CASE NO. I 1141/93

JOSEF ISMAEL versus FIRST NATIONAL BANK OF NAMIBIA LTD

HANNAH.J

1996/11/2

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BANKING LAW:

Exchange of foreign currency by bank for local currency. True nature of transaction is one of an agreement for sale, not banking.

Bank has a right to set-off one account held by customer against another account held by that customer unless he has made some agreement, express or implied, to keep them separate. Bank has a right to combine the two accounts and set one against the other.

Bank has a right to retain a credit balance on a customer's account against a debt due from that customer.

CASE NO. I 1141/93

IN THE HIGH COURT OF NAMIBIA

In the matter between

JOSEF ISMAEL **PLAINTIFF**

versus

FIRST NATIONAL BANK OF

NAMIBIA LTD **DEFENDANT**

CORAM: HANNAH, J.

Heard on: 1996.09.02

Delivered on: 1996.11.29

JUDGMENT

HANNAH, J.: In this action the plaintiff seeks a declaration that the defendant bank was not entitled to make certain debits and a credit to accounts which he held with the bank and an order requiring the defendant to reverse the debits and credit and pay the appropriate interest due on his accounts. Alternatively, he claims payment of the sum of R309 005.55 with interest as sought in the main claim.

The claim as set out in the amended pleadings and the defence thereto is as follows. The plaintiff was a customer of the defendant bank. I will, as a matter of convenience for the most part refer to the defendant as "the bank". In July, 1990 he held two accounts at the bank's Oshakati branch, namely accounts numbered 5002723832 and 542904002188. Again for the sake of convenience I will refer to the two accounts as the "current account" and the "call account" respectively. On or about 26th July, 1990 the bank debited the current account with an amount of R309 005.55 plus an amount of RIO.00 without the permission of the plaintiff and contrary to the terms of his agreement with the bank. The following day the bank debited the call account with an amount of R400 00 0 and credited the current account with that amount again without the permission of the plaintiff and contrary to the terms of his agreement with the bank. As a result of these debits and credits the plaintiff was deprived of his entitlement to withdraw the sum of R309 005.55 from his accounts and was deprived of interest on the amount of R400 000 debited to the call account. The bank has failed or refused to reverse the debits and credit and accordingly the declaration and order previously mentioned is sought. In the alternative to his claim based in contract the plaintiff also makes a claim in delict. He alleges that on or about 23rd July, 1990 he

presented certain notes having the appearance of United States dollar bank notes to the manager of the bank's Oshakati branch and a person named Patrick who was employed in the foreign exchange department of the branch. The plaintiff asked Patrick to examine the notes and advise him whether they were genuine and whether they could be legally tendered in exchange for South African rands. He asked the manager and Patrick to exchange the notes for South African rands if they were in fact genuine. The plaintiff alleges that the bank owed him a duty of care to give correct and sound advice when responding to his request or to inform him that it was unable to give the advice sought. However, the branch manager and Patrick unlawfully and negligently advised the plaintiff that the notes were in fact genuine whereupon he exchanged them for R309 005.55. Alternatively, the bank employees acted wrongfully and negligently by failing to inform the plaintiff that they were unable to determine whether the notes were genuine or not. Subsequently the bank discovered that the notes were apparently not genuine and caused the debits and credit referred to in the main claim to be made. The plaintiff alleges that the notes were exchanged by him on behalf of two persons whose names are unknown to him. The sum of R3 09 005.55 was paid over to them and, as they have disappeared, it is impossible for him to recover that amount. Accordingly, the plaintiff pleads that he has suffered damages in the amount of R309 005.55 plus the interest set out in the main claim.

Turning now to the defendant's amended plea, it admits that it debited the plaintiff's current account with the amount of R309 005.55 and R10.00 in respect of charges, as alleged, but denies that

it did so without the permission of the plaintiff and contrary to the terms of the agreement between the parties. The defendant pleads that on or about 23rd July, 1990 the plaintiff requested two of its officials at the Oshakati branch to exchange US$120 000 notes for their rand equivalent in cash. As the Oshakati branch did not have equipment to check whether the notes were genuine it was orally agreed that if, when checked in Windhoek, the notes proved not to be genuine, the bank would be entitled to utilise the funds which the plaintiff had available at the Oshakati branch to recoup the rand amount paid to the plaintiff in cash. The defendant pleads that it was an implied, alternatively tacit, term of this agreement that in the event of the notes proving to be counterfeit it would be entitled to debit the plaintiff's current account with the amount in question and would be entitled to transfer to his current account from his call account the amount of R309 005.55, being the amount in question plus a charge. The exchange transaction was completed and on or about 26th July, 1990 the notes were checked in Windhoek and found not to be genuine. The bank was accordingly entitled to debit the plaintiff's current account with the amount of R309 005.55 plus a R10 charge. Alternatively, and in any event pursuant to the oral agreement between the parties, the bank became entitled to utilise the funds available in the plaintiff's call account in order to recoup the amount paid to the plaintiff in exchange for the counterfeit notes and did so on 27th July, 1990 by transferring the sum of R400 000 to the overdrawn current account thus reducing the overdraft. The defendant also alleges that on 27th July, 1990 the plaintiff actually authorised or ratified the transfer of R400 000 from his call account to his current account in

order to cover the amount of R309 005.55 which had been debited to it and to further reduce the overdraft. It is alleged that on 27th July the plaintiff confirmed this authorisation or ratification in writing.

With regard to the alternative claim the defendant denies that it owed the duty of care alleged by the plaintiff, denies that the plaintiff sought to be advised on the genuineness of the notes or that any such advice was given. The defendant repeats its plea to the main claim that it was agreed that if, when checked in Windhoek, the notes proved to be false, it would be entitled to utilise the funds which the plaintiff had available in order to recoup the rand amount paid to the plaintiff in cash. The defendant also denies that the plaintiff has suffered any damages.

In addition to the foregoing the defendant pleads that the alternative claim is vague, contradictory, bad in law and embarrassing and fails to make out an issuable case. The defendant points, in particular, to the absence of any allegation that the plaintiff informed its representatives that he was acting in a representative capacity and in consequence the duty of care contended for could not have arisen.

Having summarised the issues as they appear on the pleadings I now come to the evidence. The only witness to testify on the plaintiff's side was the plaintiff himself. His evidence, in essence, was as follows. Despite receiving no education and being unable to read or write English or Afrikaans he is a wealthy businessman operating a

wholesale and general dealer business at Oshakati. He is also involved in the fishing industry. The monthly turnover of his business is sometimes as high as N$3 000 000. He opened a current account at the Oshakati branch of the defendant bank in 1980 and used it for the purposes of his business. That he was held in high esteem by the bank is evidenced by the following entry in 1990 on his customer record: "Very wealthy man and a star customer. Worthy of VIP treatment." Then on 2nd June, 1990 he opened a call account with an amount of R500 000. He decided to open this account in order to save money and to service his current account should it be overdrawn.

Some two or three weeks prior to the transaction with which this action is concerned a man named Jeremia approached the plaintiff and asked for the use of an office to run an insurance business. The plaintiff agreed to rent him office space. On Sunday, 22nd July, 1990 Jeremia informed the plaintiff that two men wanted to exchange some United States dollars and the following day Jeremia came with the two men who were in possession of US$19 700 in notes. Jeremia asked the plaintiff if he would exchange the notes into rands but as the plaintiff had no knowledge of dollars, by which I take it he meant he did not know the current exchange rate, he decided to take them to his bank. In cross-examination the plaintiff said that his business often traded in United States dollars so there was nothing surprising about these two unknown men having a large amount of foreign currency in their possession. He agreed to assist them because he regarded them as potential customers and he was content to take the dollar notes to his bank on their behalf.

At the bank the plaintiff was served by Patrick Shoopala, the foreign exchange teller, and the plaintiff said that he asked Shoopala to look at the dollars and exchange them for rands. Both Shoopala and the branch manager, one Wilkie, then examined the notes. They examined them visually and by

touch and said that they were alright. The notes were then exchanged for R309 005.55 in cash. The plaintiff returned with this amount to his home where Jeremia and the two men were waiting for him and after the money was counted one of the two men gave Jeremia RIO 000 and Jeremia gave that sum to the plaintiff. The two men then left and the plaintiff did not see them again. The R10 000 was apparently given to the plaintiff for his trouble that day. In cross-examination it was suggested to the plaintiff that this was a highly unusual transaction but he was not prepared to agree that what occurred constituted a transaction and said
that ".... a person can give you just money." There had been no prior agreement that he would be remunerated.

The next to happen in connection with the exchange of currency, though the plaintiff said that at the time he was unaware of the connection, occurred on Wednesday, 25th July, 1990. On that day Johannes Shivolo, the branch marketing executive at Oshakati, came to see the plaintiff and told him that he must transfer R400 000 from his call account to his current account in order to cover an overdraft on the latter account. Shivolo had a document with him containing writing in English which the plaintiff could not understand but Shivolo explained that it was to authorise the transfer of R400 0 00 from call account to current account and the

plaintiff signed it. Under cross-examination the plaintiff reiterated that the document was complete save for his signature but then he changed tack completely. He said that in fact the document was blank when presented to him by Shivolo except for a cross to indicate where he should sign.

Shivolo only explained what the signature would authorise when the document was complete. And the fact that the document was blank when presented for signature on 25th July explains the fact that it is dated 27th July and not 25th July. On this version the contents of the document were probably written on 27th July. This volte face by the plaintiff in his evidence is for more than one reason significant when considering the credibility of his account but I will come to that later.

Continuing with the narrative, the plaintiff said that no mention was made of the currency exchange on that Wednesday but the following day he went to the bank and Wilkie informed him that the dollar notes were counterfeit. Wilkie also told him that he intended to debit his account with the amount received in exchange for the counterfeit notes and the plaintiff said that he told Wilkie that he did not accept that. He also told Wilkie that he would get the person who had brought the notes to him and he then went home, took the RIO 000 he had received from Jeremia, and reported what had happened to the police. He handed the police the RIO 000 and instructed them to search for Jeremia. Apparently the police found Jeremia but not the two men referred to by the plaintiff.

At this point I will briefly deal with the plaintiff's two bank accounts. At the beginning of July, 1990 the current account was

overdrawn by R158 754.21 but by 7th July it was in credit by R89 376.96. It then fluctuated from overdraft to credit as the month went on and by close of business on

23rd July it was R110 062.94 in credit. On 25th July it was overdrawn by R233 850.30 as a result of a cheque for R286 200.10 payable to Namibia Sugar Packers being debited and on 26th July the overdraft increased to R544 082.70 as a result of the sum of R3 09 005.55 plus a R10 charge being debited in respect of the counterfeit notes. On 27th July the overdraft was reduced to R144 082.70 with the transfer of R400 000 from the call account. The call account was opened on 29th June with a deposit of R500 000 and the only withdrawal in July was the withdrawal of R4 00 000 which was transferred to the current account in order to reduce the overdraft.

I will now highlight some of the answers given by the plaintiff during cross-examination. He was asked about the averment in the original particulars of claim that immediately prior to the exchange transaction the bank knew or should have known that the "Plaintiff would use the sum of R309 005.55 for any legal purpose he deemed meet." The plaintiff denied giving any such instruction to his lawyers. He gave his lawyers the same account as that given to the Court, he said. However, it was not until further particulars dated 23rd October, 1991 were delivered that an averment was made that the sum received in exchange for the notes was paid over to a third party.

The plaintiff was also asked about a statement which he made to the police on 26th July, 1990. According to the statement Jeremia, although his name is not mentioned, asked the plaintiff on 22nd July, 1990 if he had enough rands to exchange US$119 700 and the plaintiff then offered to exchange the dollars the following day at the bank. The plaintiff took the dollar notes from Jeremia and on Monday, 23rd July he went to the bank and exchanged them for R308 359.80. That figure is obviously incorrect by about R645. The statement continues:

> "I took the money and went to my business where I handed over the R3 08 359.80 to the person. This was the man who rented the office from me. After I had handed over the money to him, the man gave RIO 000 to me. I am still in possession of the R10 000. At about 13:00 the same day I was invited to a meal at the Guest House. I left the man to whom I had handed over the money, there at my business and went to the Guest House. I arrived back at my business at about 14:00 and found that the man was not in his office. Up to this date I have not seen him again. On Wednesday 90.7.25 at about 14:00 Johannes who works at the First National Bank, told me that the dollars that I had exchanged, were forged."

The plaintiff agreed that this was what he had told the police except for the last sentence in which reference is made to Johannes (obviously this is Johannes Shivolo) informing him on Wednesday, 25th July that the dollars were forged. The plaintiff said that he could not recall saying such a thing to the police. The plaintiff reiterated that the first time that he heard that the dollars were forged was on Thursday, 2 6th July which was, of course, the day when the statement was made. The only explanation the plaintiff could offer for what is set out in the statement was that there might have been a misunderstanding between himself and the police due to his lack of fluency in Afrikaans. A few lines later the statement continues:

"On 90.7.25 I for the first time heard at the bank that the dollars were forged."

Again the plaintiff said that this might have been as a result of a misunderstanding between himself and the police officer who took the statement because he did not go to the bank until 26th July and it was only on that day that he discovered that the dollar notes were forged.

Towards the beginning of the statement reference is made to Jeremia appearing at the plaintiff's business with two men the day after Jeremia was given an office there but nowhere in the statement is there a reference to two men arriving on Monday, 23rd July with the US$19 700 or of two men waiting with Jeremia while the notes were exchanged or of RIO 000 being given to Jeremia who in turn handed that sum to the plaintiff. The statement is singularly silent on the role played by the two unknown men in the transaction and the plaintiff was asked about this peculiarity. He said that it may have been a mistake by the police officer who took the statement or it may have been that he himself had not clarified it and told the right story. When pressed on this he said that maybe the police officer and himself had not understood each other.

Another statement made by the plaintiff on 6th August, 1990 was also put to him. According to that statement the earlier statement was incorrect when it stated that the dollars had been received from Jeremia. They had been received from a person introduced as Kloppers and the rands received in exchange had been handed to a certain Gideon who gave the plaintiff RIO OOO. However, the plaintiff had

little or no recollection of this second statement and insisted that he did not know the names of the two men who came with Jeremia that Monday morning. In fact later in cross-examination he denied that he gave the two names to the police and as the officer who took the statement is dead there the matter must lie.

Another matter upon which the plaintiff was cross-examined was his earlier testimony that Jeremia asked him to exchange the dollars and he obliged because he hoped that in the future the two men might become customers. It was pointed out to the plaintiff that this was not entirely consistent with what is set out in the further particulars of the particulars of claim where the following appears:

> "The two coloured males, who were at that stage unknown to plaintiff, expressed an interest in purchasing goods from Plaintiff through medium of paying for such goods with United States Dollars and Plaintiff informed them that he had no knowledge whatsoever of Dollars and was only prepared to sell goods to them in Rand. It was then agreed that the Dollars would be handed by these two coloured males to Plaintiff, which was duly done in the presence of Jeremiah Bualala, and Plaintiff would then attend upon the Defendant for purposes of cashing the Dollars and converting them into Rands. Subsequent to Defendant having paid to Plaintiff the Rand value of the said Dollars, the Plaintiff returned and in the presence of Jeremiah Bualala he paid to the coloured males the Rand value of the Dollars. The coloured males stated that they would return and purchase the goods with the Rand value which they had received from the plaintiff in respect of the Dollars but they never returned again."

The plaintiff was asked why he had not given this account in his earlier testimony and he said that he had just responded to the questions which had been asked and rather curiously he agreed, when it was put to him, that he truth of what he said was determined by the nature of the question being asked. Perhaps he did not mean this literally.

Another matter upon which the plaintiff was cross-examined was his evidence, and he was adamant about this, that the document authorising transfer of R400 000 from his call account to his current account was signed on Wednesday, 25th July, 1990 and not on 27th July as would appear from the face of the document. The plaintiff begrudgingly accepted that there was in existence in July, 1990 an overdraft limit on his current account of R355 000. In fact this is clear from the customer record kept by the branch. He also agreed that on 25th July his current account was well within that limit. It was only on 26th July when the sum of R309 005.55 was debited to the current account that the overdraft exceeded R355 000. To explain why he signed the transfer authorisation on 25th July when his overdraft was not in excess of its limit the plaintiff said that he thought the bank was requesting such authorisation in order to cover cheques issued by him in respect of purchases of sugar from Namibia Sugar Packers. Reference was made to cheques dated 3rd July, 1990 for an amount of R170 431.75, 7th July, 1990 for an amount of R171 619.20, 20th July, 1990 for an amount of R286 200.10, 28th July, 1990 for an amount of R115 651.70 and 31st July, 1990 for an amount of R300 723. The first two cheques had been debited to the current account early in the month and the last two had not been drawn when the transfer authorisation was signed and this was pointed out to the plaintiff. His reply was that he knew he would make the purchases in question and the transfer was supposed to cover these purchases. However, when it was further pointed out that this explanation would require clairvoyance on the part of the bank he said he had no answer but insisted he was telling the truth when saying

that the transfer authorisation was signed on 25th July. The plaintiff was also asked about further particulars which state that at the time when the request to transfer funds was made the bank did not inform the plaintiff that his accounts had been debited and credited in respect of the dollar transaction. It was pointed out that if the further particulars were correct the authorisation could not have been signed on 25th July because the debits and credit were not made until 26th and 27th July. All the plaintiff could do was to insist that he was telling the truth. What this part of the cross-examination led to was the suggestion that the document authorising transfer of funds was executed on 27th July at which time, on his own version, the plaintiff knew that the dollar notes were counterfeit. That it was given to confirm the plaintiff's acceptance that R3 09 005.55 had been debited to his current account and his acceptance that R400 000 would be transferred from his call account to cover the overdraft thus created in excess of the agreed limit. This the plaintiff denied reiterating that the transfer was to cover the purchase of sugar.

The defendant called a number of witnesses including an agent in the employ of the United States Secret Service who had examined a sample of the notes which the plaintiff exchanged on 23rd July, 1990. **I** need not set out his evidence. It is clear that the notes were counterfeit and although the quality is, in the agent's opinion, fair to poor he agreed that it would be difficult for someone without his training to detect the fact that they are counterfeit notes.

I come now to the evidence of Patrick Shoopala, the official at the Oshakati branch of the bank responsible for foreign exchange in July, 1990. He recalled the plaintiff coming to the branch on 23rd July, 1990 with US$19 700 in US$100 notes and said that it was the largest amount of dollar notes the branch had ever received. The notes were in a cardboard box and he opened it and showed the notes to the manager, Wilkie. There had been what the bank called "urgent spreadings" issued by the bank's head office warning that counterfeit notes were circulating in the country and accordingly he and Wilkie examined the notes. The notes looked as though they were genuine but Wilkie said he was not sure and informed the plaintiff of his uncertainty. He suggested to the plaintiff that the amount due on exchange be credited to his call account until the dollar notes were cleared. However, the plaintiff said he wanted the amount in cash and Wilkie agreed to this but told the plaintiff that if something happened the bank would have to withdraw the amount from his account. The plaintiff nodded his apparent assent. Shoopala then calculated the amount due and gave it to the plaintiff and the notes were sent to Windhoek. The only other evidence of any note given by this witness in evidence-in-chief was that the plaintiff was asked where he had obtained the dollar notes but he did not mention where.

Shoopala was cross-examined on his evidence concerning "urgent spreadings" and it was apparent that his recollection in this regard was rather hazy. However, a later witness, John Martin, who was at the time the bank's resources manager at Windhoek, not only confirmed that "urgent spreadings" dealing with counterfeit notes had been sent out before 23rd July, 1990 but he produced two sent

out in 1989. One dated 11th April, 1989 warned branches to exercise special caution when negotiating US$100 notes as a large number of forged notes of this denomination were in circulation and instructed branches to contact a Mr Grosse-Weischede at the Windhoek branch before cashing them. One dated 9th April, 1989 referred in similar terms to US$50 notes and stated that if doubt existed Grosse-Weischede should be consulted.

Shoopala was also asked whether, in view of the uncertainty surrounding the notes, head office was contacted. He could not remember but it is clear from other evidence that neither head office nor Grosse-Weischede was contacted. The witness was pressed on this and agreed that the failure by the branch to advise head office of the suspicions about the notes could have led to a loss of over R300 000. It was put to him that if he and the manager really had entertained doubts it was inconceivable that head office would not have been alerted. The witness had no answer. Shoopala was also questioned on his evidence that the notes were accepted on a collection basis. He insisted that they were and re-emphasised that the plaintiff wanted cash. As he was a creditworthy customer the bank agreed. However, later in cross-examination the witness agreed that the notes were not accepted on a collection basis. By this I think he probably meant that they were not accepted on a true collection basis.

Shoopala was also cross-examined on an affidavit which he made on 26th July, 1990 during police investigations. In that affidavit he said:

> "I thoroughly checked the dollars but I could detect no signs of the notes being counterfeit. I even compared the notes with dollar notes that I had in the bank but could see no difference. Even my Bank Manager, Mr Wilkie, checked the notes and he could also not find any difference."

Shoopala was asked how this married up with his evidence-in-chief and he said that the fact that they could see no difference between the notes brought by the plaintiff and other notes did not mean that they were sure that they were not counterfeit. He thought that he had told the police that they had not been sure about the notes but he had no recollection of this.

Another matter upon which Shoopala was cross-examined was the transaction whereby the plaintiff's call account was debited and the sum debited was then credited to his current account. He agreed that he and another bank employee, Johannes Shivolo, signed the debit form on the call account for R400 000 on 27th July and that on the same day a deposit slip for that amount was completed and signed by Shivolo. He said that this had been authorised by the plaintiff and his signature was therefore not required. Shoopala said that he was not aware of the reason for the transfer and he signed the withdrawal slip at the instance of Shivolo who showed him the plaintiff's authorisation.

Shoopala was also asked to explain the lack of documentation surrounding the exchange transaction. He agreed that if the dollar notes were accepted on a collection basis and there was doubt whether they were genuine or not it could be expected that something would be put in writing. However, he was unaware of that being done. It was put to Shoopala that the whole transaction was a major blunder. Nothing had been put in writing and head office had not

even been informed of the suspicions entertained by the branch. Shoopala had no answer.

Another document put to Shoopala was an internal head office memorandum setting out a brief history of what had happened. It was stated in this memorandum that the counterfeit notes were deposited to the credit of the plaintiff's account in the books of the Oshakati branch. Shoopala agreed that that statement did not reflect the true position and he was unable to give any explanation.

Parts of Shoopala's evidence under cross-examination were distinctly vague but this could well have been due to lapse of time. He was not sure, for example, whether head office had been notified of the receipt of the notes but when referred to his affidavit of 26th July was able to confirm that head office had indeed been notified by telex. Shoopala did not impress me as a particularly reliable witness and his competence at his job was also called in question. It became apparent that he was not entirely conversant with the form required to complete a foreign exchange transaction.

Before leaving Shoopala's evidence mention must be made of his evidence in re-examination that he did not see anything wrong with the notes and that if they had seen anything wrong they would not have continued with the transaction. This was very much in line with his affidavit dated 26th July, 1990 but not in accordance with his earlier evidence-in-chief that Wilkie was not sure about the authenticity of the notes.

Another of the bank's witnesses who testified as to the exchange transaction was Oscar Halidulu. He was head of the foreign exchange and investment department at the branch and after the plaintiff had brought in the dollar notes he was called by Shoopala. His evidence-in-chief as to what then took place corresponded for the most part with the account given by Shoopala. He said that Wilkie expressed doubts as to whether the notes were genuine and asked the plaintiff whether they could be sent to Windhoek on a collection basis and in the meantime their Namibian equivalent would be credited to the plaintiff's account. However, the plaintiff insisted on being given cash. Wilkie then agreed but told the plaintiff that if the notes were not good there would have to be a refund. Halidulu said that from what took place it was impossible to say whether any refund would take the form of cash or a debit but he heard no objection from the plaintiff. The plaintiff was then paid in cash and the dollar notes were parcelled and sent to Windhoek. He himself sent a telex to head office notifying it of the consignment. Halidulu said that he was not involved in the subsequent debiting of the plaintiff's account.

Halidulu was cross-examined on the difference between his evidence and that of Shoopala with regard to the reaction of the bank employees to the appearance of the notes. Whereas Shoopala had said that there was merely a degree of uncertainty whether the notes were genuine Halidulu insisted that Wilkie had not only expressed doubts concerning the authenticity of the notes but had said that there was a great possibility that they were not genuine.

Halidulu was also questioned on the apparent lack of concern at branch level to notes which had a great possibility of being counterfeit. Why were they not accepted on a collection basis when standing instructions required that to be done in the case of all US dollar notes? Halidulu's answer was that that was a matter for the branch manager who had a general discretion. Also, why was head office not informed that suspect notes were being consigned? Halidulu's answer was again that that was a matter for Wilkie and he was surprised that no such notification had been made. As with Shoopala this witness was also not conversant with all the requirements of exchange control regulations and the need for certain forms to be used when exchanging foreign bank notes.

I now come to the evidence of Johannes Shivolo who, in July, 1990 was the marketing executive at the Oshakati branch. As I understand it part of his duties was customer relations and it was he who was sent by Wilkie to go and see the plaintiff after the branch had been informed that the plaintiff's dollar notes were in fact counterfeit. His instructions were, he said, to obtain a written instruction so that the bank could transfer R4 00 000 from the plaintiff's call account because his current account was overdrawn. He explained to the plaintiff that he had been told to obtain his written instructions so as to debit his call account and credit his cheque account but the witness could not remember whether he had made any mention of the fact that the dollars previously exchanged by the plaintiff had been returned because they were counterfeit. Shivolo said that he wrote out the following on a plain piece of paper while in the plaintiff's office:

"Request to transfer

1990/7/27

The Manager FNB
Oshakati

Please transfer R4 00
000.00 from my call acc to
my current"

and the plaintiff then signed his name. Shivolo denied arriving with a document already written as first alleged by the plaintiff in his evidence and he denied asking the plaintiff to sign a blank document as later alleged by the plaintiff. He just wrote the document at the plaintiff's office, he said, gave it to the plaintiff and the plaintiff signed it where he, Shivolo, had made a mark with a cross.

Although Shivolo could not recall whether the matter of the US dollars had been raised he said, in terms, that neither he nor the plaintiff spoke about the purchase of sugar.

To round off the evidence adduced on behalf of the defendant I will refer briefly to the testimony given by two of its managerial staff. John Martin is at present the branch manager at Grootfontein but in 1990 was resources manager at Windhoek. His evidence touched on various procedures laid down by the bank but I intend to mention only a couple. He said that despite the "spreadings" from head office the Oshakati branch could have carried out the foreign exchange transaction without reporting to head office but he thought it strange that there was no prior communication. Had he been faced with the situation which confronted Wilkie he would have decided what course to take having regard to the standing of the client.

When asked what he, as a branch manager, would have done if the branch's biggest customer had presented US$119 000 for exchange and insisted on cash he said he would have cashed them. He would have done it on trust.

The matter of how a similar transaction would have been dealt with by Martin was taken further with him in crossexamination. He said that if suspicion existed about the notes then the proper course would be to phone in and ask for instructions. He agreed that not to do so would be reckless. If the notes did not look genuine or if, as was stated by Halidulu, there was a great possibility that they were counterfeit, Martin was in no doubt that he would only have taken the notes on a collection basis. After head office discovered that the notes were counterfeit Wilkie was about to be reprimanded but this was not pursued once it was learnt that the client's account had been debited.

The other official to whose evidence I will briefly refer is Josef Grosse-Weischede who, in 1990, was head of the foreign exchange department at head office. He confirmed that if a branch is not sure of the authenticity of foreign notes the usual practice is for head office to be contacted but that practice was not followed in the present case. He also said that following an incident such as an acceptance of counterfeit US$119 700 he would expect internal memos between head office and the branch concerned but the Oshakati branch file contained none. That he found surprising. On the question whether a bank is entitled to debit a client's account only if he agrees the witness was of the view that this was not the position.

It is sufficient if the client is advised and then, if he objects, the matter would be referred higher.

In final submissions Mr Bertelsman, for the defendant, launched a strong attack on the credibility of the plaintiff's testimony as to the source of the dollar notes.

Mr Bertelsman pointed to the inconsistencies which emerged between what was alleged in the pleadings, what was said in evidence-in-chief, what was said while under cross-examination and what was set out in the plaintiff's statements to the police. Also, the contradictions made by the plaintiff in his evidence when dealing with this aspect of the matter. If in truth the plaintiff was an innocent businessman duped by two criminals none of these inconsistencies and contradictions would have appeared, submitted Mr Bertelsman.' In response Mr Joubert, for the plaintiff, asked rhetorically why a wealthy businessman should have become knowingly involved in an illegal transaction and there is, of course, some force in this point. But it would be naive to think that wealthy businessmen never involve themselves in illegal transactions. Sometimes the temptation to increase their wealth is simply too great. What I find particularly puzzling is why the plaintiff should go to such trouble to assist two unknown men. To do so he had to pay a visit to the bank, wait while the transaction was completed and whilst on his way to the bank and on his way back had to take responsibility for a substantial sum of cash. Why do all this

when he could have told the two men to exchange the dollars at the bank themselves. One does not need a bank account to exchange foreign currency.

In his evidence-in-chief the plaintiff said that he agreed to assist the two men because he regarded them as potential customers but this does not explain why he did not tell them that they could complete the transaction themselves and return to his store. Nor does it explain why in the further particulars it was alleged in terms that the two men actually expressed an interest in purchasing goods and paying with US dollars and that it was this that motivated the plaintiff to go to the bank. And we know that, according to the plaintiff, no purchases were made when he returned with the local currency. Instead the plaintiff was given RIO 000. He was asked why he should be the recipient of such generosity but all he could reply, rather lamely I thought, was "a person can give you just money." A person can but usually a person does not.

It is true that once the plaintiff learnt that his call account was to be debited he went to the police and handed to the police a sum of RIO 000 and I bear that in mind. But nonetheless at the end of the day I regard the plaintiff's account of how it came about that he took US$119 700 to the bank as highly suspect. Although the evidence of Shoopala and Halidulu is open to criticism on various matters which I will refer to shortly they both said that the plaintiff remained silent when asked where the dollar notes came from. I think it perfectly normal that such a question should have been asked of a regular customer seeking to exchange a large quantity of US dollar notes and I am satisfied that the question was

asked. The plaintiff's silence is yet another reason to question the account which he gave to the Court.

As I have said, the evidence of Shoopala and Halidulu is also open to criticism in various respects. Shoopala said that the dollar notes looked genuine but Wilkie was not sure of their authenticity. This has to be contrasted with what he said in his affidavit dated 26th July, 1990, namely that Wilkie checked the notes but could find no difference between them and other dollar notes in the bank's possession. I also have regard to his evidence in reexamination that he did not see anything wrong with the notes and had they seen anything wrong they would not have proceeded with the transaction. And both Shoopala's testimony and his affidavit have to be contrasted with the evidence of Halidulu. He first said that Wilkie expressed doubt as to whether the notes were genuine and then, under cross-examination, said that Wilkie thought there was a great possibility that they were not genuine. The plaintiff's evidence was that Shoopala and Wilkie said that the notes were alright.

In view of the "urgent spreadings" "advising caution when accepting US$100 notes I should have thought Wilkie and Shoopala would have subjected the notes to careful scrutiny before accepting them and if there had been any doubt in their minds as to their authenticity head office would have been contacted. But no such step was taken. Nor was head office advised of the doubts entertained at branch level when the notes were sent to head office. In all the circumstances, I prefer the evidence of the plaintiff on this issue. It is quite apparent from the evidence before me that the staff at the Oshakati branch were slack in their approach to their work. They were not even aware that basic forms had to be used when exchanging

foreign currency over a certain limit. The probabilities are, in my judgment, that when one of their best customers came in with a large number of dollar notes they threw caution to the wind in order to please and simply accepted that the notes were genuine. A strong hint of this is to be found in the evidence of Shoopala himself when he agreed in reexamination that the plaintiff was regarded with respect and that the fact that the plaintiff was special influenced the bank's position. In my judgment, no question arose of the plaintiff being informed that if the notes were not genuine his account would be debited. It was only when head office discovered that the notes were counterfeit that the question of debiting the plaintiff's account arose. And then later, when the instant action was launched, Shoopala and Halidulu saw fit to avoid criticism by their superiors by concocting the account which they gave to the Court.

I now come to the debiting of the plaintiff's account. The defendant's case is, in the first place, that it was agreed on or about 23 rd July, 1990 that if the notes were not genuine the defendant would be entitled to debit the plaintiff's current account and make a corresponding transfer from his call account. I have already rejected that defence on the facts. An alternative defence avers that the defendant became entitled to utilise funds available in the plaintiff's call account in order to recoup the amount paid to the plaintiff in exchange for the counterfeit notes. The part of the plea which raises this defence is a little confusing because it refers also to the agreement made on 23rd July, 1990 but I think this is probably due to caution on the part of the pleader. What is being averred, as **I** understand it, is that the defendant was entitled, as a matter of law, to repayment if the notes were

counterfeit and the defendant was entitled to exact repayment by making a debit on the current account and then combining current and call account and setting off the debit against the call account which was in credit. Other bases for recouping the money paid out were advanced in argument. A further defence avers that on 27th July, 1990 the plaintiff actually authorised or ratified the transfer of R4 0 0 000 from his call account to his current account in order to cover the amount of R309 005.55 which had been debited to it and to reduce the overdraft and it is this plea with which I will now deal.

I have already summarised the evidence relating to the written instruction dated 27th July, 1990 and signed by the plaintiff and I do not intend to repeat it in any detail. On the plaintiff's version he was informed by Wilkie that the dollar notes were counterfeit on 26th July, 1990 and that he, Wilkie, intended to debit the plaintiff's account with the amount received in exchange for them. The plaintiff testified that he protested and told Wilkie that he did not accept that. The written instruction to transfer R400 000 from call account to current account had nothing to do with the threatened debit because it had been signed the previous day on 25th July. However, the plaintiff's evidence concerning the written instruction was completely unsatisfactory. At first the plaintiff said that the document was complete save for his signature when it was brought to him and then he said that it was blank save for a cross indicating where he should sign. In my judgment, the first of these two accounts was no mere slip by the plaintiff. He suddenly realised the pitfall which lay ahead in the shape of the date on the document and concocted the account of the document being blank in order to avoid that pitfall. He suddenly saw the problems which

would arise if he admitted signing a document dated 27th July authorising the transfer of R400 000 because the next question would inevitably be why authorise such a transfer when you had already been informed by the bank manager that he intended to make a debit to cover the amount paid by the bank for the counterfeit dollars? You must have realised that the transfer was being made for that purpose and you authorised it.

I have considered the evidence of both the plaintiff and Shivolo with regard to the written instruction dated 27th July, 1990 and I have no hesitation in preferring that of Shivolo. I find that the document was written out and signed on 27th July. I do not find anything sinister in the fact that the bank's usual withdrawal and deposit slips were not used and I reject the plaintiff's evidence that he thought the bank was requesting him to authorise the transfer to cover cheques issued for the purchase of sugar. He had been informed on 26th July that a debit would be made on his account to cover the payment made for the counterfeit dollars and whether he was expressly told by Shivolo what the written authorisation was for - Shivolo could not recall whether the matter of the US dollars had been raised - I am satisfied that when the plaintiff signed the written

authorisation on 27th July he knew perfectly well that he was authorising the debit that Wilkie said he would make. It is a clear inference from this that the plaintiff did not protest the debit when it was raised by Wilkie on the 26th. At that stage the plaintiff accepted his liability to repay the bank and it was only later that he revised his views. And I find nothing mysterious in

the fact that the authorisation was for the transfer of R400 000 and not R309 005.55. With the debit of R309 005.55 the plaintiff's overdraft on his current account went up to R542 855.89 and I can well understand that Wilkie would have thought it sensible, both from the point of view of the bank and that of the plaintiff, that a greater and rounder sum be transferred.

I therefore find that the document dated 27th July, 1990 was drawn and signed with the express purpose of authorising or ratifying the debit of R309 005.55 to cover the repayment to the bank of the money received for the counterfeit dollars. And it follows from this finding that the plaintiff's contractual claim must fail.

As the matter was canvassed I will also deal with the defendant's plea that regardless whether authorisation had been obtained from the plaintiff it was entitled to exact payment by debiting the plaintiff's current account and then utilise funds available in the call account in order to extinguish the plaintiff's liability.

The starting point of Mr Bertelsman's submissions on this part of the defendant's case was this. He submitted that the true nature of a transaction in terms of which a customer exchanges foreign currency at his bank for local currency is one of an agreement of sale. He relied on S v Katsikaris, 1980(3) 580 (A) at 590 C. Mr Joubert, however, submitted that the true nature of such a transaction is one of barter and he, in turn, relied upon certain observations in The Legal Aspect of Money by Mann (5th Ed.) at p. 196 and a certain passage in Goode's Payment Obligations in Commercial and

Financial Transactions at p. 5. I have read the passages referred to and I do not consider they support the proposition advanced by Mr Joubert. In the first publication referred to the following appears at p. 196:

> "If a Londoner exchanges a pound sterling note against 10 French francs at Cook's in London, or if he requests his banker to convert a sum of pounds sterling into 1 000 USA dollars or to pay dollars to his American creditor, nobody will hesitate to draw the inference that this customer buys francs and dollars as a commodity and that the delivery of the foreign money is the subject matter of a sale."

And the following appears in the second mentioned publication at p. 5:

> "If I order 100 United States dollars from my bank in readiness for a visit to the United States, my account being debited with the sterling equivalent at the date the dollars are made available to me, it is clear that I receive the dollars as a commodity, not as money, for I am buying them, not borrowing them. Again, if as a London currency dealer I purchase francs in exchange for marks, the transaction is one of barter, the exchange of one commodity for another."

The distinction which must be made, as I see it, is between a transaction where one commodity is exchanged for another and a transaction where money is paid for a commodity or received for a commodity. The former is barter whereas the latter is a sale and the transaction between the plaintiff and the defendant clearly fell into the latter category.

To continue with Mr Bertelsman's submissions, he submitted that the plaintiff was only entitled to payment in terms of the agreement of sale if the dollar notes purchased by the defendant were genuine.

They were not. They were worthless counterfeit notes and the defendant was entitled to repayment of the amount paid to the plaintiff unless he could put up a case that the dollar notes were sold voetstoots or that the defendant agreed to accept the risk of the transaction. This is not the plaintiff's case on the contractual claim.

Mr Bertelsman then pointed to the fact that the relationship of the plaintiff and defendant was one of banker and customer and, as such, debtor and creditor. This was accepted in the landmark case of Foley v Hill (1843 - 60) All E R Rep. 16 and has also been accepted by courts applying the Roman-Dutch system of law. See: Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd. 1995(4) SA 510 (C) at pp. 530 - 531 and the various cases cited therein.

Mr Bertelsman then relied on the specialities of banking law and submitted that the defendant had a right to set-off one account against the other. He referred in particular to Halesowen v Westminster Bank Ltd. 1970(3) All E R 473 where Lord Denning M.R. said at p. 477 F:

> ".... suppose a customer has one account in credit and another in debit. Has the banker a right to combine the two accounts so that he can set-off the debit against the credit, and be liable only for the balance? The answer to this question is: Yes, the banker has a right to combine the two accounts whenever he pleases, and to set-off one against the other, unless he has made some agreement, express or implied, to keep them separate."

Winn, L.J. agreed. Buckley, L.J., though dissenting on another point, also agreed on the point under

consideration. Lord Denning M.R. went on to point out that where a bank opens two accounts for a customer, one of which is a loan account and the other is a current account, there is usually an implied agreement that the bank will not combine the two accounts or set-off one against the other without the consent of the customer. Otherwise no customer could have any security in drawing a cheque on his current account. But that was not the position in the instant case. The plaintiff had a current account and a call account and there has been no suggestion made in the evidence that there was some agreement, either express or implied, that the defendant, as a matter of banking law, would not have a right to combine the two accounts and to set-off one against the other. Mr Joubert did not refer the Court to any authority on this special rule relating to bank accounts and I am unable to see any good reason not to apply it.

The foregoing submission was made to meet the eventuality of a finding that the debit to the current account was unauthorised. **I** have found that that was not the case. Mr Joubert argued that lack of authority to make the debit alters the position with regard to combining accounts but in the circumstances of this case I do not think it does. A banker has an unquestionable right to retain a credit balance on a customer's account against a debt due from that customer. See Paget's Law of Banking (9th ed.) at p. 411. He is entitled to set-off one debt against another. The debit to the current account followed by a transfer from the call account were mere book entries made to achieve that result. I

therefore hold that as a matter of law the defendant was entitled to combine the plaintiff's two accounts and to set-off one against the other or to set-off the plaintiff's indebtedness against the credit balance in his call account. This is a further ground for dismissing the plaintiff's contractual claim.

Turning now to the alternative claim in delict it is clear that the plaintiff bears the onus of proof. It is alleged that the plaintiff asked the defendant's employees to advise him whether the dollar notes were genuine and they negligently advised him that they were. Alternatively, the employees negligently failed to inform the plaintiff that they were unable to determine whether the notes were genuine or not. So far as the first allegation is concerned I am not satisfied on the evidence that the plaintiff did indeed ask for advice whether the notes were genuine. I have already said that I regard the plaintiff's account of how it came about that he took the counterfeit dollar notes to the bank as highly suspect and I think it unlikely that he would have raised any question of their authenticity or lack of

it. As I have already indicated, the probabilities are that when one of their best customers came in to the bank with a large number of dollar notes the bank employees threw caution to the wind in order to please and simply accepted that the notes were genuine.

As for the averment that the defendant owed the plaintiff a duty of care to inform the plaintiff that they were unable to determine whether the notes were genuine or not the

plaintiff faces a number of difficulties. I have been referred to no case, nor do I know of one, where a banker purchasing foreign currency has been held liable to the seller for failing to inform him that he, the banker, is unable to determine whether the notes being sold are genuine or not. A banker is not in the business of detecting forged currency and I very much doubt whether reason and good sense, or policy for that matter, require that such a duty be imposed. However, putting that matter to one side, the plaintiff has to prove that the conduct alleged caused him to sustain loss and that that loss was reasonably foreseeable. This, it is quite clear, he has singularly failed to do. His loss, if there was a loss, was a consequence of him acting as agent for two unknown men to whom he says the amount of R309 005.55 was handed over. He did not disclose that fact to the bank. In the ordinary course of events an innocent person who seeks to exchange counterfeit currency at a bank will have already suffered his loss as a result of some previous transaction in which he acquired the counterfeit currency. In the ordinary course of events a bank would not foresee that he is acting **as an agent on behalf of strangers against whom he will have no recourse. That, in my opinion, was the position in the present case and it is sufficient to dispose of the plaintiff's claim in delict.**

HANNAH, JUDGE

For the foregoing reasons the action is dismissed with costs including the costs of two counsel.

ON BEHALF OF THE PLAINTIFF:	MR JOUBERT with MR G COETZEE Lorentz & Bone
Instructed by:	
ON BEHALF OF THE RESPONDENT:	MR BERTELSMANN with MRS VIVIER-TURCK Fisher, Quarmby & Pfeifer
Instructed by:	