JA. On the law we appear to be more or less in agreement; on the interpretation of the evidence I fear we clearly are not.

[29] All six judges of the High Court who dealt with this matter previously have

stated, five of them expressly, one by implication, that *prima facie* at the very least a fraud had been perpetrated invalidating the letter of credit which is the source of the appellant's ('VWB''s) claim against Nedcor Bank Ltd ('Nedbank'); and that the issue of fraud is to be resolved in a trial that had been instituted for that very purpose, citing all interested parties including VWB and Nedbank. Yet if the conclusion reached by Cameron JA is sound Nedbank is now to be compelled to make a payment to VWB of what may ultimately prove to be the fruits of a fraud to which VWB is not entitled. It is recognised in the judgment that it by no means follows that Nedbank, if now compelled to pay, will be able to recoup itself from the amount deposited with it by Irvine International Trade Finance (Pty) Ltd ('Irvine'). Nedbank may well not be able to do so since the spectre of a fraud committed by Boli Speditions-und Vermittlungsgeschäfte GmbH ('Boli') was explicitly raised with it by Irvine. In fact that was the very reason prompting Nedbank to approach the South African Reserve Bank for guidance as to how it should deal with the matter. The Reserve Bank's solution was to order the funds, earmarked for payment of the letter of credit, to be credited to a blocked account 'until the matter was clarified satisfactorily'. Everything hinged on the finding of fraud. Nevertheless, according to Cameron JA's judgment, Nedbank is to pay the disputed amount to VWB in the meantime. What is more, Nedbank is to make that payment now for the very reason, so it is found, that it has already made it in the past. On the approach of my learned colleague it will then be left to Nedbank, having made a fresh payment pursuant to the proposed order, to engage VWB in further litigation in a foreign jurisdiction, more than a decade after the fraud was first committed, to recover its payment if such fraud is eventually established in the pending trial in South Africa. Such a result, in my view, will be unjust. Moreover, it is predicated on either a supposed agreement between Nedbank and VWB or on a reconstructed ratification that, as I shall attempt to demonstrate - and I say this with utmost respect -simply did not exist.

[30] In his judgment in matter no. 11456/92 Goldblatt J said:

'It is, however, abundantly clear that Vereins have not been paid the money in the sense that they are able to unconditionally utilise the fund as they wish. Prima facie *and depending on such evidence as may be led at a trial* it appears that Nedperm [Nedbank] have not paid the monies to Vereins [VWB] but have merely credited an account styled "Vereins" with the amount referred to in the letter of credit. Vereins have at present no control at all over the manner in which Nedperm deals with such account. If Vereins had sued Nedperm for the monies I fail to see how Nedperm could have alleged it had paid Vereins merely by virtue of crediting an account in its books where such account had not previously existed and where Vereins had not specified the crediting of such an account as a form of adjectus solutionis causa. Clearly if Nedperm had prior to the granting of the rule nisi already paid Vereins then the interdict granted would have been purposeless and of no protection to the applicant.' (The italics are mine.)

From the passage, and in particular the italicised phrase, it is plain that Goldblatt J envisaged that the issue (whether VWB had in fact been paid) was to be determined at a subsequent trial. As it happens action had already been instituted by the time

Goldblatt J gave his judgment. It is matter no. 92/15598. The pivotal issue in that trial was whether a fraud had been committed in connection with the letter of credit and consequently whether Nedbank was obliged to make a payment to VWB in terms thereof. That being so, it is not immediately apparent why Goldblatt J, in granting an order interdicting Nedbank from discharging its obligations under the letter of credit to VWB, thought it necessary to annex a condition to his order. The order reads:

> 'In the event and to the extent that the 3rd respondent has not yet discharged all of its obligations in terms of letter of credit 862241/08/91 it is hereby interdicted from discharging such obligations pending the final determination of the action instituted by the applicant in this court under Case No 92/15598.'

One can only presume that Goldblatt J was anticipating a possibility that his *prima facie* view on payment might prove to be wrong, in which event the interdict he was granting would of course be an idle one. His qualification of the order in this manner allowed VWB to attack the interdict not frontally by means of an appeal, but more insidiously by attempting to show that it was a *brutum fulmen.* This it sought to do by launching the present proceedings in matter no 10436/93 by way of notice of motion. This is the matter that commenced before Marais J, whose order, in effect referring the entire matter to the trial Court, was confirmed on appeal by the Full Bench. It is that order that is now under attack before us with special leave granted on petition.

[31] In VWB's application the first prayer of the relief sought reads:

'Declaring that the first respondent [Nedbank] has discharged its obligations in terms of the letter of credit 862241/08/91.'

This prayer is in line with the introductory qualification of Goldblatt J's order. That is the only issue that was properly before Marais J.

[32] The second prayer is in the following terms:

'Directing the first respondent to reverse the debits which it effected to the applicant's account number 7986-017325 on 29 April 1992.'

This relates to the unblocking of the blocked account that Nedbank was directed by the Reserve Bank, acting on behalf of the Treasury, to create and credit. When, on 28 April 1992, the Reserve Bank advised Nedbank in a telex message that the funds had been 'unblocked' Nedbank, on 29 April 1992, credited those funds to an account styled 'Sheriff of the Supreme Court'. It is that presumed transfer which prayer 2, so it seems, seeks to undo. The underlying logic would appear to be that since payment into the blocked account was the equivalent of payment to VWB the account had to be resurrected so that payment can now be extracted from it. The logic is flawed. If

payment into the blocked account discharged Nedbank's debt to VWB Nedbank was no longer indebted to VWB and the status quo could not be restored.

[33] The third prayer is a supposedly sequential one for the actual payment over by Nedbank to VWB, with interest, of the amount Nedbank retained; and the fourth prayer is one for costs.

[34] The first prayer is in response to the qualification which Goldblatt J built into his first order. Prayers 2 and 3, however, constitute an attempt by VWB to circumvent the interdict and to pre-empt the pending trial. On the face of it the prayers are inherently contradictory. As stated earlier, if it should be held, in accordance with the first prayer, that payment had indeed been made and that Nedbank's liability in terms of the letter of credit had been discharged, Nedbank would no longer be VWB's debtor. Yet Nedbank is still in possession of the money. The very fact that Nedbank is still in possession of the money, albeit under a differently styled account, is proof positive that payment had not yet been made to VWB. In order to entitle it to lay claim to the true (as opposed to a fictionalised) payment of the money it was incumbent on VWB to contrive to invent a new cause of action. According to VWB's argument payment became due not in terms of the letter of credit (which, because it has been discharged, has expired), but in terms of a new obligation that arose, Phoenix-like, from the ashes of the defunct letter of credit. That new obligation, so it was contended, happens to be an ordinary relationship of banker (Nedbank) and customer (VWB). I shall return to this point later in the judgment.

[35] Nedbank did not oppose the relief sought. In taking the decision not to do so, it may have been poorly advised. Nedbank doubtless believed that its position was secure; that, having credited the blocked account, it was immune to any claim from any other party; and that once the account is debited it would as a matter of course be entitled to reimburse itself from the funds of Irvine which it held at its disposal. For the reasons stated in para 29 that view may have been overly simplistic. Having been forewarned by Irvine of the possibility of fraud tainting the letter of credit, any payment to VWB may prove at the trial to have been a payment to someone not entitled to it, in circumstances where it may also prove to be irrecoverable from either its own customer (Irvine) or the foreign bank (VWB) that Nedbank seemingly favoured at the former's expense.

[36] VWB's case as initially presented appears to be based on two propositions:

(1) that the crediting by Nedbank of the blocked account was coincidentally intended by both Nedbank and VWB to constitute performance by Nedbank of its obligations in terms of the letter of credit; and

(2) since Nedbank's liability in terms of the letter of credit had been fully discharged, Nedbank became obliged to make payment to VWB of the amount reflected in the letter of credit, not in its own terms, but in terms of a different contractual relationship that was identified *ex post facto* as an ordinary relationship of banker and customer.

[37] Marais J held that the unilateral opening of the blocked account at the

insistence of the Reserve Bank was not the equivalent of payment to the creditor either by consensus between the debtor and the creditor or in terms of a proper interpretation of the Exchange Control Regulations 1961 ('the Regulations'), to which I shall return later in this judgment. Stegmann J in his judgment for the Full Bench approached the matter from a different perspective. Since it is the correctness of Marais J's judgment that is at stake before us, I propose to deal with Marais J's findings against the following backdrop: first, to analyse the legal requirements for a proper payment and, thereafter, and in the light thereof, to analyse the factual allegations on which VWB and Cameron JA in his judgment rely for the conclusion that Nedbank has discharged its debt.

[38] Performance of an obligation, whenever the cooperation of a creditor is required in order to enable the debtor to effect it, consists of a bilateral juristic act (De Wet & Van Wyk, *Kontraktereg en Handelsreg* 5ed (1992) 263). The payment of a money debt is a case in point (cf *Saambou-Nasionale Bouvereniging v Friedman* 1979 (3) SA 978 (A) at 993A-C; *Volkskas Bank v Bankorp Bpk (h/a Trust Bank) en 'n Ander* 1991 (3) SA 605 (A) at 612C-E; *Pfeiffer v First National Bank of SA Ltd* 1998 (3) SA 1018 (A) at 1025I-J). It requires an *animus solvendi* of the debtor corresponding to that of the creditor as to a manner, recognised by law, whereby the debtor relinquishes and the creditor acquires access to and control over the funds to be transferred. A debtor, for instance, would not be able to effect payment by electronic transfer to his creditor's banking account unless the latter has furnished him with his banking details for that purpose. In such a case, although the creditor can draw on it, it would not count as proper performance binding the creditor because his corresponding *animus solvendi* is lacking. He may reject any such attempt at payment if some or other legal consequence, such as the cancellation of a lease, should be dependent on it. In different circumstances his conduct may, however, indicate assent after the event. The concurrence will as a rule relate to a manner of payment that ensures him access to and control over the funds, either directly or through an agent. Notionally, I suppose, it is conceivable that parties may be in agreement on a method of payment, duly executed, that would not be effectual in giving the creditor such access to and control over the funds; but I would imagine that strong evidence would be required to support an arrangement that is essentially sterile, particularly where the relationship between the parties is a strictly commercial one.

[39] The letter of credit stipulates a deferred payment by Nedbank to Boli to be made to VWB at Hamburg. The contemplated manner of payment, one can safely assume, would have been by means of an electronic transfer as is customary between banking institutions. Any deviation from the strict terms of the letter of credit to allow Nedbank to make a payment by means of a crediting of a blocked account, would therefore require either the prior consent of VWB (which did not happen) or such conduct on its part as to indicate to Nedbank that the mere book entry by Nedbank was per se accepted by VWB as a complete and final discharge by Nedbank of its obligations under the letter of credit, thereby at best giving VWB access to the funds in South Africa.

[40] In determining whether Nedbank had discharged its obligations under the letter of credit by the creation and crediting of the blocked account on the instructions of the Reserve Bank, there are two distinct aspects that require scrutiny:

(1) whether Nedbank, as debtor, had the *animus* to effect a transmission of the funds to VWB; and

(2) whether VWB's conduct, on its side, manifested the *animus* that such crediting would constitute a transmission of the funds to it.

The answer to both questions, in my opinion, is in the negative.

[41] Commencing with Nedbank's *animus*, the first relevant document is its letter to the Reserve Bank of 24 January 1992 in which it describes the beneficiary as 'Boli GmbH Germany' (and not VWB), stating:

> '… we advised you that a letter of credit had been put in place for the import of motor vehicles to this country, which to date have not arrived. In addition, draws against the Letters of Credit were allowed by the German correspondent bank and in our application, we indicated that same were not legally permissible …
>
> Our bank is therefore in a precarious situation in that it would appear that we are legally obliged to make payment on the 22 February 1992 in term of the Letter of Credit. In addition, non-payment would seriously affect this Bank's long term relationship with the correspondent bank in Germany.
>
> We therefore seek your urgent guidance in the matter as to what action should be taken.'

That letter does not reflect an unqualified resolve on the part of Nedbank to effect payment either on the due date, at the due place or at all.

[42] The Reserve Bank responded:

> 'I thank you for the information furnished and advise that in the particular circumstances the funds must be paid to an account blocked in terms of Regulation 4(2) of the Exchange Control Regulations until such time as the matter has been clarified satisfactorily.
>
> Kindly request your branch to keep us posted of any further developments, including the opening of the blocked account and the crediting of the funds thereto.'

[43] On 18 February 1992 Nedbank was again warned by Irvine's legal representative:

'As you are now aware of the true position, any further dealing by you with the letter of credit is done at your risk and all my clients' rights are reserved.'

This was followed up by a further letter from Irvine's representative, dated 20 February 1992, paragraph 4 of which reads:

'I confirm further your undertaking to include in such letter that you will be complying strictly with the requirements of the assistant general manager of the Reserve Bank, in that the funds will be paid into an account blocked in terms of Regulation 4(2) of the Exchange Control Regulations until the matter is clarified.'

[44] Notwithstanding this admonition Nedbank sent two electronic S.W.I.F.T. messages to VWB on 24 February 1992 (two days after the due date of the letter of credit) in the following terms. The one read:

'We have credited the amount to USD 434 782-61 into a blocked account in your good bank's name being in terms of the S.A. Reserve Bank directives and in settlement of our obligation under this letter of credit stop Please be guided accordingly.'

The other read:

'We have credited your currency account as follows:

Drawing under L/C 862241/08/91
Value Ben : Boli GmbH.'

[45] The statement 'in settlement of our obligations under this letter of credit' in the first message follows broadly the wording of regulation 4(5) of the Exchange Control Regulations (quoted in full below) which state that a payment made to a blocked account shall 'operate as a valid discharge to the person making payment'. This may be an opportune moment of saying something about those Regulations. Regulation 4(2) reads as follows:

'Whenever a person in the Republic is under legal obligation to make a payment to a person outside the Republic but is precluded from effecting the payment as a result of any restrictions imposed by or under these regulations, the Treasury may order such person to make the payment to a blocked account.'

It postulates a payment made by a person in the Republic who 'is under a legal obligation to make a payment to a person outside the Republic'. Regulation 4(6)

(which I do not need to quote in full) likewise refers to 'the liability to make payment'.

[46] In such a case, where the person in the Republic is precluded from effecting a payment to a foreigner as a result of any restrictions imposed by or under the Regulations, the Treasury (acting in the instance through the Reserve Bank) may order such a person to make 'the payment' to a blocked account. A 'blocked account' means an account opened with an authorised dealer, as defined (regulation 4(1)).

[47] Any such payment is therefore made on the basis that the person in the Republic is under a legal obligation to make the payment. If the basis should afterwards prove to be false it follows that the Reserve Bank must reverse its instruction and that the payment to the authorised dealer is likewise to be reversed. Where there is no dispute about the legal obligation to make a payment, the need for such a reversal will of course not arise. Where there is a dispute, the debtor can simply refrain from making the payment. But where (as in this case) the debtor in the Republic is uncertain as to whether the legal obligation exists, or where it only emerges after the payment into the blocked account had been made that the legal obligation is problematic, a determination will have to be made as to the existence or not of the legal obligation and therefore as to the possible reversal thereof. If the finding is that the legal obligation does not exist the funds will have to be released by the authorised dealer to the party who initially paid it into the blocked account, and not to the ostensible creditor who is outside the Republic.

[48] Regulation 4(2) must be read in conjunction with Regulation 4(5). It provides:

> 'Any payment made to a blocked account in terms of this regulation shall, to the extent of the sum paid, operate as a valid discharge to the person making payment.'

That sub-regulation provides that any payment made to a blocked account 'in terms of this Regulation' (ie on the supposition of the existence of the legal obligation to make the payment) shall operate 'as a valid discharge to the person making payment'.' The person 'making the payment' is the payer and not the payee. The Regulation accordingly does not stipulate that such payment shall operate as a valid discharge to the person outside the Republic ie to the ostensible creditor. What Regulation 4(5) contemplates is a 'discharge' for a particular limited purpose ie as a valid discharge as far as the payer is concerned. The Regulation does not purport to provide that the payment into the blocked account is for all conceivable legal purposes to be regarded as a payment to the creditor. In particular it does not provide that it is to operate as a discharge to the ostensible payee. The limited purpose is manifestly to favour the

debtor in the Republic who, because of the blockage, is unable to effect payment to his overseas creditor for as long as the Regulation maintains its blocking effect. For the duration thereof the Regulation provides the payer, if sued for performance, with the legal defence that the debt is deemed to be discharged.

[49] Such a discharge is a fictional one inasmuch as the creditor has in fact received neither the money nor full access to or control over it. It is a 'deemed discharged'. That this is the correct construction also appears from Regulation 4(8) which, dealing with a refund, provides 'to the extent of such refund no payment shall be deemed to have been made for the purpose of sub-regulation (5).' In that event the previously deemed discharge will no longer operate as such.

[50] From the above analysis of the operation of the Regulations several conclusions can be drawn. The first is that there is but one debt and that is the debt in respect of which the blocked account was credited. That debt in this case was the debt in terms of the letter of credit. The unblocking of the funds followed by a corresponding book entry meant that the status quo was restored and that Nedbank was reinstated in a capacity solely as debtor vis-à-vis VWB in terms of the letter of credit. No other ancillary, parallel or complementary debt supervened.

[51] The second conclusion is that the lifting of the embargo meant that Nedbank was no longer an authorised dealer in respect of that transaction. In the instant case the situation is somewhat complicated in that Nedbank operated simultaneously as debtor and as authorised dealer. In its capacity as debtor it made a book entry to itself in its capacity as authorised dealer, in accordance with the directive of the Reserve Bank. Thereafter it held the money in the latter capacity. When the Reserve Bank, for reasons not apparent from the papers (and which could not be explained by counsel) ordered the blocked account to be unblocked, Nedbank became obliged, which it did, to release the money by an appropriate book entry. Nedbank thereupon relinquished its dual capacity and reverted to its single capacity as a debtor in terms of the letter of credit. That did not mean that an automatic payment had now taken place in terms of the letter of credit to VWB. No such payment had been made because VWB had still not obtained access to the money. That, after all, is exactly why VWB grasped the opportunity created for it by Goldblatt J to launch the current proceedings for payment. If payment had effectually been made to it when the blocked account was created and credited, there would in truth have been no need for it to do so.

[52] At that stage, once Nedbank was ordered to unblock the funds, Nedbank, if it believed itself to be obliged to do so, could have transmitted the money electronically to VWB in Germany. But because it got wind of the impending interdict proceedings it refrained from doing so. The money therefore remained with Nedbank. It is still with Nedbank. The issue whether VWB is entitled to payment as against Nedbank, therefore remains an open one.

[53] The next conclusion to be drawn from the analysis of the Regulations is that Nedbank was not constituted, merely by virtue of the book entry made by it in terms

of the Regulations, as the agent of VWB for the purpose of accepting payment to it. Payment to an authorised dealer in terms of the Regulations is not per se a payment to the creditor. The creditor after all has not received the funds and he cannot do so for as long as the money remains in the blocked account. An authorised dealer to which payment is directed by the Reserve Bank to be made will in the normal course of events not be in a legal relationship with the creditor outside the Republic. The creditor outside the Republic will have no claim against the authorised dealer in that capacity. The authorised dealer is not a party, it is merely a holder of the money for the time being in accordance with both the directives of the Reserve Bank and the provisions of the Regulations. It is, in short, not the agent of the one party or the other. To the extent that an actual deposit is made to it in terms of the Regulations by a person in South Africa any repayment or refund to be made in terms of the Regulations is therefore to be made to the party who made the payment in the first instance. In the instant case Nedbank, as authorised dealer, was, therefore, upon the unblocking of the funds, obliged to make a book entry in favour of itself. It did so and was thereby restored merely as the debtor in terms of the letter of credit. The so-called discharge in terms of Regulation 4(5) was therefore merely a temporary measure, for a limited time and for the limited purpose of assisting the South African debtor (Nedbank) in the predicament in which it found itself. Because of the blocking effect of the Reserve Bank's directive, Nedbank was legally unable to satisfy its liability to VWB in terms of the letter of credit by transmitting any payment to its creditor (VWB) overseas.

[54] The fact that Nedbank as authorised dealer was not and could never have been thought to be VWB's agent for purposes of receiving performance, puts paid to any suggestion that this is properly a case of ratification, if that is what was intended by the extended reference in footnote 5 of Cameron JA's judgment to Pothier, *Obligations* para 492. Ratification in its true sense describes 'a subsequent expression of will validating an antecedent unauthorised act of representation' (Joubert (ed) *The Law of South Africa* 1st reissue vol 1 para 126; De Wet & Van Wyk, *Kontraktereg en Handelsreg, supra,* 114 ff). It is apposite in the field of agency, and applies when someone without the requisite authority purported to act on behalf of a principal, and the principal afterwards ratifies the professed agent's prior actions. Translated to the facts of this case ratification will only be in point if Nedbank (in its capacity as an authorised dealer in terms of the Regulations) purported to act as agent on behalf of VWB in accepting its own crediting of the blocked account as due and proper performance by Nedbank (in its capacity as a debtor) of its liability in terms of the letter of credit. Any suggestion that such a scenario reflected the true intention of Nedbank at the time is fanciful; and there is no suggestion in the evidence or even in Tesdorpf's exposition thereof that VWB ever professed to ratify a lack of authority by Nedbank in paying itself on behalf of VWB.

[55] The final conclusion to be drawn from the above analysis of the Regulations is that Nedbank could never have intended that by its book entry in respect of the blocked account it was making a final and conclusive payment to VWB. Nedbank knew that it was crediting the blocked account on the instructions of the Reserve Bank and in accordance with the Regulations. It furthermore knew that this was a purely temporary state of affairs 'until such time as the matter had been clarified satisfactorily'. Depending on such clarification and in particular whether the motor vehicles in question had or had not been duly delivered, the money would eventually, once the bar imposed by the Reserve Bank had been lifted, have to be released. It would have to be released by itself as authorised dealer to itself as a debtor. Only in that event would an actual payment have to be made - to VWB if there was no fraud, and to Irvine if there was. That stage has not yet been reached. In both instances the actual payment would have to be made some time in the future - which is utterly destructive of any notion that it was intended by it to have been made in the past. Nedbank knew that it did not intend to transmit the money to VWB in Germany - the very purpose of crediting the blocked account was, after all, to preclude it from doing so.

[56] Against that background I return to the manner in which Nedbank actually expressed its intention. In paras 41 to 44 above I have referred to its exchanges with the Reserve Bank and VWB and in particular to its S.W.I.F.T. messages of 24 February 1992. I cannot read in the above exchanges any intention on Nedbank's part other than that it was acknowledging its liability to VWB and was complying with the Reserve Bank's directives.

[57] In an affidavit filed in the earlier application before Goldblatt J, an official in Nedbank's employ, one Rheeder, stated:

> 'When the letter of credit was subsequently, within the extended period of validity, submitted to the third respondent, it recognised its obligation to pay out in terms thereof. It performed such obligation by purchasing foreign currency (US dollars) in the required amount and by depositing such foreign currency into a blocked account in the name of the sixth respondent. From that moment, the sixth respondent became entitled to that money and it did not belong to anyone else, least of all the applicant, Pienaar or Pinebro.'

That statement was later recanted by Rheeder in stating that all monetary transactions:

'were undertaken and performed by way of book entries. No physical moneys were identified or are identifiable. The Sixth Respondent [VWB] when credited with amounts has a claim thereto.'

He also asked that the opinion he expressed in the last sentence of his earlier statement be deleted.

[58] I digress for a moment to say that it is plain from Rheeder's later statement that it is factually wrong to suggest, as is done in paras 10, 15, 16 and 25 of the judgment of Cameron JA, that an amount was 'deposited' into the blocked account. There was no deposit. It was simply a book entry under a unilaterally created account to which VWB never had and never could gain access. It could never gain such access because the closing of the account necessarily meant its debiting in Nedbank's books of account.

[59] Regardless of the deletion of the last paragraph, Rheeder's statement goes no further than to recognise that, as far as Nedbank was concerned, VWB was 'entitled' to the money and that it 'did not belong to anyone else'. That statement falls far short of manifesting an *animus* on Nedbank's part that it intended to make, and believed that it had thereby effected, a payment to VWB in a manner that gave the latter access to the fund; and that it was therefore effectual as a form of payment for all legal purposes.

[60] To sum up, therefore, VWB, on which the onus rested, had not shown that the crediting of the blocked account was intended by Nedbank to operate as a proper payment.

[61] Absent any true *animus solvendi* on Nedbank's part there can of course be no corresponding *animus solvendi* on VWB's part. Even so, it is necessary to examine VWB's response. There was none. While the funds remained under embargo in the blocked account there was not a single document or message by VWB in response to Nedbank's S.W.I.F.T. messages to it of 24 February 1992. Not once did VWB intimate to Nedbank that it agreed or accepted that the payment into the blocked account would function as a full and final discharge by Nedbank of its liability to it in terms of the letter of credit. Complete silence, in the absence of a duty to speak, cannot qualify as a tacit acceptance. Such a duty to speak was not alleged by any of the parties. VWB's attitude was a purely passive one, which was perfectly sensible since there was nothing VWB could have done to alter the situation for as long as the funds remained blocked. It accepted the crediting of the blocked account as a *fait accompli* - as a discharge by Nedbank of its obligations under the Regulations rather than under the letter of credit. Indeed, there is nothing to indicate that it ever occurred to either Nedbank or VWB at the time that the crediting of the blocked account would put a final end to the letter of credit.

[62] And there the matter rested until 28 April 1992 when Nedbank was telephonically notified by the Reserve Bank that the blocked funds should be released. Nedbank thereupon sent VWB a message, referring expressly to the

letter of credit, and informing it of the unblocking. It proceeded:

'We have however also received notification from S.A. Supreme Court that an application will be made to the court to prevent us to release the funds to you.'

[63] To that message there was once again no response from the VWB. In particular, VWB did not react to it by adopting the attitude that a discharge of Nedbank's liability under the letter of credit had already occurred and that Nedbank was now liable to it on some other basis such as an ordinary commercial banker-customer relationship.

[64] In anticipation of the impending interdict Nedbank thereupon unilaterally created a new account which it credited with the amount reflected in the letter of credit. Again there was not a word of protest from VWB or, for that matter, a reaction of any kind.

[65] Later that same day the interdict was granted by Schutz J precluding an actual payment by Nedbank to VWB in the meantime. That interdict was eventually overtaken by the interdict granted by Goldblatt J on 17 November 1992, referred to in para 3 above.

[66] The position, then, is that there was no reaction by VWB to the events until after the interdict was granted by Schutz J. It was only in an answering affidavit in the subsequent proceedings before Goldblatt J that VWB's vice president and assistant general council, Mr Tesdorpf, for the first time suggested, not by way of a positive averment, but by way of a general denial 'that no payment had been made in terms of the letter of credit'. In a supplementary affidavit Tesdorpf elaborated on his earlier statement by saying:

'It is clear from annexure 'JCT9' [the S.W.I.F.T. message sent by Nedbank to VWB on 24 February 1992, referred to in para 18 above] to the sixth respondent's [VWB's] answering affidavit that the third respondent [Nedbank], as it was obliged to do, complied with its obligations in terms of the letter of credit and transferred an amount of US $ 434 786,61 into an account in the sixth respondent's name. This quite clearly constitutes a payment by the third respondent to the sixth respondent in terms of the letter of credit.'

This is not a statement of fact as to what transpired between the parties at the time; it is little more than a conclusion of law that, for the reasons stated earlier, is in any event incorrect. It denies the bilateral nature of payment and falls far short of an allegation of fact that Nedbank's crediting of the blocked account was intended by it, and accepted by VWB, as a definitive discharge by Nedbank of its liability to the VWB in terms of the letter of credit. The paragraph, it needs to be said, was

explicitly denied by the respondents in the application.

> [67] A final statement by Tesdorpf, contained in para 43 of the supplementary affidavit, adds little to the earlier statement and was likewise denied. It reads as follows:
>
> 'Once the third respondent paid the moneys into an account in the name of the sixth respondent, it complied with its obligations under the letter of credit and the sixth respondent is entitled thereto. Any subsequent withdrawal by the third respondent of such moneys cannot affect the sixth respondent's right to receive the moneys set aside by the third respondent for the sixth respondent.'

This, once again, falls far short of a positive averment of an intention by VWB to accept the book entry as a substituted form of performance and of any intimation by VWB of its acceptance thereof. Furthermore there is in this set of affidavits not even a hint of an ordinary banker-customer relationship that was supposedly established between Nedbank and VWB.

> [68] In the subsequent matter before Marais J there are two further statements by Tesdorpf, this time in VWB's founding affidavit, which are in point. The first is para 15.5 thereof which reads as follows:
> 'It is submitted that the documents aforementioned indicate a clear intention on the part of the first respondent to discharge its obligation under the letter of credit in that manner, *and that has been accepted by the applicant as performance* by the first respondent of its obligations under the letter of credit. Once the applicant's account was credited, the *normal relationship of banker and customer arose* between the first respondent and the applicant respectively in relation to those funds, and the first respondent was obliged to deal with such funds in accordance with the applicant's instructions (subject only to such restrictions as may have been imposed by exchange control regulations).' (My emphasis.)

The second averment is in para 15.7 which reads:

> 'Accordingly I submit that it is clear from the first respondent's own documents, and from the admissions made by its authorised official [presumably Rheeder], that the first respondent discharged its obligation under the letter of credit by crediting the applicant's account. This *has been accepted by the applicant*.' (My emphasis.)

[69] It is to be emphasised that Tesdorpf refers to an acceptance that supposedly took place in the past but of which he furnishes no details; and that Tesdorpf does not claim that his own affidavit, made long after the blocked account had been closed, was itself to serve as proof of such 'acceptance'.

[70] Both the quoted paragraphs are cast in the form of 'submissions' by VWB's assistant general counsel who was not himself involved in the actual transactions between the two banks. The italicised phrases are simply legal contentions. They are not based on actual evidence or hard fact. The hard fact is that Nedbank never intended and VWB never accepted that a mere book entry, described by Nedbank as a discharge in the language of the Regulations, was to serve as a form of substituted performance. The further allegation that VWB was an ordinary customer of Nedbank is likewise merely an expedient afterthought. These statements, in my opinion, are nothing less than self-serving *ex post facto* rationalisations with a view to fabricating a theory of bilateral performance.

[71] Since that theory would leave VWB without any claim (the only debt in existence between the parties having, according to it, been discharged) it was necessary, in addition, to improvise a banker-customer relationship. Once again this was a purely opportunistic post-dated invention. Nowhere in the actual exchanges between the parties is there the remotest suggestion that VWB applied for and that Nedbank agreed to accept VWB as an ordinary banking client. No details are given in Tesdorpf's affidavits of any application or offers that were made and of any exchanges that took place as to how and when such a relationship was created; whether it is permissible for a foreign bank to enter into such a relationship with a South African bank; whether special permission was required and obtained, and so forth. And once again the suggestion of such a relationship, insinuated into Tesdorpf's affidavit, was specifically denied. Such a denial must, in motion proceedings, be taken as fact. In short, no basis of any nature whatsoever has been laid justifying a finding in law or in fact that such a relationship had ever been established between the parties.

[72] The observation made in the judgment of Cameron JA that the respondents in the proceedings before both Goldblatt J and Marais J did not deny that 'as a matter of fact' VWB in February 1992 accepted Nedbank's book entry as a payment to it of the sum claimed, is, with respect, also not correct. No such averment was made by any official of VWB who, at the time, was involved with the transaction with Nedbank. There was accordingly nothing to deny. And the later gloss that Tesdorpf sought to place on the evidence, or lack of it, was consistently denied whenever it was made. The charge of a non-denial can therefore not be held against the respondents.

[73] For all the above reasons the appeal should, in my view, be dismissed. But there is one further matter that needs to be mentioned. VWB raised an additional cause of action structured on the chance use of the word 'negotiation' in the letter of credit. The point was not argued before Marais J but a good deal of the judgment of the Full Bench was devoted to it. It was found to be false. I prefer to express no view on it since it was not, in my opinion, properly aired in the papers and depends peripherally on issues that are factually in dispute, such as VWB's *bona fides* when taking cession of the letter of credit. These, too, are matters best dealt with by the trial Court to which the entire dispute, in the manner ordered by Marais J, should properly be referred.

[74] I would accordingly dismiss the appeal with costs, including the costs of two counsel.

……..

P M NIENABER
JUDGE OF APPEAL

STREICHER JA:

[75] I have read the judgments by Cameron JA and Nienaber JA. I agree with the judgment by Cameron JA but wish to add a few comments of my own, more specifically in relation to the judgment by Nienaber JA.

[76] The appellant claimed an order:

'1 Declaring that (Nedbank) has discharged its obligations in terms of the letter of credit 862241/08/91.

2 Directing (Nedbank) to reverse the debits which it effected to the applicant's account number 7986-017325 on 29 April 1992.

3 Directing (Nedbank) to pay to the applicant the sum of US $434 782,61 together with such interest as has accrued thereon from 24 February 1992 to date of payment.'

[77] In argument the appellant indicated that it would be satisfied with an order in terms of prayer 3. That claim of the appellant is not a claim for payment in terms of the letter of credit. The appellant's case is that the letter of credit was discharged and that it no longer has any claim against Nedbank in terms of the letter of credit. If its claim were a claim in terms of the letter of credit the simple answer would have been that payment in terms of the letter of credit is prohibited by the interdict granted by Goldblatt J on 17 November 1992. It is also not a claim for money that has been credited to an account in the name of the appellant as a result of a fraud. Nedbank had been advised before it credited the account that the documents required in terms of the letter of credit had been forged. It is not contended that the appellant was a party to any such forgery.

[78] Nedbank at no stage opposed the appellant's claim for payment of the aforesaid amount. It considered itself legally obliged to make payment in terms of the letter of credit. That appears firstly from its letter to the South African Reserve Bank ('the SARB') and secondly from its notification to the appellant that it had credited the amount into a blocked account in the name of the appellant 'in settlement of *our obligation* under this letter of credit' (my italics). It probably wrote to the SARB because it was worried that it may be transgressing exchange control regulations by transferring money abroad in respect of vehicles which had not arrived. In the proceedings before Goldblatt J an affidavit by a Mr Rheeder, a Senior Manager Operations, International Branch of Nedbank was filed which was later amplified and qualified by him. This is referred to in para 16 of Cameron JA's judgment. So amplified and qualified he said:

'When the letter of credit was subsequently, within the extended period of validity, submitted to (Nedbank), it recognised its obligation to pay out in

terms thereof. It performed such obligation by purchasing foreign currency (US dollars) in the required amount and by depositing such foreign currency into a blocked account in the name of the (appellant). All the monetary transactions referred to . . . were undertaken and performed by way of book entries. No physical moneys were identified or are identifiable. The (appellant) when credited with amounts has a claim thereto.'

The last three sentences replaced the following sentence:

'From that moment, the (appellant) became entitled to that money and it did not belong to anyone else, least of all (Nedbank), Pienaar or Pinebro.'

[79] In my view it is clear from the aforesaid facts that Nedbank refrained from opposing the claim for payment of the aforesaid amount because it considered itself obliged to pay the amount to the appellant. The respondents do oppose the granting of an order in terms of prayer 3 against Nedbank but could not say on what basis they had standing to do so. Having regard to the fact that the amount is not claimed on the basis that it is payable in terms of the letter of credit and that it has not been credited as a result of fraud, they had no standing to do so.

[80] It is nevertheless necessary to determine whether the appellant made out a case for payment of the amount.

[81] Nedbank stated that the amount had been credited into a blocked account in the appellant's name 'being in terms of the SARB directive and in settlement of our obligation under this letter of credit.'

[82] The SARB directed that the amount had to be paid 'into an account blocked in terms of Regulation 4(2)'. Regulation 4(5) provided that 'any payment made to a blocked account in terms of this regulation shall, to the extent of the sum paid, operate as a valid discharge to the person making payment.' Nienaber JA is of the view that a payment in terms of the regulation would operate as a valid discharge as far as the payer is concerned but not as a valid discharge by the payer to the ostensible payee. I cannot agree with this construction of the regulation. If the payment constitutes a discharge of the payer it must be a discharge in respect of the obligation in respect of which the Treasury ordered the payment to a blocked account. It must of necessity then operate as a valid discharge by the debtor to the creditor. Any claim by the creditor in terms of the legal obligation which gave rise to the payment into the blocked account could be met by a defence that the payment into the blocked account operated as a valid discharge of that obligation i.e. it operated as a discharge by the payer to the payee.

[83] It is true that the discharge could be undone in terms of reg 4(8) which provided that 'the Treasury may grant exemptions from the provisions of this regulation and may authorise the refund to any person of moneys paid by him into a blocked account' and that 'to the extent of such refund no payment shall be deemed to

have been made for the purposes of sub-regulation (5)' but until such a refund had been ordered the payment remained one operating as a valid discharge to the person who made the payment. Nienaber JA would seem to equate the unblocking of an account with an authorisation by the Treasury of a refund of the amount paid into the blocked account to the person who paid the amount into that account. Neither in the papers before the court nor in argument has it been suggested that the unblocking of the account constituted an authorisation in terms of reg 4(8). I do not think that there is any basis for so equating an authorisation in terms of reg 4(8) with an unblocking of an account.

[84] Nedbank considered itself obliged to pay the amount to the appellant and in my view it is clear in the light of that fact coupled with the fact that it advised the appellant on 24 February 1992 that it had credited the amount to an account in the name of the appellant 'in settlement of our obligation' that it intended to discharge that debt. Notwithstanding an allegation by the appellant in its founding affidavit that the documents indicate a clear intention on the part of Nedbank to discharge its obligations in that manner no affidavit by Nedbank denying that to be the case has been filed. On the contrary Rheeder's affidavit would seem to confirm that to have been the case.

[85] Not surprisingly the appellant did not immediately react. There was nothing it could do other than accept Nedbank's actions as a proper discharge of its obligations in terms of the letter of credit.

[86] When the account in the name of the appellant was unblocked Nedbank considered the appellant to be entitled to payment of the amount standing to the credit of the account in the name of the appellant as is shown by the fact that it advised the appellant on 28 April 1992 that the funds had been unblocked but that there was an application pending to prevent it from releasing the funds to the appellant, that it had no option but to act in terms of the documentation served on it and that it would keep the appellant informed of developments. At the same time Nedbank recommended an attorney to the appellant. It is implicit in Nedbank's advice that there was no dispute between it and the appellant and that had it not been for the pending application the funds would have been 'released' to the appellant.

[87] The application resulted in an interim order granted by Schutz J on 28 April 1992 that Nedbank be interdicted from in any way dealing with the funds which had been unblocked and that such moneys be attached pending an action to be instituted. Nedbank thereupon, presumably as a result of an attachment by the Sheriff of the Supreme Court, on 29 April 1992 debited the account in the name of the appellant and credited an account styled 'Sheriff of the Supreme Court'. Subsequently the interim order was set aside by Goldblatt J who issued an interdict prohibiting Nedbank from discharging its obligations in terms of the letter of credit to the extent that it had not already done so, pending the final determination of an action which had by then been instituted.

[88] There is no evidence and no reason to believe that Nedbank ever changed its attitude that it had made a payment in settlement of its obligations in terms of the letter of credit by crediting an account opened in the name of the appellant and that the appellant was as far as Nedbank was concerned entitled to payment of that amount. Rheeder's affidavit is confirmation that that was the case at least until the order by Goldblatt J was made.

[89] It was therefore at any time before the order by Goldblatt J open to the appellant to accept the actions of Nedbank as a payment in terms of the letter of credit or as a discharge of Nedbank's obligations in terms of the letter of credit, as was

contended by Nedbank.

[90] At the hearing of the application by Marais J the parties accepted that the papers in the proceedings before Goldblatt J could be treated as evidence before Marais J. The affidavits filed by the appellant and deposed to by Mr Testdorpf, a vice-president and an assistant general counsel of the appellant, in these proceedings are replete with allegations that Nedbank discharged its obligations to the appellant by crediting the relevant amount to an account in the appellant's name and that such crediting constituted a payment to the appellant. Nienaber JA is of the view that such statements did not prove acceptance by the appellant in that they were little more than conclusions of law and were denied. In my view, even if there had been no acceptance by that time, the statement itself indicates that the appellant accepted that Nedbank's actions constituted a discharge of its obligations in terms of the letter of credit. Not only did the appellant say that Nedbank's actions constituted a discharge of its obligations and did it claim, on a basis other than the provisions of the letter of credit, to be entitled to payment of the amount that had been credited to the account opened in its name, it, in addition, obtained an affidavit by Rheeder to the effect that Nedbank performed its obligations in terms of the letter of credit and that the appellant became entitled to the money credited to the account opened in its name.

[91] In the present application Tesdorpf submits that the documents indicate a clear intention on the part of Nedbank to discharge its obligations under the letter of credit. He then makes the statement that the appellant accepted Nedbank's actions as a discharge of its obligations under the letter of credit. Nienaber JA says that these statements are simply legal contentions. I cannot agree. The statements purport to be statements of fact and there is, in my view, no reason to interpret them otherwise. The statement is not denied by Nedbank or by any of the other respondents. Whether or not there was an acceptance by the appellant was, therefore, not even an issue in the present application.

[92] In my view it has been established:

1. That Nedbank's attitude was that it had discharged its obligations in terms of the letter of credit and that the appellant was entitled to such money unless the Exchange Control Regulations or a court order prevented it from paying to the appellant.

That the appellant accepted Nedbank's actions and thereby accepted that it had become entitled to payment of the money credited to the account opened in its name.

[93] In the circumstances the appellant is entitled to payment of the amount claimed. For these reasons and for the reasons given by Cameron JA I agree with the order proposed by him.

P E Streicher

Judge of Appeal

Cameron, JA)
Mthiyane, JA)
Heher, AJA) concur