



## SUPREME COURT OF APPEAL OF SOUTH AFRICA

### **MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL**

**FROM:** The Registrar, Supreme Court of Appeal  
**DATE:** 18 March 2021  
**STATUS:** Immediate

***Please note that the media summary is for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.***

**FirstRand Bank Limited v The Spar Group Limited (1334/2019) [2021] ZASCA 20 (18 March 2021)**

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Today the Supreme Court of Appeal (SCA) unanimously dismissed the appeal with costs including the costs of two counsel.

This case was about banks, their customers, and third parties who have put money into the customers' accounts. The respondent, Spar Group Ltd (Spar), conducted business as a franchisor of the Spar brand of retail grocers and the Tops brand of liquor vendors. Spar fell into a dispute with one of its franchisees, Umtshingo Trading 30 (Pty) Ltd (Umtshingo), whose controlling mind was Mr Paolo. Spar held a notarial bond over the assets of Umtshingo. Umtshingo defaulted on its obligations under the franchise agreement. In consequence, Spar obtained a provisional order from the local magistrates' court to perfect its security. The terms of the notarial bond permitted Spar to take over the Umtshingo businesses and run them for its own account which it did. The single reservation was that Mr Paolo refused to de-link the speedpoint credit card devices of the stores from the bank accounts of Umtshingo.

Spar ran the outlets on the terms of the unsigned draft agreement and in the course thereof, credited the stock on hand to Umtshingo and brought in new stock. Spar took several steps to try to get Mr Paolo to consent to a change or to get FNB to redirect the revenue to a Spar account. Spar's failure to achieve these objectives resulted in substantial sums flowing into Umtshingo's accounts. Mr Paolo retained control over the accounts and effected substantial disbursements.

FNB's conduct was twofold. First, the debit balances in two of the accounts were extinguished by FNB applying set off against the credits in these accounts that derived from the revenue generated by Spar and deposited into the accounts. Second, disbursements were made at Mr Paolo's behest despite the credit balances being derived from the revenue generated by Spar's trading.

Spar claimed that because Umtshingo had no rightful interest or claim to the funds, FNB was not entitled to set off Umtshingo's debts from Spar's revenue. Moreover, FNB owed Spar a duty of care not to allow Mr Paolo to steal money from the accounts. Spar had four claims, two in relation to an

improper set off by FNB, and two in respect of Mr Paulo causing money to be withdrawn from the Umtshingo accounts.

FNB's defences were that it lawfully appropriated the sums by way of set off because these were amounts due and payable to FNB by Umtshingo, that it was not liable to protect Spar from Mr Paulo withdrawals of money from the accounts, that in respect of one claim relating to set off, the claim had prescribed by the time it was made, and lastly, if there was any liability to Spar, Spar was contributorily negligent.

The issues that arose for decision were these:

(a) Was FNB entitled to set-off the credits that derived from the funds deposited into the accounts by Spar against Umtshingo's debts owing to FNB?

(b) Was FNB liable in delict to Spar for the losses it suffered when Mr Paulo caused sums to be withdrawn from these accounts, which funds derived from deposits into the accounts by Spar, and to which neither Mr Paulo, nor Umtshingo, had any rightful interest or claim?

(c) Had one of four distinct claims, relating to set off, prescribed because it was instituted more than three years after the set off had occurred?

Spar had sued FNB in the Gauteng Division of the High Court. At the conclusion of the trial, one claim relating to a set off was dismissed because it was held to have prescribed, and the other three claims were dismissed on the basis that FNB had not done anything to incur liability to Spar. On appeal to the full court of the Gauteng Division, these results were reversed by a majority decision. Spar was held to have proven its case in respect of all four claims. It was the majority judgment of the full court that was on appeal to this Court.

This Court noted that there was no dispute as to Umtshingo's indebtedness to FNB. The question was whether FNB was indebted to Umtshingo in respect of the credit balances. This Court held that although the deposit of the proceeds of these businesses into the accounts of Umtshingo gave rise to credits in the accounts of Umtshingo held with FNB, this did not mean that Umtshingo had a claim against FNB for the credit balance because those funds were the proceeds of the business conducted by Spar for its own benefit.

FNB could not contend that Umtshingo's indebtedness to the FNB could be set off against the credit balances. This Court held that once it was apparent to FNB that its customer had no entitlement to the moneys deposited, two consequences followed. First, the customer, Umtshingo, had no claim against FNB in respect of the credit balance reflected in the accounts. Second, FNB could not apply set off, as there was no mutuality of debts as between FNB and its customer. Therefore, the customer was not entitled to claim from the FNB but Spar was entitled to do so.

In respect of the claims relating to withdrawal of funds from the accounts by Mr Paulo, the cause of action was predicated upon the legal duty of FNB to prevent Mr Paulo as the controlling mind of Umtshingo, from making disbursements from Umtshingo's accounts, into which Spar had deposited the funds generated by it. FNB knew of the arrangement between Umtshingo and Spar and also knew that Umtshingo had no entitlement to the funds deposited. When Mr Paulo made disbursements from Umtshingo's accounts, his conduct amounted to theft. The Bank enabled Mr Paulo's conduct by allowing him to operate the accounts, well knowing that Umtshingo had no claim to the credits reflected in the accounts. The Bank was therefore a joint wrongdoer and breached a legal duty to Spar in this regard.

As to the defence of contributory negligence by Spar, this Court held that Spar had relied on FNB's assurances of 'the account being frozen' which was a misrepresentation as the existence of another account was deliberately concealed. Therefore, it was incongruent to construe Spar's conduct, as being negligent in relation to the culpable conduct of a joint wrongdoer.

As to the defence of prescription, the belated addition of a claim relating to a set off by FNB from a particular account was the result of Spar being denied knowledge of the existence of the account and of the set off until a much later moment. It was impossible for Spar to identify FNB as a debtor until that information was disclosed. These circumstances were a direct result of FNB's wilful non-disclosure. Accordingly, prescription could not begin to run until that knowledge was acquired.

For these reasons, the appeal was dismissed in respect of all claims with the costs of Spar, including the costs of two counsel to be borne by FNB.

--The End--