THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 307/11
765/11

In the matter between:

JOUBERT SCHOLTZ INC	**1ST APPELLANT**
POLLACK, R K, N.O.	
AND MATLALA, N A, N.O.	
(in their capacities as joint trustees of	
GOOSEN, PIETER ANDRIES)	**2ND APPELLANT**
ELANDSFONTEIN 95 CC	**3RD APPELLANT**
ELANDSFONTEIN BOTTLING CC	**4TH APPELLANT**
and	
ELANDSFONTEIN BEVERAGE MARKETING (PTY) LTD	**RESPONDENT**

Neutral citation: *Joubert Scholtz Inc v Elandsfontein Beverage Marketing* (307/11 & 765/11) [2012] ZASCA 6 (9 March 2012)

Coram: BRAND, HEHER, MHLANTLA, MALAN AND MAJIEDT JJA

Heard: 21 February 2012

Delivered: 9 March 2012

Updated:

Summary: Principal and agent – attorney receiving funds into trust account – terms and scope of mandate – probabilities.
Enrichment – *condictio sine causa* – attorney authorised to distribute funds in trust account in accordance with directions of G – payments made with lawful cause – misuse by G – no *condictio* available.
Enrichment - impoverishment – defendant holding credit loan account in plaintiff – account reduced by amount of misappropriated funds – no impoverishment.

ORDER

On appeal from: South Gauteng High Court (Johannesburg) (Lamont, Coppin and Mayat JJ sitting as court of appeal):

1. The appeals of the first, second, third and fourth appellants are upheld with costs.
2. The order of the court a quo is set aside and substituted by the following order:

'The appeal and cross-appeal are dismissed with costs.'

3. All orders for costs are to include the costs of two counsel where employed.

JUDGMENT

HEHER JA (BRAND, MHLANTLA, MALAN AND MAJIEDT JJA concurring):

[1] The respondent in the appeal was the plaintiff in the court of first instance, the South Gauteng High Court (Tshiqi J). It claimed from the first appellant, a firm of attorneys ('Joubert Scholtz'), specific performance of an alleged oral mandate calling for the repayment of surplus funds held in trust after payment to First National Bank ('FNB') and Standard Bank ('Standard') of moneys paid by the plaintiff into trust for the purpose of discharging debts of and secured by assets of the plaintiff.

[2] The plaintiff also claimed, in the same action, against Pieter Andries Goosen[1] and the third and fourth appellants (respectively Elandsfontein 95 CC and Elandsfontein Bottling CC) for payment of amounts paid by Joubert Scholtz to those appellants or their creditors from moneys paid by the plaintiff into the trust account in pursuance of the aforesaid mandate that, so the plaintiff alleged, were paid by Joubert Scholtz in breach of its mandate and without legal obligation and resulted in the unjust enrichment of those appellants at the expense of the plaintiff.

[3] The trial court dismissed the plaintiff's claims, but upheld a claim in reconvention by

[1] Goosen was sequestrated during the course of the proceedings and his joint trustees are the second appellant.

Goosen for a statement and debatement of his capital loan account in the plaintiff.

[4] On appeal to the Full Court (Lamont, Coppin and Mayat JJ) the plaintiff was more successful: the order made by Tshiqi J in respect of the plaintiff's claims was set aside and replaced with money judgments against each of the appellants. The appeal against the order on the claim in reconvention was dismissed.

[5] This Court granted special leave to appeal to all the appellants. There was no cross-appeal by the respondent.

The dispute as it appeared in the pleadings

[6] On 3 December 1999 at Durban the plaintiff, then known as Melton Trading (Pty) Ltd, entered into a written agreement with Goosen, the third and fourth appellants, and Platinum Food and Beverages CC (the holder of the intellectual property rights for the 'Goosen Group') in terms of which the four parties would sell to the plaintiff their business as a going concern together with the moveable assets and immovable property from which the businesses were conducted in Elandsfontein. The plaintiff in turn accepted responsibility in respect of the liabilities of the businesses and the immovable property including any liabilities of Goosen for any obligations secured by any mortgage bonds over the property for the sum of up to R12 million only. The liabilities for which the plaintiff undertook responsibility included, so the plaintiff alleged:

(1) payment of the settlement amount owed by Goosen to FNB in respect of the mortgage bond over the property; and

(2) payment of the settlement amount owed by the fourth appellant to Standard in respect of a notarial bond passed over the plant and equipment of the corporation which formed part of the assets of the businesses sold to the plaintiff.

[7] The plaintiff's case was that it mandated Joubert Scholtz (represented by Mr Jan Joubert, a partner in the firm) to investigate, negotiate, settle and pay the debts of Goosen and the fourth defendant that were the subject-matter of its undertaking. To this end it paid certain moneys into the trust account of Joubert Scholtz for that limited purpose. However, the attorneys refused either to account for the moneys received or to repay such moneys

as had not been applied to the execution of its mandate. The plaintiff accordingly claimed payment of the amounts of R800 000,00 (the alleged FNB surplus) and R1 574 024,65 (the alleged Standard surplus) or such amounts as might be found due after debatement of the account.

[8] Joubert Scholtz admitted that it received money into its trust account from the plaintiff and alleged that it had paid out all moneys so received as it had been instructed by Goosen so to do. It denied the terms of the mandate as set up by the plaintiff. It pleaded that it had been instructed by Goosen and / or Mr Abdoola on behalf of the plaintiff to use and apply money received from the plaintiff 'to make payment of (to) such entities and in such amounts as it may be instructed by [Goosen]' and had agreed to account to Goosen in respect of all moneys received and paid.

[9] In its replication to the plea of Joubert Scholtz the plaintiff:

(1) denied that Goosen possessed authority to furnish instructions on its behalf with regard to the use and application of the money paid into the trust account;

(2) alleged that Joubert Scholtz was aware of the terms of the agreement relating to its undertaking to discharge the liabilities of Goosen and the fourth appellant;

(3) alleged in consequence that Joubert Scholtz was estopped from relying on such authority as Goosen might be found to possess, 'for the purpose of establishing a lawful excuse or justification for payment of the moneys entrusted to it'.

[10] The plaintiff's claim for unjust enrichment was framed against the four defendants jointly and severally. It set up once again the mandate allegedly conferred on Joubert Scholtz to investigate, settle, receive funds and pay FNB and Standard 'as contemplated in clause 6.1.2 of the written agreement'. It alleged that it entrusted R4,6 million to Joubert Scholtz in January and February 2000 for the purpose of discharging Goosen's indebtedness to FNB and R2 724 024,65 during June to August 2000 for the purpose of discharging the fourth appellant's indebtedness to Standard. It further alleged that, having paid the banks, Joubert Scholtz, instead of retaining the surplus funds in its trust account paid such funds to Goosen or his creditors or nominees and to the third and fourth appellants. To the knowledge of Goosen and the third and fourth appellants, the plaintiff

averred, there was no legal obligation that bound the plaintiff to make such payments. As a result of the payments, Goosen and the third and fourth appellants had been unjustly enriched at the plaintiff's expense.

The issues on appeal

[11] The plaintiff's case against Joubert Scholtz turns on the terms of the mandate: Was the instruction to Joubert such as to limit the use of the funds deposited by the plaintiff to strict adherence to the payment of the FNB and Standard debts for which the plaintiff had assumed liability or did it confer a broader authority to take and give effect to instructions from Goosen as to the disposal of the money? In this regard the plaintiff bore the onus of proof throughout the trial.

[12] Only four witnesses were called at the trial. Mr Abdoola, a director of the respondent at certain of the relevant times, was the single witness for the plaintiff. Mr Joubert testified for Joubert Scholtz. Mr Goosen and his wife (whose evidence was of minor consequence) were the witnesses for the second, third and fourth appellants.

[13] The trial commenced in November 2005, more than five years after the material events in the case. Much of the evidence consisted of the uncorroborated recollections of the witnesses. The plaintiff's case was weakened by the absence of contemporaneous letters confirming the fact and content of meetings and conversations in circumstances where such confirmation might reasonably have been expected from a canny businessman, as Abdoola certainly was. In relation to all the evidence one must necessarily be slow to accept such uncorroborated testimony at face value and as reflecting with accuracy the actual words uttered or the sequence of statements and events.

[14] The trial judge made no findings concerning the demeanour of the witnesses. She did however reject the evidence of Abdoola as false in material respects on the strength of her assessment of the probabilities. The Full Court, by contrast, overturned her order because it concluded, also on the probabilities, that Joubert and Goosen had dishonestly conspired to defeat the claim, a conspiracy that included the manufacturing of

correspondence.

[15] I too propose to determine the probabilities applying the principles set out in *SFW Group Ltd and another v Martell et Cie and others* 2003 (1) SA 11 (SCA) paras 5, 6, 7 and 34. In doing so it will be helpful to establish the subjective understanding of the various witnesses as to the rights and duties imposed on the plaintiff and Goosen by the written agreements. For this purpose it does not matter whether that understanding correctly reflects the intent and purpose of the agreements. This is so because the likelihood that a witness would have behaved in one way or another depends not on the correctness of his grasp of the terms of the agreement but rather on how his perception, right or wrong, would have influenced his conduct.

[16] In considering the evidence there are, apart from the principal issue that I have identified above, certain other subsidiary disputes that may need to be decided. These are:

(1) the meaning of the terms of the payment liability clause in the Sale of Business agreement;

(2) whether Joubert was aware of the terms of the agreement at any material time;

(3) Goosen's authority, if any, to act on behalf of the plaintiff in relation to the payment of the debts for the payment of which the plaintiff had taken responsibility;

(4) Joubert's understanding of Goosen's authority;

(5) whether Joubert and / or Goosen deceived the plaintiff as to the proposed or actual use of the funds deposited by the plaintiff in the trust account;

(6) whether the moneys were held in trust for the plaintiff or Goosen;

(7) what, if any, inference or weight is to be attached to the failure of the plaintiff to call Moosa to testify;

(8) whether a face to face meeting between Abdoola, Goosen, Groenewald and Joubert took place in January to discuss payment of the FNB debt.

[17] The evidence was inordinately drawn out. Abdoola's testimony covers nearly 400 pages, Joubert's about 350 and Goosen's more than 200. In what follows I have necessarily limited my synopsis as far as possible without ignoring the whole picture.

Abdoola's evidence

[18] By 1999 Goosen and his Elandsfontein group of corporate entities were in serious financial difficulty. Goosen was introduced to Abdoola who resided in Durban and ran a company called Sunnyfield Packing Co (Pty) Ltd. He expressed an interest in acquiring Goosen's business interests.

[19] In October of that year Goosen, in his personal capacity, and as representative of the third appellant (the property arm) and the fourth appellant (the bottling arm) entered into a Memorandum of Interest ('MOI') with Abdoola who acted 'as nominee for the Moosa / Abdoola Group' as well as nominee for a company to be formed. The MOI contemplated the sale of the business interests as a going concern to the new company in which Goosen and the Moosa / Abdoola interest would hold 49.9% and 50.1% respectively. For the purpose of formalising the sale a formal agreement was to be concluded between the parties.

[20] Prior to the conclusion of the sale agreement the business interests were de facto taken over by a shell company, Melton Trading (Pty) Ltd (the plaintiff). Goosen was its sole shareholder and director. The transfer of the immovable property on which the business was conducted would only be effected some months later.

[21] The MOI expressly stated that

'3.1 The Third Party will inject capital by way of funding into the Company as and when such funds may be required, but limited to SIX MILLION (R6M). Such funding by the Third Party will be treated as a loan to the Company and their loan accounts to be credited accordingly.

3.2 Both the First and Third parties will be responsible for the complete management and control of the Company.'

[22] On 3 December 1999, Goosen signed a Sale of Business and Property Agreement with the plaintiff for a price of R30 million. The sellers (Goosen, third appellant, fourth appellant and Platinum) assigned the liabilities of the combined business at the effective date, 17 October 1999, to the extent of R12 million only to the purchaser (the plaintiff).

[23] Clause 5.5 of the agreement provided as follows:

'The purchaser shall accept responsibility, in respect of the liabilities of the business and the Property (including any liabilities of Goosen for any obligations secured by mortgage bonds over the Property) for the sum of R12,000,000 (Twelve Million Rand) only, and the sellers hereby indemnify and hold harmless the purchaser against any liabilities of the business and any such secured liabilities of Goosen incurred or arising prior to the effective date, including any contingent liabilities, in excess of the said sum of R12,000,000 (Twelve Million Rand). The amount payable by the purchaser to the sellers in respect of the purchase price (R30 000 000) (Thirty Million Rand) shall be reduced by the said sum of R12,000,000 (Twelve Million Rand), which latter sum shall be paid in accordance with 6.1.2 below.'

[24] The payment terms were contained in clause 6:

'6.1 The purchase price shall be paid as follows:

6.1.1 by the issue to Goosen, as part payment of the purchase price of the Property of R10,000,000 (Ten Million Rand) ordinary par value shares of R1 (One Rand) each in the share capital of the purchaser, which shares shall be issued against transfer of the Property into the name of the purchaser;

6.1.2 by the payment by the purchaser to such of the creditors of Goosen (in respect of any obligations secured by mortgage bond or bonds over the Property) or the creditors of the other sellers in respect of the business as the purchaser shall in its election determine of the sum of up to R12,000,000 (Twelve Million Rand);

As to the balance thereof by the creation of loan accounts in favour of Goosen in the books of the purchaser.'

[25] According to Abdoola the ceiling of R12 million on assigned liabilities was derived from information furnished by Goosen to him during pre-contractual discussions. Abdoola was aware of his financial problems. Although a schedule of liabilities was provided by Goosen later in December subsequent events proved it to be both incomplete and inaccurate. The result was that Abdoola, who ran the administrative affairs of the plaintiff from Durban, never obtained a reliable identification or quantification of the liabilities covered by the provisions in clauses 5 and 6, and was often taken by surprise when Goosen told him of demands by creditors of whom he was unaware.

[26] Simultaneously with the conclusion of the Sale of Business and Property

Agreement, Goosen, the plaintiff, Groenewald (a minor shareholder and the auditor of the fourth appellant) and the family trusts of Abdoola and Moosa concluded a Sale and Shareholders' Agreement. In return for 51.1% of the business as a going concern, including immovable property valued in terms of the sale agreement at R13.4 million and all the plant, equipment and stock, the Moosa / Abdoola interests undertook only one financial obligation: to provide or procure R12 million in loan funding to the plaintiff which would attract interest at prime bank rate. The purpose of the funding was to liquidate the debts of the sellers up to the amount of R12 million. Any debts in excess of that figure would be the liability of the sellers.

[27] From the outset, according to Abdoola, he and Goosen were the de facto directors of the plaintiff. The appointments were only formalised by a resolution on 24 February 2000 at which time Moosa was added as a further (non-executive) director. No company documents or resolutions were adduced that reflected an earlier appointment of Abdoola or any division or allocation of duties and responsibilities to the respective directors or any delineation of or limitation upon their authority. In so far as the board of the plaintiff, at least from 24 February 2000, consisted of at least three directors, no evidence whatsoever was adduced of its approval or disapproval of the subsequent acts of Abdoola, Moosa or Goosen whether before or after the event. One only has Abdoola's say-so (prima facie in conflict with the unvaried terms of the MOI) that Goosen's only duty (and use) was to oversee production at the factory in Elandsfontein; beside that he had no decision-making capacity. Goosen disputed this, although he conceded that he had no authority to sign cheques. This was, from the point of view of the onus borne by the plaintiff, manifestly unsatisfactory. Abdoola's evidence of the spheres of authority was not the best evidence, and certainly not definitive, of such authority. Given the silence of the board on this crucial aspect one is bound to assume that the terms of the MOI continued to reflect the formal understanding between the shareholders and was recognised in the interaction of the directors appointed to represent their interests. Upon this premise Goosen retained throughout an equal level of authority with Abdoola in the direction of its affairs including the payment of debtors pre- and post the effective date of the agreements.

[28] Abdoola testified that Goosen had authority to settle certain debts of his own . . . 'we allowed him to settle it because he knew exactly what was going on'. Although this may have been closer to a statement of opinion than a definition of legal authority, it was certainly a recognition of the practical reality that Goosen was in the best position to know which historical business debts required to be paid. Abdoola also emphasised that Goosen was obliged to inform the plaintiff of who such debtors were and produce some sort of proof of the debt; the company would then pay in its discretion, often not even notifying Goosen of who had been paid. That may indeed have been the practice but it needs to be borne in mind that the facts of the present case are different since in both instances large sums of money were paid by the company, clearly in the first instance to settle FNB and Standard. The question is whether any limitation was expressly or impliedly put on the utilisation of whatever may have been unnecessary for those purposes.

[29] According to Abdoola, Goosen phoned him in late December or early January to tell him that FNB was foreclosing on its bond over the property of the plaintiff. Abdoola knew that the debt was some R5.4 million but had not been aware of litigation. Goosen suggested that it might be possible to negotiate a discount. He told Abdoola that Joubert Scholtz in the person of Joubert, was handling the matter for him. Because that firm was also engaged in the transfer of the property it seemed a good idea to involve Joubert in the proposed negotiations.

[30] Abdoola testified that he travelled by air to Johannesburg and met Goosen and Groenewald at the factory. All three went to Joubert's office in Kempton Park. There he met Joubert for the first time.

[31] Joubert told him they (he and Goosen) were under pressure and that the plaintiff was, in terms of the agreement, obliged to pay the claim against Goosen under the FNB bond. Abdoola, led to believe there was a prospect of settlement, told Joubert that the plaintiff would transfer the money into his trust account. There was no urgency but the bond had to be paid. Abdoola also said that the plaintiff was applying for a bond over the property in order to raise the money to pay. Joubert suggested they should try to

negotiate a lower figure with FNB, but said cash was necessary to achieve this. Abdoola thereupon instructed Joubert that since he was handling the transfer he should also deal with the cancellation of the bond and control the money from the plaintiff to settle FNB's claim from his trust account and, having done so, report back to the plaintiff so that transfer of the property could be speeded up.

[32] I interpose to note that Joubert and Goosen denied the meeting about which Abdoola testified in its entirety and put forward a completely different version to explain why the plaintiff deposited money to meet the FNB debt.

[33] Later, as Abdoola testified, Goosen reported to him that FNB was prepared to settle for R4.6 million. Abdoola asked him to obtain terms for payment, but was told that the figure was immutable because the agreement was for an immediate cash settlement. He regarded R4.6 million as representing an attractive saving on the original debt and accordingly went about raising the funds from associate companies. According to his evidence 'we managed to raise R3.8 million and we undertook to get another R800 000.00 within a month'. He contacted Goosen and told him to instruct Joubert to that effect.

[34] When the money was available he telephoned Joubert and obtained his trust account details and told him R3.8 million would be paid into the account. He could not remember exactly what was said 'but I would say that he was aware that R3.8 million was coming initially and a further R800 000.00 would be coming to his trust account to make up the balance of R4.6 million, *which he also affirmed, is the settlement figure of First National Bank*' (my emphasis). He instructed Joubert to cancel the bond and speed up the transfer.

[35] On 17 January 2000 the plaintiff's cheque for R3.8 million signed by Abdoola was deposited to the credit of Joubert Scholtz at the Prospecton branch of Standard Bank. On 16 February 2000 a further cheque for R800 000 was similarly deposited. Both cheques bore endorsement relating to their use but it is common cause that neither came to the attention of Joubert.

[36] Also on 17 January 2000 Joubert addressed a letter to the plaintiff which he sent to its fax number in Elandsfontein in the following terms:

'Geagte menere

EERSTE NASIONALE BANK

Die konsultasie tussen skrywer en u mnr Goosen vroeër vandag verwys.

Ons wens u instruksies te bevestig dat ons 'n bedrag van R3.8 miljoen en R800 000-00 in ons trustrekening moet ontvang ten einde Eerste Nasionale Bank te betaal.

Ons bevestig dat u onderneem het om met Eerste Nasionale Bank te onderhandel en te kyk wat die minimum bedrag is wat hulle bereid sou wees om in volle en finale vereffening te ontvang.'

Although Abdoola professed to have been unaware of the letter until the first appellant made discovery, he confirmed that it precisely reflected his instructions.

[37] Abdoola was also shown a letter written in manuscript by Goosen and purportedly dated 18 January 2000 and addressed to 'Jan' (Joubert) as follows:

'Na die vele telefoon oproepe na Abdoola en Moosa gedurende Desember en begin Januarie gaan ons nou R3,8 miljoen rand by jou inbetaal, vandag of more, wat jy asb. In trust moet neem en mnr. Uys van FNB laat weet (dringend). Dit is deel van die koopprys van die fabriek (deel van die krediteure lys).

Dié R3,8m moet dringend aan Uys & Kie oorbetaal word en kan nie langer wag nie.

'n Verdere bedrag van R800,000 sal aan jou oorbetaal word in die nabye toekoms welke bedrag jy moet oorhou totdat ek jou instruksies gee (aangesien ek nog met FNB probeer onderhandel vir afslag) hoe uitbetaling moet geskied.

Is dit moontlik dat rente verdien kan word op gelde nog nie uitbetaal nie?'

Abdoola denied ever having seen this letter.

[38] Abdoola was referred to a letter dated 18 February 2000 from Joubert Scholtz to Goosen and once again faxed to the plaintiff's Elandsfontein number:

'EERSTE NASIONALE BANK

Ons bevestig dat ons die bedrag van R800 000-00 vandag ontvang het en dat ons op u instruksies voormelde oorgeplaas het na u rekening by NBS Bank.

Ons bevestig dat u onderneem het om self toe te sien dat enige restant van Eerste Nasionale Bank daaruit afgelos sal word.'

Of this letter Abdoola testified:

'It is totally against my instructions to Mr Joubert. He was supposed to pay FNB and not Goosen . . . Mr Goosen was not entitled to any money . . . He had no authority to give any instructions [that the

money be paid into his bank account]. He took instructions from me . . . I was not told the moneys were given to anyone . . . including Goosen.'

[39] According to Abdoola he 'believed the fire had been put out' (ie in relation to FNB). He waited for an accounting from Joubert Scholtz with the transfer of the property, something that only occurred much later. When he eventually received the title deed in 2001 he requested an accounting from Joubert and was told he was not entitled to it as the money was Goosen's.

[40] After FNB the next step in the saga was a phone call to him from Goosen in early March to tell him that Standard was now putting pressure on the plaintiff and taking legal action. He was informed, for the first time, he said, that that bank held a notarial bond over the plant and equipment at Elandsfontein which it was now threatening to perfect. Goosen told Abdoola that Joubert Scholtz was handling the bank and he would get Joubert to call him. Joubert phoned and told him that Standard had fixed a deadline of 22 March for payment.

[41] On 16 March 2000 Joubert sent a copy of a letter addressed by the bank to the members of the fourth appellant and dated 1 March 2000 to the plaintiff's address in Durban. It read as follows:

'***Offer of R2 600 000 in full and final settlement for the overdrafts on:***

PA Goosen – account numbers 01 282 082 2 and 01 282 339 2 and Elandsfontein Bottling CC – account number 41 030 035 7.

The offer of R2 600 000 contained in your letter dated 3 February 2000, in full and final settlement of the debts in the name of Mr. Goosen and Elandsfontein Bottling CC, has been accepted.

Our agreement is subject to the full amount being paid to ourselves within 21 days of this letter i.e. 22 March 2000 failing which we will have no option but to proceed with legal action.

Once payment has been received all suretyships will be released together with our Notarial General Bond.'

Abdoola testified that he had overlooked the clear reference to the settlement of Goosen's personal debt.

[42] Towards the beginning of April, Abdoola, Goosen, Groenewald and Joubert met at

the first appellant's premises in Kempton Park. Abdoola wanted to negotiate a longer time to pay Standard. Joubert told him he could not persuade the bank to take a lower amount or extend the time. Abdoola undertook to deal directly with Mr Claassen, the bank manager. He told Joubert that it was obvious that the plaintiff must pay or lose both the equipment and its business. As before, he instructed him to use the money that the plaintiff would deposit into the trust account to pay the bank and cancel the notarial bond.

[43] Abdoola negotiated with Claassen, stressing, he said, the value of the plant and machinery. On 12 April he submitted a written proposal for an extension of terms. Two days later the bank agreed to accept payment by 12 May. But the plaintiff did not comply and on 17 May the bank demanded settlement by the following day. Further negotiations between Abdoola and Claassen resulted in a deferment until the end of June.

[44] On 30 June the plaintiff deposited a cheque for R1 million at the Prospecton branch of Standard into the trust account of Joubert Scholtz. Abdoola said he discussed the matter with Joubert and informed him that the plaintiff had not been able to raise more but would do so if given time. The payment apparently had the desired effect of staying the axe until 27 July.

[45] Later in July Abdoola told Joubert that a further R1.6 million was available and would be paid into his trust account to settle the bank's claim and procure cancellation of the notarial bond. On 31 July the deposit was made.

[46] When Abdoola spoke to Joubert in August 2000 the latter drew to his attention that the plaintiff had agreed to pay interest at prime rate from 22 March on the Standard debt and that that undertaking was still unfulfilled. Joubert later phoned and gave Abdoola a figure of R124 024,65. A cheque dated 14 August 2000 was made out by the plaintiff and handed to Goosen for delivery to Joubert Scholtz. Goosen phoned Joubert in Abdoola's presence and told him it should be used to finally settle the debt to Standard.

[47] The plaintiff made discovery of a letter dated 11 August 2000 from Joubert to it at its Durban fax number in which he voiced a number of grievances held by Goosen in

relation to the management of the company, the keeping of financial records and payment of a monthly management fee due to Goosen under the agreement. This letter also contains the following statements:

'Our previous conversations refers.

We have now received confirmation from Standard Bank that their claim has been paid in full. We wish to confirm that we have paid out in accordance with your instructions as follows:

04/07/2000 – R900 000; 31/07/2000 – R1,3 million; 01/08/2000 – R200 000;

01/08/2000 – R324 024.65 directly to Elandsfontein 95 CC.

Mr Goosen has requested us to discuss certain matters with you which causes him great concern.

. . .

7. During the inspections of the books Messrs Goosen and Groenewald were unable to establish exactly what amount was paid out to creditors. To this end we are informed that the transaction for the sale essentially had the following in mind:

7.1 The contract made provision for creditors of R12 million. In the event of the creditors not being R12 million the difference between that actually paid out and the amount of R12 million has to be accounted for in Mr Goosen's loan account by way of a credit. Mr Goosen would then be immediately be entitled to payment of that portion of the loan account.

7.2 Please can you give us a full breakdown as to the amounts paid to creditors to date and which creditors had not been paid. Mr Goosen's concern in this regard stems from the fact that in most of those instances he is liable as surety and co-principal debtor.'

Abdoola denied ever receiving the letter. He asserted that the disposition of the moneys received was in conflict with his instructions to Joubert and that the reference to the terms of the agreement showed that Joubert had had insight into its content at least in regard to the plaintiff's obligation to pay creditors of the business. He was unable to suggest why Joubert, intent as he maintained on deceiving the plaintiff, should have recorded that the amount of R324 024.65 (clearly an incorrect reference to the money earmarked for the interest) had been paid to the third appellant.

[48] During 2001 the plaintiff's auditors required a reconciliation of the liabilities paid in respect of FNB, Standard and the Industrial Development Corporation. They asked why a total of about R2.724 million had been paid to Standard when only R2.011 million had been owed. Abdoola phoned Joubert and asked for an accounting. Joubert's response was that he did not need to account to the plaintiff as the money sent to him had been for Goosen. That prompted Abdoola to take legal advice. Despite extensive correspondence

between his attorneys and Joubert Scholtz he was unable to obtain an explanation that satisfied him. He eventually became aware that the moneys paid into the trust account to meet the debt of FNB had been applied not only to that end but also to settle other creditors of Goosen and the third and fourth appellants outside the scope of clauses 5 and 6 of the agreement. Nobody, he testified, had ever informed him that the bank's claims had been settled at amounts less than the payments made for the purpose by the plaintiff. Nor had the plaintiff authorized Joubert Scholtz to utilize the funds for any other purpose.

The trust account

[49] A copy of the trust account of Joubert Scholtz, in so far as it related to the receipt and disposal of the plaintiff's payment was accepted in evidence. It clearly illustrates the reason for the plaintiff's grievance, given that the evidence of Abdoola was truthful and reliable. The breakdown of the account was as follows:

‘			ONTVANG	BETAAL
2/6/2000		Ontvang	1 000 000,00	
2/6/2000		Betaal Elandsfontein Bottling		
		rekening by Standard Bank		900 000,00
1/7/2000		Ontvang	1 600 000,00	
1/7/2000		Betaal Elandsfontein Bottling		
		Rekening by Standard Bank		1 300 000,00
1/8/2000		STANDARD BANK KREDIET		
	A.	P A GOOSEN		150 000,00
	B.	ENB krediet P A Goosen		50 000,00
	C.	Elandsfontein 95		30 000,00
	D.	NBS (Krediet Servcon)		150 000,00
	E.	Elandsfontein 95		20 000,00
2/8/2000		Melton Trading	124 024,56	
	A.	Elandsfontein 95 CC		60 000,00
	B.	NBS Krediet Goosen		64 024,65
18/1/2000		Deposito Melton Trading	3 800 000,00	
18/1/2000		Uys & Kie		3 800 000,00
16/2/2000		Deposito Melton Trading	800 000,00	
17/2/2000		P A Goosen NBS		800 000,00

7 324 024,56	7 324 024,65

The corporate saver account

[50] Joubert opened a corporate saver trust account for Goosen. It too was proved in evidence. It reflects the details of when and how the main trust account was depleted (on the instructions of Goosen) and the moneys transferred from it were used to pay entities other than the FNB and Standard debts which were covered by the terms of the Sale of Business agreement.

[51] Noteworthy is the fact that the amount of R124 024.65 paid by the plaintiff expressly to discharge its liability for the interest on the Standard debt was not applied to that purpose at all.

The countervailing testimony of Joubert and Goosen

[52] Mr Joubert is an attorney with more than 20 years experience. By the end of 1999 Mr Goosen had been his client for several years. The relationship was purely professional. They were not friends. In so far as the court a quo built its finding of a conspiracy on a close friendship the conclusion finds no support in the evidence. Joubert advised Goosen in relation to the business that he carried on at Elandsfontein under the umbrella of what Joubert thought of as 'the Goosen group'.

[53] The business fell on hard times. In October 1998 Standard obtained summary judgment against Goosen and the third appellant and commenced proceedings to perfect its notarial bond over the assets. To Joubert's knowledge Goosen had been trying to dispose of the business for about two years by the end of 1999.

[54] In October or November 1999 Goosen showed Joubert a memorandum of understanding that he had signed with Mr Abdoola.

[55] In November 1999 Goosen settled an action brought by FNB at court, Joubert

being present and keeping a file note. The defendants were required to pay R3.8 million by 17 January 2000.

[56] In December Goosen called on Joubert at his office seeking help in relation to a contract. He required Joubert to travel immediately to KwaZulu-Natal. Joubert, however, was not available. At Goosen's request he made contact with an attorney in Pietermaritzburg and arranged for Goosen to consult with him that afternoon. Joubert faxed the contract brought by Goosen to him but did not himself look at the document and, in evidence, professed himself unable to identify it. Nor did he retain a copy, returning the original to Goosen. There his initial involvement ended.

[57] At the beginning of January Goosen contacted him again. They discussed the latter's problems with debt. Goosen told him the problems were over. He said he had signed an agreement that required him, Abdoola and Moosa to set up a new company to purchase the Elandsfontein property and the business. The company was to raise a loan of R12 million that would be paid to him to liquidate his debts. Goosen described the arrangement as 'more a matter of taking in partners than selling the business', as he was to remain one of the directors (with Abdoola). They were, he said, to have equal control, Abdoola handling the affairs in Durban while the business continued as before at Elandsfontein.

[58] Also in early January 2000, Mr Uys, the attorney representing FNB, phoned Joubert and informed him that he had received instructions that R3.8 million had been paid into the first appellant's trust account. Joubert could find no record of such a payment. He contacted Goosen who said that R4.6 million would be deposited in a few days. Joubert spoke to Goosen daily after that but nothing was forthcoming. Meanwhile Uys was pressing for payment and uttering threats.

[59] On 17 January Goosen came to Joubert's office. He asked him to check the trust account again. Goosen had discussed the matter with his partners. Joubert ascertained that no payment had been made. Using his cellphone Goosen spoke to Mr Moosa. After a while he handed the phone to Joubert. Joubert told Moosa that Goosen alleged that an

amount of R4.6 million would be paid by Moosa into his trust account. Moosa confirmed that the money would be paid. Joubert remarked that there were various creditors pressing, that his firm would be handling a lot of cases for Goosen, and that R4.6 million would not be sufficient. Moosa asked him what the creditors amounted to. Joubert, after a quick calculation named the principal creditors and the amounts owed to them and said they could reach R14 million or R15 million. Moosa's response was that 'their' obligation to Goosen was limited to R12 million. He added, 'Anyhow it is Mr Goosen's debts and his problem and he must decide who to pay and who not to pay'.

[60] Moosa asked how long Joubert could hold back the creditors. Joubert answered that R3.8 million had to be paid that day and that there were various other creditors who could not be resisted much longer. Moosa then undertook to pay R3.8 million into the firm's trust account immediately and 'some other money later' that could be used to pay other creditors, including a further bond of R500 000,00 in favour of FNB. The reference to R800 000, Joubert said, came from Goosen after Moosa rang off, he telling Joubert that R4.6 million would be paid in.

[61] Goosen instructed Joubert to pay the FNB settlement figure forthwith but to hold back other payments as he intended to negotiate further to obtain better terms. He also instructed Joubert that whatever came in should be placed in an interest-bearing account for him and that he would notify Joubert as to who should be paid.

[62] On the same day, Joubert testified, he wrote to the plaintiff at Elandsfontein confirming his instructions. (This is the letter quoted in para 36 above.) Because of the difficulties he was experiencing with his colleague, Uys, he asked Goosen to write a letter that would stress the imminence of the payment to FNB. In due course he received from Goosen the letter dated 18 January 2000 (quoted in para 37).

[63] On 26 January Joubert wrote again to the plaintiff at Elandsfontein:

'EERSTE NASIONALE BANK

Ons bevestig dat ons vandag 'n bedrag van R3.8 miljoen aan die Prokureurs van Eerste Nasionale bank oorbetaal het ter gedeeltelike vereffening van die eis van Eerste Nasionale Bank teen uself.

Ons is in afwagting van u spesifieke instruksies oor wat die bedag is waarop u met Eerste Nasionale Bank ooreengekom het en wil ons ook aan u bevestig dat ons tot op datum slegs die bedrag van R3.8 miljoen vanaf u ontvang het. Indien u enige verdere deposito's in ons trustrekening gemaak het, wil ons u versoek om asseblief aan ons 'n aanduiding te gee van die bedrag en die datum waarop, aangesien ons geen verdere aanduiding kan kry van bedrae geld deur u gedeponeer nie.
Volgens ons berekenings skuld u Eerste Nasionale Bank aansienlik meer as die bedrag van R3.8 miljoen reeds betaal en sal ons dit waardeer indien u hierdie aangeleentheid as een van dringendheid sal hanteer.'

[64] On 18 February an amount of R800 000.00 was deposited into the first appellant's trust account. Joubert at once ensured that it was transferred into a corporate saver account in Goosen's name which carried interest and enabled creditors to be paid directly from it. He received instructions from Goosen from time to time to pay various persons. As appears from his account such instructions were carried out. In reply to a question as to why he had not opened an account in the plaintiff's name Joubert replied that Goosen had told him that, according to the arrangements with his new partners, the money was his, and, in any event, he (Joubert) was in possession of none of the company documents necessary for the opening of such an account.

[65] Throughout the period January to April 2000, Joubert testified, they were battling to keep Goosen's creditors at bay. Standard, which held a notarial bond over the plant and equipment of the business, was particularly urgent and embarrassing for Joubert who was on that bank's conveyancing panel. Although he held some discussions with Claassen, the manager, he left the negotiating to Goosen and Groenewald.

[66] Joubert was informed that a settlement had been reached with Standard at a figure of R2.6 million. During the course of a telephone conversation between them, Abdoola asked him how much was outstanding to Standard. Joubert replied that he had a letter given to him by Goosen stating that the debt was R2.6 million. On 16 March 2000, he faxed to him the letter quoted earlier (in para 41).

[67] In April 2000 Abdoola, Goosen and Groenewald came to Joubert's office. This, said

Joubert, was the first and only occasion that he met Abdoola in person. They discussed various creditors. Standard was threatening to exercise its rights under the notarial bond. Joubert had a conflict of interest and did not want to get involved, so Abdoola and Goosen agreed to 'sort it out' with the bank. Abdoola said Goosen and Groenewald should see how long they could keep the bank at a distance and the plaintiff would shortly pay some money in; they should come back to Joubert with what and who should be paid (not just Standard). He said 'Goosen will sort it out; they are his debtors and he will tell you who and what you must pay'. Abdoola also made it clear that Goosen would run the company as before and described the relationship between them as 'family'.

[68] On 12 April 2000 Abdoola, on behalf of the plaintiff, wrote as follows to Standard:

'RE: ELANDSFONTEIN BOTTLING CC

We refer to our telecom with regard to the debt of the above named company, and our purchase of the business, it's assets, and immovable property at Elandsfontein from Mr P.A. Goosen.

At present we are sorting out the best financing structure to fund the equipment and immovable property. No financing has yet been concluded by our company. However negotiations are at an advanced stage.

According to our records the total outstanding to your company by Elandsfontein Bottling CC is 2,6 million, secured by a notarial bond over the equipment. The value of which exceeds R12 million installed.

We would like to request your company to extend us a further 30 days to finalize our funding and settle the debt. Interest at prime rate can be levied from March 22 2000 until payment date, which would not exceed May 12 2000.

Your co-operation is respectfully required. We hope the above will be acceptable. Your response is awaited.'

Joubert first saw this letter on discovery.

[69] On 30 June the plaintiff deposited R1 million to the firm's trust account. Joubert transferred the money to Goosen's corporate saver account and Goosen again instructed him on various occasions to deal with the moneys as the account reflects. Joubert was unaware and, apparently, unconcerned as to whether the persons he was told to pay were 'group' creditors or not.

[70] At the end of July a further amount of R1.6 million was deposited by the plaintiff and likewise disposed of.

[71] In August Goosen brought a cheque from the plaintiff for about R124 000.00. Joubert denied that he was responsible for providing the interest amount on the Standard debt to Abdoola as, he testified, he was no longer involved in negotiations. Goosen, he said, would have picked up a cheque from Joubert Scholtz and delivered it to Claassen in Pretoria. He subsequently became aware that Goosen had in fact persuaded Claassen to forgo the interest obligation.

[72] Joubert was cross-examined about his response to a letter dated 14 June 2001 written by the plaintiff's then attorney, Mr Adams of Bowman Gilfillan Inc, in the following terms:

'As you know we act on behalf of Elandsfontein Beverage Marketing (Pty) Limited, formerly known as Melton Trading (Pty) Limited.

Our client instructs us that on or about the 30 of June 2000 and the 31 of July 2000 you received payments from our client in the amounts of one million rand and one million six hundred rand respectively, coming to a total of R2.6 million.

We are instructed that the above amounts were paid to you with instructions to pay same to Standard Bank in order to settle the amount owing to Standard Bank by Elandsfontein Bottling CC, which amount was secured by a Notarial Bond over the equipment sold to our client. We are further instructed that Standard Bank required payment of interest on the above amount, which was also paid to yourselves for this purpose in an amount of R124 024,6 on or about the 14 of August 2000.

In this regard our client requires written confirmation of the full details of the amounts paid to Standard Bank and confirmation that such monies were allocated in order to liquidate the amount owing by Elandsfontein Bottling CC to Standard Bank. In the event of you being in possession of any of the bond documents we also request same to the extent that there are any surplus funds our client would require repayment of same.'

The reply signed by Joubert was in the following terms:

'Our failure to deal with all matters raised in your letter under reply shall not be construed as an admission of the correctness thereof.

Writer is to say the least amazed at the stance now adopted by your client in your letter under reply. Allow us to place the following on record:

1. The writer represented Elandsfontein Bottling CC as attorney as well as Melton Trading (Pty)

Ltd now known as Elandsfontein Beverage Marketing (Pty) Ltd.

2. The writer also assisted Mr Goosen as attorney in the purchase and sale agreement that was entered into between various parties in terms whereof *inter alia* assets of Elandsfontein Bottling CC were sold to Melton Trading now Elandsfontein Beverage Marketing (Pty) Ltd.

3. As part of the purchase price Elandsfontein Beverage Marketing (Pty) Ltd was to settle certain debts including that of Standard Bank. By the 22nd March 2001 Standard Bank had obtained a judgement against Elandsfontein Bottling CC as well as Mr Goosen in personal capacity. As a result of the failure of Elandsfontein Beverage Marketing (Pty) Ltd to settle the debt, Standard Bank instructed its lawyers to proceed with execution steps and the property of Elandsfontein Beverage Marketing was subsequently attached.

4. During April 2000 writer consulted with two of the directors of Melton Trading now Elandsfontein Beverage Marketing (Pty) Ltd, to wit Mr G Abdoola and Mr P Goosen when the abovementioned attachment was discussed. The amount Standard Bank was prepared to settle on were R2,6 million plus interest at 14,5%. Mr Abdoola asked Mr P Goosen to try and negotiate with Standard bank regarding the repayment as he was not in a position to pay the judgment debt in full. He requested Mr P Goosen to do everything in his power to stop removal of the goods attached which would obviously have caused seriously damage for Elandsfontein Beverage Marketing.

5. He also informed Mr P Goosen that he could make an amount of R1 million immediately available and asked Mr P Goosen to try and arrange for the balance to be paid off over the next months.

6. Mr P Goosen informed Mr G Abdoola that he had been paying certain amounts directly out of own funds to keep Standard Bank happy. Mr G Abdoola intimated that he was aware of this and thanked Mr P Goosen for his assistance in overcoming the problem with *inter alia* Standard Bank.

7. Writer obviously viewed this meeting as one between partners co-operating in order to protect their business.

8. The amounts referred to by you were subsequently paid into our Trust account.

9. The writer received instructions from Mr Goosen to effect payments of the following amounts:

9.1 04/07/2000 R900 000

9.2 31/07/2000 R1.3 million

9.3 01/08/2000 R200 000

9.4 01/08/2000 R324 024.65

Lastmentioned amount was paid directly to Elandsfontein 95 CC. The other amounts were paid to Standard Bank.

On the 11th of August 2000 we received confirmation from Standard Bank that their full outstanding debt had been paid and that their file will be closed.'

It will be observed that the last-mentioned letter does not refer to any authorisation conferred by Moosa or Abdoola on Goosen or Joubert in relation to the payment of debts. Joubert explained this omission as an oversight. As far as para 2 of the letter referred to him assisting Goosen as the latter's attorney in the sale agreement Joubert maintained that his intention was merely directed to the emergency assistance in finding a substitute attorney for Goosen in early December 1999.

[73] That in substance completes the evidence of Joubert. Goosen's version of events does not require minute analysis. He essentially confirmed the factual aspects of Joubert's testimony although there were areas of difference. He repeatedly stated that according to his understanding of the sale agreement the R12 million allocated to the payment of creditors was part of the purchase price that he was entitled to dispose of at his discretion with due regard to the need to pay historical creditors of the group business. That is why he was at all times so eager to try to settle at lesser figures, believing that if he did so, the difference saved would come to him. His evidence concerning his right to use the moneys paid by plaintiff to the trust account of Joubert Scholtz was by no means consistent. He vacillated between claims to an out and out entitlement to the disposition of the full amount in his discretion and an acceptance of an obligation to settle creditors and a right to receive the balance of the R12 million cash after such settlement. His view of which creditors were the subject of the agreement also appeared to be flexible, generally extending to all his personal creditors and creditors of the business as well as those of the third and fourth appellants. It is also apparent that he was influenced by an unspoken grievance that his fellow shareholders had not been more forthcoming in their compliance with the obligation to provide the capital to pay the debts. It is also clear from his evidence that he was prepared to mislead Abdoola, and probably also Joubert, to lay his hands on money made available by the plaintiff. The disposition of the R124 024.65 deposited by the plaintiff under the impression that it would be used to pay the Standard interest debt provides a clear example of such conduct. Having persuaded the bank to waive the claim, instead of notifying Abdoola, Goosen instructed Joubert to make payments to the third appellant and NBS that are reflected in the trust account.

[74] It is clear from the evidence that Goosen was devious to the point of dishonesty

with both Abdoola and Joubert. Such behaviour was motivated and probably accentuated by a fuzzy but wrong appreciation of the payment responsibilities of the plaintiff and the Moosa / Abdoola group under the agreement. I think his state of mind is best explained by the following concession made towards the end of his evidence. Asked whether he had studied the agreement of sale he replied:

'Unfortunately at the time I did not and I must say whatever I read, I read in the context how I saw this business. It has been shown here in the court to me in quite a different context.'

Whether his conduct and his evidence was rooted in confusion and grievance (as I am inclined to think was the case) or in dishonesty, what is certain is that, save for those instances where his evidence is reliably corroborated, no reliance should be placed on it. In his case, the unreliability of his evidence is exacerbated not only by the disadvantage of delay in bringing the matter to trial, but also by the frailties of advancing age.

[75] Where then, on a conspectus of all the evidence, is the truth to be found? Certain areas of disputes can easily be resolved and I propose to deal with these first.

The interpretation of clause 6 of the Sale of Business and Property Agreement

[76] As counsel for Goosen has pointed out there are subtle differences between the formulation of the liabilities assumed by the plaintiff as purchaser of 'the business' (as defined in clause 1.1.10 read with clauses 1.1.11, 1.1.12 and 1.1.13 of the agreement) to be found in clauses 3.1.2 and 5.5 on the one hand and clause 6.1.2 on the other. I agree with counsel's submission that, because clause 6 deals with the *mechanism* of payment and not the obligation to pay, the inconsistency should be resolved on the basis that the, perhaps, more extensive obligation in clauses 3.1.2 and 5.5 (which do regulate the *obligation* to pay) should prevail.

[77] I also agree with Goosen's counsel that the effect of the payment obligation and method of division of the payment of the price is that the plaintiff as purchaser as at the date of purchase parted with no cash at all for the acquisition of the business and property. Goosen obtained 10 000 shares and a loan account. The sellers would notionally be rid of up to R12 million of debt if and when the plaintiff, a dormant company at the time of sale, paid their creditors. Even treating the undertaking to pay the sellers'

creditors and the Goosen loan account for the balance of the purchase price as constituting value in the hands of Goosen, one third of the purchase price is made up of his shares in the self-same plaintiff which was, in turn, obliged to honour the obligation to pay creditors to the tune of R12 million, and, in due course, Goosen's loan account.

[78] Furthermore, on a proper interpretation of the agreement, provided the plaintiff was able to procure loan funding of up to R12 million from a financial institution, the Moosa / Abdoola family trusts were able to avoid any obligation at all in return for their controlling interest in the plaintiff which now owned the business and assets built up by Goosen. Even if they had to provide the funding from their own resources, they were entitled to repayment plus interest at prime. Despite the substantial sounding purchase consideration of R30 million for their 50.1% share of the business, the trusts were in fact not obliged to pay one cent for their shares in the plaintiff beyond the nominal R200 provided for in the Sale and Shareholders' Agreement. Goosen, for his part, retained 49.9% of an entity that still had to pay off its creditors, without receiving a cent other than a book entry loan account which was only repayable, without interest, when the majority shareholder consented.

[79] Neither the interpretation of the agreement nor its pernicious effects (on Goosen) was such as (of itself) to justify payment to any creditor falling outside the scope of the payment obligation. Those creditors included creditors of the businesses conducted by the third and fourth appellants and Platinum, the creditors of Goosen in respect of Portion 86 (of which he was the owner), and the creditors in respect of obligations secured by mortgage bonds over Portion 86, to a limit of R12 million.

Joubert's knowledge of the terms of the Sale of Business and Property Agreement

[80] Joubert gave a clear and forthright account of the circumstances under which Goosen sought his assistance at the last moment in relation to the conclusion of the agreement and his inability to do so. His evidence was confirmed in all material respects by Goosen. No rebutting evidence was led. There was no inconsistency or inherent improbability in his relation of events. The attempt to discredit him was founded entirely in inferences sought to be drawn from letters written many months afterwards that might

suggest some acquaintance with its terms at the later stage. By then however Goosen had consulted Joubert about his own grievances concerning the implementation of the agreement and may have furnished him with a copy in whole or in part. Nothing in the later correspondence offsets the direct testimony of Joubert that he did not become acquainted with the terms of the agreement and was not involved in its negotiation.

[81] If Joubert had known the terms of the agreement he would have been in no doubt that Goosen was deluding himself. It is inconceivable in such circumstances that he would have played along with the delusion instead of spelling out the reality to him. It is also inconceivable that Joubert as Goosen's adviser (and not a friend) would have co-operated in opening the corporate saver account and effectively allowed Goosen carte blanche in the disposal of the funds paid into the trust account by the plaintiff. Nor is it likely that he would have failed to make diligent enquiry of both Moosa (in relation to FNB) and Abdoola (in relation to Standard) as to the precise use of the trust moneys and failed to account for such use.

[82] In my view the trial court was correct in finding that Joubert probably had no first-hand knowledge of its terms, and, particularly, those regulating the obligations of the plaintiff in relation to payment of creditors at the effective date.

The subjective states of mind of Abdoola, Joubert, and Goosen in relation to the payment obligation

[83] The agreements were drawn by Messrs Garlicke and Bousfield the attorneys of the Moosa / Abdoola parties. Although Abdoola was never pertinently questioned about it, he was almost certainly aware of the limitations on the plaintiff's obligations in respect of creditors and the rights and obligations of Goosen. He probably understood the obligations more or less according to their terms. Nor did he have any cause for believing that Goosen perceived matters differently to himself since Goosen never articulated any misunderstanding. Since Abdoola seems also to have believed that Joubert had at all material times been aware of the contents of the agreement it is also fair to infer that Abdoola had no reason to believe that he too understood matters otherwise. Because Abdoola and Goosen each assumed that the other shared the same understanding,

relations between them continued in an atmosphere of amity and trust until at least August 2000.

[84] Where did Joubert stand in all this, given, as I have found, that he had no knowledge of the terms of the agreement?

[85] When he spoke to Joubert at the beginning of January 2000, Goosen painted a rosy picture of his prospects in the context of his own perception of the plaintiff's obligations and his position within the company. From the outset, therefore, Joubert understood that Goosen would receive R12 million as his share of the price which he would use, in the first instance, to discharge creditors of the group. Joubert was told nothing about the loan account, nor did he have reason to believe that the payment of creditors was an obligation cast on Goosen by the terms of the agreement.

[86] During the conversation with Moosa on 17 January Joubert's initial understanding of Goosen's position can only have been affirmed. Moosa said or, at least, created the impression, that as long as the creditors did not exceed R12 million the plaintiff would pay and he was prepared to make R3.8 million available immediately to make good his word and more shortly. The letters exchanged between Joubert and the plaintiff (Goosen) after the interaction with Moosa make it plain that Joubert accepted Goosen's version of the plaintiff's obligations to him.

Did the face to face meeting take place in January at which Abdoola instructed Joubert as to payment of the FNB bond obligation?

[87] The January meeting depends entirely on Abdoola's say-so. It is unsupported by any contemporary (or ex post facto) documentation, or proof that Abdoola was even in Johannesburg on that day. It is rebutted by both Joubert and Goosen.

[88] The plaintiff's case was not that the telephonic discussion with Moosa did not take place. That was not put, expressly or impliedly, to the defendants' witnesses. Nor was the content of that discussion challenged (although Moosa's authority to give instructions to Joubert was) and Moosa was not called to give evidence, although he was obviously in

the plaintiff's camp, and it was not suggested that he was unavailable. Although never stated in specific terms, the inference that the plaintiff relies on is that the meeting between Abdoola and Groenewald, Goosen and Joubert must have preceded the discussion with Moosa. But that inference is untenable for a number of reasons. First Joubert, unchallenged, described how the report of the alleged FNB payment into his trust account came from Uys, FNB's attorney, how he checked for the expected payment from day to day and discussed the matter frequently with Goosen who finally, clearly in some desperation, on the last date for payment phoned Moosa. Such a sequence of events allows for no meeting such as Abdoola purported to recall. Second, the conversation with Moosa must necessarily have involved reference to the meeting with Abdoola and been influenced by Abdoola's promise to pay and instructions to Joubert, but it was not suggested that that was the case. Third, if there had been a prior meeting with Abdoola, he would have been the logical target of the call, not Moosa. Finally, the letters written by Joubert and Goosen contemporaneously make no reference to Abdoola (save as one of the persons with whom Goosen had been telephonically in contact preceding the Moosa conversation) nor his instructions. If, as Abdoola would have it, the directions communicated by Goosen to Joubert in his letter were in opposition to his own instructions to Joubert, it is improbable that Joubert would simply have followed one above the other without query. The combined weight of all these considerations results in a clear balance of probability against the meeting having taken place at all. That finding which is consistent with the conclusion of the trial court, necessarily reduces both the general credibility and reliability of Abdoola as a witness. The possibility of an innocent mistake on his part attributable to a failing memory is remote, given the importance of the occasion and the detail supplied by him to validate his version.

Which version of the April meeting in Kempton Park is more probable?

[89] In this instance the meeting is common cause but crucial details are in dispute which bear on the terms of the mandate to Joubert Scholtz. Once again the plaintiff's case suffers from the shortcoming of a failure by Abdoola to confirm his alleged oral instructions in writing.

[90] It is not certain whether the copy of the Standard letter of 1 March 2000 (sent 16

March to Abdoola) was received by Abdoola before or after the meeting. Either way it tends to favour the defendants' version. The heading to the letter unequivocally draws attention to the acceptance by the bank of a settlement offer of R2.6 million 'in full and final settlement for the overdrafts on: P A Goosen-account numbers 01 282 082 2 and 01 282 339 2 and Elandsfontein Bottling CC – account number 41 030 035 7.'
In the body of the letter reference is again made to 'settlement of the debts in the name of Mr Goosen and Elandsfontein Bottling CC'.
To the average reader this notification would have been clear. To a person having the knowledge and interest of Mr Abdoola it must have shouted. Yet he testified, lamely, that he had overlooked the significance that it bore to a settlement that included Goosen's personal debt to the bank. Surprisingly, his explanation was not challenged. But even without challenge it remains improbable and even if true, his oversight was consistent with an attitude which would have allowed him to say (as Joubert testified) 'Goosen will decide who and what to pay'. That his attention was drawn to the true terms of the settlement in a letter forwarded by Joubert also belies his own (and his counsel's) contention that Joubert subsequently deliberately misrepresented that Standard had been paid R2.6 million whereas he knew that the business debt was some R500 000 less.

[91] As I have earlier pointed out Abdoola had no particular reason to place a limit on Goosen's authority to pay creditors because he believed Goosen's (and Joubert's) understanding of the agreement accorded with his own and there was trust between them. On the other hand at all material times before the meeting Joubert accepted that Goosen was entitled to receive up to R12 million as his share of the purchase price. If Abdoola had before or during the meeting said anything to qualify his perception the probabilities are that:

(1) Joubert would have queried the statement and the question of Goosen's entitlement and authority would have been clarified;

(2) Joubert would have been astute at all necessary times after that (in relation to the Standard payments) to confirm his instructions and make full accounting to the plaintiff;

(3) Joubert would not have continued to operate the corporate saver account as if the funds in it belonged to Goosen;

(4) Abdoola, now aware that there had been a misunderstanding, would have ensured

that payments were not simply deposited without clear directions as to their disposition. That none of these consequences followed is, in my view, a strong indication that Abdoola gave no instruction to Joubert which ran contrary to the latter's perception of Goosen's entitlement and authority to deal with the funds as he deemed best. The evidence of Joubert and Goosen that Abdoola made a direct statement to that effect is, in the circumstances, more probable than the version derived from his evidence. In thus concluding I have included in the balance of probabilities the failure by Joubert to mention his reliance on an express authorisation by Abdoola in later correspondence.

The deposit by the plaintiff to settle the interest claim of Standard

[92] The following probabilities are established by the evidence:

(1) Abdoola was notified that the bank required payment of interest at the agreed rate before its claim could be regarded as discharged;

(2) Joubert forwarded the bank's letter of 1 September 2000 to the plaintiff;

(3) Joubert had no personal knowledge of the amount of interest claimed by the bank.

(4) Joubert was not informed by Abdoola that he should deal with the deposit in any specific way.

(5) Joubert was not made aware by Goosen that the bank had waived its claim.

(6) There is no reason to believe that Joubert acted towards the plaintiff in a deceitful or dishonest manner in relation to the disposition of the funds or the absence of an accounting.

Conclusion

[93] The conclusions I have reached in relation to the disputed aspects of the case (save in relation to the interpretation of the Sale of Business and Property Agreement) lead to an overall finding that the plaintiff failed to prove that it conferred a mandate on Joubert Scholtz in the terms pleaded by it and, more broadly, either a mandate or a resolution of the company which limited the authority of Goosen, as a shareholder empowered by the MOI and a director whose authority was not impugned or restricted by the board, to determine how the funds deposited at the time of the FNB and Standard negotiations and pursuant to them should be used.

[94] The consequence is that the plaintiff failed to prove that Joubert Scholtz was under a duty to account for and return 'surplus' funds to it. The trial judge was accordingly correct in her finding and her order must be restored.

[95] As far as the unjust enrichment action against the second, third and fourth defendants is concerned, their counsel submitted that the claim had to fail on two grounds: first, that the plaintiff had failed to prove that Joubert did not act in accordance with a mandate properly given and, therefore, on the case pleaded, had failed to prove a lack of just cause for the payments, and second that, even if Goosen acted beyond his authority in receiving the payments to and appropriating them to liabilities not the subject of agreement, the plaintiff had not been impoverished by such receipts or appropriations.

[96] I think both submissions are sound. As to the first the law is correctly stated by Rose-Innes J in *Govender v Standard Bank of SA Ltd* 1984 (2) SA 392 (C) at 397F:

'. . . in the case of a *condictio sine causa*, money which has come into the hands or possession of another for no justifiable cause, that is to say, not by gift, payment discharging a debt, or in terms of a promise, or some other obligation or lawful ground for passing of the money to the recipient, may be recovered to the extent that the recipient has thereby been enriched at the expense of the person whose money it was.'

[97] The plaintiff complains that Joubert had no mandate to pay the surplus funds held in trust, after payment of the secured FNB and Standard debts, to other creditors of the Goosen group. The proposition that Joubert lacked a mandate is based on the contention that only Abdoola and not Goosen could instruct Joubert on behalf of the plaintiff how to apply the trust moneys. I have found that no such limitation was placed on Goosen's authority when Moosa made the funds available in January 2000. Such evidence as exists is to the effect that he had plenary authority equally with Abdoola to control the affairs of the plaintiff. At the meeting in April, Abdoola probably authorised Joubert to dispose of the funds as he was instructed by Goosen to do. As Joubert and not the plaintiff made the payments in question and did so in accordance with his mandate, there was lawful cause for the payments.

[98] By reason of the terms of agreement the loan account must stand to Goosen's credit in an amount of at least R4 million (after due allowance has been made for deduction of the sale price for a proportion of Goosen's shares in the plaintiff sold to his fellow shareholders). The quantum of an enrichment claim is the lesser of the amount by which the recipient has been enriched and the amount, if any, by which the party claiming has been impoverished: *Kudu Granite Operations (Pty) Ltd v Caterna Ltd* 2003 (5) SA 193 (SCA) at para 17. Goosen's credit loan account for the balance of the purchase price of the business and Portion 86 constituted a liability of the plaintiff, however difficult the majority shareholders might be able to make it for Goosen ever to realise payment of it. There can be no doubt that in so far as the surplus funds were used to pay creditors of Goosen and his group the amount fell to be deducted from his loan account. It follows that the liabilities to Goosen on loan account whether arising under clauses 3.1.2, 5.5 and 6.1.2 of the agreement or otherwise were reduced, but the plaintiff's patrimony was not. Because there was no impoverishment, no enrichment claim accordingly lay against the second, third and fourth defendants.

[99] The following order is made:

1. The appeals of the first, second, third and fourth appellants are upheld with costs.
2. The order of the court a quo is set aside and substituted by the following order:

'The appeal and cross-appeal are dismissed with costs.'

3. All orders for costs are to include the costs of two counsel where employed.

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J A HEHER
JUDGE OF APPEAL

APPEARANCES

FIRST APPELLANT:	E F Dippenaar SC
	Webber Wentzel, Sandton
	Lovius Block, Bloemfontein
SECOND, THIRD AND FOURTH APPELLANTS:	C E Watt-Pringle SC
	Ramsay Webber, Illovo
	Lovius Block, Bloemfontein
RESPONDENT:	S L Joseph SC
	Bouwer, Kobeli & Morabe, Rosebank
	Naudés, Bloemfontein