IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

15/10/2008

In the matter between: Case No: 14302/03

RICO BERNERT Plaintiff

and

ABSA BANK LIMITED Defendant

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
DATE 15/10/2008 SIGNATURE

JUDGMENT

RANCHOD, AJ:

[1] In this matter the Plaintiff an adult businessman initially preferred three alternative claims against the Defendant, a company with limited liability duly registered in terms of the statutes of the Republic of South Africa. Although not expressly alleged by the Plaintiff, it was implicit and never contradicted, that the Defendant is a registered bank. On the contrary, in its amended plea, the Defendant pleaded that it is a registered bank in terms of Chapter III of the Banks Act, 1990. Before the trial, liability was separated from quantum with regard to all three alternative claims. Ultimately, the

Plaintiff persisted only with the second of these alternative claims, described in the Plaintiff's heads of argument as "Delictual Claim 2".

[2] This claim is as follows (as formulated in paragraphs 12 to 18 of the Plaintiff's amended particulars of claim):

"12. During or about September 1999, to the knowledge of the Defendant, the cedent [i.e. Rotrax Cars International CC, a close corporation duly registered according to the statutes of the Republic of South Africa with registration number CK95/40067/23, as defined in paragraph 3 of the amended particulars of claim], duly represented by the Plaintiff in Dubai, entered into a written agreement with the Al Fawaz Group of Dubai, duly represented by Sheik Fawaz Bin Abdullah al-Khalifa, in order to obtain finance from such group for the manufacturing of a motor vehicle called the El Macho Jeep. A copy of the said agreement is annexed hereto, marked Annexure 'C'.

"13 13.1 On 30 May 2000, Routledge Modise, acting on behalf of the Defendant informed Emirates Bank (the financial institution used by the Al Fawaz Group), in

writing that a letter dated 12 October 1999 with reference number A62961 on the letterhead of the Defendant, with the heading 'Verbiage of Bank Guarantee' (annexed as Annexure 'A' hereto), was issued by a person not authorised thereto, was issued in irregular circumstances and should be disregarded by you(*sic*), thereby implying that the cedent obtained the said letter from the Defendant, under irregular circumstances and thereby further implying that the cedent did so fraudulently. A copy of the said undertaking (*sic*) is annexed as Annexure 'A' [but see above] and a copy of the letter is annexed hereto marked Annexure 'D'.

"13.2 During or about 2002 the cedent became aware that representatives of the Defendant, whose identity is to the Plaintiff unknown, acting within the course and scope of their employment, blacklisted the cedent with the International Chamber of Commerce.

"14. The aforesaid acts were wrongful and were done intentionally, alternatively negligently by the Defendant,

alternatively its representatives acting aforesaid, who acted in the following manner:

"14.1 They failed to ascertain the true position and circumstances under which, Annexure 'A' the undertaking (*sic*) was obtained by the cedent from the Defendant;

"14.2 In the alternative, the Defendant, alternatively its representatives were aware of the circumstances under which Annexure 'A' was obtained by the cedent from the Defendant.

"15. The Defendant, alternatively their representatives were aware that in the event that the cedent was blacklisted with the International Chamber of Commerce and/or was presented to the Emirates Bank as acting under dubious circumstances, such facts would come to the knowledge of the Al Fawaz Group and that under the said circumstances the Al Fawaz Group would no longer be willing to do any business with the said cedent, including the manufacturing [of] the said motor vehicles, and that should the cedent be blacklisted, no Triple A bank or any other financial institution would do business with the cedent.

"16. As a direct consequence of the aforesaid conduct of the Defendant, the cedent was unable to obtain further finance for the manufacturing of the said vehicles.

"17. The Al Fawaz Group as a result of the aforementioned acts by the Defendant, alternatively its representatives, refused to do any business with the cedent.

"18. As a result of the foregoing the cedent suffered damages computed as follows:

"18.1 Get up costs expended and lost to the amount of R 115 260 000,00 (one hundred and fifteen million two hundred and sixty thousand rand);

In the alternative to 18.1 above:

"18.2 Orders procured for the manufacturing of 150 vehicles representing a loss of R 250 000,00 per vehicle, in total an amount of R 37 500 000,00;

"18.3 Anticipated orders for a further 10 000 vehicle over five years at a loss of R 15 000,00 per vehicle, in total an amount of R 150 000 000,00.

"Wherefore Plaintiff claims in respect of Claim 2:

"1. Payment of the amount of R 115 269 000,00;

"2. In the alternative to prayer 1 above payment of the amount of R 187 650 000,00;

"3. Interest on the capital amount set out in prayer 1, alternatively prayer 2 *a tempore morae*;

"4. Costs of the action;

"5. Further and/or alternative relief."

[3] Annexure "C" to the amended particulars of claim is a copy of a prolix Joint Venture Agreement (JVA) entered into between the Al Fawaz Group (UAE DUBAI Trade Licence Number 505531) represented by Sheik Fawaz Bin Abdullah Al-Khalifa (Sheikh Fawaz) and the cedent (i.e. Rotrax Cars International cc: CK95/40067/23), represented by the Plaintiff with a view to the Group purchasing 51% shareholding (*sic*) of the close corporation as having the exclusive right to market and manufacture the El Macho Motor Vehicle and owning the intellectual property thereof.

[4] Annexure "A" is a letter written ostensibly on an official letterhead of the Defendant (Brooklyn Branch) under "Ref No: A62961" by Mr Louis Coetzee, Relationship Manager, addressed to

Mr Majid Al Yousuf, The Credit Officer, Emirates Bank International, Baniyas Square Branch, P.O. Box 2923 Dubai, concerning: Verbiage of Bank Guarantee. It is dated 12 October 1999. (Annexure "A" of the Particulars of Claim is identical to annexure "A" to Defendant's plea. Annexure "B" to the plea is also identical to "A" except that "A" is addressed to "The Credit Officer" a "Mr Majid Al Yousef" of Emirates Bank International, whereas "B" is addressed to "The Branch Manager" "Mr Halah Mohammedd" of the same bank. The reference number on both is the same.

[5] Annexure "D" to the Particulars of Claim is a letter dated 30 May 2000 ostensibly written on an official letterhead of Routledge Modise Attorneys on behalf of that firm under the reference Mr A Joubert/jc to the selfsame Credit Officer referred to above (Ref: Mr Majid Al Yousuf) and headed: "Our Client: Absa Bank Limited" and "In Re: 'Verbiage of Bank Guarantee'."

[6] In the amended plea (and, more particularly, in paragraphs 15 to 21 thereof), the Defendant pleaded as follows to Plaintiff's Claim 2:

"15. Ad paragraph 12.

"15.1 The Defendant denies this paragraph.

"15.2 Alternatively, and in the event of the above Honourable Court finding that the Plaintiff and the Al Fawaz Group executed the agreement, being [Annexure] 'C' to the particulars of claim, the Defendant denies that a valid and/or lawful and/or enforceable agreement came into being for the following reasons:

15.2.1 the Defendant denies the existence of a legal entity known as the Al Fawaz Group;

15.2.2 the Defendant denies the authority of the representative of the Al Fawaz Group;

15.2.3 the agreement contravened section 29 of the Close Corporations Act, 1984 in that the Al Fawaz Group is not a natural person as contemplated in section 29(1) of that Act;

15.2.4 the agreement constituted a contravention of regulations 3(1)(e) and 10(1)(c); and

15.2.5 Clause 2.1 of the agreement was not capable of being performed in that no South African banking institution has a 'triple A rating'.

"16. Ad paragraph 13.

"16.1 The Defendant repeats paragraphs 10.1 to 10.3 above [which read as follows:

"10.1 On 15 December 1999, and in terms of international banking practice, the Defendant forwarded a letter (including certain annexures) to the International Chambers of Commerce, Commercial Crimes Services in London, a copy whereof (including the annexures) is annexed marked 'A'.

"10.2 During 2000 the Defendant launched two applications under case number 3442/2000 and 14346/2000 to retrieve and regain possession of fake financial instruments issued unlawfully and unauthorised on its letterhead.

"10.3 On 13 May 2000 Routledge Modise Attorneys, representing the Defendant, forwarded a letter dated 30 May 2000, being [Annexure] 'B' to

the particulars of claim, to the credit officer, Emirates Bank International"].

"16.2 Save as aforesaid, the Defendant denies this paragraph.

"17. Ad paragraph 14. The Defendant denies this paragraph.

"18. Ad paragraph 15. The Defendant denies this paragraph.

"19. Ad paragraph 16. The Defendant denies this paragraph.

"20. Ad paragraph 17. The Defendant denies this paragraph.

"21. Ad paragraph 18. The Defendant denies this paragraph."

[7] Annexure "A" to the amended plea appears on the face of it to be a copy of Annexure "A" to the amended particulars of claim.

[8] The Defendant did not pursue its special plea of prescription; nor did it persist in its denial of the cession (alleged in paragraph 3 of the amended particulars of claim and initially denied in paragraph 7.1 of the amended plea) by the cedent (Rotrax Cars International cc) to the Plaintiff of its supposed claim against the Defendant. The arguments in regard to issue estoppel were also not proceeded with.

[9] As I said in the end Plaintiff decided to rely only on Claim 2. I will therefore primarily deal with the evidence insofar as it relates to that claim.

[10] Five witnesses gave evidence on behalf of the Plaintiff. They were the Plaintiff himself, Mr Fowler, Mr Thornton, Mr Fanjek and Sheikh Fawaz.

[11] Plaintiff sketched the background relating to him ultimately appointing a Mr Vanjeck to, on his behalf, obtain Annexure "A" to the particulars of claim (the so-called "Verbiage of a Bank Guarantee") from the Defendant. He testified that –

> 11.1 ROTRAX CARS INTERNATIONAL CC ("Rotrax") of which the Plaintiff is the sole member, is a motor vehicle manufacturer and developed the El Macho motor vehicle. The Plaintiff is the owner of the design of the El Macho and the intellectual property rights relating thereto. Plaintiff is a motor mechanic by training.

11.2 The car was tested by the South African Bureau of Standards [SABS] and a car manufacturing license was issued. The SABS manufacturing licence entails that the vehicle can be produced in South Africa to standards known as ISO 9000 and up to ISO 9009 for commercial and civilian use. The vehicle when produced is regarded as being road worthy and it is not necessary to obtain a roadworthy certificate when it is sold. The owner of such a motor vehicle licence is also entitled to export the vehicle without a roadworthy certificate or other documentation required, apart from the usual export documentation.

11.3 A prototype of the vehicle was exhibited in co-operation with ARMSCOR at a military exhibition in Santiago, Chile in March 1994. There was tremendous interest in the vehicle. Thereafter the vehicle was exhibited, again in close corporation with ARMSCOR, at an exhibition in South Africa, where the vehicle was slung underneath a helicopter for quick deployment. This took place in October 1994. Thereafter, in

March 1995, the vehicle was exhibited in Abu Dhabi (U.A.E.), also in co-operation with ARMSCOR.

11.4 Numerous enquiries were received from all over the world. There was also interest from the United Nations in Angola via the South African Ambassador, Rodger Ballard Tremeer.

11.5 Plaintiff had difficulty in obtaining finance for the development of the vehicle project. While seeking finance he met Mr. Ghassan Dinawi, who was the business manager of Sheikh Fawaz. Sheikh Fawaz was very keen to invest in the motor manufacturing company and the Joint Venture Agreement was entered into between the Al Fawaz Group and Rotrax Cars International CC. The agreement was signed on the 22nd September 1999 in Dubai. The JVA states that South African Law is applicable to the contract. In terms of the Agreement the Al Fawaz Group would purchase a 51% controlling member's interest (incorrectly referred to as 'shareholding' in Plaintiff's documents) in the Close Corporation

(the cedent) for an amount of US$ 6 million less the cost of the building of a factory.

11.6 The US$ 6 million would have been paid into a bank account in the name of the Al Fawaz Group within South Africa. Before that could happen, it was necessary for Rotrax in terms of clause 2.1 of the JVA, to obtain a formal undertaking and a guaranteed interest rate on the amount of US$ 6 million from a AAA-rated South African Banking institution to assure Sheikh Fawaz his money was safe. The JVA provided that the US $ 6 million would be a loan that Sheikh Fawaz on behalf of the Al Fawaz Group would obtain from the Emirates Bank in Dubai.

11.7 The reason why Sheikh Fawaz wanted such an undertaking in advance, was because he had no knowledge of South Africa, has never done any business in South Africa and has never visited South Africa prior to entering into the JVA.

11.8 The Plaintiff appointed Mr Fanjek to negotiate such a formal undertaking which resulted in annexure "A" to the

Plaintiff's Particulars of Claim being provided by Mr Louis Coetzee of the Defendant. [The relevant content of annexure "A" (dated "12/10/1999") ostensibly on Defendant's letterhead, is:

> *"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 (sic)) at our bank. On receipt of the 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 (sic) 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 (sic) the receipt of funds, ABSA will issue the said guarantee (fixed deposit certificate) to EMIRATES BANK INTERNATIONAL in their favour.*
> *8. Any cheques (sic) 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 (sic) behalf to secure the guarantee to EMIRATES BANK INTERNATIONAL.*

9. The guarantee (fixed deposit certificate) is legal in terms of international banking practices.

Yours Sincerely
(signature)
MR LOUIS COETZEE
RELATIONSHIP MANAGER"

11.9 Sheikh Fawaz and the Plaintiff regarded annexure "A" as the "***formal undertaking***" fulfilling the requirements of paragraph 2.1 of the Joint Venture Agreement.

11.10 The Plaintiff faxed annexures "A" and "B" to the plea to Mr Majid Al Yousouf on the 15th November 1999, being the date on which he received it from Fanjek. Plaintiff was advised by Mr Dinawi on the 17th November 1999 that the letter, annexure "A" was acceptable to both the Emirates Bank and the Sheikh.

11.11 On the 6th of February 2000, with the object of implementing the agreement, Plaintiff, in the company of Mr Fanjek and Mr Thornton visited the Sheikh in Bahrain, where the original of annexure "A" was handed to the Sheikh. (The reason for the time lapse between the 15th of November 1999

and the 9th of February 2000, according to Sheikh Fawaz, was due to the restraints of the Christian and Muslim religious calendars.)

11.12 On the 9th of February 2000 in Bahrain, Fanjek was telephonically advised by his wife that the Defendant had launched an urgent High Court application for the return of certain documents.

11.13 Until that time the Plaintiff was not aware of the fact that Fanjek had been on a frolic of his own and had obtained documents from the Defendant for himself which were similar to annexure "A" but addressed to entities other than Emirates Bank. Those documents are annexures "C", "D" and "E" to the plea. The Plaintiff was uncertain as to the effect that the application would have on the status of annexures "A" and "B" and advised the Sheikh that the matter be put on hold. The Plaintiff immediately returned to South Africa with the intention of resolving the matter before any further negotiations with the Sheikh took place.

11.14 The urgent application proceeded on an opposed basis and on 26th May 2000 the Court ordered Fanjek to return to the Defendant the documents in his possession, namely "C", "D" and "E". (It is important to note that Annexures "A" and "B" did not form part of this Court Order.)

11.15 Plaintiff adopted the attitude that the application against Fanjek had no bearing on the validity of annexures "A" and "B" in his possession, issued by the Defendant for the benefit of the Cedent.

11.16 In the meantime and because of the delay, Dinawi, on instructions of the Sheikh wrote a letter to the Plaintiff on the 21st of February 2000, informing him that the Sheikh "*...will not continue with the project or the investment until you or the issuer bank will give him solid confirmation, that there are not problems with this transaction or document supplied by you...*".

[12] After the Court order against Fanjek, the latter advised the Defendant's attorneys of the existence of "A" and "B" to Defendant's Plea. Mr van Tonder (a forensic investigator in the employ of ABSA Group Limited) and the then attorney for the Defendant, Mr Joubert of the firm Routledge Modise, visited the Plaintiff in his offices on 29th May 2000 demanding the return of "A" and "B". Plaintiff refused during what was apparently an acrimonious exchange of words between them. Mr Van Tonder prepared a confidential report for the Defendant in which he said:

> *"'Bernert" informed the meeting of the following:-*
>
> * *The guarantee (original letter) was handed to him by "Fanjek".*
> * *The guarantee (original letter) was not in his possession or at his premises.*
> * *The guarantee (disputed letter) was handed to the Al-Fawaz Group, Burein(sic), Middle East, in an attempt to obtain finance from the Al-Fawaz Group to invest in "Rotrax" (my emphasis).*

* *He (Bernert) was not prepared to surrender the guarantee (disputed letter) or provide any details thereof.*
* *Absa Group Limited must take him (Bernert) to Court for the court to decide what to do".*

[13] The Plaintiff, though clearly angry at what he perceives to be a great injustice that has taken place because of Defendant's agents' conduct, gave his evidence in a forthright manner without any exaggeration or embellishment of the facts. I see no reason to reject any of it.

[14] The following day, on the 30th May 2000 Attorneys Routledge Modise on behalf of the Defendant wrote a letter to the Emirates Bank, the addressee of annexure "A". This letter is the cause of the Plaintiff's claims against the Defendant, in particular claim 2.

[15] Mr van Tonder, and Mr Merrett (who is also a forensic investigator) of the International Chamber of Commerce were called to testify on behalf of the Defendant. Merrett testified that it is the duty

of a forensic investigator to investigate all aspects of a transaction and *"...to listen to the other side...."* Mr van Tonder initially agreed with this approach, but afterwards made it clear that he makes the decisions and that he wanted annexure "A" back and that he was never really prepared to consider the reasons for the existence of annexure "A". I will revert to Merrett's evidence later on in this judgment.

[16] It is abundantly clear from Van Tonder's confidential report to the Defendant that he knew the purpose and object of annexure "A" was to obtain finance from the Al-Fawaz Group to invest in the Cedent, namely Rotrax. At that stage he also knew that annexure "A" had already been handed to the Sheikh and that the process of obtaining finance was in motion. Van Tonder, in my view did, and if he did not, he should have realized and appreciated that to interrupt the process to obtain finance for the project, could and in all probability, would cause serious harm and damages.

[17] I turn then to the evidence of Shiekh Fawaz, who came from Dubai to testify on behalf of the Plaintiff. The legal situation in Dubai is, according to the evidence of Sheikh Fawaz, that an individual doing business on his own is not a separate legal entity. To form a separate legal entity, a company with limited liability, more than one person is required as members. He referred to the Al-Fawaz Group as *"my company"*. He testified that it is not a separate legal entity, but an "enterprise". The situation in Dubai is that all businesses must be registered. For that reason an enterprise (an individual doing business for its own account or a sole trader), must also be registered. He was adamant that he signed the contract in his personal capacity and he refers to himself as the Al Fawaz Group.

[18] The Sheikh testified that the intention was to sign the JVA on behalf of his personal business group and that the reference in the contract to LLC (Limited Liability Company) is, as far as he is concerned, not important and was in any event incorrect.

[19] Plaintiff's Counsel argued that it is of no legal consequence that the Defendant attacks the validity of the JVA as both the Sheikh and the Plaintiff regarded the JVA as binding upon them. I agree.

[20] The Joint Venture Agreement, clause 2.1 thereof, places an obligation on Rotrax to obtain a formal undertaking and guaranteed interest rate from a South African Bank for US$6 000 000. The Sheikh explained the reasons why he wanted a formal undertaking as set out in paragraph 1.7 of the particulars of claim quoted above.

[21] During cross-examination defence counsel unsuccessfully endeavoured to get Sheikh Fawaz to concede that annexure "A" was not the formal undertaking that he required. The Sheikh said he was satisfied with annexure "A" as he would have had control over the transfer of the money and the conditions of such a transfer. He said he could have used his own money for the US$6 million investment or he could have borrowed the money from the Emirates Bank. His ability to obtain or provide finance for the transaction was not disputed by the defence.

[22] Counsel for the Defendant cross-examined the Sheikh on the meaning of annexure "A". It was put to Sheikh Fawaz that if Annexure "A" is a guarantee, Coetzee was not authorised to sign it. But as will be apparent later, Coetzee was clearly authorised to sign annexure "A". Emirates Bank had checked the signature of Coetzee and accepted it as being correct. The Sheikh testified that both he and the Emirates Bank were satisfied with the contents of annexure "A". The Sheikh was planning to go ahead with the transaction in terms of the JVA, until the letter of the 30th May 2000 arrived.

[23] The Sheikh said the letter dated 30th May 2000 from Routledge Modise Attorneys to the Emirates Bank came as a big surprise. The Bank's reaction was influenced by the fact that the letter came from a law firm. They took it seriously. They called Sheikh Fawaz to the Bank for a meeting about this letter and warned him against doing business with people like the Plaintiff and the Cedent. The Sheikh interpreted this letter as indicative of a fraud committed by the Plaintiff.

[24] Counsel for the defence put it to the Sheikh that Emirates Bank put a hold on the transaction because of the delay in obtaining the requested undertaking and not because of the letter of the 30th May 2000. This was strongly denied by the Sheikh.

[25] The Sheikh was adamant that the proposed business as set out in the Joint Venture Agreement was destroyed by the letter from Routledge Modise dated 30th March 2000.

[26] During argument defence counsel said he was not going to ask that the Sheikh's evidence be rejected. In my view, that was a wise concession as the Sheikh was an impressive witness and one who placed a high value on doing business honourably. I have no reason to doubt his evidence as he was clearly a truthful witness even though I got the impression that he did not quite clearly understand the legal niceties around juristic personalities – but this was hardly surprising given that he is not a lawyer. At first both the Emirates Bank and the Sheikh were happy with the contents of annexure "A". They did not have the queries and objections that the witnesses for the defence gave evidence about concerning the contents and

interpretation of annexure "A". The reason for this is clear – both the Sheikh and Emirates Bank were aware of the underlying transaction and the reason for the issuing of annexure "A".

[27] Mr Thornton (an accountant) testified about the characterisation of a so-called non-repayable loan of US$5.5 million by the Sheikh to Plaintiff. In my view it is not relevant to the merits of claim 2 and I will therefore not deal with that evidence save that I have no hesitation in saying I had no reason to doubt Mr Thornton's testimony. Sheikh Fawaz was not cross examined on this issue.

[28] Mr Fanjek then testified. His evidence was that through negotiation with Paul Els, the Absa broker, he also liaised and negotiated with Mr Louis Coetzee, even though he had never met Coetzee, and obtained the two undertakings referred to as annexures "A" and "B" to the Plea.

[29] Fanjek testified that annexure "A" refers to and relates to the business of Rotrax and the Plaintiff only. He had absolutely no part in that business at all. This is not contested by the Defendant. He said

the letters referred to as "C", "D" & "E" related to the business envisaged by himself. The Plaintiff did not know about "C", "D" & "E", until told about them during the visit of the Plaintiff and Fanjek to Sheikh Fawaz in Bahrain during February 2000. Fanjek accompanied the Plaintiff to Bahrain to meet Sheikh Fawaz and Fanjek hoped to develop a business relationship with the Sheikh. It is an inescapable inference that Fanjek piggybacked on the business of Bernert and Rotrax to canvass for business for himself as well.

[30] On 28 April 2000 Fanjek deposed to an affidavit which only relates to the documents which were at that stage revealed to the Defendant's attorney, Mr. Joubert and the forensic investigator Mr. Van Tonder. Hence this affidavit relates only to "C", "D" & "E" and has no reference whatsoever to "A" and "B". This fact was not appreciated by Fanjek during his cross-examination by the defence. In the cross-examination of Fanjek he was repeatedly asked to say which averments relating to "C", "D" & "E" appearing in the said affidavit were also applicable to "A" & "B". Only "C", "D" & "E" related to Mr Fanjek's own business while "A" and "B" clearly did not.

Fanjek's testimony in this regard is understandable and cannot, in my view, be regarded as a questionable.

[31] Mr Fanjek's credibility was severely attacked under cross-examination and in argument by defence counsel. He was portrayed to be a liar. However, careful scrutiny of the relevant parts of Fanjek's evidence shows that they were common cause or can be inferred from the uncontested facts. Armed with a Court Order, Joubert and Van Tonder asked Fanjek to return the original undertakings issued by the Defendant and all copies thereof. Fanjek asked for a receipt from Joubert and Van Tonder, incorporating the wording of the letters before he would hand them over. This was refused. He said he therefore, and to protect himself, decided not to give all the documents back to Joubert and Van Tonder and to keep quiet about them. Fanjek himself revealed this to the Court and called it a *"white lie"*. He thought it necessary to protect his own interests as he perceived them to be at the time. Defendant's Counsel dissected this issue and a long and protracted cross-examination ensued. As it turned out the cross-examination relating to "C", "D" & "E" was irrelevant to the issues in the Plaintiff's case.

[32] Given Fanjek's admission that he did tell a ("white") lie the question that arises is what weight should be given to his evidence, if at all. LAWSA First Re-issue par. 645 and the authorities quoted therein states as follows:

> ***"645 False Evidence***
>
> *The fact that a witness has told a lie does not mean that his evidence will inevitably be rejected in toto. All the circumstances have to be taken into account because it is possible that there may be some innocent reason for the untruth or that the remainder of his evidence may not be tainted."*

In ***Goodrich v Goodrich*** *1946 AD 390 at 396 it was* said:

"... one should be careful to guard against the intrusion of any idea that a party should lose his case as a penalty for his perjury."

[33] While Fanjek may have lied to Defendant's representatives I am of the view, having carefully observed him whilst he was testifying, and in evaluating his evidence that it cannot be said that he was deliberately lying in this Court. ***National Employers' General Insurance v Jagers*** *1984 (4) 437 at 440D – 441B* sets out the approach of a court in considering the credibility of a witness.

[34] A number of issues were uncontested in Fanjek's evidence. I refer to some of them. That Fanjek was mandated by Rotrax and the Plaintiff to negotiate an agreement with Defendant to the effect that Defendant will issue an undertaking regarding a $6 million investment which was relevant to the Rotrax project in fulfilment of clause 2.1 of the JVA between Rotrax and Sheikh Fawaz. That Fanjek negotiated with Paul Els, who was a broker in the employment of Absa Brokers (Pty) Limited. Els in turn conveyed Fanjek's request to Coetzee, who ultimately signed annexure A. Fanjek handed to Els a copy of the cedent's business plan and other documents setting out the cedent's plans for the El Macho project. Paul Els had an office in Absa Bank's Brooklyn Branch. Els previously advised and arranged for an investment on behalf of Fanjek's wife abroad. The investment was

with Absa Bank Limited. Coetzee was at the relevant time and still was at the time of the trial a Relationship Manager at the Brooklyn Branch and his job description entailed canvassing for investments from the public in Absa products. Fanjek apparently assisted in the wording of the interest clause in Annexure "A". The rest of the document was at first drafted in rough in pencil by Coetzee and thereafter by both Els and Coetzee. Coetzee, before signing annexure "A", insisted that the words "fixed deposit certificate" be used instead of "guarantee", and Coetzee then added the words to the effect that Absa Bank would on receipt of funds issue a fixed deposit certificate. No fraud was committed by any party in the completion and production of annexure "A". (That there was no fraud involved on the part of Plaintiff was agreed to by Defendant in settlement of the application against Plaintiff to hand over "A" and "B" to the Defendant. The agreement was included in the court order.) Coetzee, as an "A" class signatory has formal signing powers also as far as Absa documentation of international relevance is concerned.

[35] The witnesses for the defence, especially Mr Van Tonder and Mr Merrett of the International Chamber of Commerce, who, like Van

Tonder, is a forensic investigator, wilfully ignored the underlying transaction and the motivation and the reasons for the existence of annexure "A". These two witnesses for the defence were in my view, clearly at fault in not looking at the total picture. They were only prepared to voice their opinion on the basis of a sentence by sentence interpretation of only Annexure "A". Mr Merrett testified that he was briefed to interpret only annexure "A" as a single document.

[36] In this respect it is interesting to note the approach of Ms Florence de Navacelle of the ICC Commercial Crime Bureau. In a letter dated 17 December 1999 to ABSA Bank in connection with the latter's request to comment on a Letter of Understanding for a Partnership Agreement between Mediapost SA (Pty) Ltd and Fanjek, she responded, *inter alia*, to ABSA as follows:

> *"Because we do not have knowledge of the whole underlying transaction, I do not feel I have enough information to comment much in details."*

Merrett, rather reluctantly, agreed under cross-examination that that should be the correct approach.

[37] Mr Merrett testified that a report which is titled a "forensic" or "audit" report gives it additional credibility in the eyes of the public. In light thereof, then, the need to ensure that it is constructed carefully and correctly by considering, in the case of annexure "A", all the surrounding circumstances was imperative. He conceded that a forensic report can have far reaching consequences for any person who is accused of wrong doings in such a report.

[38] Van Tonder's affidavit in the application in the High Court against Fanjek was signed on the 12th of May 2000 in which he stated with reference to the Fanjek documents, annexures "C", "D", and "E":

> *"There is therefore a clear risk and potential prejudice to the Applicant (Absa) that should any monies be lent and advanced to the Respondent (Fanjek) on the strength of the letters or copies thereof, signed by Louis Coetzee, and containing the information such as set out in annexure "A" and "B" to the founding affidavit (these refer to the Fanjek's letter) and the Respondent invest such monies in the business in the projects or schemes, i.e. that of the worldwide business development of Media SA Post (Pty) Limited and not in a fixed deposit with the*

applicant, that applicant would be held liable on the basis of such letters and would accordingly be prejudiced".

Yet, as I said earlier, this is in spite of the fact that in his confidential report to the Defendant he described the potential loss to the Defendant as zero. His explanation for these contradictory statements is unconvincing to say the least.

[39] Under cross-examination Van Tonder was referred to the ABSA application against the Plaintiff for recovery of "A" and "B". It was put to him that in an affidavit he told the Court in that application on behalf of Absa Bank the following:

"...Once the document on the letterhead of the relevant prime bank is in the hands of a person who has requested same, that person attempts to raise the document to one of value by presenting it as a guarantee or letter of credit, as the case may be, to other financial institutions or third parties, in order to persuade such institute or party to lend and advance money to him.

"...The document is, however, in fact valueless, but misleading. On the basis of the document the innocent institution or party

is conned in to believing that the document is a guarantee by the prime bank which will secure the amount such institution or party is requested to lend and advance to the holder of the document. Under circumstance such as these, there is created the clear risk and potential prejudice to the applicant that should any moneys be lent and advanced to the holder or presenter of such letter and should such person invest the money in business projects or schemes or any other manner apart from a fixed deposit receipt with the applicant, that the applicant (that is Absa), may be held liable on the basis of such letter and accordingly be prejudiced...."

The affidavit was attested to on the 6th of June 2000.

[40] It was put to Van Tonder that on the 30th of May 2000, 6 days before the affidavit was attested to, he wrote in his confidential report to Absa Management that the potential loss to Absa Bank is zero. It is so, as Defendant's Counsel submitted, that Van Tonder did say that the document though valueless, was nevertheless misleading. I will revert to this aspect later on.

[41] It was also put to Mr van Tonder that in the same affidavit he stated the following:

> *"The police investigation into the matter is proceeding and according to the investigation officer, Detective Sergeant van Staden of the Investigation Unit, Brooklyn, criminal prosecution of the Defendant is likely."*

But in his confidential report to Absa Management he wrote as follows:

> *"Van Staden reported that the State Prosecutor was of the opinion that reasonable grounds of suspicion exists but not enough evidence to continue with criminal prosecution."*

[42] He was unable to give convincing reasons for the contradictory views. In fact I would go so far as to say that he misled that court under oath.

[43] In the confidential report Van Tonder also wrote that Els would have obtained a commission of R2 million. It was put to him that in his recorded interview with Els the latter had told him that he would

not have received any commission whatsoever on the US $ 6 million investment.

[44] Not much weight can be placed on the evidence of these two witnesses and their opinions are in effect of little value given their methodology in investigating the facts and circumstances that led to the issuing of Annexure "A" and effect thereof.

[45] Plaintiff's attorney submitted that Fanjek, on behalf of the cedent must most certainly have entered into a verbal agreement with the Defendant and the formal undertaking, annexure "A" was produced as a result of his negotiations. I do not think I have to decide the issue. It is common cause that "A" was prepared, thereafter signed by Coetzee and it was eventually given by Plaintiff to Sheik Fawaz.

[46] Defendant sought to show that Annexure "A" could have been misused to its detriment even though it was valueless as it could have been interpreted as been a financial instrument because it referred to a bank guarantee. I am not persuaded by that argument. It is

apparent from the first paragraph of the disputed document that Fanjek will be guaranteed a **fixed deposit** for US$6 million "[o]*n receipt of funds* from *EMIRATES BANK INTERNATIONAL.*" Coetzee himself inserted the words "fixed deposit receipt" after the word "guarantee" in paragraphs 6, 7 and 9 in order to make it clear that the guarantee was an assurance that a fixed deposit receipt will be issued on receipt of funds from Emirates Bank and further subject to certain other conditions pertaining to interest rate and so forth. The document is certainly not a model of clarity, but the strained meaning sought to be given to it by Defendant's witnesses must be rejected.

[47] It is common cause that Routledge Modise (as the admitted agents of the Defendant) wrote the letter of 30 May 2000 to Emirates Bank. It is apparent that this claim of the Plaintiff (Claim 2) is founded upon the contents of that letter.

[48] In argument on behalf of the Plaintiff, Claim 2 was categorized as a claim based upon a negligent misstatement causing pure economic loss. That this claim is one of such nature was not at all disputed in argument on behalf of the Defendant. The requirements

for liability for a negligent misstatement causing pure economic loss are no longer contentious. In order to succeed in the present case the Plaintiff must prove: the misstatement, fault or culpability in the form of negligence, wrongfulness or unlawfulness, legal and factual causation, and damages representing proper compensation for the loss suffered by the Plaintiff. (*BAYER SOUTH AFRICA (PTY) LTD v FROST 1991(4) SA 559 (A) at 568; MUKHEIBER v RAATH AND ANOTHER 1999(3) SA 1065 (SCA) par [6] at 1069; OK BAZAARS (1929) LTD v STANDARD BANK OF SOUTH AFRICA LTD 2002(3) SA 688 (SCA) par [17] at 695; AUCAMP AND OTHERS v UNIVERSITY OF STELLENBOSCH 2002(4) SA 544 (C) par [71] at 569; KANTEY & TEMPLER (PTY) LTD AND ANOTHER v VAN ZYL NO 2007(1) SA 610 (C) par [13] at 615*). Whether or not the Plaintiff has established all these elements of a successful claim will be considered *seriatim* with the exception of quantum, which has already been separated for subsequent adjudication.

[49] The misstatement complained of is embodied in the letter dated 30 May 2000 (Annexure "D" to the particulars of claim) and more

particularly in paragraph 4 thereof. The body of this letter reads as follows:

"1. We act on behalf of Absa Bank Ltd.

"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 your ease of reference.

"4. The purpose of this letter is to advise you that the letter was issued by a person not authorised 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."

[50] That Mr Coetzee may have acted injudiciously in signing Annexure "A" is beside the point. He was an A class signatory of the Defendant, being reflected to the outside world as such, and held a managerial position at its Brooklyn Branch as Relationship Manager. Accepting fixed deposits fell within his authority. Soliciting fixed deposits clearly forms part of the ordinary business of the Defendant.

The evidence does not bear out the statement that Mr Coetzee was not authorised to sign Annexure "A". The ambiguity in the terms of Annexure "A" as contended for by Mr Merrett is irrelevant in this context. Although the contents of Annexure "A" may be strange and confusing, that is not the misstatement upon which Claim 2 is founded. Furthermore, it cannot be said on the evidence that the issue of Annexure "A" was tainted with impropriety or unlawfulness. There was no irregularity attached to the issue of Annexure "A" in this respect.

[51] It follows from the aforegoing that the Plaintiff has established a factual misstatement on the part of the attorneys acting for and on behalf of the Defendant. It is not suggested that the Defendant is not liable for the consequences of such misstatement by its agent.

[52] Nevertheless, Defendant, relying on *ALLIANCE BUILDING SOCIETY v DETRIECHT 1941 TPD 203 at 216-7*, argues that inasmuch as the misstatement was not made to the cedent (or the Plaintiff) but to a third party, it cannot operate to found a claim for damages for pure economic loss against the Defendant. I do not

agree. It is true that in both *BAYER SOUTH AFRICA (PTY) LTD v FROST, supra*, and *MUKHEIBER v RAATH AND ANOTHER, supra*, a misstatement "to the Plaintiff" was required, but such references must be seen in the light of the facts of those two cases. Provided all the other elements of liability are present the mere fact that the misstatement occasioning harm to the claimant was directed not to the claimant directly but to another party, is irrelevant (*PERLMAN v ZOUTENDYK 1934 CPD 151 at 161; INDAC ELECTRONICS (PTY) LTD v VOLKSKAS BANK LTD 1992(1) SA 783 (A); TISIMATAKOPOULOS v HEMINGTON ISAACS & COETZEE CC AND ANOTHER 1993(4) SA 428 (C) at 435; STANDARD CHARTERED BANK OF CANADA v NEDPERM BANK LTD 1994(4) SA 747 (A); AUCAMP AND OTHERS v UNIVERSITY OF STELLENBOSCH, supra, par [65]-[67] at 566-7*).

[53] The misstatement was clearly unreasonable. Not only was it commercially unnecessary to write in such terms when a simple cancellation or an innocuous withdrawal of the letter Annexure "A" would have sufficed, but that the letter is false in fact because: Mr Coetzee was indeed authorised to sign the letter Annexure "A"; and

such letter was not created in irregular circumstances. The undeniable import of paragraph 4 of Annexure "A" is that there was fraud attached to the issue of the letter Annexure "A" on the letterhead of the Defendant. However, there was no fraud attached to the issue of Annexure "A". The tone and content of the letter Annexure "D" was not properly supported by investigation. The letter Annexure "D" was patently written on the instructions of the Defendant. A reasonable man in the position of the Defendant would have foreseen the likelihood of the transaction between the cedent and the Al Fawaz Group failing as a result of the writing and despatch of the letter Annexure "D" and would doubtlessly have guarded against such result. The misstatement was consequently made negligently. (*KRUGER v COETZEE 1966(2) SA 428(A) at 430*).

[54] Unlawfulness is of particular importance in claims of this nature (*TRUSTEES, TWO OCEANS AQUARIUM TRUST v KATEY & TEMPLER (PTY) LTD 2006(3) SA 138 (SCA) par [10] at 143-4*) because conduct causing pure economic harm is not *prima facie* unlawful (*BOE BANK LTD v RIES 2002(2) SA 39 (SCA) par [12] at 46; TELEMATRIX (PTY) LTD t/a MATRIX TRACKING v*

ADVERTISING STANDARDS AUTHORITY OF SOUTH AFRICA 2006(1) SA 461 (SCA) par [13] at 468). The question arises whether or not there rested a legal duty on the Defendant to have exercised greater care in ensuring the correctness of the allegations contained in the letter Annexure "D" (*ADMINSTRATEUR, NATAL v TRUST BANK VAN AFRIKA BPK 1979(3) SA 824 (A) at 832-3*). It was obvious to all concerned that the support of the Al Fawaz Group was essential to the viability of the transaction. The Defendant was surely aware that importance would be attached to its view; just as reliance was to be placed on Annexure "A". The mere withdrawal or cancellation of the letter Annexure "A" would probably not have had dire consequences; but the manner in which this was achieved by the Defendant through Annexure "D", was fatal for the project and the entire relationship between the cedent and its backer. If not intended, that consequence was inevitable. That is the context in which the said misstatement was made. The unnecessary import thereof and the knowledge of the potential for damage, ought to have caused the Defendant to act more responsibly and cautiously rather than less so, as it did. There can be little doubt, the carelessness on the part of the Defendant having led to harm on the part of a businessman like the

cedent, that the legal convictions of the community would expect such harm to be actionable in a case like the present. To deny legal redress would seem unjust. Adopting an *ex post facto* objective assessment of the Defendant's conduct (*STEENKAMP NO v PROVINCIAL TENDER BOARD, EASTERN CAPE 2007(3) SA 121 (CC) par [41] at 139*), public and legal policy considerations as well as equity and fairness dictate to my mind that the negligent conduct aforesaid be typified as unlawful. There is no question of limitless liability flowing from the imposition of such legal duty in the particular circumstances of this case.

[55] The misstatement was both legally and factually the cause of the transaction failing. Causality has been established (*MINISTER OF POLICE v SKOSANA 1977(1) SA 31 (A) at 34; SIMAN & CO (PTY) LTD v BARCLAYS NATIONAL BANK LTD 1984(2) SA 888 (A) at 914*).

[56] The foundation of the Defendant's complaints regarding the validity of the joint venture agreement was never established. The evidence of Sheik Fawaz Bin Abdullah Al-Khalifa was to the effect

that the Al Fawaz Group was not a limited liability entity ('LLC') but an 'establishment' or sole proprietorship as we know it. There was no legal impediment to the execution of the joint venture agreement demonstrated. The Defendant was accepted by both the cedent (as well as the Plaintiff) and the Al Fawaz Group (i.e. Sheik Fawaz Bin Abdullah Al-Khalifa) as being the equivalent of a 'triple A' banking institution in this country. The testimony of Sheik Fawaz Bin Abdullah Al-Khalifa was unequivocally to the effect that after receipt of the letter Annexure "D" he (and the Al Fawaz Group) wanted nothing further to do with this project, the cedent or the Plaintiff. That was the direct and immediate result of the misstatement; and the eminently foreseeable consequence thereof. There are no policy considerations justifying the release of Defendant from responsibility for that consequence.

[57] All the requisites for liability on the part of the Defendant for the pure economic loss suffered by the Plaintiff as a result of the misstatement embodied in Annexure "D" have been satisfied.

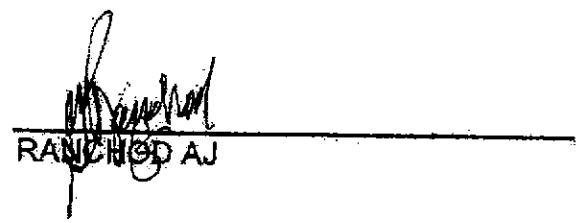
[58] Contributory negligence on the part of the Plaintiff was neither raised nor argued on behalf of the Defendant.

[59] Counsel for Defendant submitted at the beginning of his arguments that because Plaintiff abandoned claims 1 and 3, I should dismiss those claims together with a costs order against Plaintiff. I do not think that submission is justified. Claims 1 and 3 were not additional to claim 2 but rather, in the alternative. The Plaintiff having been substantially successful, it is just that the Defendant should be mulcted in costs, including those relating to the abortive special plea and the issues of the cession and issue estoppel. These costs should also include those occasioned by the application for postponement of 15 September 2005 and the application by Plaintiff to compel better discovery. Counsel for the Defendant submitted that the costs of these applications should follow the result of the matter. I agree. The Plaintiff ought also to be entitled to recover the costs of securing the attendance of Sheik Fawaz Bin Abdullah Al-Khalifa, whose evidence was critical in various respects.

[60] In the light of the aforegoing considerations I find in favour of the Plaintiff.

I accordingly order as follows:

1. It is declared that the Defendant is liable for the proven or agreed damages suffered by the Plaintiff.
2. The Defendant is ordered to pay the Plaintiff's costs of suit including the costs of the postponement on 15 September 2005.
3. The issue of quantum is postponed sine die.
4. Sheik Fawaz Bin Abdullah Al-Khalifa is hereby declared a necessary witness.



RANCHOD AJ

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