THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number : 135/2001
REPORTABLE

In the matter between :

GLOFINCO **APPELLANT**

and

ABSA BANK LIMITED t/a UNITED BANK **RESPONDENT**

CORAM : NIENABER, SCHUTZ, ZULMAN, FARLAM and NUGENT JJA

HEARD : 20 MAY 2002
DELIVERED : 30 AUGUST 2002

Summary : Estoppel - whether a bank is estopped from disputing liability when one of its branch managers, without authority to do so, guaranteed a series of post-dated cheques in the name of the bank.

JUDGMENT

NIENABER JA/

NIENABER JA:

[1] This Court, in two recent and related matters, *NBS Bank Ltd v Cape Produce Company (Pty) Ltd and Others* 2002 (1) SA 396 (SCA) and *South African Eagle Insurance Company Ltd v NBS Bank Ltd* 2002 (1) SA 560 (SCA), considered the liability of a commercial bank for unauthorised transactions concluded in its name by one of its local branch managers. In each instance the bank was held liable because of the aura of authority with which it enveloped its branch manager, causing a variety of investors to believe that they were dealing with the bank when in truth they were dealing with the branch manager. That is but another way of saying that the bank was held to be estopped from denying its branch manager's lack of actual authority. This is an analogous case turning, on different facts, on the same point of law (cf Rabie and Sonnekus, *The Law of Estoppel in South Africa* 2 ed 159-161).

[2] Ms Franca Horne, the then manager of the Balfour Park branch of the United Bank, a division of the respondent ('the Bank'), endorsed, ostensibly on behalf of the Bank and under the words, 'Bon pour aval as surety and co-principal debtor in solidum', each one of a series of five post-dated cheques with a total face value of R5 043 166.54. The

cheques were drawn on the Bank by a then still highly regarded and trusted customer of that branch office, Playtime International Holdings (Pty) Ltd ('Playtime'), in favour of the appellant ('Glofinco'), a partnership specialising in the discounting of post-dated commercial cheques. Ms Horne's trust in Playtime and its owner, a Mr Dreisenstock, proved to be badly misplaced. Both were about to go bankrupt. Glofinco duly presented the first of the cheques to the Bank for payment. By then Horne had resigned her position. Her successor as branch manager promptly dishonoured the cheque for non-payment and marked it 'refer to drawer'. This led to the current action against the Bank, initiated by Glofinco by way of provisional sentence proceedings and culminating in a trial before Lewis J in the Witwatersrand Local Division. The Court *a quo* refused relief but granted Glofinco leave to appeal to this Court. The judgment has been reported *sv Glofinco v Absa Bank Ltd (t/a United Bank)* 2001 (2) SA 1048 (W).

[3] There is a history to the series of cheques on which the action was founded. Glofinco was approached on five separate occasions to discount cheques drawn by Playtime. The approach was on each occasion made by a certain Mr Ferrer who ran a business known as the 'Jewellery Club'. Ferrer was well known to Mr Alan Braude, one of Glofinco's two partners. He was, on each occasion, accompanied by Dreisenstock.

[4] The *first approach* was in April 1997. Braude was requested to discount a series of post-dated cheques. Playtime, so he was told, imported Aiwa electronic products and Singer sewing machines. To enable it to do so it needed finance. The cheques Glofinco was asked to discount were not made out to Playtime as payee but were instead drawn by Playtime in favour of the Jewellery Club. Braude made his own enquiries about Playtime. He telephoned Horne who gave Playtime a glowing credit reference and a high credit rating. Braude was still not satisfied and despite a visit from Dreisenstock who handed him a letter from Horne, addressed to Dreisenstock himself and commending Playtime for the exemplary manner in which it conducted its account, Braude declined to purchase the cheques offered to him on that occasion.

[5] The *second approach* by Ferrer and Dreisenstock was in June 1997. Three cheques, post-dated 4, 11 and 18 August 1997, and drawn by Playtime in favour of the Jewellery Club, each for R210 000, were offered to Braude. Braude expressed some interest provided the cheques were guaranteed by the Bank. On 20 June 1997 Ferrer and Dreisenstock returned with each cheque endorsed on the reverse side by Horne on behalf of the Bank. Copies of the cheques, duly met on presentation, were not available at the trial and Braude could not be certain that the endorsements went beyond the words: ‘good for funds’.

In addition he was asked to discount a fourth cheque for R122 000, drawn by a certain Mr Wobbe. The face value of the three Playtime cheques together with the Wobbe cheque totalled R752 000. Braude telephoned Horne and she assured him that the endorsements by the Bank were regular. All three cheques were additionally endorsed as sureties and co-principal debtors by Dreisenstock and by Ferrer, in his personal capacity as well as on behalf of the Jewellery Club. Thereupon, on 20 June 1997, Braude drew a cheque for R712 955,12 in favour of the Jewellery Club. All four cheques were duly met on presentation so that there was no need for Glofinco to resort to the Bank.

[6] The *third approach* was in October 1997. Seven post-dated cheques, drawn by Playtime in favour of the Jewellery Club, with a total face value of R4 413 120 were offered to Braude for discounting. The due dates of these cheques stretched in monthly sequence from October 1997 to May 1998. The cheques were similarly endorsed by Horne on behalf of the Bank. Braude once again telephoned Horne and she once again assured him that the cheques would be met, either by Playtime or by the Bank. After obtaining further endorsements from Ferrer, the latter's wife and Dreisenstock, each signing as surety and aval, Braude, on 14 October 1997 drew a cheque for R3,6 million made out to the Jewellery Club.

[7] The *fourth approach* by Ferrer and Dreisenstock was in November 1997. The request on this occasion was for the discounting of a cheque of R2 million post-dated to 1 June 1998, drawn by Playtime in favour of the Jewellery Club. Once again Braude insisted on confirmation by Horne that the Bank would pay if Playtime did not. Horne wrote him a letter, dated 13 November 1997, in which she gave the following undertaking on behalf of the Bank:

> 'In the event of Playtime International Holdings (Pty) Ltd not meeting these cheques on due date for any reason whatsoever, the bank hereby undertakes to make good to Global Finance [a reference to the appellant] the unpaid amounts within 24 hours of notification."

Braude thereupon agreed to discount the cheque of R2 million and on 17 November 1997 drew a cheque, payable to the Jewellery Club, in the sum of R1 613 369,98.

[8] The *fifth approach* occurred in March 1998. At that stage all the cheques discounted in June 1997 and five of the seven cheques discounted in October 1997 had been duly and regularly met. Two cheques from the October and the one cheque from the November discounting, totalling well in excess of R3 million, were still outstanding. The fifth approach was for five further cheques totalling R5 043 166,54, all drawn by Playtime, to be discounted. These cheques, unlike the

earlier ones, were drawn in favour of Glofinco. The due dates stretched from the end of July in monthly sequence to the end of November 1998. All five cheques were endorsed by Ferrer in his dual capacity, as before, and by Dreisenstock, as sureties and co-principal debtors. The further events during that period are described by the Court *a quo* as follows, at 1054F-1055E:

> 'Each cheque was also stamped on the back with the ABSA Bank/United Bank stamp, which had printed on it the words "*Bon pour aval* as surety and co-principal debtor *in solidum*". Underneath appeared two signatures, those of Horne and of Bell [Marilyn Bell, a sales manager at the branch] above the printed words "Authorized Signature". Beneath these words were written the authorisation numbers of each of the signatories, preceded by the letter "A". Beneath the signatures and numbers, the date of the cheque was also inserted. There was in addition, on the back of each cheque the personal stamp of Horne, on which was printed her name, followed by "Branch Manager, United Bank, Balfour Park Branch, A14560". Braude telephoned Horne in the presence of Ferrer and Dreisenstock, and asked whether the cheques would be met and whether the guarantee was "a good one". She advised that everything was in order. He nonetheless asked her to confirm in writing that the undertaking by the bank as surety and co-principal debtor was "in order" and that the bank would make good any non-payment on 24 hours' notice. She agreed to do so and faxed a letter to this effect to the plaintiff.
>
> Braude was not fully satisfied with the letter, he said, because the bank had not expressly waived the benefit of

excussion, and because he had not seen Horne sign personally. He thus telephoned her again, in the presence of Ferrer and Dreisenstock, and asked her to sign an amended letter in his presence. She agreed to visit the plaintiff's office later in the day. Braude advised Ferrer and Dreisenstock that if she signed the letter as required the plaintiff would enter into the transaction.

Braude met Horne for the first and last time when she arrived at the plaintiff's office later in the day. She wrote on the letter she had sent earlier the words "we hereby renounce the benefit of excussion" and signed it in front of Braude. She also wrote on the back of each cheque "we hereby renounce the benefit of excussion" and signed each again after these words.

Braude took the opportunity to ask her again, "in depth" about her credentials. She "satisfied" him that she was a senior bank manager who had the requisite authority to bind the bank. When testifying, Braude said that he had also been satisfied with Horne's explanation, proffered when she came to his office, why the bank was not itself assisting Playtime with finance. Her explanation, given also on the phone previously, was that the company was involved in huge international transactions; that she was controlling the flow of funds; and that it was more convenient for the bank to guarantee a payment by Playtime than to advance the money itself. He did not comment on the submission by counsel for the bank that Horne was actually doing its valued client, Playtime, a disservice by assisting it to obtain finance at a very high rate of interest. She had, Braude said, allayed any suspicions he might have had.

On the same day Ferrer collected a cheque drawn by the plaintiff in the sum of R4 115 907,39. The discount - the amount

charged by the plaintiff - was thus some R927 259.'

[9] The above version represents Glofinco's side of the story. The Bank's side was never told. That was because Horne (who resigned her position at the Bank when informed that disciplinary proceedings were pending against her and who was embroiled at the time in a delictual action for damages brought against her by the Bank) was clearly uncooperative towards the Bank and refused to testify on its behalf. (Horne in fact brought an urgent application for leave to intervene as a party to the present action but the application was rightly refused by the Court *a quo.*) Why Horne acted as she did, whether it was for nefarious purposes of her own or because she believed that she was furthering the interests of the Bank or of her branch, one simply does not know. Bell, although still in the Bank's employ, was not called as a witness. Her position was also not clear-cut. In the affidavits filed on behalf of the Bank in the provisional sentence proceedings it was alleged that her signature on the cheques had been forged. The denial that she had signed the cheques was, however, without explanation later withdrawn. The upshot is that there is no evidence to contradict that of Braude as to how events unfolded. The matter is to be dealt with on that factual basis.

[10] What the Bank did succeed in proving was that neither Horne nor

Bell had the requisite authority to commit the Bank to the guarantees that were issued in its name. Horne's credit mandate, as bank manager, was expressly limited to R75 000 of which at most 50% could be unsecured. Bell, a sales manager, had no authority to bind the Bank to any guarantees ostensibly issued on its behalf.

[11] The issue, then, is whether the Bank, by its own conduct, caused Braude to believe that Horne was authorised to bind the Bank in the manner she professed to do, that is to say, whether the Bank was estopped from repudiating liability on the grounds that she purported to guarantee, in the name of the Bank, a series of post-dated cheques as surety and aval in amounts far exceeding the upper limits of her authority to extend credit.

[12] The requirements for holding a principal liable on the basis of the ostensible authority of its acknowledged agent were recently articulated in *NBS Bank Ltd v Cape Produce Company (Pty) Ltd and Others*, *supra,* in para 26 at 412C-E by Schutz JA to be:

> '1. A representation by words or conduct.
> 2. Made by the [principal] and not merely by [the agent] that he had the authority to act as he did.
> 3. A representation in a form such that [the principal] should reasonably have expected that outsiders would act on the strength of it.
> 4. Reliance by [the third party] on the representation.

5. The reasonableness of such reliance.

6. Consequent prejudice to [the third party].'

I proceed to discuss the first two of these requirements with reference to the facts of this case.

[13] A representation, it was emphasised in both the *NBS* cases, *supra,* must be rooted in the words or conduct of the principal himself and not merely in that of his agent (*NBS Limited v Cape Produce Company (Pty) Ltd*, *supra* at 411H-I). Assurances by an agent as to the existence or extent of his authority are therefore of no consequence when it comes to the representation of the principal inducing a third party to act to his detriment. In the instant case counsel for the appellant relied principally on the very appointment by the Bank of Horne as its branch manager, thereby enabling her to impress upon Braude that she was duly authorised, when in fact she was not, to commit the Bank to stand surety for Playtime's post-dated cheques; this impression was reinforced, so it was further contended, by the fact that eight earlier cheques of Playtime that Horne had marked 'good for funds' had been met by the Bank by the time Horne stood surety on its behalf for the last of the series of cheques.

[14] As was pointed out in both the *NBS* judgments, *supra,* the appointment of someone to a position of authority, albeit in a subordinate position but with all the trappings pertaining to the post, is a factor that in

itself is not to be underestimated (*NBS Limited v Cape Produce Company (Pty) Ltd*, *supra*, at 410C-D; 413B-D; 414C-D and G-H.) Thus it was stated, apropos a branch manager, by Marais JA in the *SA Eagle Insurance Company Ltd* case, *supra*, at 574E-G:

> 'The establishment of branches was plainly to facilitate convenient access by the public to it as an institution and to encourage the public living in the area concerned to make use of conveniently situated branches. These branches were the public face of the institution and they were intended by respondent to be so regarded. There was no suggestion by respondent that its branches were not intended to be available to the public for certain classes of lending and borrowing and that it made that generally known. There was no publicly proclaimed or advertised policy of dealing with transactions of a particular magnitude only at its head office. The branches were held out by respondent as the places to which anyone wishing to deposit money with it could and should repair. The branch manager was held out to be the person clothed with the most authority at a branch by his very designation as branch manager.'

Of course that does not mean that a bank is liable to a third party *ex contractu* for all the actions and transactions of the branch manager when the latter is in truth minding not the bank's business but his own. The *NBS* judgments dealt with the branch manager receiving substantial deposits ostensibly on behalf of the bank; the instant case is concerned with a branch manager purporting to bind the bank in the future as surety

and co-principal debtor on a series of post-dated cheques. As Marais JA pointed out at 573H-574B of his judgment, in dealing with of the scope of a branch manager's authority to bind a bank:

> 'That is, of course, a question of fact to be decided on a balance of probability. It is not reducible to the question, posed *in vacuo*, of whether a branch manager of a business has apparent authority to bind the business nor is it a question which lends itself to a generalised answer. The branch manager of a fast food outlet cannot be regarded, simply because of his appointment as such, as having been held out by the proprietor of the chain of outlets as having authority to open a new branch, to buy or hire premises for it, or to engage staff for it. *That is because these activities are so patently not within the ordinary purview of such a manager*. On the other hand, the manager of a business the sole activity of which is the buying and selling of used motor vehicles may well be justifiably thought to have been empowered by the proprietor to negotiate purchases and sales for that is the manager's publicly proclaimed *raison d'etre*. (*Reed NO v Sager's Motors (Pvt) Ltd* 1970 (1) SA 521 (RA).) In each case, it is the particular facts which will provide the answer' (my emphasis).

[15] The appointment by a bank of a branch manager implies a representation to the outside world. The representation, to the knowledge of the bank, is that the branch manager is empowered to represent the bank in the sort of business (and transactions) that a branch of the bank and its manager would ordinarily conduct. The

notion of 'ordinary business' in turn implies a qualification in the form of a limitation: that the branch manager is *not* authorised to bind the bank to a transaction that is not of the ordinary kind. What the ordinary kind of business of the branch is remains a matter of fact and hence of evidence. There is this passage in the evidence of Strang, the expert witness called by Glofinco on banking practise:

> 'Now would you tell M'Lady, as a general proposition, what the functions and duties of a bank manager are or a branch manager, in your experience. -- It was the operation side of the branch but I think the more importance I had, the more interesting is the credit lending side and that encompassed many ways of lending money to clients or facilitating their finance … The most common is overdrafts, that I think is the one people know best. There are … loans, fixed loans. There can be local finance, there can be off-shore finance. There is finance relating to foreign exchange transactions where the bank will add a surety to the transaction under letter of credit or under bill of exchange. It is really one's imagination that it is what one can do.'

The last sentence is overstating the position if the imagined method would be unorthodox and speculative. A branch manager clearly does not have, nor can he reasonably be believed by anyone to have, a free hand to bind the bank at will. His authority to do so is not unlimited both as to the nature and the extent of the business he purports to transact in the bank's name.

[16] Such limitation can be either internal or it can be implicit. It is internal if it is imposed on the functionary concerned by his conditions of service or by higher authority in the bank's hierarchy. It is implicit in the sense mentioned in para [15] above: he can bind the bank only if it is normal and usual for someone in his position to do so. An outsider dealing with a branch manager is entitled to assume that the latter's functions encompass, but do not exceed, the activities that a branch manager would commonly be known to perform. By its appointment of Horne as the manager of its Balfour Park branch the Bank created the impression that she was its representative in all its commonplace and routine dealings with customers and other members of the public; and that, as the top official in the branch, she was empowered to transact all types of business on its behalf, but no more, that the Bank would ordinarily entrust to that branch.

[17] Internal limitations of which outsiders who do business with the branch manager are unaware will not bind them. This is a principle as old as the law of agency itself. So, for example, counsel for the appellant referred to the Digest 14.3.11 which, in translation (that edited by Watson), reads as follows:

> '2. No one is treated as a manager if public notice has been given in writing that contracts are not to be made with him, It is not that the would-be-contractor needs permission, but that the

person wanting to avoid contracts should prohibit it; for otherwise the mere fact of appointing the manager will lead to liability. 3. By “public notice” is meant a notice in writing, clearly visible and easily read, in the open, for example, in front of the shop or the place of business, not hidden away but on display. Should the notice be in Greek or Latin? It depends on the locality; no one should be able to claim that he did not know what the notice said. Certainly, if the notice was posted openly and was widely read, no one will be heard to say that he did not see it or know what it said. 4. But the notice has to be there permanently. An action for the manager’s conduct will lie if the notice was not on display when the contract was made or if its text had been effaced. Thus, the owner of the shop will be liable if the notice he put up has been removed by a third party or has collapsed through age or been obscured by bad weather or something like that. But if the manager himself took down the notice with fraudulent intent, the loss from his fraud must fall on the person who appointed him, unless the contractor also was party to the fraud. 5. The terms of the appointment should be respected. For example, the person making the appointment may have wished the manager to enter transactions only on certain terms or with the approval of a particular person or if security was given or only within a certain limit. The fairest thing is to abide by the terms of the appointment. Likewise, a person who has appointed several managers might wish transactions to be concluded by all of them together or by one of them on his own. No one should be suable for the conduct of a manager by a person he has told not to do business with him; for we are entitled to prohibit dealings with a particular individual or with a given class of people or tradesmen and yet permit dealings

with others. But a person who keeps changing his mind and forbids contracts to be made now with one person and now with another will be liable in all cases; for it is wrong to confuse one's contractors. 6. A person who has been forbidden to contract altogether is not treated as a manager at all; his role is rather that of a storeman than of a manager, so he will be unable to sell even two bits of merchandise from the shop.'

[18] It may of course be impractical and even stultifying to business to advertise the internal limitations that are placed on a branch manager's authority to act on behalf of the bank. But that is a calculated risk a bank or any other organisation seeking to curb the authority of its officials to bind it, must of necessity run. In the ordinary course of events the risk is perhaps not as great as it seems since officials are as a rule honest rather than dishonest and would observe rather than disregard restraints on their given powers; so too, because an organisation's own internal systems of control are designed to anticipate or impede transgressions by maverick functionaries. But when, in the exceptional case, it does happen that an official oversteps the mark without prompt detection, as happened in the *NBS* cases and indeed as happened in this one, the consequences for the organisation may well be calamitous. If such an organisation is unable (by means of insurance or otherwise) to shift or spread the risk it created by appointing and not monitoring the activities of someone who in the event proved to

be unsuited to hold a position of financial responsibility it must itself assume and absorb it (cf *Randbank Bpk v Santam Versekeringsmaatskappy Bpk* 1965 (4) SA 363 (A) at 372D-F).

[19] In the instant case Horne's authority was expressly limited. Braude was unaware of the internal limitations placed on Horne's authority to burden the bank beyond R75 000. That limitation therefore does not count. I accordingly return to the other type of limitation mentioned above, the one that was implicit to Horne's position as a branch manager.

[20] The issues on this part of the case are twofold: first, whether the transactions on which Glofinco relies can be said to fall within the parameters of 'ordinary branch bank business' of a large commercial branch; secondly, whether Braude on behalf of Glofinco realised that the transaction in question was not of such a kind. Since a representation, to be one, must speak to the representee and since the representation is that the branch manager is empowered to transact only ordinary branch business, no representation is made if the representee is aware that the transaction he is engaging in is not of the kind a branch manager will ordinarily transact with an outsider.

[21] The argument for Glofinco can be reduced to a syllogism: what Horne did was to guarantee a series of cheques on behalf of the Bank; the guaranteeing of a customer's cheques on behalf of the Bank is part

and parcel of a branch manager's everyday duties and as such constitutes ordinary banking business; hence the guaranteeing of the cheques in question fell squarely within the scope of Horne's ostensible authority.

[22] That, in my view, is an oversimplification of the problem. I say so for three reasons. The first is that the transaction in question, properly analysed, is not a simple performance guarantee by the branch of a cheque issued by its customer; it is standing surety for a customer's post-dated cheques in anticipation, so it was explained to Braude by Horne, of funds about to flow into the account some time in the future. The second is that there is no evidence that the transaction fell within the category of what may be termed a bank's 'usual business'. The third is that Braude fully appreciated that Horne was engaged in a type of activity that was not usual for a branch manager to conduct. I deal with these points in the paragraphs that follow.

[23] The Bank in this case was not simply guaranteeing the debts of an esteemed customer. The transaction in question was a peculiar one which must be assessed against its own background and on its own terms. The following points need to be stressed:

(1) There was no evidence, not even of a hearsay nature, about the business relationship between Dreisenstock of Playtime and Ferrer of the Jewellery Club. Neither of them testified. Certainly there was no

suggestion that the previous cheques by Playtime to the Jewellery Club were related to the supply of electronic or other goods that Playtime was supposed to import.

(2) The entire transaction was implemented on 5 March 1998, at one and the same time. Glofinco was handed the post-dated cheques, made out not to the Jewellery Club but to it, and endorsed by Horne and Bell on behalf of the Bank. The face value of the cheques was R5 043 166.54 for which Glofinco thereupon issued a cheque for R4 115 907.39 to the Jewellery Club. The difference amounting to some R927 259 was said to generate a percentage of profit of approximately 40% p.a. What the true nature of the underlying transaction, the fate of the funds so paid out or the arrangement between Playtime and the Jewellery Club was, one simply does not know.

(3) What one does know is that this was a money lending transaction of some sort or another and not the discounting of a trade bill or the guaranteeing of a bill of exchange owing to a foreign creditor. Barker, *The Principles and Practice of Banking in South Africa,* 3 ed 537, defines a trade bill as 'a bill made to liquidate an actual trade transaction, as distinct from an accommodation bill'. What the Bank was here guaranteeing, if the transaction is to be upheld, was nothing of the sort.

(4) On analysis these were neither discounting nor factoring

transactions. The bank assumed a liability as surety and aval in respect of debts payable some time in the future, the nature of which cannot be determined on the evidence.

(5) At the time Playtime was operating on an overdraft of R3 million from the Bank. It went into liquidation, on its own application, the day before the due date for the first of the last series of the cheques *ie* in July 1998. It is a fair assumption that there were no, or at the very least insufficient, funds in the account in March 1998 when Horne committed the Bank to the future repayment of the post-dated cheques in the event of Playtime being unable to meet them and that Horne must have known that there was no certainty that funds would be available when the various cheques fell due for payment some months later.

(6) Whereas previous cheques appear to have been marked 'good for value' the last series of post-dated cheques was guaranteed by Horne and Bell on behalf of the bank, stamped with a specially procured stamp made at Horne's instance during January 1998, and marked 'Bon pour aval as surety and co-principal debtor in solidum'.

(7) A financier in Glofinco's position would invariably operate at margins significantly higher than those charged by banks because of the risks involved in transactions of this nature. In this instance, as a result of the Bank's interposition, that risk, if the Bank is to be held liable, was entirely eliminated. It was debated with Braude why the bank, if it was

satisfied to assume such risk, was not prepared to extend to Playtime overdraft facilities to cover such a loan. Understandably enough Braude could give no sensible answer because there does not appear to be one. Quite apart from the fact that the transaction held no profit for the Bank it in fact deprived it of the opportunity of earning the finance charges it would have earned had the loan been made to Playtime by the Bank itself.

(8) While the Bank assumed the entire risk it obtained no corresponding advantage. It was suggested that there was some advantage to the branch inasmuch as Playtime was its largest and most active foreign exchange customer, but that begs the question whether it was normal business for a bank manager to place the Bank at risk to the extent she did ie without certainty as to the sufficiency of funds, which the Bank was supposed to control, to cover the particular advance. Such control could only be exercised if the right to payments for the sale of goods imported by Playtime was ceded to the Bank. Of that there was again not the remotest suggestion in the evidence. Nor was there evidence that the cession of book debts in respect of future payments was a recognised and normal means of securing the guaranteeing of post-dated cheques by the Bank.

(9) The transaction so concluded was patently inimical to the Bank's financial and commercial interests. It is difficult to envisage how a

transaction that is demonstrably harmful to a bank can be regarded as part and parcel of normal banking practice and hence of a bank manager's ordinary functions. Whichever way it is viewed the transaction was not an ordinary and routine one which a branch manager would conclude 'in the ordinary course' and without special authorisation.

[24] I turn to the actual evidence as to the normalcy or not of Horne's dealings with Glofinco. Banks, Braude readily conceded, did not undertake 'this practice' of discounting post-dated commercial cheques; such business was 'treated in a completely different manner' by them. He was asked:

> 'How would a bank go about it, a commercial bank? -- My lady what a commercial bank might do is if they had a client in good standing, and the client had a cheque that he had received for goods and services that he had rendered to a third party he could give that cheque to the bank, who would hold it as security and perhaps issue him an overdraft up to a certain value relative to the cheque. In some cases 50%, in some cases maybe 70%, but usually the banks would do it on that basis.'

That of course deals with the situation where the bank's customer is a creditor. In the instant case the Bank's customer (Playtime) is a debtor. There was no evidence, from either Braude or Strang or Scholtz (the banking expert called by the Bank), that it was customary at the time for

banks to stand surety for a customer's post-dated cheques payable months later. In particular the series of transactions in the form analysed above was never debated with either of the two expert witnesses. When something along those lines was obliquely put to Strang in his evidence-in-chief he said: 'I cannot say it is unusual' but when asked under cross-examination,:

> 'Now as at 5 March 1998 then, we had a credit facility of R1½ million. Now if you are the bank manager at that stage with your client Playtime asking you to sign cheques for R5 million, five cheques for R5 million odd, dated at various dates in the future for some eight months, could you do that?'

he replied:

> 'No, this is what surprises me, that you have got two officers of the bank who did sign it. That I cannot understand.
>
> And now if we look at the transaction, are you aware of the circumstances of this R5 million transaction. -- No.
>
> Now let me inform you as to how I understand it to be, it is the Jewellery Club represented by its Mr Fedder, approaching the plaintiff in this matter Global Finance with a request to discount cheques to an amount of R5 million and according to the proposed transaction, there would be an interest rate of very near to 40% on this transaction. Now is that, just on those grounds, is that the sort of transaction which a bank would involve itself in? -- Not normally, certainly not.
>
> It would certainly be very unusual for the bank? -- Yes.'

Scholtz, the bank's witness, was asked, in evidence-in-chief:

> 'Nou die aard van hierdie transaksie, het u enige standpunt daaroor? -- In die eerste punt wil ek sê ons vind hierdie transaksie buite normale bank praktyk. In ons opinie is die transaksie abnormaal in die sin van as die bank wel hulle endorsement, as ons daarby verplig of verbind sou gewees het en die geld lener sou dit gesien het as 'n ten volle versekerde transaksie van sy kant af, dan kom die eerste vraag by my op, hoekom sou die bank dan nie eerder die geld aan mnr Dreisenstock geleen het nie. Want ons het uit hierdie transaksie was die bank se opbrengs nul, ons het niks gekry nie.'

His evidence, as I read it, is to the effect that Horne was not entitled, without explicit authority from head office, to compromise the Bank's position in this manner by standing surety for a series of post-dated cheques in amounts far in excess of her limits for extending credit. It goes to both the nature and the extent of her intercession in the name of the Bank.

[25] Braude's own evidence was that he confronted Horne about the reason why the Bank was not itself lending the money to Playtime instead of via Glofinco at a much higher rate of interest, when Playtime was at once so highly regarded by her and had access to sufficient funds to ensure the repayment of the amounts advanced to it. He himself, so

he said, thought that 'Mr Ferrer was in some way involved with Mr Dreisenstock with the importation of these goods' but not as a supplier thereof.

> 'For all you know this was just for extra credit facilities over and above the existing overdraft facilities? -- That is possible my lady.'

He did not think it necessary to enquire further into the mechanism of the transaction between Playtime and the Jewellery Club. But when Horne was introduced to him he nevertheless questioned her. She informed him:

> 'that in view of the complicated structure the bank controlled the flow of funds coming in and that is why she had absolutely no problem in saying that there would be funds available on the dates that the cheques were due …'

Strang, on being asked about this explanation in his evidence-in-chief, said:

> 'I find it difficult to comment frankly really. As a banker, if I receive the explanation from Ms Horne, I would have had difficulty in listening to it. But I can understand people outside the bank not knowing the procedures and the manner in which the banks operate, could have accepted their explanation.'

[26] But Braude was no neophyte. As he himself said:

> ‘My lady being involved in the finance business for many, many years I have had considerable experience with cheques, dealing with banks, suretyships, guarantees, etcetera.’

He was aware that the Bank assumed a huge risk, indeed, that he transferred his entire risk to the Bank in circumstances where there was not one iota of evidence forwarded to him as to the actual extent of Playtime’s business as an importer. The supposed advantage held out to him by Horne as being that of the Bank was little more than nebulous. As the Court *a quo* remarked at 1067B-C:

> ‘Her assertion that it was more convenient to guarantee the cheques than to advance finance was scarcely plausible.’

The transaction, to his knowledge, was patently detrimental to the Bank’s interests. On his own evidence Braude had misgivings, at least initially, about the manner in which the transaction was structured through Horne. He sought and was given reassurances by her. It was not contended on behalf of the Bank that Braude had acted dishonestly. One must therefore accept it as fact that he believed her. Relying on those reassurances about the authenticity of the Bank’s supposed intervention, he issued the cheque to The Jewellery Club. What caused Braude to act to Glofinco’s detriment was in the final analysis not the Bank’s representation in appointing Horne as bank manager but Horne’s

representation to him assuaging his misgivings about the Bank's ultimate liability.

[27] The above evidence falls significantly short, in my view, of establishing the proposition that the transaction in question qualified as a normal or usual or customary type of transaction to which any bank would commit itself at the instance of a branch manager. Since this was not an ordinary transaction, one of a kind a branch manager would as a matter of course conclude, there was, at least in that respect, no representation of the Bank, as opposed to Horne's own, as to her authority to enter into it; consequently there was, for the purpose of estoppel, no representation of the Bank itself on which Glofinco could rely in order to hold the Bank liable.

[28] The second aspect of the representation on which Glofinco sought to rely, as mentioned in para [13] above, was that the Bank had in the past met a number of similar cheques drawn on it and endorsed by Horne; that the cheques were duly met, notwithstanding Horne's conspicuous endorsements thereof purporting to bind the Bank, would have tended to lull Glofinco into the false belief, so it was contended, that the cheques were regular and not subject to objection on the part of the Bank. Counsel for the appellant advanced this argument not as a representation in itself but in reinforcement of his main submission based on the mere appointment of Horne as branch manager. In a

learned note (*Skynverwekking binne bankmilieu en estoppel*, 2001 TSAR 828) Professor J C Sonnekus, on the other hand, relied on it as the sole reason for saying that the Court *a quo* was wrong in disallowing the estoppel .

[29] There are, I believe, a number of answers to the point. The first is that all the cheques were met in the past because there happened to be sufficient funds in Playtime's account to satisfy them at the time. The Bank was never called upon to step in as surety and co-principal debtor. Consequently it cannot be said that the Bank had made a discrete representation merely because it had not queried the earlier cheques. The second reason is this: because the originals of the earlier cheques were no longer available, there was no evidence to show that they were in the same form as the last series of cheques. If they were simply marked 'good for funds', as the evidence suggested, and if at the time they were presented for payment there were sufficient funds in the account to meet them, there would have been no basis for the Bank to have refused payment. That being so, the payment would not imply a representation on its part that the Bank would in future, absent sufficient funds in the account, honour such cheques as surety and aval. The third reason is that there was no evidence to show how such cheques went through the banking system and that other officials of the Bank would have been alerted to Horne's endorsement of the cheques in

question. Lastly, there was no evidence by Braude himself that he ever treated the fact that the cheques were honoured in the past as confirmation by the Bank that the Bank would honour Horne's endorsements in the future, regardless of whether there were adequate funds in Playtime's account to meet those cheques.

[30] In sum, Braude acted throughout not on representations from the Bank but on reassurances from Horne. The Bank's mistake, viewed in hindsight, was to appoint Horne as the manager of one of its branches. That, in itself, as stated earlier, was not reason enough for upholding the replication of estoppel. The Court *a quo* was right. The appeal must fail.

[31] The following order is made:

The appeal is dismissed with costs including the costs of two counsel.

……..

P M

NIENABER

JUDGE OF APPEAL

Concur:

ZULMAN JA

FARLAM JA

NUGENT JA:

[1] I have had the privilege of reading the judgment of Nienaber JA in draft form but I regret that I am unable to agree with the order that he proposes. In my view the undertakings that were given by Horne fell within the scope of the apparent authority that the bank represented that she had and Glofinco reasonably relied upon upon that representation when acting as it did. In my view the bank is accordingly bound by Horne's undertakings and I would uphold the appeal.

[2] Before turning to the legal questions that are dealt with in the judgment of Nienaber JA it is necessary to deal with certain factual issues that are relevant, first, to the grounds upon which the trial court dismissed the claim, and secondly, to one of the grounds upon which Nienaber JA has concluded that the appeal should be dismissed.

[3] Glofinco's claim failed in the trial court on the grounds that Braude was said to have acted unreasonably in relying upon the bank's representation (if there was one) that Horne had authority to bind the bank. The trial court said that his reliance was unreasonable because '[he] must have suspected something untoward, and yet went ahead…' (at 1067C). Presumably what the trial court meant was that Braude must have

suspected that Horne was not authorised to act as she did for otherwise any suspicions that Braude might have had would hardly be relevant.

[4] If Braude suspected that Horne was not authorised, but yet went ahead with the transaction without allaying that suspicion, it is trite that the bank would not be bound, because Braude could then not be said to have relied upon the representation, and the question of whether he acted reasonably would not even arise. It would also mean, however, that Braude acted dishonestly by purporting to act in the belief that Horne was authorised, and that a large part of his evidence was false. I do not think that such a finding is warranted by the evidence, nor did the bank suggest that it was. On the contrary, the bank conceded in the trial court that Braude had not acted dishonestly in any way and in argument before us that concession was repeated. I would be reluctant in those circumstances to find *mero motu* that Braude acted dishonestly, and that his evidence is false, particularly when those imputations were never put to him directly in the course of the trial (cf. *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) par 60-65 at 36H-38C).

[5] It is also improbable, in my view, that Braude suspected that Horne was unauthorised or that anything else was untoward. The trial court inferred that he suspected that something was untoward on two grounds. First, it was said that he asked repeatedly about Horne's authority thereby indicating that he was concerned about it. That finding is not supported by the evidence. According to Braude's evidence (and there was none to contradict it) he spoke to Horne about her authority on only one occasion, which was immediately before he discounted the cheques that are now in issue. Until then he had spoken to Horne on the telephone on several occasions before he discounted cheques drawn by Playtime but then only to confirm that the signatures on the cheques were hers and to be assured that Playtime was still in good financial standing. I deal later in this judgment with what was discussed when he met Horne for the first time but for the moment it is sufficient to say that in my view the evidence relating to that discussion does not warrant the inference that he was concerned about her authority. The fact that on three occasions before then he discounted eleven cheques amounting to more than R7 million without once asking about Horne's authority supports his assertion that it never occurred to him for a moment that she might not be authorised and in my view it is most improbable that he would have put millions of rands

at risk if he had any suspicion that his security might be unsound.

[6] The second ground upon which the trial court inferred that Braude suspected that something was untoward relates to the nature of the underlying transaction. If the bank was confident that Playmate would meet the cheques on due date the question that comes to mind is why the bank was not willing to advance money to Playmate itself instead of guaranteeing cheques that would be discounted by Glofinco. By advancing the money itself the bank would not only have earned interest but it would also have enabled Playtime to capitalise upon the substantially lower cost of borrowing. That question indeed occurred to Braude and he asked it of Horne in the course of their discussion. Horne's reply embodied answers to two different questions. She said that the bank was in control of the flow of funds from substantial international trading that was being undertaken by Playtime (which would serve to explain why she was confident that the cheques would be met) but as to why the bank was not advancing the funds itself she said no more than that it was more convenient to arrange matters in that way. That was indeed no answer to the question, as pointed out by the trial court, but the fact that Horne fobbed Braude off without elaborating upon why it was 'more convenient' to arrange things in that way does not, in my view, warrant the inference

that Braude then became suspicious. That inference presupposes that Braude would have felt it necessary to persist in his enquiry until he received a proper explanation when in truth he had no reason to do so. How the bank conducted its affairs was was of no direct concern to Braude, whose primary interest was only that he should be paid. Braude said that he did not consider it his business to enquire any further and I see no reason why he should have done so after a senior bank manager had brushed aside a matter that concerned the bank's affairs. In my view it is only in retrospect, and with knowledge of what Horne was actually doing, that her evasion assumes the significance that the trial court attached to it. What must never be lost sight of is that Braude was dealing with a senior bank manager whom he had no reason to distrust.

[7] In my view it is most improbable that Braude suspected that something was untoward but yet proceeded to discount the cheques. One asks when it was that Braude is said to have become suspicious? If it is said that he became suspicious when he received the non-commital answer from Horne concerning the transaction then he would need to have had nerves of steel to have acted as he did. For it would then have dawned upon him for the first time that well over R3 million (the amount of the

cheques that were then outstanding) was already at considerable risk. Yet far from displaying concern he promptly discounted further cheques for over R5 million. In my view it is most unlikely that he would have done so if he had begun to suspect that Horne had no authority. If, on the other hand, it is said that he suspected from the outset that Horne had no authority and that the conversation merely heightened his suspicion it implies that Braude was willing to repeatedly put millions of rands at risk merely in the hope that in due course the bank would be estopped from repudiating the undertakings. That, too, is most unlikely. As Braude said, rather wryly but it carries the ring of truth: 'It is not our practice to finalise our deals in a court of law, that certainly doesn't appeal to us at all.'

[8] In my view one should not underestimate the capacity that the trappings of trustworthiness have for allaying suspicion. I see no reason to disbelieve Braude's evidence that he did not suspect for a moment that he ought to distrust a senior bank manager. The fact that he was willing to discount the cheques for millions of rand on the strength of her signature points strongly to the truth of his evidence. For the reasons I have given I respectfully disagree with the finding of the trial court that

Braude must have suspected that something was amiss but yet went ahead with the transaction.

-

[9] Nienaber JA has pointed out (at para 13) that a representation, in order to found an estoppel, must be rooted in the words or conduct of the principal himself and not merely in that of his agent (with which I respectfully agree, subject to a qualification that excludes cases in which the agent has been authorised to make the representation – see Rabie and Sonnekus: *The Law of Estoppel in South Africa* 2 ed para 2.1.1; Spencer Bower and Turner: *The Law Relating to Estoppel by Representation* 3 ed para 125 – which did not arise in the *NBS* cases and need not be considered in this case on the view that I take of the facts). He is of the view that what caused Braude to act as he did was, in the final analysis, not the bank's representation in appointing Horne as bank manager but 'Horne's representation to him assuaging his misgivings about the bank's ultimate liability' (para 26). I regret that I do not agree with that conclusion.

[10] I have already pointed out that before Braude met Horne he discounted eleven cheques, amounting in total to more than R7 million

rand, on three occasions without once questioning her authority. He met Horne for the first time immediately before he discounted the cheques that are now in issue but even then the purpose of the meeting was not to question her authority – its purpose was to have Horne sign the cheques in Braude's presence and to have her add a further clause to the bank's undertaking. In an affidavit deposed to by Braude (which was put to him in the course of cross-examination) he said that at the same time he 'had a full discussion with her in terms of which [he] questioned her closely about her credentials as the authorised bank manager' and that she 'convinced [him] that she had the necessary authority'. Precisely what was meant by Braude, and more important, what was said, was not explored in the evidence. The only other evidence in that regard emerged when he was asked (when he was giving evidence in chief) whether he was 'satisfied with her explanation [of the transaction] and her credentials' and he said the following

'Yes I was my lady. She went on to tell me of her 18 years of employ with the bank. She reiterated to me that she was a senior manager of the bank and that she had absolutely no reservation in binding the bank with this transaction because she felt there was absolutely no chance of there being any dishonour."

[11] Those snippets of evidence suggest that Braude's enquiries were directed to establishing what position Horne occupied in the bank's hierarchy rather than to whether a person in her position was authorised to transact the particular business. Indeed, Braude said (and it was never contested) that at no stage did he ask Horne whether there was a limit on her authority, which is inconsistent with the suggestion that his belief in her authority had its source in what she told him as opposed to the office that she held.

[12] Clearly when Braude discounted the first eleven cheques he relied for his belief that Horne was authorised solely on the office that she held (no other potential source of his belief has ever been suggested). That was a representation made by the bank. Various tests have been propounded by our courts for determining whether a subsequent representation might operate to substitute a new causal event. I do not think it is necessary in the present case to examine them in detail: their essence is captured by what was said by this Court in *Stellenbosch Farmers' Winery Ltd v Vlachos t/a The Liquor Den* 2001 (3) SA 597 (SCA) at 609E-F :

> '… 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) at 505F-G); if, due to some new circumstance, … 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.'

[13] I can find nothing in the evidence to suggest that when Braude discounted the cheques that are now in issue the initial image of the source of Horne's authority (i.e. that by virtue of her office she was authorised to act as she did) had been supplanted by a different image, nor does the evidence suggest what that new image might have been. In my view it is plain from the evidence as a whole that, but for the fact that Horne was the branch manager, Braude would not have acted as he did. I do not think that the evidence establishes that he acted in response to something in addition and it was never suggested to him that he did. I turn then to the questions of law.

[14] I agree with Nienaber JA that the appointment by a bank of a branch manager implies a representation to the outside world but I see the nature of that representation a little differently. By establishing branches for the conduct of its business the bank represents to the public at large that the bank conducts its ordinary business from those branches and that its manager is authorised to conduct that business on its behalf. No doubt there are generally internal limitations placed upon the authority of the

manager (as there were in this case) but as pointed out by Nienaber JA those limitations are immaterial if they are not brought to the notice of the public. Members of the public are thus entitled to assume, when they transact business at the branch which is of the kind that falls within the scope of the ordinary business of the bank, that they are dealing with the bank and not with an unauthorised third party. In *South African Eagle Insurance Co. Ltd v NBS Bank Limited* 2002 (1) SA 560 (SCA) Marais JA expressed it as follows at 575C-D:

> 'It is sufficient for successful invocation of the doctrine [of estoppel] that the conduct of the principal was such as to entitle the party concerned to believe that the person purporting to act on the principal's behalf was authorised to transact a contract *of the kind in question'* (emphasis added).

In *Freeman & Lockyer (a firm) v Buckhurst Park Properties (Mangal) Ltd and Another* 1964 (2) QB 480 (CA), which is the leading case in England on the topic, Diplock LJ expressed the principle as follows at 503-4:

> 'The representation which creates "apparent" authority may take a variety of forms of which the commonest is representation by conduct, that is, by permitting the agent to act in some way in the conduct of the principal's business with other persons. By so doing the principal represents to anyone who becomes aware that the agent is so acting that the agent has authority to enter on behalf of the principal into contracts with other persons *of the kind* which an agent so acting in the conduct of his principal's business has usually "actual" authority to enter into' (emphasis added).

[15] In my view that does not mean that the principal is bound only if the disputed contract is one that the bank would ordinarily have entered into. If that were so it would imply that a principal is bound only if the contract is one that he would be willing to ratify, which quite undermines the principles underlying estoppel and is manifestly not the case. As pointed out in *Bowstead and Reynolds on Agency* 17 ed par 8-064 a principal is bound by his agent's apparent authority even where the agent was acting fraudulently and in his own interests and indeed the claims in the two *NBS* cases referred to by Nienaber JA ought to have failed if that was the law. The question to be asked in each case, in my view, is not whether the principal would ordinarily have concluded the disputed contract, but rather whether the contract is of a kind that falls within the scope of the principal's ordinary business. In my view it is not open to a motor vehicle dealer whose ordinary business is to buy and sell vehicles to say that ordinarily he only purchases vehicles that are in peak condition, or that he ordinarily only sells them if he can do so without making a loss, and that contracts by his manager which do not meet those conditions are therefor not binding upon him. Nor, in my view, is it open to a bank to say that although it falls within the scope of its ordinary business to guarantee its customers' cheques it ordinarily does not do so in circumstances which

place it at financial risk, and thus it is not bound if its manager does so in such circumstances. Estoppel is concerned with appearances and not with idiosyncratic reservations. The public know what kind of business is undertaken by a bank and they are entitled to feel safe when they undertake business of that kind with a bank manager. They are not to know in what circumstances the bank considers it to be commercially desirable or beneficial to undertake a particular contract, or what will be inimical to its interests, and in my view they are not called upon to enquire. Members of the public who deal with a bank manager are entitled to assume that he knows what he is doing when he transacts business of the kind that one transacts with a bank. If in truth the transaction would not ordinarily have been concluded by the bank and was concluded only because its appointed agent went beyond his authority I can see no reason why the loss should fall upon the innocent party who was ignorant of that fact and in my view that is what estoppel sets out to avoid.

[16] I accept that in this case the bank would not ordinarily have guaranteed Playtime's cheques, not least of all because, as it turns out, Playtime was not financially sound. As pointed out by Nienaber JA the

transaction was indeed inimical to the bank's financial and commercial interest but I cannot see why Glofinco, which did not know that, should end up paying the price. I do not agree, however, that the transaction was not an ordinary or routine one. The transaction itself was both ordinary and routine – it was no more than an undertaking to guarantee payment of a cheque – what was out of the ordinary was that the undertaking was given in circumstances in which the bank would ordinarily not have done so because it exposed the bank to unacceptable risk. But that does not mean that the transaction is not of a kind that falls within its ordinary business. In my view it is the nature of the transaction, rather than the circumstances in which the bank is willing to enter into it, that defines whether it falls within the scope of its business.

[17] There will no doubt be cases in which the circumstances in which the transaction is concluded are such that they will alert the representee to the fact that, notwithstanding appearances, the manager must necessarily be acting outside his authority, or in which the representee ought reasonably to have been alerted, but then the claim will fail on other grounds. I have already said that in my view the circumstances of the present case did not alert Braude to the fact that Braude was acting outside

her authorty, and I will deal later with the question whther he ought reasonably to have been alerted.

[18] The contracts that are in issue in this appeal are no more than undertakings, purporting to have been given by the bank, to pay the respective holders of the cheques if the cheques are dishonoured by the bank's customer, who was the drawer of the cheques. They served, in effect if not in form, to guarantee payment by the bank's customer of future financial obligations. In my view courts are well aware, from the cases that come before them, that undertakings of that kind fall within the scope of ordinary banking business. Moreover if evidence to that effect were to be required in my view it is present in this case. Braude said that on numerous occasions in the past cheques had been guaranteed for him by bank managers and he regarded it as standard practice, and that evidence was not even challenged. Strang deposed to an affidavit in the proceedings, which he must be taken to have adopted in the course of his evidence, from which it is clear that undertaking liability as surety for a customer falls within the scope of a banker's business. It is not surprising that Scholtz, who was the only witness called by the bank, did not suggest otherwise. It is implicit in his evidence that undertakings of

this kind fell within the scope of the bank's business: his concern was only that Horne exceeded the internal limit that had been placed on her authority. In my view the undertakings fell within the terms of the bank's representation and the only remaining question is whether Braude acted reasonably in relying upon it.

[19] When a representation has been made that can reasonably be expected to mislead (as it was in this case) it ought to follow that a person who relies upon it will ordinarily be acting reasonably in doing so. The requirement that the reliance must be reasonable thus mirrors to a large extent the requirement that the representation must be one that is reasonably capable of misleading (see Spencer Bower & Turner : *Estoppel by Representation*, *supra*, cf paras 98 and 102). Nonetheless, I have already expressed the view that the circumstances in which the representee acted might be such that he ought reasonably to have realised that the agent lacked authority and if that is so the principal will not be bound. Earlier in this judgment I pointed out that the only ground upon which the trial court held that Braude did not act reasonably was that he was said to have suspected that something was untoward, a factual finding with which I do not agree. I have nevertheless considered whether the circumstances

in which Horne gave the undertakings were such that Braude ought reasonably to have realised that she was not authorised notwithstanding that her undertakings fell within the scope of the bank's ordinary business.

[20] The suggestion in that regard was that Braude should reasonably have engaged in a process of reasoning that would have driven him to the conclusion that Horne was not authorised and that Horne's failure to provide a proper explanation to him ought to have sparked that process. A little more than a century ago, in *Frederick Bloomenthal v James Ford (the Liquidator of Veuve Monnier et ses Fils, Limited)* 1897 AC 156 (HL) at 168, Lord Herschell said the following in relation to a similar submission:

'It is said that he is under this liability, and that the law of estoppel does not apply, because if he had thought the matter out, if he had put two and two together, if he had reflected on the circumstances, he would have seen and must have seen that the shares were not fully paid up. My Lords, I cannot myself think that, where an unequivocal statement is made by one party to another of a particular fact, the party who made that statement can get rid of the estoppel which arises from another man

acting upon it by saying that if the person to whom he made the statement had reflected and thought all about it he would have come to see that it could not be true. Of course, if the person to whom the statement was made did not believe it, and did not act on the belief induced by it, there is no estoppel. But supposing he did believe it and did act on the belief induced by it, then it seems to me you do not get rid of the estoppel by saying, "If you had thought more about it you would have seen it was not true". The very person who makes a statement of that sort has put the other party off making further inquiry. He has produced on his mind an impression as a result of which further inquiry is thought to be unnecessary or useless. Therefore I confess I do not think that it is legitimate to speculate what is the conclusion at which a man would have arrived if he had put together - pieced together - all the considerations that might have occurred to a reflective mind cogitating on the whole subject, and then to say that because he would have come to the conclusion that the statement made to him could not have been true, he is not entitled to act upon it as if it had been true, when in point of fact he did not enter into those considerations, but did believe it and did act upon it.'

[21] I share the view that the maker of a representation that can

reasonably be expected to mislead should not be heard to say of a person who relied upon it that if he had only put two and two together he would not have been misled. In the present case I am furthermore of the view that it was not unreasonable for Braude not to have followed that train of thought. There were indeed unusual features of the underlying transactions, as pointed out by Nienaber JA, concerning the relationship between the bank and its customer but I do not think that Braude should reasonably be expected to have enquired further into that relationship once Horne had brushed it aside. The business relationship between the bank and its customer was of no direct concern to Braude, whose concern was only to ensure that he was paid, and nothing had occurred to arouse his suspicions.

[22] Perhaps it needs to be emphasised again that Braude was dealing with a senior bank manager. Braude said that if he knew then what he now knows he might have questioned Horne's authority but at that time he had absolutely no reason to do so – in his many years of dealing with banks he had never come across a case in which a bank had repudiated the authority of its manager. That it should turn out when the transactions are analysed in retrospect that they bear the fingerprints of fraud is hardly

surprising but I do not think Braude can be faulted for not having seen them earlier. I do not think it is unreasonable for a member of the public, when dealing with the affairs of a bank, to trust the word of a bank manager, which is what Braude did. What is surprising is only that a bank should submit that it was.

For those reasons I would uphold the appeal.

NUGENT JA

SCHUTZ JA: concurs