

Department of Welfare, Eastern Cape 2008 6 BCLR 571 (CC) para 33). The defence of prescription must be raised by the party relying on it. It is unlikely that the question of prescription had been raised as the court *a quo* should then have had to deal with it. There is no indication in the report that this happened.

6 Conclusion

The *Pheiffer* case should be welcomed as it finally resolves the conflicting judgments in *Bombay Properties* and *Sandton Square* in regard to the unwarranted differentiation between debtor/creditor liens and enrichment liens when considering the adequacy of the security tendered by the owner of the property. Whether the security tendered is by way of payment into court or a bank guarantee does not make any difference, provided that the court can be convinced that the guarantee is sufficient to compensate the holder of the lien for his loss of the right. Bank guarantees have always been acceptable in practice. Despite Sonnekus' misgivings, there can also be no objection to a third party providing the security as happened in this case. The identity of the third party or the reasons for it to tender and put up adequate security is of no concern to the holder of the lien, provided it is adequate security.

Due to the nature of eviction proceedings as application proceedings it will often be difficult to determine the level of the security other than relying on the evidence provided by the respondent alleging that improvements have been effected or expenses incurred. The eventual liabilities will be established in the enrichment action that must follow.

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THE BANK AND CUSTOMER RELATIONSHIP, COMBINATION OF ACCOUNTS AND SET-OFF*

OPSOMMING

Die bank/kliëntverhouding, kombinerings van rekeninge en skuldvergelyking

In 'n onlangse saak, *Absa Bank Limited v Rossouw* 2016 JDR 0226 (GP), het die verweerder twee bankrekeninge by dieselfde bank gehad. Een was 'n tjekrekening en die ander 'n rekening ten opsigte van die aankoop van 'n trekker waarvoor die bank hom gefinansier het en waarin hy die ooreengekome terugbetalingspaaielemente moes inbetaal. By sy versuim om een sodanige paaielement in die betrokke rekening in te betaal was daar (byna) voldoende fondse in sy tjekrekening om die bedrag van die paaielement ten opsigte van die afbetalingsrekening te dek. Toe hy deur die bank aangespreek is, het die

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verweerder aangevoer dat hy inderdaad die finansieringspaaierment betaal het deur vir voldoende fondse in sy tjekrekening voorsiening te maak en al wat die bank moes doen was om die fondse van die een rekening na die ander oor te plaas. Die verweerder het hom dus, alhoewel nie in soveel woorde nie, op die kombinerings van rekeninge en skuldvergelyking beroep. Die hof het beslis dat die bank nie sonder 'n ooreenkoms te dien effekte en op instruksie van die verweerder aldus kon optree nie en dat dit ook nie daartoe verplig was nie. In Suid-Afrika is daar 'n skaarste aan gerapporteerde beslissings en ander gesag wat die regsposisie in hierdie verband duidelik stel. Die korrektheid van die *Rossouw*-beslissing word teen die agtergrond van die Engelse reg in hierdie verband ondersoek.

1 Background

1.1 *Legal nature of the bank/customer relationship*

The relationship between bank and customer, specifically the holder of a current account, must be explained in terms of the general principles of the law of obligations – and, in particular, the law of contract. According to Malan *et al Malan on bills of exchange, cheques and promissory notes* (2009) para 217 this is

“a debtor and creditor relationship, in terms of which the bank becomes owner of moneys deposited on the customer’s current account and obliged to pay cheques drawn on it by the customer. [It] is not one of *depositum*, nor can all its consequences be explained by the principles of *mutuum* that govern the individual loans made by the customer to the bank when he makes deposits on his current account. Because of the complexity of the relationship, it has often been called a contract *sui generis*” (footnotes omitted).

However, the main characteristic of the bank/customer relationship is that of mandate (see Nagel and Pretorius “Mandate and the bank and customer relationship. *DA Ungaro & Sons (Pty) Ltd v Absa Bank Ltd* [2015] 4 All SA 783 (GJ)” 2016 *THRHR* 514). Malan *et al ibid* explain it as follows:

“[I]n essence the contract between bank and customer obliges the bank to render certain services . . . to the customer on his instructions and for this reason it can be classified as a contract of *mandatum*. The bank and customer relationship is based on a comprehensive mandate in terms of which the customer lends money to the bank on current account, the bank undertakes to repay it on demand by honouring cheques drawn on it and to perform certain other services for the customer, such as the collection of cheques and other instruments, and the keeping and accounting of his current account.”

The debtor/creditor relationship between the parties is explained as follows by Itzikowitz and Du Toit “Banking and currency” 2(1) *LAWSA* (2003) para 343:

“The bank . . . receives money and collects bills for the account of its customer, borrows the proceeds and undertakes to repay them to the customer on demand. When a customer deposits money it becomes that of the bank subject to the bank’s obligation to honour cheques validly drawn by its customer. Any money deposited with a bank is not held in trust for the customer but constitutes a loan, without interest, to the bank. When a customer’s account is overdrawn the relationship is reversed. The customer becomes the debtor and any deposit made by the customer reduces his or her indebtedness to the bank.”

In *Absa Bank Limited v Hanley* 2014 2 SA 448 (SCA) para 25 the Supreme Court of Appeal described the relationship as follows:

“The relationship between a bank and its customer is unique and involves a debtor and creditor relationship. The relationship is contractual and may involve several agreements establishing different accounts. These agreements, generally, require the bank to perform certain services for the customer. Whether it relates to one or more of these services, the agreement giving rise to them is an

agreement of mandate . . . A bank undertaking to transfer funds on the instructions of its customer acts as a mandatary. The principal duty of the bank effecting a credit transfer is to perform its mandate timeously, in good faith and without negligence” (footnotes omitted).

1.2 *Bank’s duty to pay cheques and combining of accounts*

A bank is under a duty to pay on demand cheques drawn on it by a customer, provided that they are in all respects genuine and complete and provided that sufficient funds or overdraft facilities are available on the customer’s account. As a general rule, a bank may combine two or more accounts of the customer in order to pay a cheque (Malan *et al* para 218). This amounts to set-off (see Smith “Some thoughts on the law of set-off and the banker” 1980 (2) *Modern Business Law* 27ff). Writing mainly on English law, McCracken *The banker’s remedy of set-off* (1993) 4 explains the terminology used in this regard as follows:

“While ‘combination’ is probably the term most frequently found in this context as an apparent synonym for consolidation, confounding and blending, the terms are often used indiscriminately and interchangeably, and even, on occasions, in conjunction with each other. The relationship which they bear to set-off and the accuracy as a matter of law with which they describe the action of a bank in applying a credit balance against a debit balance are far from clear.”

The question of the combination of accounts and set-off, although not pleaded in so many words and in a slightly different context, came before the court in *Absa Bank Limited v Rossouw* and is canvassed more fully in paragraph 3.3 below. The relevant parts of this judgment are considered in paragraph 2 below.

2 *Absa Bank Limited v Rossouw*

2.1 *Facts*

The matter came before court as a stated case of which the salient facts are as follows (see paras 3–12 of the judgment): On 19 December 2007, the plaintiff (Absa) and the defendant (Rossouw) entered into a written instalment sale agreement in terms of which Absa sold a tractor to Rossouw for R409 792.51. Rossouw undertook to pay the purchase price by way of five annual instalments of R81 958.50 each. The first instalment had to be paid on 1 December 2008 and the remaining instalments on the corresponding date in successive years. Absa opened an instalment sale account in the name of Rossouw, against which the principal debt and other amounts together with interest would be debited. Rossouw undertook to pay all amounts that were due under the agreement in South African Rand. All payments had to be made in a manner that was acceptable to Absa; and the method of payment did not detract from Rossouw’s obligations in terms of the agreement. The agreement also provided that if Rossouw failed to pay any amount that was due by him to Absa on the due date, he would be guilty of malperformance. It likewise provided that if Rossouw malperformed, Absa could initiate legal steps to enforce the agreement, including taking repossession of the tractor, if Absa gave Rossouw written notice as envisaged in the agreement, and Rossouw had malperformed in terms of the agreement for at least twenty business days, and at least ten business days had passed since the delivery of Absa’s notice as referred to in the agreement.

Rossouw held two accounts with Absa, namely, a current account and the instalment sale account in respect of the tractor. Statements issued by Absa showed that on 1 December 2009, the opening balance of the Rossouw’s current account was R77 176.79 and the closing balance was R77 120.42. On the same date, the

instalment sale agreement account was not credited with the amount of the instalment that was due, namely, R77 471.96. Absa failed to deliver the above-mentioned written notice to Rossouw before cancelling the agreement by way of summons issued on 10 February 2010.

However, Absa did deliver a notice in terms of sections 127, 129, 130 and 130(3) of the National Credit Act 34 of 2005 to Rossouw personally. (The section of the judgment dealing with these formal requirements (see paras 14–15 17 20–21 32ff) falls outside the scope of this case note.)

2.2 Dispute regarding payment

The primary dispute concerned the payment of the instalment of R77 471.96 which was due on 1 December 2009 (para 10). It was common cause that if the court were to find that (a) Rossouw did make payment of the instalment on 1 December 2009; or (b) Absa was not entitled to cancel the agreement; or (c) failed to cancel the agreement, the action should be dismissed (para 11). If the court came to a finding to the contrary, Absa prayed for (a) confirmation of cancellation of the agreement; (b) repossession of the tractor; (c) damages; (d) costs of suit on attorney and client scale; and (e) interest (para 123). (The dispute relating to cancellation of the agreement is not pursued further in this note. Suffice it to say that Absa was successful.)

The dispute regarding payment was whether or not Rossouw, by securing the availability of the balance(s) in his current account on 1 December 2009, made payment of the instalment of R77 471.96 that was due and payable on 1 December 2009 (para 13).

Absa contended that Rossouw did not make payment of the instalment of R77 471.96 on 1 December 2009 (para 16). However, Rossouw argued (a) that the above-mentioned statements regarding his current account served as proof that he did pay the instalment of R77 471.96 on 1 December 2009 (para 18); and (b) that he effected payment of the instalment by way of securing an amount equal to the instalment in his current account “*for the plaintiff itself to transfer*” (para 19; our emphasis). Rossouw contended that by securing the availability of the balance(s) in his current account on 1 December 2009, he had made payment of the instalment that was due on that date (para 24). He argued that in securing the amount in his current account, he effected payment of the instalment (para 25). Rossouw further stated that it was incumbent on Absa, itself, to transfer the amount from the current account to the instalment sale account (*ibid*).

2.3 Decision

Jansen J pointed out (para 23) that in terms of clause 5.3 of the credit agreement, Rossouw had to make payments in any manner acceptable to Absa. This clause also provided that the method of payment chosen by Rossouw in no way detracted from his obligations in terms of the agreement (see also para 2.1 above). However, both the agreement and the stated case were silent as to what methods of payment were acceptable to Absa (para 26).

As regards actually making payment, Jansen J held that Rossouw

“could not simply assume that [Absa] was supposed to transfer the money from his cheque account to his instalment sale account. He had to authorise and instruct [Absa] to do so, and whether this would be acceptable to [Absa] is unknown because clearly [Rossouw] and [Absa] did not enter into such an agreement” (para 27).

As the payments methods which would be acceptable to Absa were not mentioned in the instalment agreement, Jansen J held that if Rossouw

“wished to impose an obligation on [Absa] to transfer the money to the instalment sale agreement, a written or additional clause of the credit agreement would have had to be added to the credit agreement by an authorised agent of [Absa], signed by [Rossouw], in terms of clause 13 of the credit agreement. This was never done” (para 28).

Jansen J held that nothing in the instalment sale agreement offered any support to Rossouw’s argument that Absa was under an obligation to transfer the money from the current account to the instalment sale account. “In fact, [Absa] would not be entitled to do so without the authority of [Rossouw]” (para 29).

The court furthermore pointed out that the balance in Rossouw’s current account was R77 176.79 on 1 December 2009, which fell short of the instalment amount of R77 471.96 (para 30).

In view of the above facts, Jansen J concluded that Rossouw had not proved that he had made the required payment (para 31).

3 Discussion

3.1 Aspects of payment

Payment is one of the well-known ways in which an obligation may be discharged. As Innes CJ said in *Harrismith Board of Executors v Odendaal* 1923 AD 530 539: “Payment is the delivery of what is owed by a person competent to deliver to a person competent to receive. And when made it operates to discharge the obligation of the debtor.” There can be no doubt that in *Rossouw*, the onus was on the defendant (Rossouw) to prove that payment was made in terms of the instalment sale. As was pointed out by Louw AJ in *Italtile Products (Pty) Ltd v Touch of Class* [1982] 1 All SA 111 (O) 112–113:

“It is trite law that a debtor who relies upon payment of the debt when sued upon it must prove such payment . . . [I]t seems to me that the very requirement that a debtor should prove payment of a debt, in itself necessitates proof that the debt in question has been paid and not simply proof that a payment has been made to the creditor” (see also, eg, Greenberg J in *Standard Bank of South Africa Ltd v Sacks* 1928 TPD 352 356).

Although payment is generally said to be a bilateral juristic act which can only be effected through agreement or co-operation by both parties (see, eg, *Volkskas Bank Bpk v Bankorp Bpk (h/a Trust Bank* 1991 3 SA 605 (A); *Pfeiffer v First National Bank of SA Ltd* 1998 3 SA 1018 (SCA); *Burg Trailers SA (Pty) Ltd v Absa Bank Ltd* 2004 1 SA 284 (SCA); *Absa Bank Ltd v Lombard Insurance Co Ltd* 2012 6 SA 569 (SCA) para 18) there are perhaps situations where this may not be the case and there may be persuasive arguments to the contrary (see, eg, the discussion by Du Plessis “Die regsaaard van prestasie” 2002 *THRHR* 61ff and Perlman *Legal and regulatory aspects of mobile financial services* (LLD thesis Unisa 2012) 383ff). Suffice to say that the final verdict on this question is still with the jury. But we must not divert from the question at hand.

Although not stated in so many words, what Rossouw in fact attempted to achieve in the case under discussion was to show that his indebtedness in terms of the instalment sale was extinguished *pro tanto* by the credit balance in his current account by the operation of set-off (see para 2.2 above *in fine*). As was mentioned in paragraph 2.3 above, the court held that this could only have been achieved by means of an agreement between Absa and Rossouw and on the

latter's instruction, Absa being under no obligation to utilise set-off in order to obtain payment in terms of the instalment sale.

Some support for Jansen J's reasoning in *Rossouw* can be found in the following explanation by Malan JA in *Absa Bank Ltd v Lombard Insurance Co Ltd* 2012 6 SA 569 (SCA) para 18:

"To discharge a debt it must be paid in the name of the true debtor. Generally, the discharge of a debt requires an agreement between the parties to that effect. For payment by electronic means to be effective the payee must acquire 'the unfettered or unrestricted right to the immediate use of the funds in question'. It requires the parties to be in agreement as to the debt, whether that of the payer or that of a third party, to be paid. A debt-extinguishing agreement, like any other agreement, may be concluded expressly or tacitly, by conduct."

Unfortunately, the judge did not refer to *Lombard*. It could be that the case was not brought to her attention by counsel.

3 2 Aspects of set-off

Set-off (also known as *compensatio* or compensation) is a method by which obligations (contractual or otherwise) can be extinguished (see, eg, Van Rensburg *et al* "Contract" in 9 *LAWSA* (2014) para 433); for example, where two parties are mutually indebted to one another (see, eg, Smith 1980 (2) *Modern Business Law* 27ff for examples). It seems to be settled law that set-off operates automatically (*ipso iure*) and that it is unnecessary for either party to invoke it (see, eg, *Schierhout v Union Government* 1926 AD 286 289–290; *Van Aswegen v Pienaar* 1967 3 SA 677 (O); *Great North Farms (Edms) Bpk v Ras* 1972 4 SA 7 (T); and *Transkei Development Corporation Ltd v Oshkosh Africa (Pty) Ltd* 1986 1 SA 150 (C) 153–154; cf Scott "Skuldvergelyking – Toe (*ex tunc*) en nou (*ex nunc*) *Southern Cape Liquors (Pty) Ltd v Delipcus Beleggings BK* 1998 4 SA 494 (K)"). Compensation is the equivalent of payment and, like payment, it must be proved

"so that the court may give effect to it; but its operation dates back to the moment when the two persons concerned were reciprocally liable to one another . . . At that moment in intendment of law they are regarded as having paid each other's claim with its own, so far as it would go" (*Treasurer General v Van Vuren* 1905 TS 588 590).

In short, the requirements for a successful reliance on set-off are the following (see, eg, Christie and Bradfield *The law of contract in South Africa* (2011) 494ff; Hutchison and Pretorius (eds) *The law of contract in South Africa* (2012) 382; Van der Merwe *et al Contract general principles* (2012) 470ff; Harms "Obligations" 19 *LAWSA* (2006) para 244; and Nagel *et al Commercial law* (2015) paras 9.130–9.134): (a) The debts must exist mutually between the same persons; (b) in the same capacities; (c) the debts must be of the same nature; (d) both debts must be due and enforceable; and (e) both debts must be liquidated.

3 3 Is a bank entitled – or obliged – to combine accounts by way of set-off?

3 3 1 English law

It is perhaps, for reasons that will become clear later on, convenient to start with the position in English law. (In parenthesis, we concede that we should not primarily rely on the English law to explain the South African banking law (see Schulze "The sources of South African banking law – A twenty-first century perspective (Part II) 2002 *SA Merc LJ* 601 624). However, it is submitted that

the English law “will continue to play an important role in shaping modern South African banking law” (*ibid.*)

In English law, the banking practice of combining the different accounts of customers is well known and there are numerous cases dealing with the issue (see, eg, McCracken *passim*). In fact, English law has developed a whole set of integrate and specific rules dealing with the bank’s right of combining of a customer’s accounts. These rules are discussed at length by Ellinger *et al Modern banking law* (2009) 248–268 (hereafter “Ellinger”). Although it would serve very little purpose to repeat or explain all these rules here, it is nevertheless interesting to highlight a few aspects that may be relevant for present purposes:

- (a) The bank’s right to combine the customer’s accounts is a common law right. This right may be abrogated or changed by agreement between the parties (Ellinger 252).
- (b) Despite some uncertainty in the past, in modern English law the bank’s right to combine the balances of all the accounts of a single customer, is regarded as a right of set-off (Ellinger 250). Decisions and academic opinion to the effect that in the process the bank exercises a lien over any credit balance in the customer’s account seem to be incorrect (see McCracken 9ff; Ellinger 250ff and, especially, the leading English decision of the House of Lords in *National Westminster Bank Ltd v Halesowen Presswork & Assemblies Ltd* [1972] AC 785).
- (c) The single, basic principle that supports the doctrine that in certain situations a bank is entitled to combine the accounts of its customer is that the latter’s underlying contractual relationship is with the bank and not with the branch at which the account is kept. All the accounts of a customer – regardless of the type of account – are governed by the basic banker/customer relationship, although there may be variations in the rights of parties holding different types of account (Ellinger 249).
- (d) In *Re European Bank, Agra Bank Claims* (1872) LR 8 Ch, the question was whether the credit available in the loan account could be used to pay off an overdraft. In the Court of Appeal in Chancery, James LJ observed that

“[i]t was only for convenience that the loan account was kept separately . . . In truth, as between banker and customer, whatever number of accounts are kept in books, the whole is really but one account, and it is not open to the customer, in the absence of some special contract, to say that the securities which he deposits are only applicable to one account” (44; quoted with approval by Connor CJ in *In re White v Brown* (1883) 4 NLR 88 90).
- (e) Ellinger 250 points out that the view of *Re European Bank* has become well established in case law and that there is only one basic relationship between a bank and its customer. Yet it has to be emphasised that the details of this relationship differ from account to account. He states (*ibid.*):

“Thus, a current account is operable by cheques, whilst a savings account cannot be utilised in this way. Funds deposited in an ordinary savings account are usually repayable on demand: but amounts standing to the credit of an ‘extra interest account’ fall due at one month’s notice. In reality, it is possible to treat the contracts involved in separate types of accounts as distinct arrangements between the bank and its customer. *Re European Bank* and the cases following it do not overlook the point. All they suggest is that the parties to the contractual relationship, effected in respect of each account, are the customer and the bank. For this reason, debts accrued to the customer are due from the bank and not from the

individual branch. Equally, debts due from the customer are recoverable by the bank and not by its branches. There is, thus, room for a set-off.”

As is always the case, one should not underestimate the intricacies of the English law. In *Re EJ Morel (1934) Ltd* [1962] Ch 21 the question of combination arose in the case of liquidation. Buckley LJ, with reference to *Bradford Old Bank Ltd v Sutcliffe* [1918] 2 KB 833, observed that

“there is an important difference between a case where a customer has several current accounts, and a case where a customer has an account which is not a current account, and one or more current accounts in the bank. In the first case where all the accounts are current, the bank can combine those accounts in whatever way he chooses, treating them all as being one account of his relationship with his customer. In the other case the accounts are of a different character, and the banker is not free to combine them in that way” (31–32).

Ellinger 253, with reference to *T&H Greenwood Teale v Williams, Williams, Brown & Co* (1894) 11 TLR 56, identifies three exceptions to the general rule that a bank is entitled to combine a customer’s accounts, namely, where there is an agreement to the contrary; where a special item of property was remitted to the bank and appropriated for a special purpose as in the Canadian case of *Rouxel v Royal Bank of Canada* [1918] 2 WWR 791; and where the bank has express knowledge that one of the accounts is a trust account.

The significance of designating an account as being of a certain type is relevant, for example, where the possibility of combination arises in case of a loan account. “The circumstances leading to the opening of a loan account usually indicate that the parties have agreed that it be not combined with other accounts as long as a customer is able to carry on business” (Ellinger 256). In *Bradford* the court held that the fact that one of the accounts was designated a loan account clearly showed “that the accounts were kept distinct by arrangement” between the parties (839; see also *Re EJ Morel (1934) Ltd* [1962] Ch 21 and the *Halesowen* case *supra*). Ellinger 256–257 therefore submits that a loan account and a current account are usually not meant to be combined and that it will be “unusual for a bank to exercise a right of set-off in respect of such an account whilst the customer’s business was a going concern”.

A final aspect referred to by Ellinger 267 is that a bank is not under an obligation to combine a customer’s accounts even if it is in the customer’s interest, except in case of the customer’s insolvency where it will be for the benefit of the general creditors (see, eg, *Mutton v Peat* [1900] 2 Ch 79; McCracken 40).

3 3 2 South African law

Much has been written on the legal nature of the relationship between a bank and its customer. For the present purposes, we can accept the view that the banker-client relationship is a multi-faceted relationship (see the brief discussion in para 1 1 above). It invariably involves various types of contract, for example, mandate, loan for use, *depositum* and deposit-taking. The parties to the bank-client relationship may, depending on the circumstances, fulfil the role of either debtor or creditor. The description of the relationship by English and South African courts as a debtor-creditor relationship is only a general description and not really a classification. After all, all contracts involve a creditor and a debtor. It is true that, in the important English case of *Foley v Hill* [1843–60] *All ER Rep* 16 19, the court expressly stated that “the banker is not an agent or factor, but he is a debtor”. It must, however, be kept in mind that, in this case, the court was dealing with the question of determining the ownership of money deposited in a

banking account. It is for this purpose that the court described the bank as being a debtor, and not an agent, of the customer. The court wished to make it clear that the bank was not merely an agent of the customer, receiving money which remained the property of the customer and which the bank could apply only on behalf of and in accordance with the instructions of its principal. According to this decision, ownership in the money deposited actually passes to the bank, which may use it for its own purposes as it sees fit, with only a debtor's obligation to repay the customer. This is also the *ratio* of the South African judgments in which the relationship between bank and cheque-account holder has been described as a debtor-creditor relationship.

In *Duba v Ketsikili* 1924 EDL 332 341 it was stated that

“[m]oney paid into the credit of a customer of a bank without special instructions as to how the money is to be dealt with becomes in law a debt due by the bank to the customer with a super-added obligation on the part of the bank if the account is in credit to pay it out upon cheques drawn by the customer”.

In *Western Bank Ltd v Registrar of Financial Institutions* 1975 4 SA 37 (T) 43–44 it was said that the

“relation between banker and customer is that of debtor and creditor, with a super-added obligation on the part of the banker to honour the customer's cheques if the account is in credit or if the banker has agreed that the customer may overdraw. In that sense a cheque drawn by a customer is in point of law a mandate to the banker to pay the amount according to the tenor of the cheque”.

See also *Trustees, Estate Whitehead v Dumas* 2013 3 SA 331 (SCA) where the court referred to *Louw v Coetzee* 2003 3 SA 329 (SCA) and *Commissioner of Customs and Excise v Bank of Lisbon International* 1994 1 SA 205 (N) and said:

“Generally, where money is deposited into a bank account of an account-holder it mixes with other money and, by virtue of commixtion, becomes the property of the bank regardless of the circumstances in the deposit was made or by whom it was made” (para 13).

Whatever the position in English law may be, in South African law it clearly does not lead to unacceptable results if it is accepted that the agreement consists of more than one type of contract known to common law. The *essentialia* of both loan (*mutuum*) and mandate (*mandatum*) are present, while the interdependent functioning of these different elements is explained by the operation of set-off.

Although it has been said (on the authority of *In re White v Brown supra*) that a South African bank has the right to combine bank accounts (Cowen and Gering *Cowen on The law of negotiable instruments in South Africa* (1966) 371), it is nevertheless submitted that a bank may only do so, in the absence of a contractual agreement, on the basis of a set-off. We have already pointed out that the decision in *Re European Bank supra* leaves room for a set-off. However, the question remains whether this was the appropriate remedy in *Rossouw*.

The importance of set-off within the bank-customer relationship becomes especially relevant when the customer has two or more accounts at the same bank. The fact that the accounts are kept at different branches of the bank makes no difference to the applicable principles, because the branches are not separate juristic persons (see *Volkskas Bank Bpk v Bankorp Bpk (h/a Trust Bank)* 1991 3 SA 605 (A) 611C–F). It is generally accepted that a bank may set off a debit balance on one account against a credit balance on another account. It does not matter if the accounts are kept at different branches or even under different names, as long as the same person is the account holder. The parties may expressly or

tacitly agree that the bank will not have the right to combine two or more accounts. For example, if a bank grants a loan to a customer with a substantial credit balance on his current account, and no specific date for repayment of the loan is agreed upon, the bank may not simply debit the account with the amount of the loan. The bank first has to give reasonable notice of its intention to do so. In this type of case, it is clearly the intention of the parties that the credit balance on current account should remain available to the customer until reasonable notice for repayment has been given. Consolidation of two accounts is also not possible if an amount is paid into one of the accounts on the express understanding between the parties that the particular amount should be utilised only for that particular account. In *Joint Stock Co Varvarinskoye v Absa Bank Ltd* 2008 4 SA 287 (SCA) para 37 it was stated:

“The relationship between banker and client is based on contract. It involves a debtor and creditor relationship in terms of which the banker becomes owner of money deposited on the client’s account subject to its obligation *to its client* to pay cheques drawn on it . . . In the present case the bank’s knowledge of the source and purpose of the funds in account 1313 is of course directly relevant to its asserted right to effect set-off, which it claimed by virtue of a contract entered into with the account holder, its client. Furthermore, its knowledge is highly relevant in relation to the appellant’s claim that the bank and the account holder had agreed to warehouse the money in account 1313 and that there was thus no entitlement to the money on the part of either.”

There is no doubt that the bank’s right to combine accounts without notice to the customer can create problems for the customer. An example that comes to mind is that of a customer which is a going concern with several accounts. It is usually important for such a customer to ensure cash-flow and it would therefore be equally important for the customer not to have a credit balance on his business account suddenly extinguished through set-off regarding, for example, another current account with a debit balance.

The bank’s right to combine accounts and thus to rely on set-off, moreover, is useful if the customer becomes insolvent. In such a case the bank may, for example, set off a debit balance of R1 000 on one account against a credit balance of R1 000 on another account. The result is that the bank in fact receives full payment of its claim against the insolvent. If the debts became capable of set-off within six months before sequestration or liquidation, the bank will usually have no problem in complying with section 46 of the Insolvency Act 24 of 1936. This provision provides for the disregarding of set-off by the trustee or liquidator if it did not take place in the ordinary course of business. If an amount is paid into a customer’s overdrawn account *after* sequestration or liquidation, the bank may, of course, not utilise this deposit to reduce the debit balance. It is submitted that the correct legal position is that the bank must keep the amount deposited available for administration by the trustee or liquidator and would have to prove a concurrent claim for the debit balance. (For a discussion of the legal position in case of insolvency, see Smith 1980 (2) *Modern Business Law* 30–31; and Bertelsmann *et al Mars The law of insolvency* (2008) para 18.22.) But, perhaps this is a discussion for another day.

4 Conclusion

The question whether Absa in the *Rossouw* matter would have been *entitled* to claim a set-off would depend on whether there has been compliance with the prerequisites for set-off as outlined above. However, by analogy of what was said

above about the possibility of combining a current account with a loan account, it seems that Jansen J, although she did not refer to any authority, was correct in holding that (absent a prior agreement to this effect) the relevant funds could only be transferred on the instruction of Rossouw. (This was also the essence of the discussion by Nagel and Pretorius 2016 *THRHR* 514.)

Although set-off operates *ipso iure*, and a bank may be entitled to use set-off, it is submitted that the judgment is also correct in that the bank is under *no obligation* to combine accounts by way of set-off (see also Ellinger 266ff).

The judgment is also to be welcomed as there is a dearth of authority on this aspect in the South African law. (See, eg, albeit in a slightly different context, *Standard Bank of South Africa Ltd v Echo Petroleum CC* 2012 5 SA 283 (SCA).)

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