**(?) CASE NO.** I 1307/99

**IN THE HIGH COURT NAMIBIA**

In the matter between:

**BANK WINDHOEK LTD** **PLAINTIFF**

versus

**MARIO MARINE GUTERRES** **DEFENDANT**

**CORAM:** HOFF, A.J

Heard on: 1999/08/31; 1999/09/1 & 23; 1999/10/11

Delivered: 2000/01/28

**JUDGMENT:**

**HOFF, A.J:** Plaintiff instituted action against defendant and states its main claim as follows in its amended declaration:

> "Defendant is indebted to plaintiff in the sum of N$25 049,98 as at 12 January 1996 in respect of monies lent and advanced by plaintiff to defendant at defendant's special instance and request, together with interest thereon as agreed between the parties and referred to hereinafter, during the period 30 November 1995 to the end of December

1995 at Windhoek, Namibia."

The alternative claim reads ***inter alia*** as follows:

> "On 30 November 1995 and on 4 December 1995 at plaintiffs Kudu Branch, Independence Avenue, Windhoek, plaintiff entered into an oral agreement with defendant in terms whereof plaintiff granted credit to defendant, on the defendant's existing overdraft account, in the sums of NS11 045,96 and NS11 023,30 respectively on condition that two cheque deposits/transfers from the United Kingdom emanating from Lloyds Bank, London, drawn by one Mancor in favour of defendant, would be honoured/paid.
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> In the ***bona fide*** and reasonable belief that the above-mentioned payments would be made as envisaged hereinabove, plaintiff allowed withdrawals by the defendant against the conditional credits as aforesaid."

Mr Oosthuizen who appeared on behalf of plaintiff addressed the court before any evidence was led and informed the Court that the main claim rests on a contractual basis and the alternative claim on the basis of enrichment.

Defendant denied that monies were lent and advanced to him by plaintiff. He pleaded ***inter alia*** that the parties concluded an agreement in terms whereof plaintiff agreed to allow the defendant to deposit two cheques in the amounts of N$ll 045,96 and N$l 1 023,30 respectively drawn by one Steve Mancor in favour of defendant and that it was agreed that plaintiff would only pay these amounts in the event of those two cheques being honoured.

Defendant further pleaded that the plaintiff misrepresented to him that the cheques had been honoured and that on the strength of such misrepresentation defendant acted to his detriment by withdrawing such monies and by paying the amounts to the said Steve Mancor and that he was not obliged to pay plaintiff the amounts claimed.

The only witness who was called to testify on behalf of plaintiff was one Carla da Silva. She testified that she is employed by plaintiff and was appointed in the foreign exchange department from about 1991 and was also so employed during 1995 and 1996. On 30 November 1995 the defendant together with one Mancor approached her and she was informed by defendant that Mancor wanted to invest some money in his business. Mancor had a chequebook with him from Lloyds Bank, London and he wanted to write a cheque in favour of defendant. Defendant asked whether the funds could be made available immediately. This request was eventually granted the same day on condition that should the cheque not be honoured by Lloyds Bank defendant would be liable to repay the amount deposited immediately. On 4 December 1995 the events of 30 November 1995 were repeated. Lloyds Bank, London subsequently dishonoured both cheques. The defendant was informed during January 1996 that the cheques had been dishonoured and when defendant and Mancor subsequently visited Ms da Silva at the branch where she was employed Mancor said that he would repay the amounts in questions. She denied as alleged by defendant in his plea that plaintiff agreed and undertook to ascertain and establish whether the two cheques would be honoured and then thereafter to allow the two respective amounts to be withdrawn by defendant in order to pay those amounts over to Mancor. She testified that she told defendant that his overdraft account would be credited but if he decided to withdraw beforehand he would be fully liable should the cheques be returned dishonoured. She denied any misrepresentation to defendant by plaintiff.

The case for plaintiff was closed after cross-examination of Ms da Silva. Mr Mouton who appeared on behalf of defendant applied for absolution from the instance at this stage.

He argued that the evidence led on behalf of the plaintiff was at variance with and did not support the pleadings of plaintiff in respect of both the main and alternative claims. It was also argued in respect of both the main and alternative claims that certain essential allegations must

appear in the pleadings and must be proved by a plaintiff and it was argued that plaintiff failed in this regard.

It was submitted that in respect of the main claim of monies lent and advanced that it was in effect a loan agreement and that none of the requirements of a loan agreement had been complied with and that testimony on behalf of plaintiff specifically stated that the agreement between plaintiff and defendant was not a loan agreement.

In respect of the alternative claim the same argument was presented viz that in order to succeed in its claim based on the ***condictio indebiti*** certain essential allegations must be pleaded and must also be proved by a plaintiff that plaintiff ***in casu*** failed to do so. Mr Oosthuizen opposed the application. The court granted the application for absolution from the instance in respect of the main claim but refused the application in respect of the alternative claim. Reasons for the ruling were given which need not

be repeated save to mention that it was ruled in respect of the alternative claim that

the essential requirements for a claim based on the ***condictio indibiti*** were not alleged in plaintiffs pleadings but that the evidence presented supports the alternative claim of plaintiff as formulated in the amended declaration of the plaintiff and is essentially of a contractual nature.

Defendant testified that he together with one Mancor approached Mrs da Silva of Bank Windhoek on two different occasions. It was agreed on both occasions that defendant could deposit an amount of £2000.00 into his personal account and that after those cheques had been cleared defendant would be entitled to withdraw form his account.

Mancor on each occasion was present during the discussions and Mancor on both occasions completed the cheques, signed it and handed it over to Ms da Silva. It was explained to Ms da

Silva that Mancor did not have the required identity documents to open a bank account and they enquired whether Mancor could deposit cheques into the account of defendant. It was explained to Ms da Silva that the money would eventually be withdrawn by defendant and paid over to Mancor.

Defendant denied that there was an agreement that if the cheques were not met that he had to repay the bank/plaintiff.

He testified that the next day he went to the bank where he saw that the amount deposited the previous day was reflected on his account and he then withdrew an amount of N$10 000.00 and gave it to Mancor. He also gave smaller amounts to
Mancor in cash, on some occasions he paid Mancor by cheque and on some occasions he paid some accounts on behalf of Mancor.

He testified that after the plaintiff had informed him that the cheques had not been honoured Mancor accompanied him to the bank where Mancor accepted liability and agreed to pay back the amounts deposited. Defendant subsequently never heard from Mancor and he at some stage afterwards laid a criminal charge against Mancor with the Namibian Police.

It is common cause that defendant had two accounts with plaintiff bank viz a personal account and a business account and that the two cheques were deposited into the personal account.

Ms da Silva testified that the normal banking procedure when a foreign cheque is deposited is to deal with it on a collection basis. This means that the cheque is physically sent to the issuing bank (in this case Lloyds Bank, London). A reply is usually received after 2-3 weeks. Only if the cheque has been cleared is a client allowed to make withdrawals.

According to Ms da Silva the wife of defendant was a permanent staff member of plaintiff at

that stage. Defendant informed her that he needed to make withdrawals immediately as he was in urgent need of equipment for the business. She contacted the international department of plaintiff and she was informed that she could use her discretion. She then repeatedly informed defendant that should he make withdrawals and the cheques are not honoured he would be liable to repay the amounts in question.

She denied giving defendant the unconditional authority to make immediate withdrawals. It is further common cause that credit reflecting the amount deposited by defendant appeared on the same day after the cheques had been deposited.

In his address on behalf of plaintiff Mr Oosthuizen analysed the testimony of defendant and submitted that the witness on behalf of plaintiff was a more reliable and truthful witness than the defendant and levelled the following criticisms against the testimony of defendant:

a) that during the cross-examination of Ms da Silva it was put to her that a Mr Frans Beukes, a credit manager of plaintiff bank gave authority to defendant to make withdrawals after the cheques were deposited at the stage when defendant wanted to make withdrawals whereas defendant in his evidence in chief stated at some time after the cheques were deposited he looked at his bank statement saw the credit reflected in his statements and withdrew money. It was only during cross-examination that defendant mentioned that he deducted that Frans Beukes gave him authority to withdraw money.

b) Defendant testified in his evidence in chief testified that the first cheque was deposited on 30 November 1995, that he went to the bank the next day, withdrew the amount of NS10.000.00 which he gave to Mancor while his bank statement reflects that it was on the same day that he made a withdrawal and that the amount was not N$ 10,000.00 but N$6 000.00.

c) Defendant during cross-examination stated that when Mancor wrote out the cheque and handed it over to Ms da Silva she immediately said that it was a good cheque, a cheque

from an elite banking institution. This was not put to Ms da Silva during cross-examination. It was argued that defendant mentioned this in an attempt to show that Ms da Silva gave him authority to make withdrawals on the same day.

d) During cross-examination new evidence was presented by defendant by stating that Ms da Silva suggested that they should construe the cheque that Mancor was about to deposit into the account of defendant as a gift. This was never put to Ms da Silva during cross-examination.

It was submitted on behalf of plaintiff that the fact withdrawals were made almost immediately after the cheques were deposited is support for the testimony of Ms da Silva that defendant requested that the cheques should immediately be reflected in his statement as credits since he was in need of money to buy certain equipment. Regarding the general practices of financial institutions the Court was referred to Lawsa Volume 1 paragraph 496 p. 458 where it is stated that: "Banks using the services of another bank for the purpose of giving effect to the instructions of the applicant for the credit ...? do so for the account and at the risk of the applicant. Banks assume no liability or responsibility if the instruction they transmit are not carried out. Applicant is bound by and liable to indemnify banks against all obligations and responsibilities imposed by foreign laws and units."

Reference was also made to the case of ***Absa Bank Limited v I.W. Blumberg and Wilkinson*** 1997(3) SA 669 SCA p.675H - 676C where the following appears:

> "The fact that the appellant might have permitted the respondent to draw cheques against uncleared effects, despite there being no agreement in this regard, would not excuse the respondents in law from liability to make payment to the appellant. The appellant was perfectly entitled to choose to honour such cheques, notwithstanding the fact that the effects earlier deposited had not been cleared, and to waive any benefit afforded to it in this regard by its agreement with the respondent. It would be

> strange indeed if it were permissible for a customer of a bank to draw a cheque on the bank, requesting the bank to honour the cheque, and thereafter, when the bank honoured the cheque despite the absence of an overdraft facility, to them plead that this would have resulted in an overdraft facility which had not been agreed upon. In essence this is precisely what the respondent is contending for. It hardly lies in the mouth of the respondent, who drew the two cheques in question against uncleared effects, albeit contrary to the agreement between the parties, to be heard to complain that the bank should not have honoured the cheques and debited his account. Put differently, it is the appellant, so it is suggested, who must bear the loss if the uncleared effects were not met. This can not be so. ...
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> As pointed out by ***Lozens - Hardy Mr in Cuthbert*** v ***Robarts, Lubbock & Co*** [1909] 2 Ch 226 at 233:
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> > 'If a customer draws a cheque for a sum in excess of the amount standing to the credit of his current account, it is really a request for a loan, and if the cheque is honoured, the customer has borrowed money.'"

It was submitted that both on the agreement reached between the parties ie that plaintiff was entitled to reverse the initial credits in the event of the cheques being dishonoured and on the basis of undue enrichment that plaintiff should succeed in its claim against defendant.

Mr Oosthuizen subsequently in terms of Clause 4.13 of the Rules of the Bar Society of Namibia referred the Court to the case of ***Absa Bank Ltd. v De Klerk*** 1998(1) SA 861 WLD for consideration by this Court.

Mr Mouton submitted that if defendant had the intention of benefiting from the cheques himself he could simply have deposited the cheques into his account and follow the normal banking procedure but he did not do it and took Mancor along with him to the bank in order to

reach some kind of an agreement with the bank. He further submitted that if defendant wanted to have funds in order to promote his business he could have applied for a loan or for an increase of his facilities but that defendant did not want money from Mancor to promote his business.

He argued that the probabilities are in favour of the version defendant presented to court. He submitted that Ms da Silva specifically testified that the agreement between the parties was not a loan agreement.

Mr Mouton argued that it was not necessary for Ms da Silva to repeatedly inform defendant that if he make withdrawals it would be at his own risk if it is in any case normal banking practice to debit a client's account if he has overdrawn on his account and that it is in any case normal banking practice to reverse credits if cheques are not honoured. He submitted that defendant did all he could in order to involve the bank from the beginning with Mancor to ensure that no one would suffer any prejudice. He submitted that there is support for the version of defendant in the fact that Ms da Silva testified that Mancor in the presence of Mr Zeelie a bank manager said he would repay the bank.

Mr Mouton submitted that the alternative claim of plaintiff is in a claim based on overdraft facilities which in essence a loan agreement. He referred to Amler's Precedents of Pleadings where it is stated that a claim by a banker on an overdraft is simply a claim of monies lent and advanced which are repayble on demand. He argued the evidence of Ms da Silva to the effect that the agreement reached between the parties is not a loan agreement is irreconsilable with the particulars of claim of plaintiff.

Regarding the question of enrichment Mr Mouton referred the Court to the works Lawsa Volume 9 p.46 ***et seq*** where it is stated that although there is no general action based on enrichment in South African law, there are nonetheless certain general requirements for any action based on enrichment. According to him the plaintiff ***in casu*** cannot rely on the ***condictio indebiti*** and that the ***condictio sine causa*** is the appropriate action.

He argued that plaintiff did not succeed in proving these requirements. He submitted that Ms

da Silva did not follow normal banking practice and when she excercised her discretion to grant defendant authority to immediately withdraw from his account she

took a calculated risk unilaterally and without any conduct on defendant's part

inducing it. The bank must take the risk of the acts of its employees and cannot rely

on normal banking procedure where they failed to follow such procedures.

He further posed the question why it was necessary for Mr Zeelie a senior manager on 12 January 1996 to express himself in Exhibit E in the following manner:

"The only chance to recover the monies with our client, Mr Gutteres and to give him a personal loan of NS70,000.00 over 60 months. We will call him in and negotiate with him in this regard.

If, as testified by Ms da Silva, the agreement was that defendant could make withdrawals at his own risk such suggested re-negotiation was unnecessary. Mr Mouton submitted that the reason why this was necessary was because the agreement reached between the parties were on other terms as testified by Ms da Silva and that the plaintiff bank found itself in a dilemma.

Referring to the case of ***Absa Bank Ltd*** v ***I. W. Blumberg and Wdkenson*** it was pointed out that that case is distinguishable from the one under consideration inter alia in the following aspects:

e) in the ***Absa Bank v Blumberg*** case defendant did not plead estoppel whereas ***in casu*** defendant pleaded estoppel as a defence;

f) defendant Blumberg admitted that the bank following normal banking practices was entitled to reverse a credit given to a client and ***in casu*** Gutteres never admitted that there was an agreement that credits given could be reversed. He submitted that the defendant Gutteres pleaded and proved the defence of estoppel.

Referring to the ***Absa Bank*** v ***De Klerk*** case it was submitted that that case is also distinguishable from the one under consideration in the following respects:

g) in the ***Absa Bank v De Klerk*** case the court ruled that the monies were paid due to a mistake. In the case under consideration plaintiff s case was that monies were paid as a result of an agreement and not due to a mistake;

h) in the ***Absa Bank*** v ***De Klerk*** case plaintiff reasonably but mistakenly believed that foreign cheques were met and allowed defendant to withdraw against such unpaid cheques. /// ***casu*** plaintiff bank was all along aware of the fact that cheques still had to be cleared and honoured but nevertheless allowed defendant to withdraw against those cheques on certain conditions.

i) Defendant in the ***Absa Bank v De Klerk*** case also raised the defence of estoppel but failed to show that he acted to his prejudice having relied on the misrepresentation of plaintiff that the cheques had been cleared. The evidence of Gutteres ***in casu*** (which was not rebutted by plaintiff) was that the monies he received was utilized by Mancor and not by himself.

j) In the ***Absa Bank*** v ***De Klerk*** case the court found that there was no negligence on the part of Absa Bank - the manager having taken all necessary precautions to ensure that funds were available to pay defendant (De Klerk) although these funds due to a mistake were not available.

***In casu*** it was never the evidence of plaintiff that the bank followed normal procedure and it must therefore be assumed that the bank was negligent. Plaintiff (Bank Windhoek) did not take all the necessary precautions and was therefore negligent.

It was submitted that the plea of estoppel should be upheld.

This court in an application for absolution from the instance brought by defendant at the conclusion of the evidence presented on behalf of plaintiff ruled against plaintiff on its claim for undue enrichment and allowed plaintiff only to proceed with a claim based contract. The court at that stage gave its reasons for its ruling and finds it unnecessary to repeat those reasons or to consider the arguments presented on behalf of plaintiff regarding the question of

undue enrichment, afresh.

I am of the opinion that the Court need at this stage only determine what the terms were of the agreement reached between the parties at the stage when the cheques were deposited into the personal account of the defendant.

If the Court finds on a preponderance of probabilities that the version presented on behalf of plaintiff is to be preferred then defendant would be liable to pay those amounts claimed by plaintiff.

The Court must look at the probabilities of each version presented and must make a finding regarding the credibility of the witnesses.

The criticism levelled against the testimony of defendant by Mr Oosthuizen is in my view justified.

One of the criticisms was that defendant's testimony regarding the amount of and the date when he made his first withdrawal after the first Mancor cheque had been deposited differed substantially from the information on his bank statement. Defendant later tried to rectify this during cross-examination by explaining that he confused that withdrawal with another withdrawal from his business account during the same period of time. Defendant further explained that he never perused his bank statements prior to his testimony. I find it highly unlikely that defendant would on this score have come to court so unprepared. That aspect of his evidence was highly relevant.

Mr Mouton during cross-examination and during his address attached much significance to and questioned the testimony of Ms da Silva on the point that she repeatedly informed defendant that if the cheques were not to be honoured that he would be liable to repay the

bank - this being normal banking practice in any case. I do not find her reminding defendant of the risk involved should he make withdrawals under those circumstances to be unusual. I am of the opinion that if one for the sake of argument accepts that her testimony relating to the rest of the agreement reached between the parties is correct and in particular the purpose why the cheques had been deposited then her warning to defendant regarding the risk involved seems to me a most natural thing to say especially seen in the light that she at that stage had already deviated from normal banking practice by not dealing with the cheques on a collection basis and that by exercising the discretion in allowing him to make withdrawals she herself took a risk.

Defendant in his plea stated that plaintiff misrepresented to him that the cheques in question had been honoured and acting on the strength of such misrepresentation he acted to his detriment and that plaintiff at the time knowing that he would act on such representation owed a duty of care towards him by providing him with the correct information. It was further pleaded that plaintiff was negligent in making such representation without making a proper investigation into the financial position of Mancor.

If it proved to be true that he had been repeated warned of the risk involved and the condition under which the credits would appear on his bank statement then obviously there would be no negligent misrepresentation by plaintiff and defendant's defence of estoppel would fail even if the other requirements of a defence of estoppel were proved. Mr Mouton, in my view, during his argument that defendant should succeed in his defence of estoppel, correctly submitted, that it has not been proved that defendant did not suffer prejudice i.e. that defendant did not pay the monies withdrawn from his personal account to Mancor.

I however do not agree with the submission made on behalf of defendant that the fact that a departmental disciplinary hearing was held in respect of the handling of the matter by Ms da Silva is necessarily support for the view that her conduct amounted under the circumstances to negligent misrepresentation and that management therefor wanted to discipline her.

Regarding the evidence presented on behalf of plaintiff it has correctly been submitted by Mr Mouton that plaintiff is ***dominus litus*** and bears the onus to prove its claim on a preponderance of probabilities. One witness ie Ms da Silva testified on behalf of plaintiff. It also appears from her evidence that another employee of plaintiff bank was present when defendant and Ms da Silva discussed the terms of the agreement. This person for reasons unknown to this court was however not called by plaintiff as a witness. It also appears that between 30 November 1995 and 19 December 1995 defendant made 14 separate withdrawals from his account for the total amount of

NS20 071.39. Defendant testified that he paid to Mancor all the money deposited in his personal bank account by Mancor. This was done by cash payments, by payments to Mancor and by payment to third parties on behalf of Mancor. Ms da Silva testified that cheques presented to the bank for payment were at that stage only remitted to the clients of the bank on request of the clients. Ms da Silva denied that it was agreed that the withdrawals on the strength of the two cheques deposited were earmarked for payment to Mancor but that it would be utilised by defendant to support his business. Two cheques at the most were presented to defendant during cross-examination in order to elicit an explanation from defendant regarding the purpose of the withdrawals. He was not asked to give an explanation regarding the other twelve cheques. This in my view is important since it would indicate for what purpose those cheques were utilised.

I am of the view that the quality of the testimony of defendant does not justify a finding that plaintiff made a negligent misrepresentation to defendant.

I am of the view that taking into account the incidence of proof that the probabilities do not favour the defence raised by defendant neither do they favour the claim of plaintiff. ***In casu*** the acceptance of the version of one party necessitates the rejection of the other party's version.

In the case of ***Koster Ko-operatiewe Landbou Maatskappy Bpk v Suid-Afrikaanse Spoorwee en Hawens*** 1974 (4) SA 420 WLD it was found by the Court at the conclusion of the evidence that the versions of plaintiff and defendant were mutually destructive and that the ***onus*** rested on plaintiff to prove on a balance of probabilities that plaintiff s version was true and that of defendant false.

The court in the ***Koster Ko-op*** case referred to a ***dictum*** of Wessels AJ in the case of ***National Employers Mutual General Insurance Association*** v ***Gany*** 1931 AD 187 on 199 where the following appears:

> "Where there are two stories mutually destructive, before the ***onus*** is discharged the Court must be satisfied that the story of the litigant upon whom the ***onus*** rests is true and the other false."

I am ***in casu*** not so satisfied.

Absolution of the instance is granted. Each party to pay its own costs.

**ON BEHALF OF THE PLAINTIFF** **MR MOUTON**

**Instructed by:** **A Vaatz & Co**

**ON BEHALF OF THE DEFENDANT:** **ADV H OOSTHUIZEN**

**Instructed by:** **Weder, Kruger & Hartmann**