THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE
Case No: 578/2011

In the matter between:

CONRAD FOURIE **APPELLANT**

v

FIRSTRAND BANK LIMITED **FIRST RESPONDENT**
JACOBUS SPANGENBERG NO **SECOND RESPONDENT**

Neutral citation:	*C Fourie v FirstRand Bank Ltd* (578/2012) [2012] ZASCA 119 (18 September 2012).
Coram:	Brand, Lewis, Bosielo, Shongwe and Theron JJA
Heard:	**27 August 2012**
Delivered:	**18 September 2012**
Summary:	**Claim against appellant in terms of s 424 of the Companies Act 61 of 1973 based on fraudulent conduct – causal link between fraudulent conduct and company's inability to pay not required – second respondent held vicariously liable in delict, jointly and severally with appellant for the same damages suffered by the first respondent.**

ORDER

On appeal from: North Gauteng High Court, Pretoria (Southwood J sitting as court of first instance):

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

2 The cross-appeal is upheld with costs, including the costs of two counsel.

3 Paragraph III of the order of the court a quo is set aside and replaced with the following:

"III The second defendant is ordered to pay to the plaintiff, jointly and severally with the first defendant, the one paying the other to be absolved:

(i) the capital amount of R7 340 229.73;

(ii) Interest up to and including 31 October 2010 in the sum of R5 361 200.93, less the sum of R1 193 595.21;

(iii) on the capital amount of R7 340 229.73 at the rate of 11,5 per cent per annum from 1 November 2010 to date of payment.'

4 Paragraph IV of the order of the court a quo is amended to read as follows:

'IV The first and second defendants, jointly and severally, the one paying the other to be absolved, are ordered to pay the plaintiff's costs of suit, such costs to include the costs consequent upon the employment of two counsel and the qualifying fees of Messrs S Harcourt-Cooke and J Rhoda.'

JUDGMENT

BRAND JA (LEWIS, BOSIELO, SHONGWE AND THERON CONCURRING):

[1] The appellant, Mr Conrad Fourie, is an accountant by profession. Throughout the events that gave rise to these proceedings, he was employed by an auditor, Mr Francois du Preez, in Polokwane. The first respondent is FirstRand Bank Limited that trades under various names, in this instance as Wesbank. Proceedings commenced when FirstRand instituted action against Fourie and Du Preez in the North Gauteng High Court for payment of about R10 million, together with interest and costs. The action against Fourie was brought in terms of s 424 of the Companies Act 61 of 1973, alternatively, on the basis of the *actio legis Aquiliae*. As against Du Preez, FirstRand claimed that he was liable in delict for the same amount, jointly and severally with Fourie, on the basis that he was vicariously responsible for the wrongdoings of the latter.

[2] During the course of the trial in the court a quo, Du Preez took his own life. In consequence, the second respondent, Mr Jacobus Spangenberg, was appointed as the executor in his deceased estate and then substituted as a party to the action in his stead. At the end of the proceedings in the court a quo, Southwood J gave judgment in favour of FirstRand against Fourie on the basis of the main claim in terms of s 424. The delictual claim against Spangenberg, as Du Preez's executor, on the other hand, was dismissed with costs. This led to the present appeal by Fourie against FirstRand and the cross-appeal by FirstRand against Spangenberg, now cited as the second respondent. Both the appeal and the cross-appeal are with the leave of the court a quo. I shall refer to the first respondent as FirstRand or, depending on the context, as Wesbank; to the appellant as Fourie; and to the second respondent as Du Preez.

The claim against Fourie in terms of s 424 of the Companies Act

[3] In relevant part s 424 provides:

'(1) When it appears, whether it be in a winding-up, judicial management or otherwise, that any business of the company was or is being carried on recklessly or with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the Court may, on the application of the Master, the liquidator, the judicial manager, any creditor or member or contributory of the company, declare that any person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court may direct.

(2) *(a)* Where the Court makes any such declaration, it may give such further directions as it thinks proper for the purpose of giving effect to the declaration, and in particular may make provision . . .'

[4] FirstRand's claim under the section arose out of the conduct of the business of XHRS Investments 71 (Pty) Ltd, t/a Supreme Car (Supreme Car) during the period 16 August 2001 to 20 April 2004. Supreme Car was a trader in second-hand motor vehicles, first in Polokwane and later also in Tzaneen. On 16 November 2001 it entered into an agreement described as a Used Car Floor Plan Agreement with FirstRand t/a Wesbank. Pursuant to this agreement FirstRand advanced substantial sums of money to Supreme Car for the purchase of second-hand motor vehicles, which then became the property of FirstRand and thus constituted its security for the loan. In consequence an essential term of the floor plan agreement was that upon resale of the vehicle by Supreme Car, it was obliged to repay the sum advanced by FirstRand for the purchase of that vehicle, within the following week.

[5] During the first part of 2004 Wesbank discovered, however, that Supreme Car was in breach of this essential term in that vehicles financed pursuant to the floor plan agreement were resold without repayment of the purchase price. On 20 April 2004, FirstRand therefore cancelled the floor plan agreement. As at that date there were 136 vehicles subject to the floor plan agreement which FirstRand

had financed and for which Supreme Car had not paid. When FirstRand went to Supreme Car's premises to repossess the vehicles, it found only 84 of them. The remaining 52 were missing and could not be accounted for. In the event Supreme Car was provisionally wound-up on 17 May 2004 and placed under final liquidation on 15 June 2004. It became clear that at the date of its winding-up Supreme Car was hopelessly insolvent. The amount for which judgment was obtained against Fourie in the court a quo represented the agreed quantum of Supreme Car's outstanding liability to FirstRand under the floor plan agreement which could not be recovered from the company in the liquidation process.

[6] In holding Fourie personally liable for the debts of Supreme Car pursuant to s 424, the court a quo found that the requirement of the section had been established by FirstRand. In arriving at this conclusion the court essentially held: (a) that Fourie knowingly made false representations on behalf of Supreme Car to FirstRand by preparing false financial statements, and thus committed fraud; (b) that the business of Supreme Car was conducted in a manner that amounted to recklessness and that Fourie was knowingly a party to this conduct. With regard to the claim in delict against Du Preez, on the other hand, the court held, in broad outline, that although the false financial statements were prepared by Fourie in the course and scope of his employment as an employee of Du Preez, FirstRand had failed to establish a causal link between the false statements and the damages that it claimed. Eventually all these findings were challenged on appeal. The nature of the challenges will be better understood against the factual background that follows.

Background

[7] XHRS Investments 71 (Pty) Ltd started out life as a shelf company. On 16 August 2001 it became the corporate vehicle for the business of Supreme Car. On that date Mrs Rey Naude became its sole director and shareholder, while Du Preez was appointed as its auditor. As it turned out, however, Mrs Rey Naude lived in Yzerfontein in the Western Cape. She had nothing to do with the conduct

of Supreme Car's business. Its *de facto* manager was her son, Danie Naude (Naude). By all accounts Naude was a very successful salesman of second-hand motor vehicles, but he proved to be a disastrous financial administrator. In consequence, Du Preez instructed his employee, Fourie, to assist Naude in the financial administration of Supreme Car. It will be remembered that Du Preez took his own life during the course of the trial. As it happened, however, both Mrs Rey Naude and her son Danie, also passed away either before or shortly after the commencement of the proceedings in the court a quo.

[8] The exact ambit of Fourie's role in the conduct of Supreme Car's business is in dispute. According to FirstRand, Fourie was in effect its financial manager. Fourie's version, on the other hand, is that his authority extended to no more than cash flow management. Eventually, Southwood J decided this issue against Fourie. But, in the end, very little, if anything, turned on the outcome of this dispute. Of greater significance was the undisputed fact that Fourie prepared certain documents, nine in all, on behalf of Supreme Car that were destined to take centre stage in these proceedings. According to Fourie, these documents were no more than working papers, prepared with the sole purpose of facilitating his discussions with management. On the face of it, however, the documents had all the trappings of audited financial statements. Without any intent to prejudge the issue and only for lack of a better description, I propose to refer to them as financial statements.

[9] As I have said by way of introduction, the floor plan agreement between Supreme Car and Wesbank was entered into on 15 November 2001. At that stage the credit facility afforded in terms of the agreement was limited to R3 million. But as the business expanded, Supreme Car applied for and was granted increases in the facility to R4 million, then R8 million, then R9.3 million and finally R13 million. With regard to these increases FirstRand tendered the evidence of, amongst others, Mr Hentie Pienaar who was the manager of the Wesbank branch in Polokwane from May 2003 until September 2004 and Mr

Edward Symes, a credit manager in Wesbank's head-office credit control department.

[10] From their evidence and the documents they relied on, it emerged that, in broad strokes, Wesbank observed the following internal procedure every time an increase in the credit facility was sought. Supreme Car was required formally to apply to the branch manager in Polokwane and provide sufficient information to justify the increase. In order to meet this requirement, Supreme Car included its most recent financial statement, prepared by Fourie, to every one of its applications. Though Fourie prepared nine of these, FirstRand relied on the information contained in five of them when it increased the facility available to Supreme Car.

[11] Upon receipt of the application, the branch manager referred it to Wesbank's head-office together with his or her recommendation that the application be approved. At head-office it was assessed by one or more managers in the credit department. What was emphasised by Symes was that the application would only succeed if it appeared that the client's business was profitable and that it generated sufficient turnover to justify the credit limit requested. This was primarily determined, so Symes testified, with reference to the financial statements furnished. It was common cause that according to the financial statements prepared by Fourie, Supreme Car's business was growing, it was making substantial profits and was financially sound. Pienaar accordingly testified that if he knew that the financial statements provided by Supreme Car misrepresented its financial position in that its business was in fact not profitable nor financially sound, he would not have recommended an increase in the floor-plan credit facility as and when he did. In the same vein, Symes testified that, had the credit department in Wesbank's head-office been aware that the financial statements relied upon constituted a misrepresentation of Supreme Car's financial situation, the recurring increases in the credit facilities would not have been approved.

[12] Fourie also gave evidence. His answer to FirstRand's allegations of fraudulent misrepresentation, contained in the financial statements, typified a classic illustration of a cover-all defence. The financial statements, he said, were not, or were at least not intended, to communicate any representations to third parties about Supreme Car's financial position. In so far as they did in fact constitute representations, he denied that his representations were untrue. Moreover, and in any event, Fourie denied that Wesbank's officials relied on the representations contained in the financial statements when they approved the increases of Supreme Car's credit facilities. Finally he contended that, even if these increases were induced by fraudulent misrepresentations in the financial statements, FirstRand had failed to establish any causal link between these fraudulent misrepresentations, on the one hand, and Supreme Car's eventual inability to pay, on the other.

[13] This all-embracing defence unfortunately resulted in a trial of many days with oral and documentary evidence covering over 3 000 pages. Its further negative result, from Fourie's perspective, was that it often compelled him, under cross-examination, to defend positions that proved to be indefensible. This, in turn, led to a credibility finding by the court a quo, which was clearly well-founded, that Fourie was 'a most unsatisfactory witness' about whom '[t]here is no doubt that he will say anything to avoid being held liable for Supreme Car's indebtedness to the plaintiff.' Ultimately, the court a quo decided all the issues raised by Fourie's cover-all defence in favour of FirstRand.

[14] Every one of his factual findings was fully motivated by Southwood J in a most comprehensive judgment. Despite the argument by counsel for Fourie on appeal that some of these motivations reflected misdirections in the reasoning of the court a quo, I do not believe that is so. The time honoured approach by this court is, in sum, that absent any misdirections on the part of the trial court, a court of appeal is not permitted to interfere with findings of fact (see eg *R v Dhlumayo* 1948 (2) SA 677 (A) 705-706). In the event I find it unnecessary to

restate the detailed reasons given by the court a quo for its factual findings against Fourie which should, in my view, be endorsed by this court. It is sufficient to refer to the findings in broad outline only.

Did the financial statements constitute fraudulent misrepresentations?

[15] I first deal with Fourie's proposition that, save for the first of the five documents relied upon by FirstRand, these documents were prepared as working papers only and not as financial statements. As to the first document, Fourie conceded that he had presented it to FirstRand as the audited financial statement of Supreme Car for the financial period which ended on 28 February 2008. His predicament was, however, that the other four documents were for all intents and purposes in the same format as the first. They also pronounced themselves as financial statements of Supreme Car for the period mentioned; they also purported to include, first, an unqualified opinion by an independent auditor that the statement fairly represented the financial position of Supreme Car; and, second, a director's report to the same effect. Lastly, as in the case of the financial statement of 28 February 2008, most of these statements were also signed by either Du Preez or Fourie. Fourie's explanation for the format in which the documents were couched, was essentially that they were the products of a standard computer programme. But he could suggest no reason why these 'working papers' were formally signed by Du Preez or himself. Nor could he account for the fact that they were relied upon by Supreme Car in the same way as the first document, in support of their recurring applications for increased credit facilities.

[16] On appeal, counsel for Fourie argued that, since the documents did not comply with the provisions of the Companies Act with reference to financial statements, they should not be regarded as such. But as I see it, this argument misses the whole point. Seen in context, the documents were held out as a true and fair reflection of the financial position of Supreme Car which was vouched for by an independent financial expert; they were prepared by Fourie for that very

purpose; they were relied upon by Supreme Car in its recurring applications to FirstRand for an increase in its credit facility under the floor plan agreement; and Fourie knew that they would be used by Supreme Car for that purpose.

[17] In denying that the representations contained in the financial statements were untrue, Fourie maintained that during the period covered by the statements, Supreme Car's business was in fact growing; that it was in fact making a profit and that the business was indeed financially sound. In response to these allegations, FirstRand relied on the expert testimony of a chartered accountant, Mr Steven Harcourt-Cooke, that the contents of these documents were indeed misleading. Mr Harcourt-Cooke, however, experienced the fundamental difficulty that most of the source documents, which could notionally form the underlying basis of the financial statements, were no longer available. They disappeared under somewhat mysterious circumstances. But FirstRand also relied on admissions that the contents of the financial statements were misleading which were made by Fourie under oath on two occasions preceding the trial. The first of these occasions was in an affidavit deposed to by Fourie in answer to an application for the sequestration of his estate which was launched on behalf of Supreme Car, represented by Rey Naude, on 13 May 2004. The application did not proceed because Supreme Car was placed under provisional liquidation shortly thereafter. The second occasion was when Fourie testified during the inquiry in terms of s 417 of the Companies Act into the affairs of Supreme Car.

[18] In support of the sequestration application, Rey Naude alleged that Supreme Car was a creditor of Fourie because he had stolen large amounts of money from it. In the course of motivating these allegations, she also contended that Fourie misled her and her son, Danie Naude, about the financial situation of Supreme Car by the financial statements that he prepared for the company. These statements represented, she said, that the company had a healthy, profitable business which was properly administered and earning substantial profits, which representations all turned out to be untrue. The financial

statements she referred to included those relied upon by FirstRand in these proceedings. In his detailed answering affidavit Fourie denied that he had stolen or misappropriated money from Supreme Car. He also denied that he misled the Naudés in any way. In this regard he inter alia stated:

'In fact, by drawing up these statements, I realised that the gross profit of the business, as calculated from the figures given to me, was misstated, which led me to discover that some of the expenses relating to stock was not correctly accounted for . . . '

And:

'I emphatically deny that I could ever bring [the Naudés] under the impression that [Supreme Car] had a healthy, profitable business which was properly administered and earning substantial profits. On the contrary, [Danie Naude] was painfully aware of the financial predicament of the applicant and assured me repeatedly that he would see to it that [Supreme Car] trades out of its financial difficulties.'

[19] During the s 417 inquiry, Fourie admitted, for instance, that neither he nor Du Preez ever audited Supreme Car's books. His attempts in his evidence at the trial to retract or qualify this admission were described by Southwood J, rightly in my view, as singularly unconvincing. This means that Fourie's covering letter to FirstRand, in which he described the financial statement of 28 February 2002 as having been audited, as well as the contents of the statement itself, were blatantly untrue. Moreover, Southwood J held that, to the knowledge of Fourie, the same misrepresentation, namely that they were audited financial statements, was also made, at least by implication, in respect of the other financial statements relied upon by FirstRand. I do not believe this finding can be faulted.

[20] In addition, the evidence showed that the financial statements were demonstrably misleading in other material respects. In this regard one rather blatant example will, in my view, suffice. It transpired that Du Preez himself had lent Supreme Car the sum of R3.5 million at an interest rate of 36 per cent per annum, ie R105 000 per month. Neither this loan nor the exorbitant interest rate payable – and in fact paid – by Supreme Car, were reflected in any of the financial statements given to FirstRand. What these statements reflected instead

was an interest free loan by Rey Naude. Fourie's explanation, that he thought this made no difference, was patently untrue. To Fourie, as an accountant, the reason for the disguise must have been obvious: it is of importance to a bank that the shareholder of a company has committed his or her own funds and is not purely reliant on outside loans. Moreover, had the true state of affairs been disclosed, it would obviously reduce the profitability of the business. It would also have shown that Supreme Car was under capitalised in that it had to rely on funding by an outside party at an exorbitant interest rate.

Was the granting of credit induced by the fraudulent representations?

[21] This brings me to Fourie's challenge to the court a quo's finding that the recurring increases in Supreme Car's credit facilities under the floor plan agreement had been induced by the misleading financial statements. From the court a quo's judgment it is apparent that this finding was squarely based on the direct evidence of Pienaar and Symes that the increases were indeed so induced. As I understand Fourie's criticism of this finding, it amounts to this. Despite the rosy picture painted of Supreme Car's financial position in the misleading financial statements, so Fourie contended, the officials of Wesbank knew that Supreme Car at times experienced cash flow problems. Yet the applications for increased credit were consistently approved. I do not believe this argument warrants a detailed analysis. I say this because, as I understand the evidence in this regard, it supports the contrary position, namely that because the misleading financial statements painted such a rosy picture of Supreme Car's overall financial position, the Wesbank officials were prepared to overlook the cash flow problems that it experienced from time to time. This means, of course, that but for the misleading financial statements, the cash flow problems would have made Wesbank reconsider increasing Supreme Car's credit.

[22] Moreover, as I see it, it hardly lies in the mouth of Fourie – who knowingly set out to enable and assist Supreme Car to mislead FirstRand – to argue that if the bank's officials had been more careful he would not have succeeded in

misleading them. It is therefore not surprising that this kind of argument, albeit in slightly different context, received short shrift in the following statement which was endorsed by this court in *Oranje Benefit Society v Central Merchant Bank Ltd* 1976 (4) SA 659 (A) at 673H:

'But it appears to me that when once it is established that there has been any fraudulent misrepresentation or wilful concealment by which a person has been induced to enter into a contract it is no answer to his claim to be relieved from it to tell him that he might have known the truth by proper enquiry.'

(See also *Central Merchant Bank Ltd v Oranje Benefit Society* 1975 (4) SA 588 (C) 594E-H; J C de Wet and A H van Wyk *Die Suid-Afrikaanse Kontraktereg & Handelsreg* 5 ed vol 1 at 47.)

The requirement of a causal link between the fraudulent conduct and Supreme Car's inability to pay

[23] The final leg of Fourie's argument relied on the proposition that s 424 of the Companies Act requires a causal link between the fraudulent or reckless conduct of the company's business and its inability to pay. Since FirstRand had failed to establish this causal link between his fraudulent conduct relied upon and Supreme Car's inability to pay, so Fourie's argument went, the court a quo had erred in holding him liable under the section. For the proposition of law underlying the argument, Fourie sought to find authority in the decisions of this court in *L & P Plant Hire BK v Bosch* 2002 (2) SA 662 (SCA) and *Saincic v Industro-Clean (Pty) Ltd* 2009 (1) SA 538 (SCA).

[24] As its factual basis this argument relied on Fourie's own evidence, which in this respect stood uncontroverted, that during the period June 2003 to April 2004, Rey Naude and her son Danie used Supreme Car's funds to speculate in seaside properties in Yzerfontein which was experiencing a boom. So, for example, they spent R2.9 million of Supreme Car's money on completing a house which they expected to sell for between R5 million and R7 million, but which prospect never materialised. During the same period Danie Naude also

used about R2.7 million of Supreme Car's funds to pay for personal expenses. According to Fourie, this gave rise to a cash flow crisis which ultimately led to Supreme Car's financial demise.

[25] Southwood J accepted, for the sake of argument, that the decisions of this court relied upon constituted authority for the proposition on which Fourie's argument was founded. He also accepted that, as a matter of fact, Supreme Car's inability to pay had in the final instance been brought about by the reckless spending of the Naudés. His further conclusion was, however, that all this was of no avail to Fourie. The reason, so Southwood J held, was that Fourie was in any event involved in the Naudés' property speculation at Yzerfontein. In support of this finding he referred to Fourie's own evidence that he had travelled to Yzerfontein to view the properties and to advise the Naudés on the financial viability of some of these transactions. The same held true, so Southwood J found, of the use of Supreme Car's fund for the Naudés' personal debts. Though Fourie obviously knew what Naude was doing, there is no suggestion in his evidence that he took any further steps to stop him from using Supreme Car's funds or that he ever threatened to resign if Naude did not desist. What Southwood J therefore held, in sum, was that, apart from Fourie's fraudulent misrepresentation in the financial statements, the business of Supreme Car was in any event conducted recklessly and that Fourie was knowingly a party to the conduct of the business in this way. This finding in itself, so he concluded, constituted sufficient reason for Fourie to be held liable in terms of s 424.

[26] On appeal Fourie supported the finding that the business of Supreme Car was conducted in a manner that came down to recklessness. What he took issue with was the finding that he was a party to the conduct of the business in that way. But there is an enquiry that logically precedes the consideration of that issue. It concerns the correctness of the interpretation of this court's judgment in *L & P Plant Hire BK v Bosch* 2002 (2) SA 662 (SCA) contended for by Fourie. According to that interpretation, paras 39 and 40 of the *L & P Plant Hire*

judgment, in particular, constitute authority for the proposition that in order to sustain a claim by a creditor in terms of s 424, there must be a causal link between the reckless or fraudulent conduct relied upon and the company's inability to pay.

[27] *L & P Plant Hire* concerned s 64 of the Close Corporations Act 69 of 1984. But the slight difference between that section and s 424 of the Companies Act is of no consequence for present purposes. Fourie was therefore correct in arguing that the interpretation afforded to s 64 must also hold true for s 424. My difficulty lies with the meaning that Fourie ascribed to that judgment, namely that it imported a requirement of causation into s 64 and, by the same token, into s 424. My further difficulty is that it is clear from the judgments of both Harms JA and Farlam JA in *Saincic v Indo-Clean (Pty) Ltd* 2009 (1) SA 538 (SCA) that they both understood paras 39 and 40 of *L & P Plant Hire* in the same way as did Fourie. That much appears, for instance, from the following statement by Harms JA (para 29):

'These statements [in paras 39 and 40 of *L & P Plant Hire*] imply at least that as far as creditors are concerned there must be some or other causal link between the fraudulent conduct and the inability to pay the debt. In other words, it must be due to the fraudulent conduct that a particular creditor's debt cannot be repaid. In this regard the statements appear to be in conflict with some generalised earlier dicta that the section applies irrespective of causation. These conflicting approaches should be seen in context. Take the example of company A that incurs a liability towards creditor B for debt C while the business of A was conducted in a fraudulent manner. The fraud did not affect the solvency of the company and debt C was paid. Thereafter A incurs debt D at a time when the business was properly conducted. Due to other circumstances A cannot pay this amount to B. There can be little doubt that B would not be entitled to rely on s 424(1) in these circumstances. This example illustrates that the provision could not have intended that causation does not play any role at least as far as creditors are concerned. Whether the matter should rather be considered as part of the general discretion (as Farlam JA has done) or as a prerequisite (as *L & P Plant Hire* has done), makes no difference to the outcome of this case.'

[28] Why I have difficulty with this understanding of paras 39 and 40 of *L & P Plant Hire*, is that they were never intended to bear that meaning at all. As the scribe of those paragraphs I must confess that I find the need to explain them a somewhat humbling experience. But perhaps I should be grateful for the opportunity to avoid further confusion. The context of *L & P Plant Hire* was that there was no evidence that the close corporation concerned was unable to pay its debts. Read in that context, the judgment is rightly understood by Meskin (P M Meskin, B Galgut, J A Kunst, P Delport and Q Vorster *Henochsberg on the Companies Act* 5 ed vol 1 at 913) as saying no more than this: if, despite the reckless conduct of the company's business, it is nevertheless able to pay its debt to a particular creditor, that creditor has no cause of action under s 64 – or s 424 – against those responsible for the reckless conduct. This is so, the judgment in *L & P Plant Hire* explained, because s 424 was not intended to create a joint and several liability between the company and those responsible for the reckless conduct of its business, but rather to protect creditors against the prejudice they may suffer as a result of the business of the company being carried on in that way. Logic dictates that unless the company is unable to pay, no such prejudice would follow. That does not mean that the plaintiff-creditor has to liquidate or excuss the company, but only that there must be evidence of the company's inability to pay (see also *Saincic* para 27).

[29] What the *L & P Plant Hire* judgment did dissent from was the notion thus expressed in *Harri & others NNO v On-Line Management* 2001 (4) SA 1097 (T) 1099F:

'Like s 424 of the Companies Act [s 64 of the Close Corporations Act] is aimed at discouraging fraudulent, dishonest and reckless persons from abusing the protection which is provided by a corporate entity. The impact thereof should not be limited to instances where the corporate entity has been mismanaged to the extent that it is unable to meet the resultant financial obligations.'

[30] Thus understood, *L & P Plant Hire* finds no application in a case such as the present where the company proved to be hopelessly insolvent and was

clearly unable to pay the debt which the plaintiff-creditor seeks to recover from the miscreant conductor of the company's business in a fraudulent or reckless way, under s 424. Hence it is no authority for the proposition that in these circumstances the plaintiff-creditor is required to establish a causal link between the fraudulent or reckless conduct relied upon and the company's inability to pay its debt. On the contrary, *L & P Plant Hire* was never intended to deviate from those decisions of this court (such as *Howard v Herrigel* 1991 (2) SA 660 (A) 672C-E and *Philotex (Pty) Ltd v Snyman* 1998 (2) SA 138 (SCA) 142G-I) which expressly laid down the general principle that s 424 does not require proof of a causal link between the relevant conduct and the company's inability to pay the debt.

[31] *Saincic* recognised an exception to this general principle where the converse had been positively established, namely, that there was plainly no causal connection between the relevant conduct and the debt, as in the example given by Harms JA (para 29). But on the facts of this case, it is clear to me that it falls way outside the ambit of the envisaged exception. Even on the basis that Supreme Car's eventual financial downfall resulted from the extravagant reckless spending by the Naudés, it is apparent that the reckless spending was facilitated by funds obtained on credit from FirstRand. But for the ever increasing credit facilities extended to Supreme Car, its cash flow would simply not have allowed the Naudés' extravagant spending. These credit facilities, as we know, were in turn afforded on the basis of Fourie's fraudulent statements. In the circumstances the link between the fraudulent statements and the debt for which FirstRand seeks to hold Fourie liable cannot be denied. In this light it is strictly speaking unnecessary to consider whether or not the court a quo was right in finding that Fourie was party to the reckless spending by the Naudés. But, in any event, I am yet again unpersuaded that this factual finding resulted from any misdirection on the part of the court a quo. It follows that, in my view, that finding must also be confirmed.

[32] Finally and rather belatedly Fourie contended that, in the exercise of its discretion under s 424, the court a quo should have reduced the amount for which he was held liable by R3 million, on the basis that credit for that amount had already been extended to Supreme Car before his misrepresentations. I do not agree with this contention. Firstly, there is no indication that the court a quo had been asked to exercise its discretion in this way. On the contrary, the quantum of FirstRand's claim was agreed upon. Secondly, it must be remembered that the amount for which Fourie was held liable represented the balance that FirstRand was unable to recover from Supreme Car. In this light, there is no reason to think that if the credit facilities under the floor plan agreement were never raised beyond R3 million, FirstRand would not be able to recover its claim in full from the company in liquidation. Thirdly, I can think of no reason why, in the circumstances of this case, Fourie should be better off than if he were to be held liable in delict. Fourthly, this contention was never raised in Fourie's grounds of appeal.

[33] For these reasons I believe that Fourie's appeal should be dismissed with costs, including the costs of two counsel. This brings met to FirstRand's cross-appeal against the second respondent as the executor in the estate of Du Preez.

FirstRand's cross-appeal

[34] It was not disputed that Fourie acted in the course and scope of his employment as Du Preez's employee when he prepared the financial statements that were found to be fraudulent. If Fourie were to be held liable in delict for the loss resulting from the statements, Du Preez's vicarious responsibility would therefore follow. The court a quo found, however, that Fourie was not delictually liable, because FirstRand had failed to establish a causal link between the fraudulent statements and the damages claimed.

[35] In this regard Southwood J referred to the distinction between the concepts of factual causation, which is ordinarily determined by the so-called

'but-for' test, and legal causation, which is generally dependent on considerations of policy (see eg *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) 700E-701C). His factual findings following upon this distinction are encapsulated in the following statement:

'In the present case if the misrepresentations factually caused the loss there can be no doubt that the defendants should have to answer for this. The problem lies with the issue of factual causation. There were multiple misrepresentations but none has been shown to have caused any part of the indebtedness as at the termination of the floor plan agreement. The evidence shows rather that this indebtedness and Supreme Car's inability to meet its obligations in terms of the floor plan agreement was caused by the Naudés' uncontrolled . . . expenditure of Supreme Car's funds in respect of the property speculation at Yzerfontein which did not produce the anticipated profits and to pay personal expenses.'

[36] The statement appears to embrace two separate considerations. First, that FirstRand had to establish a causal link between each of the five individual misrepresentations relied upon and the damages it eventually suffered. Secondly, that, in any event, FirstRand had failed to establish that the damages it had suffered were caused by Fourie's misrepresentations, because on the evidence it resulted from the reckless spending of the Naudés. I shall deal with these two considerations in turn.

[37] The 'but-for' or '*causa sine qua non*' test, which is the accepted yardstick for determining factual causation, requires a hypothetical enquiry as to what probably would have happened, but-for the wrongful conduct of the defendant. If one applies this test to every one of the five misrepresentations relied upon by FirstRand individually, one may well arrive at the conclusion that its elimination would make no difference, because the consequences of the remaining misrepresentations would remain the same. But that, in my view, would be a wrong application of the test. It would mean that A, who committed a series of frauds, is in a better position than B, who committed only one.

[38] Properly analysed, FirstRand's case relied on a course of fraudulent conduct consisting of five misrepresentations, which gave rise to a globular loss. The factual finding of the court a quo – which should, in my view, be endorsed – showed that, but for the misrepresentations of the financial position of Supreme Car, the incremental credit facility, climbing from R3 million to R13 million, would not have been granted to Supreme Car. It follows, in my view, that but for this series of misrepresentations, the total facility of R13 million would not have been granted. Thus understood, Supreme Car's indebtedness at the time of the termination of the floor plan agreement, was directly caused by Fourie's misrepresentations.

[39] I do not believe that the fact of the Naudés' uncontrolled spending detracts from this conclusion in any way. In a sense, it is true to say that Supreme Car's inability to meet its obligations to FirstRand was caused by this uncontrolled spending. But on the evidence the various elements cannot be divorced from each other. Fourie's misrepresentations served two purposes; to cover up the uncontrolled spending; and, at the same time, to induce the increased credit facilities by FirstRand. The increased facilities in turn served to facilitate the uncontrolled spending. But for Fourie's misrepresentations, FirstRand would therefore not have been exposed to the risk of a claim that proved to be irrecoverable upon the liquidation of Supreme Car. Or, put differently, it would not have suffered the agreed amount of damages claimed.

[40] In this light I do not agree with the court a quo's finding that the delictual element of factual causation had not been established by FirstRand. This leads me to three further conclusions. First, Fourie is liable not only in terms of s 424, but also in delict for the agreed amount of damages claimed by FirstRand. Second, the second respondent, as executor in the deceased estate of Du Preez, is also liable, jointly and severally with Fourie, for these damages. Third, that the cross-appeal should be upheld with costs, including the costs of two counsel.

[41] In the result it is ordered:

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

2 The cross-appeal is upheld with costs, including the costs of two counsel.

3 Paragraph III of the order of the court a quo is set aside and replaced with the following:

‘III The second defendant is ordered to pay to the plaintiff, jointly and severally with the first defendant, the one paying the other to be absolved:

(iii) the capital amount of R7 340 229.73;

(iv) Interest up to and including 31 October 2010 in the sum of R5 361 200.93, less the sum of R1 193 595.21;

(v) Interest on the capital amount of R7 340 229.73 at the rate of 11,5 per cent per annum from 1 November 2010 to date of payment.’

4 Paragraph IV of the order of the court a quo is amended to read as follows:

‘IV The first and second defendants, jointly and severally, the one paying the other to be absolved, are ordered to pay the plaintiff’s costs of suit, such costs to include the costs consequent upon the employment of two counsel and the qualifying fees of Messrs S Harcourt-Cooke and J Rhoda.'

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F D J BRAND
JUDGE OF APPEAL

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