deletion of the words 'from the estate of Corporate Acceptances Finance (Pty) Ltd (in liquidation)', the counter-application is dismissed with costs, including the costs of two counsel.

Smalberger JA, Schutz JA, Nugent AJA and Chetty AJA concurred.

Applicant's (Appellant's) Attorneys: *A L Mostert & Co Inc*, Bryanston; *Jan S de Villiers & Son*, Cape Town; *Naudes*, Bloemfontein. Respondent's Attorneys: *Walkers Inc*, Cape Town; *Claude Reid Inc*, Bloemfontein.

COLUMBUS JOINT VENTURE v ABSA BANK LTD

SUPREME COURT OF APPEAL

VIVIER ADCJ, OLIVIER JA, CAMERON JA, CLOETE AJA and BRAND AJA

2001 September 7, 28 Case No 65/2000

Banker—Collecting banker—Liability of to true owner of lost or stolen cheque—Duty of banker when opening new account for customer—Banker owing duty of care to owner of cheque not to collect proceeds of cheque on behalf of one not entitled to payment—Such duty encompassing obligation to take reasonable care when receiving and processing application to open new banking account—Where new account opened for existing customer, verified record of customer's personal details serving as significant disincentive to fraud—Such disincentive absent in case of new customer—Banker then under duty to take reasonable measures to ascertain and verify new customer's identity and trustworthiness.

Banker—Duty of when opening account for customer—New account in name other than customer's own—Use of such other name calling for explanation—Banker under obligation to take reasonable steps to verify customer's identity and to scrutinise with reasonable caution documentation submitted in substantiation of use to which customer proposing to put account—Where explanation adequate and circumstances such as not to cause reasonable and prudent banker, properly considering available information, to have suspicions about customer's bona fides, *further investigation not required—Bank not required to undertake duty of being amateur detective—However, where circumstances putting bank on enquiry, necessary enquiries must be made—Fear of offending customer or of invading customer's privacy not to inhibit performance of that duty.*

A collecting banker owes the owner of a cheque a duty of care not to collect its proceeds negligently on behalf of one not entitled to payment. This duty of care encompasses an obligation to take reasonable care when receiving and processing an application to open a new banking account through which cheques belonging to another are subsequently collected for payment. (Paragraph [5] at 96B/C–D.)

There are important differences between the circumstances when a stranger requests that a new bank account be opened and those when an existing customer of the bank makes a similar request. In the latter case the existing customer generally has a verified identity and confirmed work and residential contact details. Should the new account be used for fraud, the customer can be traced and brought to book. In addition, the location of the customer's assets may be known or traceable through the details already furnished. The pre-eminent consequence is heightened accountability, which substantially diminishes the possibility of the account being used for fraud with impunity. There is thus a significant disincentive to fraudulent use of the account. (Paragraph [9] at 97H–98B.)

In contrast, the disincentive to fraud is absent in the case of a new customer, whose identity, location and other details have not been verified. In such circumstances a banker is under a duty to take reasonable measures to ascertain and verify the new customer's identity and trustworthiness, for without the disincentive that verification of the relevant details provides, the risk that the account could be used for fraudulent purposes is heightened. (Paragraphs [10] and [11] at 98C/D–D and D/E–E/F.)

An employee of the appellant, one B, had opened an account with the respondent bank, not in his own name, but in the name of 'Stanbrooke & Hooper' (S & H). A document purporting to be a franchise agreement between S & H, as franchisor, and B, as franchisee, was handed to the bank. S & H was reflected therein as a firm of solicitors specialising in European Community law in Brussels, Belgium. The 'franchise agreement' required that the franchisee operate a bank account in the name of S & H. When the S & H account was opened B was an existing client of the bank. This fact was reflected on the application form. The personal details which B furnished on the form were all authentic. Although a firm of European Community solicitors in Brussels named S & H existed, the franchise agreement was a fraud. Before the fraud was discovered B had between November 1993 and April 1996 deposited 39 cheques, all drawn by the appellant on its bank account, into the S & H account and had caused a telegraphic transfer from the appellant's bank account to the S & H account. The appellant suffered substantial loss, which it sought to recover from the bank. It alleged that the bank had been negligent in that *(a)* it had failed to establish whether the franchise agreement had been authentic and the information it contained correct; and *(b)* it had failed to satisfy itself that S & H existed and had authorised B to open and control an account in its name. The appellant contended that the bank could easily have obtained S & H's Brussels telephone number by calling the local telephone operator's international enquiries service and that a further call to the number so obtained would in all likelihood have established that B was unknown to them and that the 'franchise agreement' was part of a fraudulent scheme.

Held, that when he had opened the S & H account B had furnished the bank with an identity number and other personal details, all of them authentic. His disclosure that he was an existing customer had also been authentic. That had served as an assurance of the authenticity of the other details, since a comparison was available which would have brought any discrepancy to light. Most important of all, the details meant that, in the event of fraudulent use of the new account, the customer could be traced and held accountable. (Paragraph [12] at 98F–G/H.)

Held, further, that the fact that disincentives to fraud might from time to time be

ineffective could not render them irrelevant in determining the standard of care required of bankers in extending further facilities to customers with already authenticated identity, work and residential details. (Paragraph [13] at 98I–99A/B.)

Held, further, that the issue was whether it had been shown that the circumstances had been such as to have caused a reasonable and prudent banker, properly considering the available information, to have suspicions about its customer's *bona fides*. Only if the circumstances were such would the need for further enquiries arise. (Paragraph [15] at 99C/D–D/E.)

Held, further, that the fact that the bank could easily have called S & H in Brussels did not in itself translate into a breach of a duty to have done so: an omission to act did not constitute a breach of duty merely because the omitted action would have been easy to take. (Paragraph [16] at 99E.)

Held, further, that the 'franchise agreement' appeared quite regular on the face of it. There was nothing untoward about the joint venture proposed therein and nothing in its terms to suggest the necessity for further enquiry. (Paragraph [18] at 100B/C–C.)

Held, further, that bankers were under an obligation to take reasonable steps to ensure that their clients were who they said they were and to scrutinise with reasonable caution documentation submitted to them in substantiation of the uses to which their clients propose to put the accounts they opened. The duty which the appellant sought to impose on the bank in this instance, being 'the duty of being an amateur detective', was too high: nothing in this instance justified its imposition on the bank. (Paragraph [18] at 100D–F.)

Held, further that there was an evident danger that an account operated under a name other than that of the bank's customer might be used for fraud. The use of a name other than the customer's own thus called for an explanation. (Paragraph [21] at 101C/D–D/E.)

Held, further, as to the nature and extent of such explanation, that, if circumstances put a bank on enquiry in extending new facilities to an existing customer or in creating facilities for a new customer, the necessary enquiries had to be made. Fear of offending the customer or of invading the customer's privacy could not inhibit the performance of that duty. (Paragraph [25] at 102E–E/F, read with paras [22] and [23] at 101F/G–H.)

Held, further, given that B was an existing customer, with verified details, and given the plausibility of his explanation that the 'franchise agreement' required him to conduct the account in the name of S & H, that there had been no circumstances putting the bank on further enquiry and requiring it to undertake further investigations, despite the ease with which that could have been done. There was, accordingly, no basis for concluding that the bank had failed in the duty it owed to the appellant. (Paragraph [26] at 102G–H.)

The decision in the Witwatersrand Local Division in *Columbus Joint Venture v ABSA Bank Ltd* 2000 (3) SA 491 (W) confirmed.

Annotations:

Reported cases

A L Underwood Ltd v Bank of Liverpool [1924] 1 KB 775 (CA): dictum at 793 approved

ABSA Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd 2001 (1) SA 372 (SCA): referred to

Columbus Joint Venture v ABSA Bank Ltd 2000 (2) SA 491 (W): confirmed on appeal

Energy Measurements (Pty) Ltd v First National Bank of SA Ltd 2001 (3) SA 132 (W): approved

First National Bank of SA Ltd v Quality Tyres (1970) (Pty) Ltd 1995 (3) SA 556 (A): referred to

Indac Electronics (Pty) Ltd v Volkskas Bank Ltd 1992 (1) SA 783 (A): applied

Kwamashu Bakery Ltd v Standard Bank of South Africa Ltd 1995 (1) SA 377 (D): approved

Lloyds Bank Ltd v E B Savory & Co [1933] AC 201 (HL): considered

Marfani & Co Ltd v Midland Bank Ltd [1968] 2 All ER 573 (CA): dictum at 581G–I criticised

Powell and Another v ABSA Bank Ltd t/a Volkskas Bank 1998 (2) SA 807 (SE): approved.

Appeal from a decision in the Witwatersrand Local Division (Malan J), reported at 2000 (3) SA 491. The facts appear from the judgment of Cameron JA.

C W Jordaan SC for the appellant (the heads of argument were drawn by *J H Engelbrecht*).

H van Eeden for the respondent.

In addition to the authorities cited in the judgment of the Court counsel referred to the following:

APA Network Consultants (Pty) Ltd v ABSA Bank Ltd 1996 (1) SA 1159 (W) at 1167A–1169E

Basil Read Sun Homes (Pty) Ltd v Nedperm Bank Ltd 1997 (2) SA 610 (W) at 618B–E, 619B–D

Basil Read Sun Homes (Pty) Ltd v Nedperm Bank Ltd 1999 (1) SA 831 (SCA) at 840I–841B

Big Dutchman (SA) (Pty) Ltd v Barclays National Bank Ltd 1979 (3) SA 267 (W) at 283A–D

Bond Equipment (Pretoria) (Pty) Ltd v ABSA Bank Ltd 1999 (2) SA 63 (W) at 68F–69B

Dalrymple, Frank v Friedman and Another 1954 (4) SA 649 (A) at 664

ESS Kay Electronics (Pte) Ltd and Another v First National Bank of Southern Africa Ltd 1998 (4) SA 1102 (W) at 1109D–1110A

Government of the Republic of South Africa v Penz and Another 1982 (1) SA 553 (T)

Greater Johannesbueg Transitional Metropolitan Council v ABSA Bank Ltd t/a Volkskas Bank 1997 (2) SA 591 (W)

Holzman v Standard Bank Ltd 1985 (1) SA 360 (W) at 364

Kruger v Coetzee 1966 (2) SA 428 (A) at 430E–F

Kundy v Lindsay [1874–80] All ER Rep 1149 at 1151I, 1153E, 1154B

Ladbroke v Todd [1914/15] All ER Rep 1134

Minister of Law and Order v Ngobo 1992 (4) SA 822 (A) at 826H–828A

Minister van Wet en Orde en 'n Ander v Ntasane 1993 (1) SA 560 (A) at 570A

Pierce v Hau Mon 1944 AD 175 at 197–8

Pafitis v Naoumoff 1965 (4) SA 591 (SR)

Randbond Investments (Pty) Ltd v FBS (Northern Region) (Pty) Ltd 1992 (2) SA 608 (W) at 619F–G, 620H–621A

Thoroughbred Breeders Association of SA v Price Waterhouse 1999 (4) SA 968 (W) at 1024

Union Government v National Bank of Africa Ltd 1921 AD 121 at 149

Universal Stores Ltd v OK Bazaars (1929) Ltd 1973 (4) SA 747 (A) at 762E–G
Wapnick and Another v Durban City Garage 1984 (2) SA 414 (D) at 418

Copeling 'Vonnisbespreking' (1966) *THRHR* 261
Ellinger and Lomnicka *Modern Banking Law* 2nd ed at 528
Fourie *The Banker and the Law* (1993) at 1
Joubert (ed) *The Law of South Africa* vol 8 part 1 (first re-issue) para 24 at 23–4, para 119 at 177
Kelly *Practice of Banking 1* at 99
Malan and Pretorius 'Medewerkende Opset en die Invorderingsbank' (1997) *THRHR* 155–9
McKerron *The Law of Delict* 7th ed at 58, 296
Neethling, Potgieter and Visser *The Law of Delict* 3rd ed at 372
Van der Merwe *Sakereg* 2nd ed at 303
Van der Merwe and Olivier *Onregmatige Daad in die Suid-Afrikaanse Reg* 4th ed at 153, 170 *et seq*
Visser and Potgieter *Skadevergoeding* (1993) at 242.

Cur adv vult.

Postea (September 27).

Cameron JA:

[1] Between November 1993 and April 1996 an employee of the appellant, Bertolis, deposited 39 cheques and caused a telegraphic transfer to be made into a cheque account that he had opened with the respondent bank ('the bank'). The appellant had drawn all the cheques on its banking account. The transfer was likewise from its account. The scheme was a fraud Bertolis conceived and perpetrated on the appellant, which suffered substantial losses. These the appellant ('the plaintiff') sought to recover in an action against the bank. It alleged that the bank was negligent in opening the account Bertolis used to effect the deposits and the transfer. The bank defended the action, and the parties presented a stated case in terms of Rule 33(1) of the Uniform Rules of Court to the trial Court (Malan J). It set out certain agreed facts and questions for decision, and recorded the parties' contentions in regard to them.

[2] The bank raised a number of defences to the claim. The first was that the plaintiff had not remained owner of the cheques. This the trial Court rejected. The second, that the bank was not negligent in opening the account, he upheld;[1] this is an appeal with his leave against that finding. Although that disposed of the matter, the parties had requested Malan J to answer also the remaining questions. He did so, favourably to the

[1] *Columbus Joint Venture v ABSA Bank Ltd* 2000 (2) SA 491 (W).

plaintiff. The view I take makes it unnecessary to address those questions.[2]

[3] The agreed facts the parties placed before the Court below are set out fully in its reported judgment[3] and do not require repetition. The salient aspects are these.

(a) Bertolis opened an account with the bank's Allied division.
(b) The account was not in his own name, but under the name 'Stanbrooke & Hooper'.
(c) At the time the bank opened the account for Bertolis, he was in two respects an existing customer of its Allied division: (i) he held a personal cheque account at another branch, and (ii) he also had an existing account secured by a mortgage bond in respect of a property loan.
(d) The bank official opening the account noted 'has existing account' on the application form, together with the correct number of Bertolis' personal cheque account.
(e) The personal details Bertolis furnished the bank in opening the Stanbrooke & Hooper account included (i) his name; (ii) his identity number; (iii) a true copy of his identity document; (iv) his home address; (v) his home telephone number; (vi) his work telephone number.
(f) These details were all authentic.
(g) Against 'type of business' on the application form Bertolis indicated 'legal advice CC'.
(h) In opening the account, he presented to the bank a typed document purporting to be a 'franchise agreement' between 'Stanbrooke & Hooper', as franchisor, and himself, as franchisee.
(i) The 'franchise agreement' reflected that Stanbrooke & Hooper was a firm of solicitors specialising in European Community law in Brussels, Belgium.
(j) A firm of European Community lawyers in Brussels, so named, did in fact exist.
(k) But the 'franchise agreement' was a fraud and no entity called Stanbrooke & Hooper ever authorised Bertolis to conduct and control a banking account under that name.
(l) The franchise agreement further reflected that Bertolis was 'an attorney admitted as such in the Republic of South Africa'.
(m) In fact Bertolis had been struck off the roll of attorneys, but the plaintiff, which employed him as its group legal advisor, did not discover this until after the fraud had been perpetrated.

[4] Regarding the plaintiff's ownership of the cheques, Malan J held that the transactions Bertolis engineered, which led to his acquiring the

[2] Malan J's rejection (at 512H–I) of the bank's contention that the plaintiff was vicariously liable for Bertolis' conduct was, however, quoted with approval in *ABSA Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd* 2001 (1) SA 372 (SCA) at 382–3.
[3] 2000 (2) SA 491 (W) at 495–9.

cheques, were void from their inception, and not merely voidable. The plaintiff thus retained ownership of the cheques. On appeal counsel for the bank was unable to challenge this finding with conviction and could not advance any basis for impeaching the trial Court's conclusion. The plaintiff plainly did not intend to transfer ownership in the cheques to Bertolis in his guise as the operator of the 'Stanbrooke & Hooper' account, and it is enough to say that for the reasons Malan J gave I agree that ownership remained with the plaintiff.[4]

[5] Regarding the second question, this Court held in *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd*[5] that a collecting banker owes the owner of a cheque a duty of care not to collect its proceeds negligently on behalf of one not entitled to payment. This duty was developed[6] and accepted[7] in a number of first-instance decisions as encompassing an obligation to take reasonable care when receiving and processing an application to open a new banking account through which cheques belonging to another are subsequently collected for payment. The bank accepted that, had it not opened the Stanbrooke & Hooper account under Bertolis' control, the plaintiff's loss would not have occurred. This approach was correct for, as was pointed out in *ABSA Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd*,[8] on its own a cheque theft in circumstances such as those Bertolis' fraud created brings about 'only a potential loss'.[9] The plaintiff's practice was to draw only cheques crossed and marked 'not transferable'. All 39 cheques, which at Bertolis' contrivance had been made out to 'Stanbrooke & Hooper', were so crossed and marked. Without the cheque account in that name the fraudulent scheme could not have come to fruition.

[6] This Court recently confirmed the bank's duty to the owner of cheques subsequently cleared through an account it opens when, in an impromptu judgment, it upheld the decision in *Energy Measurements (Pty) Ltd v First National Bank of SA Ltd*.[10] In dismissing the bank's appeal, Hefer ACJ[11] declined to lay down general guidelines, but quoted with approval the trial Court's statement that when opening a new

[4] 2000 (2) SA 491 (W) at 499J–500F.
[5] 1992 (1) SA 783 (A) (*per* Vivier JA). It was observed in *First National Bank of SA Ltd v Quality Tyres (1970) (Pty) Ltd* 1995 (3) SA 556 (A) at 568D–H that it is unnecessary in this context to refer to the owner of the cheque as being the 'true' owner.
[6] *Kwamashu Bakery Ltd v Standard Bank of South Africa Ltd* 1995 (1) SA 377 (D) (PC Combrinck J).
[7] *Powell and Another v ABSA Bank Ltd t/a Volkskas Bank* 1998 (2) SA 807 (SE) (Melunsky J).
[8] 2001 (1) SA 372 (SCA) at 383E–F (Harms JA).
[9] To the same effect is *Kwamashu Bakery Ltd v Standard Bank of South Africa Ltd* 1995 (1) SA 377 (D) at 395I (compare 390B) and *Energy Measurements (Pty) Ltd v First National Bank of SA Ltd* 2001 (3) SA 132 (W) para 114.2 (Reyneke AJ).
[10] 2001 (3) SA 132 (W).
[11] Judgment of 24 August 2001 (Olivier, Cameron, Mpati and Mthiyane JJA concurring).

account 'the very least that is required of a bank is to properly consider all the documentation that is placed before it and to apply their minds thereto'.[12]

[7] The question then is whether the bank breached this duty in opening the Stanbrooke & Hooper account. The grounds of negligence the plaintiff alleged in its particulars of claim were that the bank erred

(a) in not establishing whether the 'franchise agreement' was authentic and the information in it correct;
(b) in not satisfying itself that 'Stanbrooke & Hooper' existed and had authorised Bertolis to open and control an account in its name; and
(c) in not establishing whether the information in Bertolis's application form was correct.

Except for that relating to the 'franchise agreement', the information Bertolis furnished was in fact all correct. Hence the asserted negligence necessarily focused on the way the bank dealt with the 'franchise agreement' Bertolis placed before it.

[8] As Malan J pointed out, the stated case severely limits the facts and circumstances on which a finding of negligence can be made.[13] No expert or other evidence was tendered about bank practice in opening a new account for an existing customer; nor (more pertinently to the grounds of negligence the plaintiff advanced) was there any evidence regarding how the bank should have appraised or dealt with the 'franchise agreement' placed before it. Proceeding on the basis only of the stated case, Malan J, after surveying the English, Canadian and Australasian law, concluded that the distinguishing feature of the case was that Bertolis was an existing client of the Bank:

> 'Where a stranger requests that an account be opened for him the circumstances are quite different from those when an existing client applies. An existing client asking for further facilities or another account is known to the bank and his personal particulars are, if not known to the official, ascertainable.'[14]

[9] I agree with this approach; but it is important to determine precisely why the fact that an existing client is known to the bank differentiates the circumstances. It is obviously not because existing bank customers, as a group, are by nature more trustworthy or less likely to commit fraud than other members of the public. Nor is it because they may have assets or even (as in this case) fixed property. The situation is different because existing customers generally have verified identities and confirmed work and residential contact details, and because, should the account be used for fraud, the customer can be traced and brought to book. In addition, the location of the customer's assets may be known or be traceable through the details furnished. The pre-eminent consequence is heightened accountability, which substantially diminishes the possibility of the

[12] 2001 (3) SA 132 (W) para 134.4. This Court quoted with approval also paras [135], [136], [137] and [139].
[13] 2000 (2) SA 491 (W) at 510C.
[14] 2000 (2) SA 491 (W) at 510F–G.

account being used with impunity for fraud. There exists then a significant disincentive to fraudulent use of the account, which is absent in the case of a new customer whose identity and location and other details have not been verified. It is this that bears upon the bank's duty in opening an account.

[10] *Energy Measurements* was a case of a new account for a company that claimed to be establishing a new business. Its sole director, shareholder and authorised signatory was completely unknown to the bank. No banking details were available for him.[15] The fraudster had, it appears, quite literally walked in off the street.[16] The identity he tendered to the bank was false. The result was that when he walked out after performing his last transaction, he disappeared from view. He became (again literally) unaccountable, and this is where the aggravated risk lay. The absence of disincentive to fraud accentuates the duty of reasonable care resting upon a banker opening an account for a customer whose details are unverified.

[11] What is more, the account in *Energy Measurements* was to operate in the name of neither the company nor its supposed director (I return later to the relevance of this in the present case). It is evident that in such circumstances a bank is under a duty to take reasonable measures to ascertain and verify the new customer's identity and trustworthiness, for without the disincentive that verification of the relevant details provides, the risk that the account could be used for fraudulent purposes looms large.

[12] Bertolis, in opening the Stanbrooke & Hooper account, furnished the bank with an identity number and occupation and residential address, together with other personal particulars. These were all authentic. So was his disclosure to the official opening the account that he was an existing customer. That, in turn, served as an assurance of the authenticity of the other details, since a comparison was available that would have brought any discrepancy to light. Most importantly, the details meant that in case of fraudulent use of the new account the customer could be traced and held accountable.

[13] As it happened, this did not deter Bertolis from committing the defalcations at issue. His fraudulent scheme seems in fact to have prospered for about 30 months. But eventually it was revealed and at that point his identity and work and residential locations had been known to the bank for some time. The stated case does not reveal what ensued, but that the discovery had consequences at least for Bertolis' employment and residence and accessible assets—and presumably also for his personal liberty—cannot be doubted. Disincentives to fraud may from time to time be ineffective, but that cannot render them irrelevant

[15] 2001 (3) SA 132 (W) para [122].

[16] *Kwamashu Bakery Ltd v Standard Bank of South Africa Ltd* 1995 (1) SA 377 (D) at 380–1 appears similarly to have been a case where persons completely unknown to the bank opened a new account.

in determining the standard of care required of bankers in extending further facilities to customers with already authenticated identity and work and residential details.

[14] The significant features of the stated case, upon which the plaintiff based its contention that the bank was negligent in opening the account, are that the bank could have obtained Stanbrooke & Hooper's Brussels telephone number by calling the South African operator's international inquiries service and that a further call to the number so supplied would in all likelihood have established that Bertolis was unknown to them and that the 'franchise agreement' was part of a fraudulent scheme. The bank accepted that these calls could at comparatively small expense and effort have been made and that if made they would probably have averted the plaintiff's loss.

[15] The question is whether it has been shown that the circumstances were such as to cause a reasonable and prudent banker, properly considering the available information, to have a suspicion about the customer's *bona fides*. In other words, should the bank have been put on warning? Only if the answer is yes does the second question—as to the need for any inquiries made—arise.

[16] The primary inquiry is thus whether the calls should have been made at all, for the fact that they would have been easy to make cannot by itself translate into a breach of a duty to make them. An omission to act does not constitute a breach of duty merely because the omitted action would have been easy to take. The answer must, in my view, be found by asking whether there was anything in the application for further account facilities that should have put the bank on warning of the impending fraud. The 'franchise agreement', a photocopy of the original of which was supplied to us on appeal, appears quite regular on its face. It recites that Stanbrooke & Hooper has originated a business system 'for the purpose of establishing and operating a legal office specialising in European Community law and is the owner of certain intellectual property rights used in conjunction with the business system', and that for his part the franchisee 'desires to establish and operate an office on European Community law under the name Stanbrooke & Hooper and for this purpose to use the franchisor's business system and intellectual property rights'. All this is undeniably vague, but lawyers' language often is. And it is fleshed out without evident implausibility in the rest of the document, which purports to grant the franchisee a licence for the duration of the franchise 'to operate the franchised business'.

[17] Its terms beg no further inquiry. Indeed, scrutiny would have revealed embedded in them the prescient requirement that the franchisee conduct all business—including bank accounts—under the name Stanbrooke & Hooper. Counsel for the plaintiff was, when pressed, unable to point to any aspect of the agreement that was unusual or that could conceivably have put the bank on inquiry. He was obliged to contend instead that it was somehow odd that a Brussels firm of solicitors should want to lend their name to a Johannesburg franchisee; and that Bertolis' undertaking such a venture, employed as he was at the

plaintiff's Middelburg head office (an aspect not mentioned in the stated case, and which could be inferred only from the dialling code on the work telephone Bertolis gave the bank) was inherently suspicious; and that the lawfulness or propriety or conventionality of such a venture in self-employment on the part of one already employed full-time should have aroused suspicion or at least triggered inquiries of Bertolis' employers or the supposed franchisor.

[18] I cannot agree. The truth is that the fraud was not unskilful. There was nothing inherently untoward about the joint venture proposed and nothing in the terms supposed to embody it that suggested the necessity for further inquiry. The plaintiff harboured Bertolis within its own systems, which he subordinated to his wiles, over some two and a half years. That is not to confuse the plaintiff's liability, if any, which on the view I take we do not reach, with that of the bank: it is only to emphasise that successful frauds, perpetrated by accomplished fraudsters, regrettably occur and that the imposition in hindsight of liability for the losses they cause is a notoriously unreliable craft. The bank is under an obligation to take reasonable steps to ensure that its clients are who they say they are and to scrutinise with reasonable caution documentation submitted to it in substantiation of the uses to which they propose to put the accounts they open. The plaintiff's argument seeks to go far further. It would make the bank the guarantor of the probity of its customers, or at least of their dealings and doings, as against all they injure by utilising banking facilities reasonably extended to them. It can do so only by imposing upon the bank what Lord Wright in *Lloyds Bank Ltd v E B Savory & Co*[17] called 'the duty of being amateur detectives'. That duty is too high, and nothing in the case before us justifies its imposition on the bank.

[19] Counsel was driven to contend that Bertolis' prior history with the bank should have led to the denial of further facilities. Attached to the stated case was documentation indicating that Bertolis had indeed been a less than ideal customer. At least four personal cheques had been returned because of insufficient funds in his account, and on an overdrawn account he had at another division of the bank before the frauds occurred it had taken a default judgment against him in a not inconsiderable sum (R20 702,68). The stated case did not specify whether this information was available to the bank official who opened the Stanbrooke & Hooper account and counsel for the plaintiff did not contend that if it had not been this constituted negligence on the bank's part.

[20] Malan J found that it had not been shown that, had the official opening the account seen this documentation, the account would not have been opened. Nor had circumstances been shown indicating that the official should have had access to the documents or called for them. This conclusion is, in my view, unimpeachable. The stated case does not suggest that Bertolis was in fact an unsatisfactory client, nor does the

[17] [1933] AC 201 (HL) at 239.

attached documentation in my view warrant the conclusion that he was. The question in any event is not whether Bertolis was a 'satisfactory' client, but whether in opening the new account he was a *bona fide* client; and there was nothing in his previous dealings with the bank to suggest to it that he was not. Certainly there is nothing to bear out the suggestion of plaintiff's counsel that Bertolis had a 'suspect' banking record. As was pointed out during argument, Bertolis' conduct of the other accounts did not cause the bank to close or even threaten to close them and counsel did not suggest that there were any circumstances to indicate that the bank should have closed them. No plausible foundation therefore exists for the contention that the bank should have denied him new facilities for the purpose for which he sought them.

[21] Counsel for the plaintiff rightly laid emphasis on the fact that the new account was not to operate under Bertolis' own name, but under a completely different name. That accounts operated under names other than those of the client may be used for fraud is an evident danger,[18] and Malan J correctly observed that the use of a name other than a customer's own in opening an account 'lends itself to misuse and calls for some explanation'.[19] The question is what explanation should be required and how extensive the bank should require it to be. In the present case the 'franchise agreement' provided the complete explanation. There is no suggestion in the present case that any existing South African entity (whether partnership, joint venture, firm, or corporation) existed or traded as 'Stanbrooke & Hooper'. That doubtless was part of Bertolis' cunning in devising the scheme, and it deprives the plaintiff's argument of any basis for suggesting that the bank should have been on inquiry with regard to existing entities who may have been injured by the use of the account in that name.

[22] Malan J's general conclusion was that in questioning a customer a 'right balance' should be struck: 'a bank should inquire where it is put on inquiry or the transaction is out of the ordinary'. Without dissenting from the conclusion, I have misgivings about the path Malan J took to reach it, particularly his suggestion that a bank 'should also be careful not to inquire where inquiries might offend the customer and invade his privacy'.[20]

[23] Amidst current conditions where fraud is rife—an undoubted fact that rightly informed both parties' argument—anxiety about a prospective or existing customer's sensibilities seems to me to be misplaced. The approach Malan J adopted may be traced to the judgment of Diplock LJ in *Marfani & Co Ltd v Midland Bank Ltd*,[21] which emphasised the difficulties a bank official questioning an intending fraudster was likely to encounter:

'It may be that a searching interrogation would reveal inconsistencies or improbabilities in his story, but a bank cannot reasonably be expected to subject *all* prospective customers to a cross-examination, which cannot fail to give the

[18] As illustrated by the *Kwamashu* and *Energy Measurements* decisions (above).
[19] 2000 (2) SA 491 (W) at 511E–F.
[20] 2000 (2) SA at 510I–J.
[21] [1968] 2 All ER 573 (CA) at 581G–I.

impression that the bank doubts their honesty, and which would be understandably resented by the 999 honest potential customers, on the off-chance of detecting the thousandth dishonest one.'

This led Diplock LJ to conclude that it did not constitute lack of reasonable care to refrain from making inquiries unlikely to lead to detection of a dishonest purpose, 'and which are calculated to offend him and maybe drive away his custom if he is honest'.[22]

[24] But as Diplock LJ himself stated in that case, which was decided more than 30 years ago:

'Cases decided 30 years ago, when the use by the general public of banking facilities was much less widespread, may not be a reliable guide to what the duty of a careful banker, in relation to inquiries and as to facts which should give rise to suspicion, is today.'[23]

Not only were banking facilities less widespread in South Africa 30 years ago, but so was the incidence of fraud. More apt to current conditions in South Africa, though even older, are, in my view, the observations of Scrutton LJ in *A L Underwood Ltd v Bank of Liverpool*:[24]

'If banks for fear of offending their customers will not make inquiries into unusual circumstances, they must take with the benefit of not annoying their customer the risk of liability because they do not inquire.'

[25] If circumstances should put a bank on inquiry in extending new facilities to an existing customer or creating facilities for a new customer, the necessary inquiries must be made, and fear of offending the customer cannot inhibit performance of that duty. In the present case, as I have indicated, there is no basis for concluding that inquiries that should have been made were omitted. As far as the conduct of the account in a name other than his own was concerned, Bertolis had an explanation in the 'franchise agreement', whose provisions included a term obliging him to use the name he specified. As already indicated, nothing else in that agreement put the bank on warning of its impending dishonest use.

[26] Given that Bertolis was an existing customer, with verified details, and given the plausibility of the ruse he used to trick the bank, there seem to me to have been no circumstances putting the bank on further inquiry and requiring it to undertake further investigations, despite the admitted ease with which this could have been done. In all these circumstances I am unable to find any basis for concluding that the bank failed in the duty it owed the plaintiff, and the appeal must therefore be dismissed with costs.

Vivier ADCJ, Olivier JA, Cloete AJA and Brand AJA concurred.

Appellant's Attorneys: *Everingham & Partners*, Johannesburg; *Honey & Partners Inc*, Bloemfontein. Respondent's Attorneys: *Routledge-Modise*, Johannesburg; *Israel & Sackstein Inc*, Bloemfontein.

[22] [1968] 2 All ER at 582E–F.
[23] [1968] 2 All ER at 579D–E.
[24] [1924] 1 KB 775 (CA) at 793, quoted by Reyneke AJ in *Energy Measurements* 2001 (3) SA 132 (W) para 133.2.

DEPARTMENT OF JUSTICE v HARTZENBERG

LABOUR APPEAL COURT

ZONDO JP, VAN DIJKHORST AJA and COMRIE AJA

2001 June 5 Case No JA16/00

Labour law—Courts—Practice—Appeal to Labour Appeal Court—Record of trial partially lost—Trial court having found in favour of employee—Rehearing of lost evidence before same presiding officer not indicated because most of oral evidence lost and credibility crucial—'Reconstruction hearing', in which witnesses taken through previous (lost) evidence, not viable as it would produce host of new disputes—Employer not responsible for loss of evidence—All witnesses still available—Remaining options either to let judgment stand (employer loses right to appeal) or to order remittal for retrial (employee deprived of judgment)—Appellant's right of appeal overriding prejudice to employee—Retrial ordered.

The respondent was formerly employed by the appellant and argued in proceedings before the industrial court that she had been constructively dismissed when she fell pregnant. The industrial court found in favour of the respondent and awarded compensation of R70 449. The respondent appealed to the Labour Appeal Court, but when the matter came before Court on 16 November 2000, it turned out that several of the cassettes on which the oral evidence had been recorded were missing and could not be found. The Department of Labour, and not the appellant, had been responsible for their safekeeping. The only part of the evidence still available was the respondent's evidence-in-chief. The Court gave the appellant one month to compile a reconstructed record, failing which the appeal would be deemed to be dismissed with costs, but the appellant was unable to do so. The Court deemed an attempted reconstruction submitted by the appellant to be 'hopelessly inadequate for the proper determination of this appeal', and the presiding officer in the court *a quo* refused to certify it as true and correct. The issue before the Court thus concerned the appropriate way forward.

Held, that the order of 16 November 2000 was not binding because it was interlocutory in nature and was made while a proper reconstruction of the record was still believed to be feasible. (Paragraph [7] at 106E.)

Held, further, that although the Rules of the Labour Appeal Court did not deal with the situation where most of the record was missing, it was implicit in Rule 5 that the record had to be a complete and correct record, subject to permissible omissions. (Paragraph [9] at 106J–107A.)

Held, further, that to remit the matter to the court *a quo* for a rehearing of the missing evidence was inappropriate in the present matter. It would mean a rehearing of most of the evidence, including the cross-examination of the respondent and, with credibility playing an important role, it would be asking too much of the presiding officer to disabuse herself of the perceptions she had already formed of the witnesses. It was also not feasible to remit only part of the case for rehearing before a differently constituted court. (Paragraph [13] at 108C–D/E.)

Held, further, that to remit the matter for a 'reconstruction hearing', in which the various witnesses for the appellant and the respondent would be taken through their previous cross-examinations and re-examinations within the