THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 99/09
Not Reportable

In the matter between:

ABSA BANK LIMITED Appellant

and

ENRICO BERNERT Respondent

Neutral citation: *ABSA v Bernert* (99/09) [2010] ZASCA 36 (29 March 2010)

Coram: NUGENT, CACHALIA, MALAN and TSHIQI JJA and MAJIEDT AJA

Heard: **18 FEBRUARY 2010**

Delivered: **29 MARCH 2010**

Summary: Claim in delict for damages – negligent misstatement – statement not made to or relied on by plaintiff – on facts statement in any event not false – duty of court when separating issues.

ORDER

On appeal from: North Gauteng High Court (Pretoria) (Ranchod AJ sitting as court of first instance)

The appeal is upheld with costs that include the costs of two counsel so far as two counsel were employed. The order of the court below is set aside and substituted with an order dismissing the claim with costs.

JUDGMENT

NUGENT JA (CACHALIA, MALAN and TSHIQI JJA and MAJIEDT AJA concurring)

[1] In the course of his evidence the respondent in this appeal, Mr Bernert, said that ‘in life you take things at face value’, and the court below seems to have seen things in the same way. But I have found that the evidence of Mr Merrett, of whom the trial court was rather dismissive, serves as a more useful guide when evaluating this case.

[2] Mr Merrett is the assistant director of the Financial Investigation Bureau of the International Chamber of Commerce. The Bureau investigates suspicious banking and financial transactions and Mr Merrett has considerable expertise in that field. The aspect of his evidence that I have found to be useful is his explanation of what he called ‘financial

mist'. He said that it is common for those who engage in financial scams to use fictitious documents, purporting to emanate from major financial institutions and loaded with financial terminology, to create a mist that blinds their targets to what is in truth occurring. That enables them to induce the gullible into believing that they have wealth available for investment and it also enables them to gauge the level of financial sophistication of the target.

[3] This case is about documents, particularly a document that was produced on a letterhead of the appellant, a well known financial institution, which I will refer to as Absa Bank. Notwithstanding the voluminous evidence the case really comes down to evaluating the response of Absa Bank when it discovered the existence of that document. But while the issue is narrowly confined I think it is important to appreciate the context within which the document came to be created.

[4] There are many curious features of this case that were left unexplained and there are many gaps in the narrative of what occurred. That is because much of the trial was taken up with arguments between counsel and witnesses on the meaning of documents and little interest was shown in establishing all the facts.

[5] Before turning to the evidence in more detail I think that a brief description of the principal characters in the story that unfolded and a short synopsis of how this case came about will assist to explain what is in issue in this appeal.

[6] Early in his life Mr Bernert received two years' training as an apprentice motor mechanic. He then joined his father's business restoring

motor vehicles. In the course of this business he came across an interesting design for a motor vehicle. He acquired the rights to the design and, after making various modifications, he began building the vehicles, which he called the ‘El Macho’. The events that led to this case arose from his attempts to find finance to build a production plant.

[7] I have no reason to think that Mr Bernert is anything but honest or that he was complicit in anything untoward that might have occurred. But what emerges plainly from his evidence is that Mr Bernert was a novice in the financial world. His evidence demonstrates that he had little knowledge of the nature and structure of corporations or of financial transactions in general and of financial documents in particular. I think it is clear that the meaning that he attached to the various transactions to which he was exposed was largely repetition of what he had been told they meant.

[8] Mr Bernert was the sole member of Rotrax International CC, which was the vehicle through which he hoped to develop his business. In his search for finance to construct his production plant Mr Bernert met three people through contact with the armaments industry.

[9] First, there was Mr Fanjek. Mr Fanjek has lived in this country from 1967. He described himself as a businessman but the nature of his business was not explored. The role that Mr Fanjek purported to play was that of Mr Bernert’s agent for raising investment finance. In response to a submission that Mr Fanjek was a liar the court below said that ‘careful scrutiny of the relevant parts of [his] evidence shows that they were common cause or can be inferred from the uncontested facts’. It is true that at times the evidence of Mr Fanjek coincided with incontrovertible

facts. But except where his evidence is corroborated in that way I do not believe a word that Mr Fanjek said. There was hardly a question to which he gave a direct answer and for the most part his evidence was nonsensical verbiage.

[10] Then there was Mr Dinawi, a citizen of Syria, whom Mr Bernert met at an armaments exhibition in Abu Dhabi. Mr Dinawi held himself out to be the 'business manager' of Sheikh Fawaz Bin Abdullah Al-Khalifa. He did not give evidence at the trial.

[11] And finally there was Sheikh Fawaz himself. He volunteered at the close of his evidence that he had come to this country to testify so as to scotch doubts that had been expressed by Absa Bank as to his existence. Sheikh Fawaz said that he was a member of the dynasty that has ruled Bahrain for almost three centuries. The documents do not disclose precisely where the Sheikh conducts business. His personal letterhead reflects only that he receives his correspondence at a post office box in Bahrain and at a 'hotmail.com' electronic address.

[12] The court below described Sheikh Fawaz as an impressive witness but the record of his evidence does not bear that out. This court has warned before against being seduced by the appearance of a witness at the expense of analysing what the witness has to say.[1] I have found the evidence of the Sheikh to be almost as unimpressive as that of Mr Fanjek. Most of his answers to questions about the transactions that I refer to later in this judgment were incoherent and attempts to probe them in more

[1] *Body Corporate of Dumbarton Oaks v Faiga* 1999 (1) SA 975 (SCA) at 979I-J; *Commercial Union Insurance Co of SA Ltd v Wallace* NO; 2004 (1) SA 326 (SCA) paras 40-42; *Medscheme Holdings (Pty) Ltd v Bhamjee* 2005 (5) SA 339 (SCA) para 13.

detail were brushed aside on the basis that those were matters that he left to his advisers.

[13] Another person who played a prominent role was Mr Els, who was employed as an insurance broker by Absa Brokers (Pty) Ltd. Mr Els was deceased by the time of the trial and we thus have no tested explanation for his unauthorised conduct, but it certainly seems to me that he was up to no good.

[14] And then there was Mr Coetzee, who was employed by Absa Bank as a 'business manager'. One of his functions was to solicit deposits for the bank. Mr Coetzee was an authorised signatory for a class of bank transactions. The fact of his authority was reflected in a manual that is available to banks internationally. Mr Coetzee was dismissed in consequence of the events that gave rise to this case but he was later reinstated. Though the explanations that he gave for his conduct are extraordinary it is not material to this case whether or not they are true.

[15] Now a brief synopsis of what the case is about. In his search for finance to build his plant Mr Bernert became acquainted with Mr Dinawi and Mr Fanjek and ultimately with Sheikh Fawaz. The relationship between them developed splendidly. The Sheikh agreed to invest millions of dollars to construct and operate manufacturing plants on five continents within the following five years. The precondition for this investment was that Mr Bernert had to obtain and produce to the Sheikh a particular document from a reputable bank. Mr Bernert duly produced the document through the good offices of Mr Fanjek and Mr Els and Mr Coetzee but nothing further seems to have been done on the project. Instead Mr Bernert was invited by his new acquaintances to join them in

a new project altogether, which was to establish a company that would deal in oil, precious metals and stones, and provide financial services and investments. Mr Bernert was happy to do so.

[16] But all these plans came to an end when Absa Bank discovered the document that Mr Bernert had produced. The document was on the letterhead of Absa Bank and was addressed to Emirates Bank International. The document had been compiled in collaboration between Mr Fanjek and Mr Els and had been signed by Mr Coetzee. Volumes of the evidence are taken up with argument between counsel and witnesses on the true nature of the document. One said it was this, another said it was that, and yet another said it was something else, and so it went on. The court below said that the document was 'strange and confusing' but felt that it was nonetheless a document that a bank might ordinarily issue. The fact is that it was nothing of the sort. The document, when read as a whole, was an aggregation of nonsense, decorated with financial terminology.

[17] Once having discovered the existence of the document Absa Bank set about attempting to retrieve it. Its attorney also wrote to Emirates Bank informing it that the document had been issued irregularly and without authority and that no reliance should be placed on the document if it had been received.

[18] The Sheikh said that when he was informed of the letter by Emirates Bank he decided that he would have nothing more to do with the project or with Mr Bernert. Thus ended Mr Bernert's hopes of building his manufacturing plant – and of dealing in oil and precious metal and stones, and providing financial services and investments.

[19] Mr Bernert sued Absa Bank in the High Court at Pretoria, as cessionary of a claim of Rotrax. He said that Absa Bank had acted unlawfully in causing the letter to be written to Emirates Bank. He said that if Absa Bank had not done so, and thereby alienated the Sheikh, Rotrax would have received the millions of dollars the Sheikh had promised, it would have built the proposed manufacturing plant (at least in South Africa), and it would have manufactured and sold over 10 000 cars, which would have earned it R187 million, and he claimed that amount in damages. The court below (Ranchod AJ) found that Absa Bank had indeed acted unlawfully and it issued a declaratory order, the terms of which I deal with below. Absa Bank now appeals against that order with the leave of the court below.

[20] Before turning to the detail of the evidence there is an observation that I need to make. Before the trial commenced the parties agreed to separate some of the issues in the case as envisaged by Rule 33(4). They recorded their agreement in a pre-trial minute, in which they said that they agreed to separate the 'merits' from the 'quantum' and went on to define what they meant by the 'merits' with reference to certain paragraphs of the particulars of claim. Amongst other things they said that 'the merits…consist of…paragraphs 11 to 18 (excluding 18.1 to 18.3)'. In paragraph 18 of the particulars of claim it was alleged that '[a]s a result of the [allegedly unlawful acts], [Rotrax] suffered damages computed as follows' and the subparagraphs set out the calculation of the alleged damages. In the course of the evidence of the first witness the learned judge interposed to note that the parties had agreed to separate the 'merits' from the 'quantum' and to obtain confirmation that he was to try only the 'merits'.

[21] It is imperative at the start of a trial that there should be clarity on the questions that the court is being called upon to answer. Where issues are to be separated Rule 33(4) requires the court to make an order to that effect. If for no reason but to clarify matters for itself a court that is asked to separate issues must necessarily apply its mind to whether it is indeed convenient that they be separated, and if so, the questions to be determined must be expressed in its order with clarity and precision.[2] In some cases it might be appropriate to order the separation of the 'merits' and the 'quantum' of the claim. But to use that terminology when the causative link between the wrongful act and the damage is a contested element of the claim, as it was in this case, is bound to create uncertainty.

[22] In this case the court made no separation order as it was required to do by Rule 33(4) and it gave no indication at the outset of the trial of what it understood the 'merits' of the claim to entail. In its judgment it found that the conduct of Absa Bank was unlawful and that it was 'both factually and legally the cause of the transaction failing' and it said in one sentence, without more, that 'causality has been established'. It then made an order declaring 'that [Absa Bank] is liable for the proven or agreed damages suffered by [Mr Bernert]'.

[23] At the outset of the hearing before us the legal representatives of the parties said that they understood the court below to have disposed of the 'merits' as they had been defined in their agreement with reference to the pleadings. Thus they understood the order to mean that Absa Bank was declared to be liable to Mr Bernert for the loss of the anticipated

[2] See *Denel (Edms) Bpk v Vorster* 2004 (4) SA 481 (SCA).

sales of the cars. All that remained for determination, they said, was the monetary value of those sales.

[24] I have difficulty accepting that that was indeed what the court below intended because an order to that effect would be breathtaking. The evidence in this case comes nowhere near establishing that if Absa Bank had not acted as it did Rotrax would probably have constructed its plant and manufactured and sold the cars. Indeed, the establishment of that causative link was not even touched upon in the evidence.

[25] It is true that Mr Bernert had prepared a business plan with that as its objective, but there is a long and often rocky path between preparing a business plan and bringing the plan to fruition. Even if the Sheikh had genuinely made and carried out the promise that Mr Bernert understood him to have made (which I deal with later) there is no evidence at all that even the first hurdle that would have then been encountered (which was to raise a loan to build the factory) would probably have been overcome. If the causative link was indeed one of the issues that the court was called upon to decide then the claim ought to have failed on that ground alone. Indeed, that causative link is inherently so speculative that I think the claim was always doomed from the start.

[26] But in case the court below meant by its order only that Absa Bank acted unlawfully and that it is liable for any damage that might yet be causally linked to its conduct by adequate evidence I turn to whether Absa Bank indeed acted unlawfully.

[27] To my mind the most noteworthy feature of the events that occurred in this case was the preoccupation of the principal parties with securing from Absa Bank the document I have referred to.

[28] The precondition that was set by the Sheikh for his massive financing of the project was that the document should first be secured before anything else was to happen. Yet the document that was required, according to the Sheikh and Mr Fanjek, and as they explained it to Mr Bernert, was really quite innocuous. What was required, according to their evidence, was no more than an assurance from Absa Bank that it would accept moneys from the Sheikh on fixed deposit, at a specified interest rate, and that it would return the moneys when the term of the deposit expired.

[29] One might think that the Sheikh could have obtained that assurance by having his bank telephone Absa Bank. But the whole project, entailing the investment of millions of dollars and the building of manufacturing plants on five continents, was all preconditioned upon such a readily obtainable assurance.

[30] Yet when Mr Fanjek went about securing that simple assurance he did not approach the bank and ask for it, as one might expect him to have done. Instead he went about things in a most unconventional way. Moreover, he wanted the assurance to be worded in a particular way, entailing the use of complex language studded with financial terminology. And then when the assurance was secured nothing further was done to progress the transaction.

[31] From the events that occurred, and also the lack of them, one might almost think that the sole objective of the transaction was to secure the document from Absa Bank. Certainly nothing else was achieved.

[32] I turn now to the evidence in more detail.

[33] The El Macho vehicle apparently lends itself to military and para-military uses. In search of a market for the vehicle Mr Bernert exhibited it at an armaments exhibition in Chile, and then again at a similar exhibition in Abu Dhabi, where he became acquainted with Mr Dinawi. The exhibition was held in 1995. The evidence does not fully disclose what occurred between then and 1999.

[34] But by the middle of 1999 Mr Bernert had also made contact with Mr Fanjek, who was introduced to him by an employee of Armscor. It seems that by then discussions might already have been underway with Mr Dinawi for the financing of the project. It also seems that by then Mr Fanjek was already assisting Mr Bernert to arrange finance and had been in contact with Mr Els. He said that he approached Mr Els because Mr Els had previously arranged certain ‘offshore’ business for Mr Fanjek’s wife. But that does not explain why Mr Fanjek chose to deal with Mr Els when he knew full well that Mr Els was not employed by Absa Bank and had no authority to do business on its behalf.

[35] On 8 July 1999 Mr Els addressed a letter to Rotrax, for the attention of Mr Fanjek, on a letterhead of Absa Bank. Mr Els described himself in the letter as ‘financial advisor’ and wrote as follows (sic):

‘ROTRAX CARS INTERNATIONAL

FOR ATTENTION: MR R. FANJEK

With regard to Investments within Financial Institutions and Investment Companies, the following information is required before further consideration can be given to your request.

1. A mandate from overseas investor(s) stating that Mr E. Bernert (MD of Rotrax S.A.) and Mr R. Fanjek may negotiate with Financial Institutions for the financing of the Rotrax Projects.

2. A description of Rotrax business plans locally and abroad and business plans for the funds they will be receiving to be duly presented by Mr R. Fanjek

3. A complete description and proof of the source of the funds (EG: legality, transferring bank(s) and countries of origin).

4. The business proposal (and/or a letter of cooperation between Rotrax Cars International and the International Investor(s).

Subject to all the above conditions, financial institutions would consider co-operating with the investment plan in conjunction with Rotrax Cars International. Confidentiality between all parties concerned will be strictly adhered to at all times.

For reference on any of the above initiatives please do not hesitate to contact me.’

[36] It is curious that Mr Fanjek accepted the letter when he knew full well that Mr Els was an insurance broker, not a financial adviser, and that he was not authorised to conduct business on behalf of Absa Bank. The content of the letter is curious in itself. But what is even more curious is that Mr Fanjek had himself composed the content of the letter in a document that he prepared a week earlier. Why Mr Fanjek should himself have drafted what purports to be a response by Absa Bank to a request that he had made was not explained.

[37] Meanwhile Mr Bernert had prepared a comprehensive business plan, with the assistance of an accountant, Mr Thornton, which included technical information, cash flow projections, and related financial

information. Upon receipt of the letter from Mr Els he handed to Mr Fanjek various documents, including the business plan, under cover of a letter that recorded that he had given to Mr Fanjek ‘authority to negotiate proposed Investment for the project with Absa Bank’.

[38] Precisely what occurred immediately thereafter does not appear from the evidence. But in September 1999 Mr Bernert travelled to Dubai, in the company of Mr Thornton, where he met with Mr Dinawi and the Sheikh. On 22 September 1999 a written agreement was signed by Mr Bernert on behalf of Rotrax, and by the Sheikh on behalf of the ‘Al Fawaz Group’. The Sheikh made a considerable effort in his evidence to explain who the ‘Al Fawaz Group’ was but it has left me none the wiser. But I will accept for present purposes that it was the medium through which the Sheikh conducted business. A letterhead of the ‘Al Fawaz Group’ reflects that it receives its correspondence at post office boxes in Bahrain and in Dubai but does not reflect where it carries on business.

[39] The agreement purported to record the terms upon which the Group would finance the construction and operation of manufacturing plants in South Africa, the Middle East, Europe, the United States, South America and Australia within the next five years. For an agreement of that magnitude it is decidedly brief. The body of the agreement is recorded in six pages that contain nine clauses, four of which deal with formalities. Of the remaining five clauses, one contains definitions, and one records the ‘territorial extent of the agreement’. The substance of the agreement is in the other three clauses. Clause 2 deals with the ‘obligations of the Group’, clause 3 deals with the ‘obligations of the CC’ in eight lines, and clause 4 deals with the sharing of profits.

[40] Only clause 2 is now material and the following are its terms in full (sic):

'2. OBLIGATIONS OF THE GROUP

The GROUP agrees to purchase 51% controlling share interest in the CC (first territory[3]) including 2nd, 3rd, 4th and 5th territories[4] and to finance the manufacturing plants for the manufacturer of the vehicle in the territories, within a period of 5 years from date of signature. The finance required for each territory is to be based on the attached business plan.

2.1 The CC shall initially be obliged to obtain a formal undertaking and a guaranteed interest rate for an amount of 6 (six) million U.S. Dollars from a AAA rated South African Banking Institution.

2.2 Once a formal undertaking and guaranteed interest rate is received in writing from the South African Banking Institution, the amount of six million U.S. Dollars (the loan capital) will be paid from the Group's bank account held at Emirates Bank International in Dubai, into a said bank account in the name of the Group within South Africa. The Group then undertakes to lodge loan capital and interest in the interim, as security for the erection of the first manufacturing plant.

2.3 On completion of the erection of the first manufacturing plant, the loan capital will revert to as "payment" for the controlling share interest in the CC of 51%, to Mr. Enrico Bernert authorized representative of the CC.

2.4 The finance required as per the attached business plan Pg 18, Option 2, 5.5. Million U.S. Dollars will be transferred to the CC on completion of erection of the first manufacturing plant. The U.S. 5.5. Million will be deposited as additional working capital and is non repayable by the CC or Mr. Enrico Bernert.

2.5 The obligations of the Group (Point 2.1 – 2.5) will also be the procedure for future funding of the manufacturing plants 2, 3, 4 and 5.'

[41] Clause 2.1 required Rotrax to obtain a 'formal undertaking and a guaranteed interest rate' from a South African Bank but the nature of the 'undertaking' that was required was not identified.

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[3] South Africa.

[4] 2nd: The G.C.C. Dubai / Saudi Arabia; 3rd: Europe / Spain; 4th: Australia / Adelaide / Perth; 5th: U.S.A. / Latin America / Oshkosh / Mexico.

[42] The ‘undertaking’ that was required, according to the Sheikh and Mr Fanjek, and as it was explained to Mr Bernert, was a written assurance by Absa Bank that it would accept US $6 million on fixed deposit, at the stipulated interest rate, and that it would return the money when the deposit matured. The reason for that, according to the Sheikh, was that he had not done business in this country before, and he wanted to be sure that his money would be in good hands. One might have thought that in the context of a project of this magnitude, to be undertaken at massive cost, the question whether a bank would be willing to accept a fixed deposit would be the least of their concerns. But if the Sheikh was indeed anxious on that score, it seems to me, as I observed earlier, that a telephone call from his bank to Absa Bank might have sufficed.

[43] As for the remaining provisions of clause 2 both Mr Bernert and the Sheikh said that the agreement envisaged that the Sheikh would place US $6 million on fixed deposit with a South African Bank, and Rotrax would then be authorised to borrow money for the construction of the plant on the security of the deposit. Once the plant had been built the Sheikh would hand over an additional US $5.5 million as working capital, and in the process obtain 51% of the member interest in the corporation. Questions directed to the Sheikh concerning the ultimate fate of the US $6 million, particularly if it had been pledged, elicited vague and contradictory answers.

[44] Mr Bernert returned to South Africa once the agreement was signed and the agreement was given to Mr Fanjek under cover of a

handwritten letter, addressed to Mr Fanjek, but for the attention of Mr Els, that read as follows (sic):

'After a successful trip to Dubai, Mr Thornton and myself have received our j/venture agreement from the Al-Fawaz Group, for your consideration in issueing Rotrax the undertaking in order for the foreign investment as per the agreement to be deposited with Absa Bank.

We have been asked to confirm that interest-rate as well as the period for which the guarantees will be issued once the funds are deposited.

Kindly state that your terms and conditions re: your rights for withdrawal will be limited or renewable for your initial term of guarantee.

Please return our original Joint Venture agreement a.s.a.p.'

[45] What was meant by the penultimate sentence, in the context of what was said to have been required, is not intelligible. Nonetheless, steps were then undertaken to obtain the document from Absa Bank. From this point the evidence descends into farce.

[46] Mr Fanjek delivered the agreement to Mr Els and a document was prepared by Mr Els on a letterhead of Absa Bank. In his evidence Mr Fanjek distanced himself from the document, saying that he conveyed to Mr Els only 'some indications of what His Excellency Sheikh Fawaz would be looking for' but I have little doubt that Mr Fanjek contributed materially to the content of the letter. Once the document had been prepared it was signed by Mr Coetzee at the request of Mr Els. The explanation given by Mr Coetzee for signing the document was that Mr Els had approached him and told him that he had an overseas client who wanted to invest money with Absa Bank but that the client wanted an assurance in writing that the money would be safe. He told Mr Els that he was too busy to write the letter but that Mr Els should do so and he would sign it. Mr Els brought him the letter but he was busy with other clients

and did not read through it fully. Apart from insisting that the phrase ‘fixed deposit certificate’ should be inserted in the document he signed it without amendment.

[47] For a simple assurance that Absa Bank would accept money on fixed deposit, at a specified interest rate, and return the money when the term expired, which is what the Sheikh said he wanted, the document that was produced was decidedly complex. In fact, two documents were produced.

[48] The documents were both addressed to Emirates Bank International at a post office box in Dubai. One was addressed to ‘the credit officer’ for the attention of Mr Majid Al Yousef. The other was addressed to ‘the branch manager’ who was said to be Mr Halah Mohammedd. But for that difference the two documents were identical. They were dated 12 October 1999 and they read as follows (sic):

‘VERBIAGE OF BANK GUARANTEE

ABSA wishes to certify that Mr Robert Fanjek, an associate of ROTRAX, will be guaranteed a fixed deposit on an amount of $6 mil USD (six million United States Dollar) at our bank. On receipt of funds from EMIRATES BANK INTERNATIONAL, the following will be applicable:

1. The $6 mil USD is a guaranteed Investment where the guarantee is irrevocable and unconditional.
2. The guarantee is renewable after 12 months.
3. ABSA BANK proposes an interest rate of libor plus 1% payable to EMIRATES BANK INTERNATIONAL. ABSA guarantees the money in US Dollars.
4. ABSA will guarantee the capital and the first quarter's interest which will be paid in arrears. The second quarter’s interest and all quarter’s thereafter will be paid in advance.
5. EMIRATES BANK INTERNATIONAL will approve the loan for a period of 5 years with the right of early repayment.

6. The guarantee (fixed deposit certificate) will only be issued on condition the money is placed in ABSA BANK.
7. Simultaneously to the receipt of funds, ABSA will issue the said guarantee (fixed deposit certificate) to EMIRATES BANK INTERNATIONAL in their favour.
8. Any cheques received from EMIRATES BANK INTERNATIONAL must be a bank guaranteed cheque payable to ABSA BANK. Mr Robert Fanjek is giving the bank certain guarantees on ROTRAX on behalf to secure the guarantee to EMIRATES BANK INTERNATIONAL.
9. The guarantee (fixed deposit certificate) is legal in terms of international banking practices.'

[49] Mr Coetzee said that he was asked by Mr Els for his signature on a number of occasions and that he was under the impression on each occasion that he was being asked to sign amended drafts of the document. In fact he signed not only the two documents I have described, but also three other documents, dated about a month later, which were given to Mr Fanjek. Each of those documents was in much the same terms as the documents that were addressed to Emirates Bank, except that in each case the addressee, and the amount of the 'investment', differed. One was dated 15 November 1999 and was addressed to 'The CEO, Bank of Commerce, Development and Industry' and the stated amount of the 'investment' was US $12 million. Another was dated 17 November 1999, addressed to 'BIAC Bank' in Kinshasa, and the amount was US $20 million. The third was dated 19 November 1999, addressed to 'LG International (UK) Ltd' in Sandton, and the amount was US $6.8 million.

[50] Mr Bernert was unaware of the existence of those three documents until much later. What Mr Fanjek was up to in obtaining those documents was never adequately explained. This is the clearest explanation that I have found in the evidence of Mr Fanjek:

'I had some ideas of also proposing these projects on my behalf, because of the similar procedures in terms that I did succeed to obtain such a document from Mr Rico Bernert. So I thought it would only be logical to do this myself as well, as everything was on board.'

As I understand that evidence Mr Fanjek was saying that since documents of this kind were readily forthcoming he thought that he might just as well have some for himself.

[51] Mr Fanjek gave Mr Bernert the letter addressed to Mr Majid Al Yousuf and Mr Bernert said that he faxed it to Emirates Bank. I do not find it surprising that he did not receive a response from Emirates Bank. Instead he received a letter from Mr Dinawi, dated 17 November 1999, proclaiming itself to have emanated from the Al-Fawaz Group. The letter was as follows (sic):

'With reference to the ABSA Document dated 12/09/1999 – REF NO: A62961. The credit officer who is also the personal Bank officer of H.E. Sheikh Fawaz Bin Abdullah Al-Khalifa at Emirates Bank International, Al Maktoum Branch, Dubai, Mr Majid Al Yousuf has received your fax copy of undertaking by ABSA Bank dated 12/10/1999 - Ref No A62961, which contains the terms and conditions for issuing of the fixed deposit certificate and that the terms set out are within international Banking practice.

It is therefore my great pleasure on behalf of H.E. and the Al-Fawaz Group to inform you of [our] acceptance of the Absa Bank undertaking Ref No: A62961 and that you and your colleagues are invited to meet with H.E. personally in Bahrain, in order for you to present the original Document as per our joint venture agreement and to discuss the timing of investment.

Kindly confirm your travel details of the 1st week of February 2000, visas to be collected on arrival at Bahrain International Airport, cost of travel will be reimbursed and accommodation will be provided by the Al-Fawaz Group.'

[52] Once more one might ask why the 'timing of the investment' called for discussion. Clause 2.2 of the agreement was perfectly clear. Once the 'undertaking' had been received the money would be deposited. And one might ask why the 'original document' was required to be presented to the Sheikh. The document, after all, was not intended to be presented to third parties, but was there to satisfy the Sheikh that an assurance had been given, and it is apparent from the letter that he was perfectly satisfied that it had been given.

[53] Mr Bernert nonetheless travelled to Bahrain in February, apparently to hand over the original document, in the company of Mr Thornton and Mr Fanjek. The Al-Fawaz group seems to have overlooked its offer to pay the expenses because Mr Bernert said that he paid most of the travel and accommodation costs himself.

[54] The evidence does not tell us whether they talked about the 'timing of the investment' but they certainly must have talked about branching out into a new line of business altogether. Because on 14 February, in Bahrain, a further document was signed by Mr Bernert and his new acquaintances, as well as by Mr Thornton. The document was in the following terms (sic):

'**MEMORANDUM OF ASSOCIATION**

BETWEEN

SHAIKH FAWAZ BIN ABDULA AL-KHALIFA	(Passport No . . .)[5]
ENRICO BERNERT	(Passport No: . . .)
GHASSAN DINAWI	(Passport No: . . .)
ROBERT FANJEK	(Passport No: . . .)
ROBERT THORNTON	(Passport No: . . .)

[5] I have omitted details of the passports.

1. Whereas the above mentioned parties have agreed to enter a formal business relationship.

2. The business will one established and maintained through the medium of a limited liability company registered in BAHRAIN under the name AL FAWAZ GROUP L.L.C.

3. The business will be established with a share capital of BD (N/A) (Establishment capital) which amount will be reflected as a loan to the company.

4. The establishment capital will be provided by Sheikh Fawaz AL-Khalifa.

5. The registration and all costs associated with the registration and establishment of the company will be borne out of the establishment capital.

6. The object of the business will be to establish a general trading company which will include but not limited to the following:

(i) Dealing in oil and/or precious metals and stones,

(ii) Financial services and investments.

(iii) Any other business the shareholders approve.

7. The shareholders reserve the right to amend the objectives of the business at any time.

8. The shareholding of the company will be as follows:"

- SHAIKH FAWAZ BIN ABDULA AL-KHALIFA 30%
- GHASSAN DINAWI 20%
- ENRICO BERNERT 20%
- ROBERT FANJEK 15%
- ROBERT THORNTON 15%

9. Shareholders voting rights will be in proportion to their shareholding.

10. All matters must be approved by the shareholders in a general meeting and approval requires a simple majority of shareholders.

11. Shareholders may only dispose of their shareholding on death or retirement to their immediate family (directly or indirectly). If a shareholder wishes to dispose of his holding under any other circumstances he must first offer it to the existing shareholders who may purchase the shares in proportions to their shareholding or as may be agreed by all existing shareholders. The valuation will be negotiated or if deadlocked by the valuation of independent auditors.'

[55] It was soon thereafter that Absa Bank intervened and set about retrieving the document. That was the end of the project. By then all that had been achieved in the project to manufacture cars was the securing of the Absa Bank document.

[56] Absa Bank's intervention arose from information that it received from a banking official in December 1999. Absa Bank was informed of the existence of two of the documents that Mr Fanjek had obtained from Mr Els. Mr Van Tonder, a former police detective who was employed as an investigator in the forensic services division of Absa Bank, was instructed to look into the matter.

[57] Mr Van Tonder interviewed Mr Coetzee and Mr Els and towards the end of January 2000 he met with Mr Fanjek and asked him to return the documents. Mr Fanjek declined to do so. The reason he gave is not material. In February 2000 Absa Bank instituted proceedings against Mr Fanjek in the high court, as a matter of urgency, for an order, amongst other things, compelling him to return the documents. On 11 February 2000 an order was issued calling on Mr Fanjek to show cause why such an order should not be made, and a final order compelling him to return the documents was made on 24 May 2000.

[58] Mr Fanjek was in Bahrain with Mr Bernert at the time the proceedings were launched, but the fact that the proceedings had been instituted was brought to his attention. Mr Bernert also became aware of the proceedings but felt that they had nothing to do with him. The proceedings must also have come to the Sheikh's attention because on 21 February 2000 Mr Dinawi wrote to Mr Bernert as follows:

‘Reference to our telephone conversation concerning the bank document you have issued us with I regret to inform you, that after consulting with our bank H.E. will not continue with the project or the investment until you or the issuer bank have given us solid confirmation that there are no problems with this transaction or documents supplied by you.’

[59] It was when Mr Fanjek handed over documents in compliance with the order that was made on 24 May 2000 that Absa Bank discovered the existence of the documents that had been given to Mr Bernert. Mr Bernert was asked to return the documents but he refused to do so, and once more, Absa Bank brought proceedings compelling their return. I need not deal with those proceedings. It is sufficient to say that the documents were recovered.

[60] On 30 May 2000 Absa Bank’s attorney, Mr Joubert, wrote a letter to Emirates Bank in the following terms:

‘1. We act on behalf of ABSA Bank Limited.

2. It has come to our client's attention that a letter dated 12 October 1999 with reference number A62961 on our client’s letterhead with the heading “Verbiage Of Bank Guarantee”, was addressed to you.

3. A copy of this letter is attached hereto for ease of reference.

4. The purpose of this letter is to advise you that the letter was issued by a person not authorized thereto, was issued in irregular circumstances and should be disregarded by you.

5. Should you in fact have received this letter, we shall be pleased to be advised thereof.’

[61] That is the letter upon which the claim is founded. Sheikh Fawaz said that when Emirates Bank brought the letter to his attention he was shocked because he thought that something fraudulent might be afoot and he terminated his relationship with Mr Bernert and the project. Why he

made no enquiries as to the bona fides of Mr Bernert, and why he did not resume the project once his bona fides had been established, was left unexplained.

[62] Although the letter dated 21 February 2000 indicates that the Sheikh had decided not to proceed with the transaction until he had 'solid confirmation' from Absa Bank that there were 'no problems with ... the documents', which he never received, I have assumed for present purposes that it was indeed the letter written to Emirates Bank on 30 May 2000 that caused the Sheikh to withdraw from the project. It was the sending of that letter that serves as the basis of the claim.

[63] Three claims were brought by Mr Bernert, framed in the alternative. The main claim was for breach of contract but that has been abandoned. The second alternative claim was for alleged interference in Rotrax's contractual relations with the Sheikh and that has also been abandoned. I need deal only with the first alternative claim.

[64] That was a claim that was framed in delict. It was alleged in the particulars of claim that the letter written by Absa Bank's attorney was written 'wrongfully' and 'intentionally or negligently' in that Absa Bank or its representatives

'failed to ascertain the true position and circumstances under which [the document] was obtained by [Rotrax] from [Absa Bank]; alternatively

were aware of the circumstances under which [the document] was obtained by [Rotrax] from [Absa Bank].'

[65] The court below dealt with the claim on a rather different basis. It said that the letter that was written by the attorney contained

misstatements that were wrongfully and negligently made. The statements that were false, according to the court below, were the statements that the document had not been authorised and that it had been issued in irregular circumstances.

[66] The court went on to say that our law recognises liability for a negligent misstatement resulting in pure economic loss. It relied in that regard on *Bayer South Africa (Pty) Ltd v Frost*,[6] and other cases to the same effect.[7] Those cases all concerned misstatements that were relied upon by the plaintiffs to their prejudice. That is not the case before us. In this case the allegedly false statements were not made to Mr Bernert and his alleged loss did not arise from his reliance on the statements. The statements were made to Emirates Bank.

[67] When that distinction was drawn to his attention the learned judge said that the distinction was 'irrelevant'. He said that he was supported in that radical view by the decided cases that follow. None of those cases provide that support, whether directly or by extension. *Aucamp v Univeristy of Stellenbosch*,[8] *Perlman v Zoutendyk*,[9] and *Standard Chartered Bank of Canada v Nedperm Bank Ltd*,[10] were all concerned with misstatements upon which the respective plaintiffs relied. *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd*[11] was not concerned with misstatements but with the liability of banks for negligently collecting cheques. Nor was *Tsimatakopoulos v Hemingway, Isaacs & Coetzee*

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[6] 1991 (4) SA 559 (A).
[7] *Mukheiber v Raath & another* 1999 (3) SA 1065 (SCA); *OK Bazaars (1929) Ltd v Standard Bank of South Africa Ltd* 2002 (3) SA 688 (SCA); *Aucamp & others v University of Stellenbosch* 2002 (4) SA 544 (C); *Kantey & Templer (Pty) Ltd & another v Van Zyl NO* 2007 (1) SA 610 (C).
[8] Cited above.
[9] 1934 CPD 151.
[10] 1994 (4) SA 747 (A).
[11] 1992 (1) SA 783 (A).

CC.[12] That case concerned liability to a subsequent owner of property upon which a wall had been constructed negligently.

[68] But I do not think we should dispose of this case on the law because it can just as well be disposed of on the facts.

[69] In the course of its judgment the court below said that Mr Merrett, who opined that the document had features of financial 'mist', and Mr Van Tonder, who was of the same opinion, were delinquent in not 'looking at the total picture' before forming their opinions.

[70] It seems that what the court had in mind was that if the witnesses had obtained the 'total picture' they would have understood, which is as the court understood it, that the document was meant to be an assurance by Absa Bank to accept a fixed deposit, and to return the money when the deposit matured, as the Sheikh and Mr Fanjek had explained. And once that had been understood they would have realised that it fell within the authority of Mr Coetzee to sign the document, because he had authority to solicit fixed deposits, which was what the court found. Thus, the court concluded, the statements in the letter that the document was issued without authority, and in irregular circumstances, were false, and Absa Bank was liable for the consequences.

[71] I am not altogether sure that the court below fully appreciated what this case was about. This was not a claim to enforce the terms of a contract, in which event the understanding of the parties to the document might have been relevant. The claim was that Absa Bank was not justified in advising Emirates Bank that the document had been issued

[12] 1993 (4) SA 428 (C).

without authority and in irregular circumstances. In those circumstances the question was not how the Sheikh or Mr Fanjek or even Mr Bernert understood the document. The question was whether Absa Bank was obliged to allow Emirates Bank, and indeed others to whom it might have been presented, to rely upon its authenticity. Clearly it was not obliged to do so if the document was capable of misleading third parties. Both Mr Merritt and Mr Van Tonder believed that the document was indeed capable of misleading third parties and they were perfectly correct.

[72] It needs to be borne in mind that the meaning that was given to the document by the witnesses, and by the court, was teased out from selected passages from the document, while ignoring other passages altogether. And if one meaning can be teased out of selected passages, when read in isolation, then a different meaning is capable of being teased out from contradicting passages, when they are also read in isolation. In my view the court below ought to have directed itself less to what the witnesses told it that the document meant, and more to what third parties might have thought it meant, particularly if they were told that it had a different meaning.

[73] I do not intend going through the document in detail. It is sufficient to say that at the commencement of argument Mr Bernert's attorney was asked to suggest a coherent meaning of the document when all its terms are read as a whole. He was not able to do so and the reason for that is plain. When all the terms are read together the document is a compendium of gibberish. I have no doubt that a document containing gibberish on the letterhead of a major financial institution is capable of misleading third parties as to its meaning, perhaps even more so if it is presented in the context of documentation indicating that it is part of a

larger transaction, and that Absa Bank was entitled to ensure that that did not occur. The fact that the document might not have been intended to be used in that way is immaterial. Absa Bank was not to know where the document might have ended up. I think it goes without saying that whatever authority Mr Coetzee might have had he had no authority to issue gibberish that had the potential to mislead, and that the issuing of gibberish that might mislead does not fall within the regular business of a bank.

[74] What was said to Emirates Bank by Absa Bank's attorney was perfectly correct and Absa Bank cannot be faulted for instructing him to say it. Indeed, had Absa Bank done nothing to ensure that the document did not remain in circulation, and to ensure that no reliance was placed on it, once it knew of its existence, I think its failure would have been nothing short of reckless.

[75] In my view this claim ought to have failed at every step. I find it surprising that it was brought at all.

[76] The appeal is upheld with costs that include the costs of two counsel so far as two counsel were employed. The order of the court below is set aside and substituted with an order dismissing the claim with costs.

R W NUGENT
JUDGE OF APPEAL

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