THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case number: 233/07
Reportable

In the matter between:

MILOC FINANCIAL SOLUTIONS (PTY) LTD	**APPELLANT (Applicant *a quo*)**
and	
LOGISTIC TECHNOLOGIES (PTY) LTD	**FIRST RESPONDENT (First Respondent *a quo*)**
LOG-TEK GROUP INVESTMENTS (PTY) LTD	**SECOND RESPONDENT (Second Respondent *a quo*)**
IRIS INTEGRATED RESEARCH INFORMATION SYSTEMS (PTY) LTD	**THIRD RESPONDENT (Third Respondent *a quo*)**
TECHNIPRINT (PTY) LTD	**FOURTH RESPONDENT (Fourth Respondent *a quo*)**
ROTER DESIGN (PTY) LTD	**FIFTH RESPONDENT (Fifth Respondent *a quo*)**
UBUNTU EDUNET (PTY) LTD	**SIXTH RESPONDENT (Sixth Respondent *a quo*)**
TECHNICAL ILLUSTRATIONS (PTY) LTD	**SEVENTH RESPONDENT (Seventh Respondent *a quo*)**
LOG-TEK TRAINING & SIMULATION (PTY) LTD	**EIGHTH RESPONDENT (Eighth Respondent *a quo*)**
Q-TECH SERVICES (PTY) LTD	**NINTH RESPONDENT (Ninth Respondent *a quo*)**
INFORMATION DYNAMICS (PTY) LTD	**TENTH RESPONDENT (Tenth Respondent *a quo*)**
MAXWELL NAESTED MOOLMAN	**ELEVENTH RESPONDENT (Eleventh Respondent *a quo*)**
LOG-TEK MANAGEMENT SERVICES (PTY) LTD	**TWELFTH RESPONDENT (Twelfth Respondent *a quo*)**
LOG-TEK 1993 (PTY) LTD	**THIRTEENTH RESPONDENT (Thirteenth Respondent *a quo*)**
MOOLMAN TRUST	**FOURTEENTH RESPONDENT (Fourteenth Respondent *a quo*)**

CORAM:	HOWIE P, FARLAM, CLOETE, VAN HEERDEN JJA et SNYDERS AJA
HEARD:	22 FEBRUARY 2008
DELIVERED:	28 MARCH 2008
SUMMARY:	Contract - *exceptio non adimpleti contractus* – principle of reciprocity – when applicable – payment, allocation of.

Neutral citation: This judgment may be referred to as *Miloc Financial Solutions (Pty) Ltd v Logistic Technologies (Pty) Ltd* (233/2007) [2008] ZASCA 40 (28/03/08).

FARLAM JA

[1] INTRODUCTION

This is an appeal from a judgment of Van Rooyen AJ, sitting in the Pretoria High Court, dismissing an application in which the appellant sought judgment in respect of two money claims and also certain ancillary relief against twelve of the respondents, in the case of the first claim, and against eleven of the respondents, in the case of the second claim.

[2] The appellant's first claim, which was brought against the first respondent as principal debtor and eleven of the other respondents as sureties, was for payment of R9 985 455,10, being the total of the unpaid balance allegedly owing on the first respondent's current accounts with the Standard Bank of South Africa Ltd, which had ceded its claims and the securities it held to the appellant.

[3] The appellant's second claim, which was also brought against the first respondent as principal debtor and against ten of the respondents as sureties, was for payment of R3 141 337,87, being the total of the amounts allegedly advanced to the first respondent by the appellant, and the interest which had accrued thereon, pursuant to a loan agreement concluded between the appellant and the first respondent on 6 May 2004.

APPELLANT'S FOUNDING AFFIDAVIT

[4] In the founding affidavit which accompanied the notice of motion the deponent, Mr JD Lightfoot, a manager employed by the appellant, dealt with the conclusion of the loan agreement which formed the basis of the second claim and the cession agreement in terms of which the amounts forming the subject matter of the first claim were ceded to the appellant. He also annexed two certificates of balance signed by one of the appellant's directors in respect of the two claims. (The loan agreement authorised the appellant to prove the balance owing under the loan agreement by the first respondent and the other relevant respondents by means of a certificate issued by one of its directors. I shall assume that the appellant was authorised by the various contractual documents to prove as against the first respondent and the other relevant respondents the balance owing on the overdrawn bank accounts in the same way.)

[5] Mr Lightfoot also referred in his affidavit to an agreement concluded on 19 July 2005 in terms of which the second respondent, Log-Tek Group Investments (Pty) Ltd, sold 200 shares (20% of the issued share capital) in Sigma Logistic Solutions (Pty) Ltd and 20% of the existing claims on loan account in that company to the eleventh respondent, Mr MN Moolman, for R1.5 million. This amount was to be paid to the appellant, which held the shares so sold under a perfected pledge and which agreed to allow the second respondent to sell and transfer the shares to the eleventh respondent and to release them from its pledge. The pledge referred to, as appears from the share sale agreement (to which I shall refer in what follows as 'the Moolman-Sigma agreement'), was concluded on 6 May 2004, the date the loan agreement was concluded, and it clearly forms part of the securities furnished to the appellant to secure the amounts owing to the appellant under the loan agreement.

[6] Clause 5.2 of the Moolman-Sigma agreement reads as follows:

'After payment of the purchase consideration [ie, the amount of R1.5 million] by the purchaser [the eleventh respondent] to Miloc [the appellant] the sale shares will be released from the operation of the pledge, and the company's obligations [ie, the obligations of Sigma Logistic Solutions (Pty) Ltd] to Miloc, and or any of its nominees, will have been fully discharged.'

[7] Mr Lightfoot also referred in his affidavit to another agreement for the purchase by the eleventh respondent of other shares pledged to the appellant on 6 May 2004 by the first respondent. In what follows I shall call this agreement 'the USA agreement'.

[8] The shares sold under the USA agreement were 100 shares in Information Dynamics (Pty) Ltd, the tenth respondent, and 100 shares in Logtek USA Inc. The price to be paid was R4 million, payable to the appellant, which agreed to allow the first respondent to sell the shares to the eleventh respondent. The USA agreement provided for the purchase price of the shares sold to be paid in three instalments, viz (i) R100 000 on the date when certain suspensive conditions were fulfilled; (ii) R2.9 million within a period of 30 days thereafter; and (iii) R1 million on 30 November 2005 or the date on which either of the companies whose shares were sold received the annual licence fee payable to Logtek USA Inc.

[9] Clause 7.2.3 of the USA agreement provides as follows:

'On the final payment date, the sale shares and all other shares held by Miloc [the appellant] in terms of the pledge, will be released from the operation of the pledge, and Miloc shall procure that all other securities provided by the seller, Logtek Group Investments (Proprietary) Limited [the second respondent], their subsidiaries, [the eleventh respondent] and the Moolman Trust [the fourteenth respondent] for all the seller's and [the eleventh respondent's] obligations to Miloc, and/or any of their nominees in connection with the seller's indebtedness to Miloc, will have been fully discharged and Miloc will hand over all the original security documents to the seller.'

[10] Mr Lightfoot stated that the eleventh respondent failed to adhere to the terms of the Moolman-Sigma agreement and the USA agreement and in particular he 'failed to make payment of the amounts as agreed.' He stated that the eleventh respondent only paid a total of R2 million to the appellant, namely R1 million on 3 September 2005 and a further amount of R1 million on 2 December 2005. He continued:

'Since the Eleventh Respondent's failure to adhere to the terms of the [Moolman-Sigma] Agreement and the USA Agreement, I have on a regular basis communicated with the Eleventh Respondent. Numerous meetings were also held. The purpose of the communication and the meetings was to discuss the payment by the Eleventh Respondent of the amount of R4 million, in order for all dealings between the various Respondents and the Applicant to come to an end. It was provided by the USA Agreement that, upon payment of the amount, all securities would be released to the First Respondent and the Applicant would walk away from the remaining debt.'

[11] On 13 April 2006, Mr Lightfoot stated, he wrote a letter on behalf of the appellant to the eleventh respondent informing him that the appellant was 'prepared to extend the final payment date of the amount due to [it] of R3.5 million in terms of the [Moolman Sigma agreement and the USA agreement] and to postpone cancellation thereof until 30th June 2006' on certain conditions. These included the signature of a CM 42 document in respect of the Sigma Logistic Solutions (Pty) Ltd shares pledged to the appellant as security for the amount due to it by the first respondent and that what Mr Lightfoot called 'the R3.5 million balance' would bear interest from 1 December 2006 (*sic:* I take it he meant 2005) until payment at the rate of prime plus 1%. The letter continued:

'In terms of the sale of share agreements, on payment of the R3.5 million plus interest . . ., all

pledges, sureties, covering bonds and cessions we hold in respect of Log Tek's indebtedness to us will be cancelled and returned to you. Unfortunately we will not be able to extend the validity of the sale of share agreements beyond 30 June 2006.

We hope this concession will be of assistance to you and ask that [you] acknowledge your acceptance of these terms and conditions by signing the attached copy of this letter.'

[12] Mr Lightfoot explained that the amount of R3.5 million to which he had referred in the letter was arrived at 'by adding the R1.5 million in terms of the [Moolman-Sigma agreement] to the R4 million in terms of the USA Agreement (totaling R5.5 million) less the R2 million paid'.

[13] Mr Lightfoot stated that the eleventh respondent failed to make payment by 30 June 2006 and that, on that date, he caused the appellant's attorneys to direct two letters of demand to the eleventh respondent and a third to the first respondent. In the letters sent to the eleventh respondent the amounts of R1.5 million allegedly due under the Moolman-Sigma agreement and R3.5 million, plus interest, calculated at prime plus 1% from 1 December 2006 (presumably 2005 was meant) due under the USA agreement were demanded and notice was given that, if these amounts were not paid within fourteen days, the agreement would be cancelled. In the letter to the first respondent the appellant demanded payment of R13 126 792,84, which it was said was the total amount due by the first respondent to it as cessionary of the amounts previously due to the Standard Bank of South Africa Ltd, plus the amount which had been advanced to the first respondent under the loan agreement dated 6 May 2004.

[14] As no payments were made by the eleventh respondent after receipt of the letters dealing with the Moolman-Sigma agreement and the USA agreement, further letters were sent to him on 17 July 2006 purporting to cancel those agreements.

[15] Mr Lightfoot stated that 'in light', as he put it, of the cancellation of both the Moolman-Sigma and the USA agreements, the respondents were liable towards the appellant to pay the amounts outstanding in terms of both the cession and the loan agreement.

[16] Mr Lightfoot stated further that the appellant's attorneys received a letter dated 18 July 2006 from the eleventh respondent's attorneys, responding to the letters of the 17 July 2006 in which the appellant had purported to cancel the Moolman-Sigma and USA agreements. Attached to the eleventh respondent's attorney's letter was a copy of a letter which the appellant had sent to the eleventh respondent on 8 March 2006, in which the date of payment of the amounts outstanding under the Moolman-Sigma and USA agreements (which, so it was stated, were due by no later than 30 November 2005) was extended to 18 April 2006. (It will be recalled that this was later further extended to 30 June 2006.) The letter contained the following paragraphs:

> '2. The total amount payable in terms of the sale of shares agreements is R5.5 million of which only R2 million has been received, leaving a balance of R3.5 million unpaid.
>
> . . .
>
> 4. We understand that you wish to utilize the shares in Sigma Logistic Solutions (Pty) Ltd as collateral in raising funds to settle the unpaid balance of R3.5 million referred to above, *and we confirm that we will be prepared to release these shares from the pledge, provided that we receive suitable guarantees for payment of the R3.5 million balance.'* (The italics are mine.)

[17] In their letter of 18 July 2006 the eleventh respondent's attorneys referred to the paragraphs of the appellant's attorney's letter of 8 March 2006 which I have quoted. They then stated that as the amount due under the Moolman-Sigma agreement had been paid to it, the appellant, by refusing to release the Sigma shares in question unless suitable guarantees for payment of the R3.5 million balance under the USA agreement were furnished (something to which it was not entitled under the Moolman-Sigma agreement), had breached clause 5 of the Moolman-Sigma agreement and was accordingly not entitled to claim the outstanding balance due under the USA agreement. In this regard the eleventh respondent's attorneys pointed out that the appellant's failure to release the shares had rendered it impossible for the eleventh respondent at that stage to raise the capital required to pay the outstanding balance of R3.5 million.

[18] Referring to the appellant's attorneys' letter demanding payment by the

first appellant of the full amounts due under the Standard Bank cession and the loan agreement, the attorneys stated that they, as they put it, placed it pertinently on record that the amounts outstanding under the cession and the loan agreement were not owing because of the Moolman-Sigma and the USA agreements. If these two agreements could not be carried out, they continued, it was possible that what they called the over-arching (oorkoepelende) debt under the cession and the loan agreement would be of application. In the present case, they said, it did not apply and they enquired how what they called this 'dead point' could be sorted out with the appellant.

[19] In dealing with the eleventh respondent's attorneys' letter Mr Lightfoot said that it did 'not affect the entitlement to relief sought in this application'. In support of this contention he said the following:

'57.1 The USA Agreement provides for an amount of R4 million to be paid, whereafter the parties would go their separate ways. It is common cause that only R2 million was paid. The full amount has not been paid as alleged in the letter. Accordingly the Applicant was entitled to, and cancelled the USA Agreement;

57.2 Both the [Moolman-Sigma] Agreement and the USA Agreement contain . . . non-variation clauses. Any variation has to be in writing and signed by the parties, otherwise it would have no effect;

57.3 The letter that I directed on 8 March 2006 . . . makes it clear that the Sigma shares would be released, provided that a suitable guarantee for R3 million be received by the Applicant. This did not happen;

57.4 My letters of 8 March 2006 and 13 April 2006 . . . clearly reflect that, if payment of R3,5 million is not made to the Applicant, both the sale of shares agreements would be cancelled;

57.5 At no point in time was a demand made for the release of the Sigma shares. If the Eleventh Respondent contends that the R2 million was paid [in terms] of the Sigma Agreement, one would have expected the Eleventh Respondent to have informed the Applicant that the payment was for such purpose, and to have demanded the release of the shares soon thereafter. This did not happen;

57.6 It appears from my letter of 13 April 2006 . . . that the Eleventh Respondent accepted its terms and conditions, which were *inter alia* the applicant would retain all securities until payment of R3,5 million, whereafter it would be cancelled and returned;

57.7 The Eleventh Respondent at no time indicated, that without the Sigma shares being released to it, the Eleventh Respondent would not be able to raise the funds;

57.8 The letter . . . in fact reflects an admission of the liability for the full amount, but seems to reflect a contention that the sale of shares agreements are still operative. It follows that, due to the cancellation of those agreements, the full amount of the liability on strength of the ceded claims and loan facility, [is] owing;

57.9 On any construction, it is submitted that R3,5 million is due and payable;

57.10 The letter does not raise any dispute as to the entitlement to the relief sought.'

OPPOSING AFFIDAVIT FILED ON BEHALF OF RESPONDENTS

[20] In his opposing affidavit filed on behalf of all fourteen respondents the eleventh respondent denied that any amounts had been advanced to the first respondent under the loan agreement. He also denied the total amount owing by the first respondent to the Standard Bank of South Africa Ltd on 19 April 2004. In this regard he stated that the bank had charged interest at a rate above the rate agreed. He also said that, after the cession, the appellant had charged interest above the agreed rate, had wrongly charged two so-called 'success fees' of R603 253 and R375 250 and had further charged interest on these fees. He further alleged that the appellant had, totally contrary to the agreement, charged VAT at 14% on the interest which it had debited, which rendered the effective interest levied excessive. The appellant, he said, would thus have to reconcile what he called the whole transaction history ('die gehele transaksie geskiedenis').

[21] He explained that it was for this reason that the appellant was prepared to accept R7 million for the full liability for the outstanding indebtedness towards itself. Settlement discussions took place between the respondents' attorneys and those acting for the appellant. They took place in about June 2005 and were held with the purpose of replacing and settling the total liability of the first respondent (and also of all the other respondents which stood surety for the debts of the first respondent and provided security therefor) and also in order to determine methods for the final disposal and payment of all amounts.

[22] Thereafter, said the eleventh respondent, discussions took place between Mr Lightfoot and himself and eventually, in July 2005 and at Pretoria, they orally settled the matter on the following basis and terms:

(a) the appellant was to receive an amount of R7 million in full and final settlement of all its claims against the first respondent and the other respondents;

(b) the settlement would be implemented by means of the conclusion of three agreements, viz (i) an agreement for the sale, to one WC Swanepoel, of Sigma shares for R1.5 million, payable to the appellant (what I shall call the Swanepoel-Sigma agreement); (ii) an agreement for the sale, to eleventh respondent, of Sigma shares for R1.5 million, payable to the appellant (what I have, in summarising Mr Lightfoot's affidavit, called 'the Moolman-Sigma agreement') and (iii) an agreement for the sale to the eleventh respondent of shares in the tenth respondent and Logtek USA Inc for R4 million, payable to the appellant (what I have, in summarising Mr Lightfoot's affidavit, called 'the USA agreement').

[23] The purpose of these three agreements, said the eleventh respondent, was to put in place a practical mechanism to pay the R7 million and to carry out the terms of the settlement agreement, to which all the respondents were parties. The eleventh respondent also said that it was part of the settlement that, on payment to the appellant of the two amounts of R1.5 million under the two Sigma agreements, the shares sold would be immediately released from the pledge to which they were subject. As far as the eleventh respondent was concerned, this was in order to enable him to utilise his shares to provide security to a financial institution so that he could raise the necessary funds to pay the R4 million under the USA agreement. The provision that the appellant was to release the Sigma shares was, he said, a material provision and a reciprocal term of the settlement. Both he and Mr Lightfoot were thoroughly aware of the fact and agreed that the remaining R4 million due under the settlement would have to be paid by using the Sigma shares in order to get the necessary funding.

[24] The eleventh respondent also said that the intention of the settlement between Mr Lightfoot and himself was that it and the resulting three

agreements would constitute a novation of the rights the appellant had received under the cession and the loan agreement. He explained further that the actual intention of himself and the appellant's representative was that there would be only one final settlement agreement, in terms of which R7 million would be paid to the appellant in order to discharge the whole debt. He submitted that, if the appellant were to contend that there was not one agreement but three separate agreements, it should be estopped from relying on the precise literal interpretation of the three agreements. Alternatively, he said, he and the respondents concerned were entitled to have the agreements rectified so that they were in accordance with the oral settlement agreement.

[25] The eleventh respondent stated both he and Mr Swanepoel had paid the amounts due under the Sigma agreements and he had in addition paid R500,000 in respect of the USA contract. Mr Swanepoel had received his shares under the Swanepoel-Sigma agreement but he (the eleventh respondent) had not.

[26] He annexed to his affidavit a letter which he sent to Mr Lightfoot on 20 February 2006. This letter contains the following:

'1) With regard to the two payments, totalling R2 million, made by myself towards the [Moolman-Sigma and USA] transactions, I wish to confirm that the Sigma transaction is now paid in full, being R1.5 million. The balance of R500 000 was paid towards the [USA] transaction and the balance owing on this transaction is currently R3.5 million as per our agreement last year.

2) I therefore respectfully request the return of the original Sigma share certificates and signed transfer documentation to conclude the Sigma transaction.

3) I require the certificates and transfer documentation as a matter of urgency to enable me to raise the final capital in my own name to effect the final R3.5 million payment to you.'

[27] The appellant's demand in paragraph 4 of its letter of 8 March 2006

(which was written in answer to his letter of 20 February 2006) that he provide extra security for payment of the R3.5 million before the Sigma shares were released was, he said, completely in conflict both with the settlement agreement and the terms of the three written agreements. The appellant, he contended, by refusing to release his Sigma shares was *in mora* in respect of its obligations under the agreement. It was accordingly unable to demand payment of the balance due in respect of the USA agreement.

[28] The eleventh respondent contended that the appellant was in the circumstances not entitled to cancel the Moolman-Sigma and the USA agreements. As regards the Moolman-Sigma agreement, this was because he had paid the R1.5 million due in respect of the shares and, as regards the USA agreement, because the R3.5 million, the balance outstanding under the agreement, could for the reasons stated above not be demanded until the appellant had complied with its obligation to release his Sigma shares.

[29] He also contended that, in any event, even if the two agreements were validly cancelled, this would not revive the old indebtedness in terms of the loan agreement and the indebtedness which formed the subject matter of the cession by the Standard Bank of South Africa Ltd.

APPELLANT'S REPLYING AFFIDAVIT

[30] In a replying affidavit deposed to by Mr Lightfoot, which was filed on behalf of the appellant, it is contended that the appellant is entitled to judgment against the respondent in the amount of R3.5 million, namely the amount outstanding under the USA agreement, in which amount - Mr Lightfoot said - the respondents admitted they were indebted to the appellant but which they alleged was not due because of the appellant's failure to release the Sigma shares. Mr Lightfoot further argued that the respondents could not rely on the settlement alleged by the eleventh respondent because of non-variation clauses contained in the loan agreement and the agreements between the respondents and the Standard Bank of South Africa Ltd which allegedly gave rise to the rights ceded to the appellant. Furthermore, so Mr Lightfoot contended, the eleventh respondent, by signing the letter of 13 April 2006, to which I referred in para [11] above, 'accepted the terms and

conditions contained in [that letter], which [included] that only upon payment of R3.5 million together with interest would all pledges, sureties, covering bonds and cessions be cancelled and returned. Also a term of [the letter] is that a CM42 document in respect of the Sigma shares was to be signed. This flies in the face of the allegation that payment had been made: the R2 million had been paid by 3 December 2005, [the eleventh respondent] had directed the letter of 20 February 2006 . . ., yet on 13 April 2006 [he] signed [the letter in question] with this condition stipulated therein.' Mr Lightfoot also stated that the eleventh respondent had signed the relevant CM42 document.

[31] Mr Lightfoot stated that the respondents never demanded the release of the Sigma shares, with the result that '[e]ven if payment had been made of R1.5 million, as is alleged by [the eleventh respondent], the [appellant] has not been placed in *mora* to release the Sigma shares. On this basis alone', he continued, 'the allegation that the agreements were not cancelled, is bad in law.'

[32] Mr Lightfoot stated that the appellant did lend and advance the amount of R2 489 127 to the first respondent and he annexed two documents as proof of payment of this amount.

[33] The first of the documents annexed, headed 'Transaction History', relates to a 'CFS Call Account' and contains an entry apparently dated 30 June 2004. Under the heading 'Amount' appear the figures '-469705,87' and under the heading 'Description' are the words 'BANKIT TRF TRF TO MFS-LOGTEK'. (Presumably 'MFS' is a reference to the appellant.) The next entry on this document, apparently dated 2 July 2004, also refers to LOGTEK. Under the heading 'Amount' appear the figures '469705-87' and under the heading 'Description' are the words 'BANKIT PMT TRF FROM LOGTEK TO C'. Someone has drawn an arrow from the entry dated 30 June 2004 and immediately below the head of the arrow the following appears in manuscript: 'LOAN FACILITY R469,705,87 TRANSFERRED 30 JUNE 2006'.

[34] The second annexed document, headed 'Standard Bank of South Africa Ltd', describes itself as a 'Computer Generated Copy' and 'Customer

All Payments Interim Audit Report'. The 'User Name' reflected on the document is 'Credit Management Solution' and the transaction reflected relates to an amount of R2 019 421.05. The 'Account Name' is given as 'LOGISTIC TECHNOLOGIES', the "Statement Reference' is 'CREDIT MANAGEMENT SOLUTIONS G' and the 'Status Description' is 'VALIDATED-ADDITION'. (Presumably 'CREDIT MANAGEMENT SOLUTIONS' is a reference to Credit Management Solutions (Pty) Ltd which, according to other letters in the papers, is a subsidiary of Credit Management Solutions Group (Pty) Ltd. According to other letters in the papers the appellant is also a subsidiary of Credit Management Solutions Group (Pty) Ltd.)

An arrow has been drawn from the amount 'R2 019 421.05', which appears against the entry 'Total Batch amount', and below the arrow are hand-written the words:

'LOAN FACILITY – R2, 019,421-05 TRANSFERRED 17 MAY 2004'.

<u>FURTHER AFFIDAVIT BY ELEVENTH RESPONDENT</u>

[35] The statement in the replying affidavit that the eleventh respondent by signing the letter of 13 April 2006 accepted the 'terms and conditions' set out in the letter elicited a further affidavit from the eleventh respondent. In this affidavit the eleventh respondent pointed out that the allegation in question was a new one which had not been included in the founding affidavit. He stated that he signed the letter when Mr Lightfoot handed it to him, not because he agreed with the terms and conditions for the extension of payment, but merely because Mr Lightfoot requested him to acknowledge receipt of the letter by placing his initials thereon before he was aware of the contents.

<u>JUDGMENT IN COURT *A QUO*</u>

[36] The learned judge in the court *a quo,* applying the general rule set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A), held that on the eleventh respondent's version, which had to be accepted for present purposes, the appellant's claim could successfully be resisted by the respondents by raising the *exceptio non adimpleti contractus.* He held that there was no reason to reject the eleventh respondent's averment 'that the

common intention was to make use of the share agreements to, as it were, finance each other'. He pointed out that there was no reference in the Moolman-Sigma agreement or the USA agreement 'that before shares may be released a guarantee would have to be provided for payment of the balance due under the other contract.' He also made the point that Mr Lightfoot's demand in the letter dated 8 March 2006 'that a guarantee must be provided for the R3.5 million owing if the Sigma shares are transferred to [the eleventh respondent] conflicts with the introductory part of the sentence: "We understand that you wish to utilize the shares in Sigma . . . as collateral in raising funds to settle the unpaid balance of R3.5 million referred to above . . ." Although the settlement by way of the share agreements was intended to be a unit', he continued, 'there is no indication in one of them that the release of the shares under it could be made dependent on the other. If it were possible for [the eleventh respondent] to obtain "suitable guarantees" for R3.5 million based on the shares which have been paid for, it is unlikely that he would need the release of the Sigma shares at all.'

APPELLANT'S CONTENTIONS

[37] *Mr Van Nieuwenhuizen* for the appellant submitted that this was not a case where the general rule in *Plascon-Evans, supra,* should be applied. On the contrary, he contended, the court should find that the factual dispute raised on behalf of the respondents in the eleventh respondent's opposing affidavit was not *bona fide.* He submitted that the eleventh respondent's denial that any moneys had been advanced to the first respondent under the loan agreement was false. He argued in this regard that Mr Lightfoot had demonstrated in his replying affidavit that the appellant had lent and advanced R2 489 127 to the first respondent pursuant to the loan agreement. Counsel drew attention to the fact that the eleventh respondent had chosen not to deal in the further affidavit filed on his behalf with this aspect of Mr Lightfoot's replying affidavit nor with Mr Lightfoot's statement that he had signed the CM42 form referred to in the letter of 13 April 2006.

[38] *Mr Van Nieuwenhuizen* submitted that, once it was clear that the eleventh respondent's denial that moneys had been advanced under the loan agreement was false, this was relevant on the broader question as to the

bona fides of the whole defence and that accordingly the appeal should on that ground alone succeed.

[39] In the alternative, even if the case were to be decided on the basis of what was contained in the eleventh respondent's affidavit, counsel submitted that the appeal should succeed because it was clear that the appellant had validly cancelled the Moolman-Sigma and USA agreements on 17 July 2006. He sought to answer the respondent's contentions based on the *exceptio non adimpleti contractus* by submitting that the eleventh respondent was not entitled to transfer of the Sigma shares because he had not paid for them. It follows, so he contended, that the appellant was entitled to cancel the Moolman-Sigma agreement when the eleventh respondent failed to pay for the shares by 30 June 2006, the extended date for payment. As the appellant had, on this approach, not breached any reciprocal obligation under the settlement agreement, it followed that it was also entitled to cancel the USA agreement.

[40] When asked about the two amounts totalling R2 million paid by the eleventh respondent on 3 September 2005 and 2 December 2005 and whether R1.5 million thereof should not be regarded as having constituted payment for the shares purchased under the Moolman-Sigma agreement, Mr *Van Nieuwenhuizen* submitted that, as neither the eleventh respondent nor the appellant had allocated the amounts paid to one of the debts due to the appellant, the payment was to be regarded as being, as counsel put it, 'in suspense' until it could be ascertained which debt was the most burdensome, whereupon the common law rules as to appropriation of payments would be applied. He submitted in the alternative that, on 2 December 2005, the most burdensome debt was the USA debt of R4 million because until it was discharged, the securities held by the appellant would not be released.

[41] Mr *Van Nieuwenhuizen* did not press the contention foreshadowed in the papers that the rectification contended for by the respondents could not be relied on because of the non-variation clauses in the various agreements. As the clauses in question did not in clear and explicit terms prevent reliance on rectification of a written variation contract, there was in any event, in my view,

no substance in the contention: see *Gralio (Pty) Ltd v DE Claassen (Pty) Ltd* 1980 (1) SA 816 (A) at 824A-B; *Leyland (SA) (Pty) Ltd v Rex Evans Motors (Pty) Ltd* 1980 (4) SA 271 (W) at 273B-D and *Primavera Construction SA v Government North-West Province* 2003 (3) SA 579 (B) at 598I–599A.

[42] At the end of his argument Mr *Van Nieuwenhuizen* submitted that, if the court was against him on the question as to whether the appellant had validly cancelled the agreements for the sale of shares, the court should order that the matter be referred to trial. He conceded that he had not asked for this in the court *a quo* but submitted that, if he had done so, he would have been entitled to such an order. It was also not a point raised in the notice of appeal.

DISCUSSION

(1) *BONA FIDE* DISPUTE?

[43] In my opinion it is not possible to find that the factual dispute raised on the papers by the eleventh respondent is not *bona fide.* Apart from the fact that I am not persuaded that the documents annexed to Mr Lightfoot's replying affidavit do 'demonstrate' that the eleventh respondent's denial that *the appellant* lent and advanced R2 489 127 to the first respondent is false, it does not follow, even if the denial can be rejected, that the rest of the eleventh respondent's version cannot be correct, particularly in view of the fact that there is considerable corroboration for the main parts thereof. I also do not think that the fact that the eleventh respondent signed the CM42 document relating to the shares takes the case any further.

(2) WERE THE SALE OF SHARES AGREEMENTS VALIDLY CANCELLED?

[44] I turn now to consider Mr *Van Nieuwenhuizen's* submission that the appellant validly cancelled the Moolman-Sigma and the USA agreements and that it can claim what were alleged to be the correct amounts under the old indebtedness.

[45] I shall assume, without deciding, that if the agreements in question were validly cancelled, it is possible for the appellant to claim the full amounts allegedly owing under the old indebtedness and that it was not limited to

claiming the balance of the amount outstanding under the USA agreement, plus interest thereon.

[46] On 3 September 2005, when the first amount of R1 million was paid by the eleventh respondent, only the Moolman-Sigma agreement had been concluded and the amount paid thus reduced the amount owing under that contract. When the second amount of R1 million was paid on 2 December 2005 there were two amounts owing: the balance of R500 000 under the Moolman-Sigma agreement and the R4 million under the USA agreement. As neither the debtor nor the creditor appropriated the payment to either of the two debts, the common law rules (which are set out in Wessels *The Law of Contract in South Africa* 2 ed (1951) vol 2, paras 2306-2313) apply. 'The fundamental principle underlying these rules', as was pointed out by Henning J in *Ebrahim (Pty) Ltd v Mahomed* 1962 (1) SA 90 (D) at 97G-H, 'is that payment made by a debtor to his creditor should, in the absence of express appropriation by either party, be appropriated to the debt which is most onerous to the debtor (*Wolhuter v Zeederberg* (1885) 3 H.C.G 437 at p 441), or, as it has been put, to the debt which it would be most in the interest of the debtor to pay (*Western Province Bank, In Liquidation v Du Toit, Smith & Co* (1892) 2 C.T.R 22).' We were not referred to any authority in support of Mr *Van Nieuwenhuizen's* main proposition, viz that where it is not clear what debt is most burdensome the payment goes, as it were, into suspense, nor could I find any authority on the point.

[47] In any event the submission lacks a factual basis. It is clear which debt, as on 2 December 2005, it was more in the interest of the eleventh respondent to pay: the balance due under the Moolman-Sigma agreement. The discharge of that debt would have released the Sigma shares which the eleventh respondent had purchased from the pledge to which they were subject, thus enabling the seller to transfer them to him, whereupon he could have used them in an endeavour to obtain financing to enable him to pay the amount due under the USA agreement. Mr *Van Nieuwenhuizen's* alternative argument that the payment is to be appropriated to the debt due under the USA agreement overlooks the fact that such appropriation would only have partly discharged the debt in question, whereas an appropriation to the

Moolman-Sigma agreement debt would have discharged the indebtedness and thereby, as I have said, brought about the release of the shares.

[48] It follows, that as the eleventh respondent must be taken to have paid the amount due under the Moolman-Sigma agreement on 2 December 2005, the appellant was not entitled to cancel the agreement on 17 July 2006.

[49] Mr Lightfoot's statement that the respondents never demanded release of the Sigma shares is clearly false, as the eleventh respondent's letter of 20 February 2006, which has been quoted in para 26 demonstrates. It is thus clear the appellant was *in mora* from 20 February 2006 in respect of its obligation to release the shares.

(3) PRINCIPLE OF RECIPROCITY

[50] It is clear, in my view, that on the version of the contract deposed to by him, the eleventh respondent's obligation to pay the balance due under the USA agreement was so closely linked to the appellant's obligation to release the Sigma shares that the principle of reciprocity applies: that is to say the appellant must release the Sigma shares before being able to claim the price of the USA shares. In the interim the eleventh respondent is entitled to withhold performance of his obligation to pay for the USA shares, which obligation is suspended: see *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1997 (1) SA 391 (A) at 418B-H.

[51] The fact that the overall transaction deposed to by the eleventh respondent was given effect to by the conclusion of three separate agreements will not in itself exclude the operation of the principle of reciprocity, which can still apply if 'the terms of the agreements considered as a whole clearly evince the intention that there would be reciprocity between the obligations undertaken in each': *Wynns Car Care Products (Pty) Ltd v First National Industrial Bank Ltd* 1991 (2) SA 754 (A) at 758C-D. It is the failure of the agreements taken as a whole to evince that intention which the respondents seek to deal with by having them rectified.

[52] It follows that the appellant was not entitled to cancel the USA

agreement on 17 July 2006 nor is it entitled, as Mr *Van Nieuwenhuizen* argued in the alternative, to judgment in the amount of R3.5 million, being the balance due under the USA agreement.

(4) REFERENCE TO TRIAL?

[53] I now turn to deal with Mr *Van Nieuwenhuizen's* last minute application for the matter to be referred to trial. He conceded, as I have said, that he did not apply for a reference to trial at any stage before the court *a quo.* The circumstances were such that, if it had the power to do so, the court *a quo* was not obliged to have acted *mero motu* in ordering a reference to trial: *cf Joh-Air (Pty) Ltd v Rudman* 1980 (2) SA 420 (T) at 428H-429H. (Whether it had the power to do so has been described as a question 'not free from difficulty' which has not yet been decided by this court: see *Minister of Land Affairs and Agriculture v D&F Wevell Trust* 2008 (2) SA 184 (SCA) at para 60.)

[54] The judge *a quo* can accordingly in my view not be faulted for not having done so. While I am not prepared to say that a court of appeal should never order a reference to trial where it has not been sought in the court below nor raised in the notice of appeal, such an order would in my view only be appropriate, if at all, in special circumstances, which have not been shown to be present in this case.

[55] The appeal must accordingly fail.

ORDER

[56] The following order is made:

The appeal is dismissed with costs.

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IG FARLAM
JUDGE OF APPEAL

CONCURRING

HOWIE P
CLOETE JA
VAN HEERDEN JA
SNYDERS AJA