REPORTABLE
(Paragraphs 21 to 50 only)

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No. 8723/98

In the matter between:

ERIC ANDRÉ MULLER	Plaintiff
and	
BOE BANK LIMITED	First Defendant
BAREND GERT STEYN DE WET N.O.	Second Defendant
PAUL DANEEL KRUGER N.O.	Third Defendant
HARRY KAPLAN N.O.	Fourth Defendant

JUDGMENT DELIVERED ON 25th DAY OF MAY 2010

BINNS-WARD J:

[1] The plaintiff, Mr Eric André Muller ('Muller'), issued summons in this action on 29 June 1998. Muller was an insolvent at the

time.[1] The persons cited in the action as the second, third and fourth defendants were the joint trustees of his insolvent estate. By virtue of the passage of time in the more than ten years that intervened between the institution of the action and the commencement of the trial, Muller became automatically rehabilitated in terms of the Insolvency Act during that period. The second, third and fourth defendants thus played no part in the trial.

[2] The first defendant carried on business as Boland Bank Ltd at the times most relevant to events connected to the claims in the action. The bank has subsequently been through a number of name and organisational changes and is now subsumed in Nedbank Limited. In this judgment the bank shall be referred to, as convenient, simply as 'the bank', 'Boland Bank' or 'the defendant'.

[3] Muller advanced four claims in the action. They were labelled as claims A, B, C and D, respectively. Claims A, B and C arose out of, or were related to an agreement concluded between Muller and the bank on 9 May 1988. At the commencement of the trial, after listening to the opening address by the plaintiff's

[1] The provisional order of sequestration granted on 30 June 1997 was made final on 18 August 1997.

counsel, I made a ruling in terms of rule 33(4) directing that certain issues be determined separately from, and before, the remaining matters arising from the pleadings. I furnished my reasons for making the ruling at the time. It is unnecessary to rehearse them, save in respect of claim D, which I shall do at the end of this judgment.

[4] It is convenient to presage the identification of the issues already settled and those falling to be determined in this judgment with a summary of the salient features of the agreement which gave rise to them. The deed of agreement is entitled '*Sale*', but it is clear that it in fact recorded a composite agreement dealing with a number of related, yet discrete, matters.

[5] The contract is not well-drafted and its import is by no means clear in certain material respects. The apparent object to be served by its conclusion was set out in clauses 2.4.4 - 2.4.6. Clause 2 was entitled '*Interpretation and Introduction*' and set out various definitions and a recordal. Clauses 2.4.4 - 2.4.6 formed part of the recordal and went as follows:

'2.4.4 Boland is the major creditor of the Muller Group;

2.4.5 due to the liquidity problems experienced by the Muller Group [and Muller] the latter has found it difficult and, more recently, impossible to meet its monthly payments to Boland;

2.4.6 Boland has agreed in principle to purchase the shares, the claims and the businesses from Muller [and the Muller Group] with a view to enable Muller to settle his debts to Boland as well as his other creditors.'

(The wording in square brackets did not appear in the executed deed of agreement, but in its plea Boland Bank has contended for it to be read in as if the agreement were so rectified.[2])

[6] The agreement provides for the sale by Muller to Boland Bank of 'the shares and the claims, and the assets of the businesses as going concerns, with effect from the effective date' (i.e. 1 May 1988). The 'shares' were defined as meaning 'the entire issued share capital of SA Trucking, SA Trucking (Cape) and Transaf'. The latter entities were in turn each defined as follows: 'SA Trucking means SA Trucking (Proprietary Limited, Registration No. 70/15464/07)'; 'SA Trucking (Cape) means SA Trucking (Cape) (Proprietary Limited, Registration No 83/06544/07' and 'Transaf means Transaf (Proprietary Limited, Registration No 66/12064/07'. The 'claims' were defined as meaning 'Muller's credit loan accounts in SA Trucking, SA Trucking (Cape) and

[2] Cf. *Gralio (Pty) Ltd v DE Claassen (Pty) Ltd* 1980 (1) SA 816 (A) at 824B-C.

Transaf'. The 'assets' were defined as meaning 'the mechanical horses, trucks, trailers and road transportation permits, all as more fully described in Appendix 1'.[3]

[7] The agreed purchase price was R12 million; allocated as follows: 'as to the claims, the face value thereof; and as to the businesses R2 450 000,00 …., as to the shares, the balance of the purchase price…'.

[8] In terms of clause 3.1 of the agreement, the sale was expressed to be '[S]ubject to [clause] 4'. Clause 4 provided, amongst other matters, that the purchase price was to be paid 'as and when realisation of the Muller Group is effected and cash received via the realisation process in terms of [clause] 6'. Boland Bank undertook to 'realise the assets in terms of [clause] 6 and to settle the Muller Group's liabilities as disclosed in the effective date financial statements'. ('The Muller Group' was defined as meaning 'SA Trucking [as defined] and its subsidiaries SA Trucking Cape [as defined], Transaf [as defined] and the businesses'. 'The businesses' were defined as meaning 'the transportation

[3] The underlining is in the original. Appendix 1 listed 106 trucks and gave an indication of at least 104 trailers of various identified types. It contained no reference to any road transportation permits.

businesses conducted by Muller trading as SA Trucking and TransSA'.

[9] Reference to clause 6 shows that the intention was that Boland Bank would dispose of the property purchased by it in terms of the sale provisions of the agreement and credit the proceeds generated thereby to an account to be opened in its books called the 'E A Muller Realisation Account'. The relevant businesses that were, in a sense, the subject matter of the sale were to continue to operate during the realisation period, which was contemplated to be completed within three months of the date of the signature of the agreement. The realisation account was to be credited with the proceeds 'realised on the sale of the assets by Boland' and with the income generated by the conduct of the business during the realisation period. It was agreed that the realisation account was to be debited with (i) the purchase price; (ii) 'interest on R12 000 000….which interest [fell to] be calculated monthly in arrears during the realisation period at prime plus 2%...per annum on R12 000 000…less the amount realised by Boland from the sale of the assets during each month; (iii) the business expenses listed in Appendix 3, which were to be checked

daily by 'the Boland representative' and (iv) any other expenses which were 'directly related to the sale of the assets, such as legal and audit fees'.

[10] Clause 6 further provided (in cl. 6.6) that on the 'completion date' (defined as meaning the date on which the realisation of the assets was completed) the realisation account would be closed and any surplus would be shared equally by Muller and Boland Bank; whereas any shortfall would be borne by Muller alone. Muller authorised the bank to debit any such shortfall towards his overdraft facility. Clause 6.6 fell to be read with clause 4.4.3, which provided:

> 'It is anticipated that the potential surplus due to Muller in terms of 6.6 from the realisation of the assets will be insufficient to settle Muller's liabilities. Accordingly, after the completion date, Boland agrees to grant Muller a facility of a maximum of R2 500 000….to cover the shortfall. As security for the repayment by Muller of this facility and any other amounts owing from time to time by Muller to Boland, Boland shall be permitted to register first Mortgage bonds over [three identified immovable properties].'

[11] Clause 4.4.2 of the agreement provided:

> 'It is recorded that Muller owes the Wadeville branch of The Standard Bank of South Africa Limited approximately R3 000 000…Boland agrees that on signature of this agreement by Muller it will grant Muller a facility to pay to pay to the Wadeville branch of The Standard Bank…the amount owing by Muller against an undertaking by the

> Wadeville branch that all security held by it in respect of Muller's debt to it will be ceded and/or transferred to Boland simultaneously with the payment of the debt.'

[12] The executed deed of agreement was an amended version of an earlier draft. The earlier draft had been signed by Muller on 30 April 1988, but it was not counter-signed on behalf of the bank. According to Muller, the executed version came about because of certain changes reportedly required by the bank. Muller testified he had not concerned himself with the detail of these changes when he signed the executed version on 7 May 1988; he appears to have been satisfied in this regard to be guided by a certain Dr Charles Ferreira – about whom more will be said presently.

[13] Turning to the claims advanced by Muller in his summons: Claim A is a claim for the rectification of the agreement. In this respect he seeks the deletion of clause 2.4.5 (which has been quoted above) and the rectification of clause 3.4 to read:

> 'Muller will prior to the effective date have paid all liabilities of SA Trucking, the subsidiaries, SA Trucking (Cape) and Transaf other than those owed to Boland (if any), so that Boland (and if applicable Muller) will be their sole creditor/s on the effective date'.

In the signed contract, clause 3.4 provided:

> 'Muller will prior to the effective date have paid all liabilities of SA Trucking, the subsidiaries, SA Trucking (Cape) and Transaf so that Muller will be their sole creditor on the effective date.'

[14] The significance of the rectification of clause 3.4 was essentially bound up with the ambit of the meaning of the word 'liabilities' in clause 3.3 of the agreement, which provided:

> 'Boland hereby assumes all liabilities of SA Trucking, SA Trucking (Cape) and Transaf as disclosed to Boland on 30 April 1988.'

(In their heads of argument, the plaintiff's counsel characterised the proper interpretation of clause 3.3 and 3.4 as being 'the real issue for determination' in this part of the trial. In amplification they argued that '[t]he fundamental dispute relates to the allocation of the liabilities of SA Trucking (Pty) Limited in the sum of R5 245 496,09 and [of] Transaf (Pty) Limited in the sum of R1 027 989,82 to Plaintiff as recorded in the "Kritzinger letter" of 9 May 1988.' I shall explain the role of the 'Kritzinger letter' in due course.) It follows from this that even if clause 3.4 were to be rectified as sought by the plaintiff, there would be no point in granting this relief if it were not to be accepted that in consequence

thereof the contract would fall to be construed as providing in terms of clause 3.3 thereof that Boland Bank undertook to assume the debt owing to itself; that is, in effect to write off its claims against SA Trucking (Pty) Ltd and Transaf (Pty) Ltd.

[15] Claim B was for the rendering of an account by Boland Bank in respect of the realisation account; a debatement of such account and judgment for whatever amount might appear due to Muller as a consequence of such debatement.[4]

[16] Claim C was for payment of the R12 000 000 purchase price. As evident from what has already been described above, the payment of the purchase price was an integral feature of the operation of the realisation account. It was therefore misdirected of the plaintiff to have advanced a claim for its payment, save as part of the formulated claim B. This was recognised by the plaintiff's counsel during the trial; and the claim is therefore not persisted with as a discrete claim.

[17] I directed that claim D stand over for later determination.

[4] In the plaintiff's heads of argument it is contended that the amount owed by the defendant to the plaintiff is in the sum of R6 520 598,64 as set out in the report of the accountant called by the plaintiff, Mr Claude Barnes. This allegation begs the question why a debatement of account was claimed, or is being persisted with. But nothing turns on this anomaly.

[18] Although the bank pleaded a denial of any entitlement by Muller to an accounting in respect of the realisation process, this defence was abandoned (correctly, in my view) before the commencement of the trial.[5] During the pre-trial procedures by way of discovery, the furnishing of trial particulars and the exchange of expert witness summaries, a great deal of information about the realisation process became available. When I indicated at the commencement of the trial that if Muller, notwithstanding the information thus provided, still required a direction that a statement of account be rendered, I would hear and determine that issue as a preliminary question, and separately from the remaining issues (cf *Doyle and Another v Fleet Street Motors PE (Pty) Ltd* 1971 (3) SA 760 (A) at 763), the plaintiff's counsel informed me that Muller was content to proceed to the debatement stage on the basis of the information that he then had in his possession.

[19] The parties were not, however, able to furnish me with a list of issues to be dealt with in the contemplated debatement (see *Doyle*, supra, at 763A). Absent such a list, I was not prepared to enter into the debatement. There seemed to me in any event to be

[5] In its plea the defendant alleged that it had already accounted to the plaintiff through his representative, Dr Charles Ferreira. As apparent from the discussion elsewhere in this judgment, the proper characterisation of Ferreira's role in the realisation process was a matter in contention between the parties.

no point in spending time on a debatement if, as specially pleaded by the bank, any money claims the exercise was intended to establish and quantify had been extinguished by prescription (cf. *Absa Bank Bpk v Janse van Rensburg* 2002 (3) SA 701 (SCA) at para. [14]).

[20] The ruling made in terms of rule 33(4) went as follows:

> '1. In respect of Claims A to C in the combined summons, the following issues shall be tried separately from, and before any remaining issues:-
>
> 1.1 The Claim for rectification in terms of Claim A and in relation thereto, whether the word 'liabilities' in clause 3.3 of the agreement, including[6] the liability of the entities mentioned therein - and also, to the extent that might be relevant, their subsidiaries - to Boland Bank;
>
> 1.2 In the light of the determination of the claim for rectification, the issue of the proper meaning of the agreement;
>
> 1.3 Whether the First Defendant is liable to the Plaintiff in terms of Claim C;
>
> 1.4 Whether the Plaintiff's money claims in terms of Claims B and C have been extinguished by prescription as contended in First Defendant's special plea.

The Ferreira affidavit

[21] During the course of the trial the bank sought to introduce in evidence the content of an affidavit made by Dr Charles Griffiths Ferreira. Dr Ferreira had passed away before the trial. The defendant sought to introduce Ferreira's affidavit as evidence in

[6] It was later clarified that the word including should be read as 'includes' or 'included'

terms of s 34 the Civil Evidence Proceedings Act 25 of 1965; alternatively, in terms of s 3 of the Law of Evidence Amendment Act 45 of 1988. Muller opposed the admission of the affidavit into evidence. It is appropriate to determine that issue first.

[22] Section 34 of the Civil Evidence Proceedings Act provides as follows:

> 34 **Admissibility of documentary evidence as to facts in issue**
>
> (1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall on production of the original document be admissible as evidence of that fact, provided-
>
> (a) the person who made the statement either-
>
> (i) had personal knowledge of the matters dealt with in the statement; or
>
> (ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with therein are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had or might reasonably have been supposed to have personal knowledge of those matters; and
>
> (b) the person who made the statement is called as a witness in the proceedings unless he is dead or unfit by reason of his bodily or mental condition to attend as a witness or is outside the Republic, and it is not reasonably practicable to secure his attendance or all reasonable efforts to find him have been made without success.

(2) The person presiding at the proceedings may, if having regard to all the circumstances of the case he is satisfied that undue delay or expense would otherwise be caused, admit such a statement as is referred to in subsection (1) as evidence in those proceedings-

(a) notwithstanding that the person who made the statement is available but is not called as a witness;

(b) notwithstanding that the original document is not produced, if in lieu thereof there is produced a copy of the original document or of the material part thereof proved to be a true copy.

(3) Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish.

(4) A statement in a document shall not for the purposes of this section be deemed to have been made by a person unless the document or the material part thereof was written, made or produced by him with his own hand, or was signed or initialled by him or otherwise recognized by him in writing as one for the accuracy of which he is responsible.

(5) For the purpose of deciding whether or not a statement is admissible as evidence by virtue of the provisions of this section, any reasonable inference may be drawn from the form or contents of the document in which the statement is contained or from any other circumstances, and a certificate of a registered medical practitioner may be acted upon in deciding whether or not a person is fit to attend as a witness.'

[23] The provision falls to be read with the special definitions provided in terms of s 33, and with s 35 of the Act, which, insofar as currently relevant, provides:

35 **Weight to be attached to evidence admissible under this Part**

(1) In estimating the weight, if any, to be attached to a statement admissible as evidence under this Part, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or

> otherwise of the statement, and in particular to the question whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not the person who made the statement had any incentive to conceal or misrepresent facts.

[24] It seems to be firmly established that, subject to the exclusionary provisions of s 34(3) of the Act, the court is obliged to admit a statement which complies with the criteria set out in s 34(1). In the current matter, it is not in dispute that Dr Ferreira played a central role in the realisation process contemplated in terms of the agreement between the plaintiff and the defendant. It follows that he would have had personal knowledge of the matters in connection therewith, which are dealt with at some length in the affidavit allegedly made by him that the defendant seeks to introduce under the provision. It is also not in dispute that Dr Ferreira is deceased.

[25] The document that the defendant seeks to introduce is a photocopy of the one actually signed by Dr Ferreira. The plaintiff contends on this basis that it is not the original document and that accordingly, the requirements of s 34(1) have not been satisfied in this respect. I agree with the plaintiff's contention. In arriving at that conclusion I have taken into account the decisions which have allowed that carbon copies and even roneod documents may be

regarded as duplicate originals. (See in this regard the majority judgments in *Lynes v International Trade Developer Inc* 1922 TPD 301; *Da Mata v Otto N.O.* 1972 (3) SA 858 (A) at 866B-G and 881; and *Herstigte Nasional Party van Suid Afrika v Sekretaris van Binnelandse Sake en Immigrasie* 1979 (4) SA 274 (T).) What is common to the documents accepted as originals in those decisions is that they were all originally made or executed by the maker. A draft affidavit of which a number of photocopies had been made before signature would, if more than one of the resulting documents was signed by the deponent, give rise to multiple originals in the sense illustrated by the cases. But that is not the case with a photocopy made of the one and only originally executed and signed document, as was the case with the affidavit made by Dr Ferreira.

[26] Section 34(2) of the Civil Evidence Proceedings Act affords the court a discretion to admit a copy of the document proven to be a true copy of the original or the part thereof relied upon if, having regard to all the circumstances of the case, the presiding officer is satisfied (i) that undue delay or expense would otherwise be

caused and (ii) that the copy sought to be introduced has been proved to be a true copy of the original.

[27] The evidence is that the affidavit in question was procured from Dr Ferreira for the purpose of being produced at an enquiry in terms of the Insolvency Act into Muller's affairs. The affidavit was made for the purposes of being produced in evidence at the creditors' meeting as a written statement of the nature contemplated by s 65(3) of the Insolvency Act. For reasons which are not apparent, the statement was not introduced and Dr Ferreira was not questioned at all at the meetings of creditors. It is not known what has become of the original. The evidence is that the original document, in the sense of the document actually signed by the deponent, rather than a photocopy thereof, could not be located despite diligent search.

[28] The plaintiff's counsel submitted that the discretion in terms of s 34(2) of the Civil Evidence Proceedings Act can be exercised only if the court is satisfied that the original document is still in existence; and that any view on the undue delay or unreasonable expense that would be attendant on its production can properly be formed only if the court has some basis to know what the

impediments to producing the extant original are. This indeed was the conclusion of Devlin J, as he then was, in *Bowskill v Dawson* 1954 1 QB 288, [1953] 2 All ER 1393, applying a closely equivalent provision in the then subsisting English legislation.[7]

[29] The commentary in Schwikkard et al, *Principles of Evidence* (Juta) 3ed, at 294, would appear, with reference to *Bowskill*, to offer support, albeit expressed with discernible hesitancy, for the plaintiff's counsel's submission. The authors draw attention to subsequent amendments to the English legislation which 'greatly simplify' matters and take into account advances in modern technology with regard to the generation and copying of documents.[8] In Zeffert & Paizes, *The South African Law of Evidence*, 2nd ed, LexisNexis (2009) at 421 it is suggested, however, that 'a court might take the view that once the document is shown to have been lost, so that further search would involve

[7] Section 1(1) and 1(2) of the Evidence Act, 1938 (c 28).

[8] In this regard the authors refer to s 8 of the English Civil Evidence Act, 1995, which provides:

> ***8 Proof of statements contained in documents***
>
> *(1) Where a statement contained in a document is admissible as evidence in civil proceedings, it may be proved–*
>
> *(a) by the production of that document, or*
>
> *(b) whether or not that document is still in existence, by the production of a copy of that document or of the material part of it, authenticated in such manner as the court may approve.*
>
> *(2) It is immaterial for this purpose how many removes there are between a copy and the original.*

(An affidavit such as that made by Dr Ferreira in the current matter would in England and Wales by admissible as evidence by reason of the provisions of s 2 of the English Civil Evidence Act.)

undue or expense or delay' a basis for the exercise of the discretion afforded in terms of s 34(2) is established, thereby providing what the authors describe as 'a more practical meaning'. In Schmidt and Rademeyer's *Bewysreg* (4de uitgawe) Butterworths (2000), the opinion is expressed that it is not yet certain that the South African courts will accept the strict literal approach in *Bowskill v Dawson*.[9]

[30] Devlin J noted in *Bowskill* that he considered the conclusion to which he was driven on the meaning of the English provision, and which afforded one of the two quite independent grounds upon which he excluded the copy tendered in that matter, to be not 'altogether satisfactory'. It was nevertheless one which he concluded he was bound by the language to apply. In this regard it is evident from the judgment that two matters weighed particularly with the learned judge. The first was that the provision made admissible a document which would not, in common law, be admissible, and that therefore its wording had to be 'strictly followed' (presumably in accordance with the canon of interpretation that the legislature is presumed not to intend to alter the existing law any more than necessarily follows from the words

[9] *Bewysreg* at p. 498.

used in a statute). The second was that the only qualification to the production of the original document permitted in terms of the Act required that any copy that might be admitted had to be certified to be a true copy. In this regard, it bears noting that the provisions of s 1(2) of the statute construed by Devlin J differed in small but material respects from its equivalent in s 34(2) of the South African statute. Section 1(2) of the English statute (as quoted by Devlin J at 1394B-C of the All ER report) provided:

> 'In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in sub-s. (1) of this section shall be admissible as evidence….(b) notwithstanding that the original document is not produced, if in lieu thereof there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or as the court may approve, as the case may be.'
>
> (My underlining.)

[31] In my view the second of the considerations that weighed with Devlin J was the more compelling one; and, with respect, on its own, one which, in the circumstances of that case, impelled the conclusion reached by the learned judge. I shall therefore treat of it first. The requirement that the copy admitted had to be a certified true copy suggests that, save in respect of an instance in which the tendered copy of the original had been brought into

existence and certified to be a true copy before the loss or destruction of the original (which was not the case in *Bowskill*), it would be impossible, if the certifier could not have sight of an extant original, to satisfy the requirement that the admitted copy be certified. In the former instance, that is where the true copy had been certified as such before the loss or destruction of the original, the copy could be admitted if the court was prepared to approve the manner in which it had been certified. In the latter instance, the court would give directions for the certification of the copy – an exercise it would not undertake if the original was not available for inspection by the party to be empowered by the order contemplated by the provision to do the certification.

[32] Section 34(2) of the South African statute has been quoted above. As mentioned, the difference in wording between it and s 1(2) of the English statute under consideration in *Bowskill* is material. There is no certification requirement. Instead all that is required is that the copy in question be proved to be a true copy. There is no prescription of what evidence should constitute such proof. It goes almost without saying that the measure of proof would be proof on a balance of probabilities.

[33] In the current case it is not known what has become of the original document. In the absence of any evidence that it has been destroyed, the party seeking to produce it could notionally be expected to continue searching for it notwithstanding the time and expense that would be entailed in such an exercise. No cogent reason has been suggested as to why the bank should in the circumstances of this case be required to do so. I am satisfied that it would cause undue delay in all the circumstances of the case if it were required so to do.

[34] It is unnecessary in the circumstances of this case to consider what the position would have been if the evidence had shown that the original had been destroyed. What to make of the qualification with regard to delay or undue expense that would undoubtedly arise in such a matter is a question for another case. It may well be that consideration should be given to improving the South African statute along the lines of the 1995 English Civil Evidence Act.[10]

[35] Reverting to the first of the two aforementioned considerations that weighed with Devlin J in *Bowskill*. With

[10] See footnote 8, above.

respect, I do not find it persuasive; certainly not as it might be suggested as being applicable to construing the South African legislation. It is s 34(1) that introduces an exception to the common law. Section 34(2) allows exceptions to s 34(1) - not to the common law. There is, in my view, therefore no reason in principle to apply a restrictive approach to the construction of s 34(2). The plain purpose of s 34 was to facilitate the introduction of documentary evidence in the circumstances therein stipulated. There is no reason to adopt a consciously restrictive approach to the implementation of the provision. Indeed such an approach would seem to run counter to the latitude expressly afforded in terms of s 34(5).

[36] The issue of the caution with which documents admitted in terms of the section might properly be treated and the weight to be attached to their content, being matters more centrally relevant to the effect of the statutory departures from the common law in the enactment, are discretely provided for in s 34(3) and s 35 of the Civil Evidence Proceedings Act. The argument that a restrictive interpretative approach to the section is indicated by reason of its departure from the common law is further undermined by the

savings provisions in s 38 of the Act. These make it clear that the legislative intention was to afford an extension of what the common law permits, and not to alter it restrictively. To my mind a further aspect that is relevant in construing s 34 of the Act is that it may be inferred from a consideration of the Act as a whole, and Part VI thereof in particular, that the legislative intention was to broaden the basis allowed by the common law for the admission of evidence. It may reasonably be inferred that this object must have been regarded by the lawmaker as in the public interest; no doubt to facilitate a less technically hindered ventilation of issues, thereby improving the ability of the parties to civil proceedings to establish the relevant facts, and concomitantly, that of the courts to more justly decide civil cases.

[37] If I have correctly surmised the object of the provisions, it would be inconsistent with the fulfilment thereof to adopt an especially strict or limiting approach to their construction. (Cf. *Constantinou v Frederick Hotels Ltd* [1965] 3 All ER 847, in which Lord Denning MR, in the course of dealing with a narrow question in terms of s 1(3) of the Evidence Act, 1938 – the wording of which is followed exactly by s 34(3) of the Civil Proceedings Evidence Act

– made the general observation that the Evidence Act 'should be liberally interpreted'.)

[38] The next issue that requires determination is whether Dr Ferreira was 'a person interested' in the sense of s 34(3). The view commonly expressed in the cases is that the concept should not be too narrowly defined. Some of the relevant jurisprudence was recently reviewed in this court in *Trend Finance (Pty) Ltd and another v Commissioner for SARS and another* [2005] 4 All SA 657 (C) at para. [40]. A person having a pecuniary or proprietary interest in the outcome of the proceedings, or in respect of whose evidence it might be said that there was 'a real likelihood of bias', would qualify as 'a person interested'. Of course, a relevant interest can only exist if the statement in question was made when proceedings were instituted or anticipated.

[39] I shall discuss Dr Ferreira's role in the relevant events in more detail later in this judgment. Suffice it to say that at the time that the affidavit in question was made (February 1998), there was no indication that the plaintiff might have intended to institute proceedings of the nature that ensued when summons was issued four months later. When the affidavit was made, the passage of

time that had already passed since the events most centrally relevant to the case rendered it improbable that Dr Ferreira could have anticipated any such litigation, or indeed the nature of the disputes on which it came to be founded.[11] The content of Dr Ferreira's affidavit indicates that his object, as expressly stated in the introductory section of the document, was to relate the history of Muller's dealing with the bank from the time of Ferreira's initial involvement in Muller's affairs at the beginning of 1987.

[40] This is possibly a convenient stage to deal with the evidence of Mr Kritzinger, the manager of the Johannesburg branch of Boland Bank at the time of the realisation process undertaken in terms of the May 1988 agreement. One of the primary purposes for which the plaintiff appears to have called Kritzinger was to support Muller's contention that Dr Ferreira was the bank's representative, and not his agent, as contended on behalf of the bank.

[41] Kritzinger clearly had a more direct and active involvement in the management of the Muller accounts and the realisation process than he was willing to admit to in the course of his

[11] Cf. *Da Mata v Otto* 1972 (3) SA 858 (A) at 866H-867C.

evidence, both here and in the insolvency enquiry proceedings. At both hearings Kritzinger's evidence essentially distilled to a version that he had little recollection. I can accept that he did indeed have a very limited independent memory of events.

[42] His overriding impression that the accounts were managed and the realisation process was undertaken under the exclusive management of Dr Ferreira and the bank's head office, and in particular, Mr Hickman, may have had some basis in fact.[12] But contemporaneous correspondence to which Kritzinger was party, as author, makes it evident that he did indeed play an active, even if subsidiary, role in the relevant affairs. It is not necessary to go into detail in this regard.

[43] It suffices by way of example to refer to the letter, dated 21 June 1988, written by Kritzinger to Hickman at pp.158-161 of exhibit C3. This letter was put to Kritzinger by Muller's attorney during the former's interrogation at the insolvency enquiry. The letter deals with a progress meeting in relation to the then partly completed realisation process attended by Kritzinger, Muller,

[12] In the particulars for trial furnished by the defendant it was alleged in answer to the question 'Who on behalf of the first defendant conducted the realisation account?' that this had been done by 'Various officials of the first defendant under the supervision of J.A.P. Hickman'.

Lubbe,[13] Ferreira and one Scholtz at Muller's Wadeville premises. The content of the letter exemplifies Kritzinger's active involvement in the process. Its content is also difficult to reconcile with his description in evidence of Ferreira as an employee of the bank. At the insolvency enquiry Kritzinger described Ferreira as a consultant to the bank. Certainly, it is difficult to understand why Kritzinger should have been reporting to Hickman in the manner reflected in the content of the letter under reference if Ferreira were himself a bank official.

[44] Appendix 3 to the agreement sets out the respective roles of the various individuals involved in the implementation of the realisation. It is evident from the content of the appendix that Lubbe was the appointed bank representative and that Ferreira's role was a different one. The annexure provides that the services of the bank and those of Muller himself in the implementation of the realisation process were to be rendered without remuneration. Ferreira, on the other hand, who it would appear was intended at the stage of the conclusion of the agreement to become the liquidator of the companies when they were wound up in terms of

[13] It was common ground that Lubbe was a Boland Bank official seconded to work fulltime at the Wadeville premises during the realisation process.

the contemplated scheme,[14] is referred to in the same context as one of the individuals whose services would give rise to a cost in the process; and it seems reasonably clear that the cost was to be a charge on the realisation account. If the understanding were that Ferreira's fee would be payable only at the end of the process, when he had discharged his mandate, that might explain the correspondence, to which some reference was made in the course of the trial, in which he mentioned having received 'help' from Kritzinger by way of a R20 000 payment. Such payment, in the context that I have just identified, with reference to appendix 3, as being the most plausible explanation of Ferreira's role, would have constituted a discretionary advance.

[45] Whether Ferreira was Muller's agent was a question hotly in contention between the parties at the trial. The significance of the issue went to matters such as the knowledge of facts that could allegedly be imputed to Muller if it were accepted that Ferreira had been his agent; and also to the question of how much weight should be attached to the content of Ferreira's affidavit made for the purpose of the insolvency enquiry if the affidavit were to be

[14] The Master declined to appoint Ferreira as liquidator because he was registered as the secretary of the companies.

admitted in evidence, either in terms of the Civil Evidence Proceedings Act or the Law of Evidence Amendment Act.

[46] I can understand a basis for the description of Ferreira as Muller's agent. Whether or not he was formally appointed by Muller and the latter's then wife, as Ferreira's affidavit suggests, it was only with the agreement of Muller and the directors of the affected entities in the Muller group that Ferreira could have assumed the role that even Muller acknowledged he in fact discharged. To that extent Muller undoubtedly played a role in his appointment. I consider that it is also clear that in giving instructions to Kritzinger on the issue of cheques drawn on the so-called 36T account, Ferreira must have been acting primarily on Muller's behalf, being the person in whom the right to the funds in that account vested in terms of the implementation of the realisation process. It is improbable that Muller would not have been aware of the 36T account, as he claimed. The letter by Kritzinger, dated 9 May 1988, which particularised the allocation of the proceeds of the R12 million purchase price paid by the bank in terms of the realisation agreement, appears on its face to have been addressed to the postal address nominated by Muller in

terms of the agreement as the address to which all notices to him by the bank under the agreement should be sent.

[47] It is, however, unnecessary to characterise the nature of Ferrieira's relationship to either the bank or to Muller. It is evident that Ferreira, a man with a wealth of experience in banking-related matters, was used by Boland Bank in a number of matters to resolve problems with corporate clients which had run into difficulty. The probabilities support the correctness of Muller's evidence that it was the bank's officials who introduced him to Muller, and that it was at their suggestion that Ferreira became involved in Muller's business. Ferreira had, up to his retirement, been the managing director of Merca Bank, in which Boland Bank had a proprietary interest, and he was closely acquainted with Messrs Liebenberg and Hickman, who both served, as representatives of Boland Bank, as directors on the board of Merca Bank. Indeed a letter by Hickman to Muller in December 1986 confirms that it was at the bank's instance that Ferreira was introduced to Muller.

[48] The tenor of correspondence addressed by the bank to Ferreira once the realisation process had been decided upon gives

the impression that, certainly at that stage, he was regarded by the bank's officials as representing the Muller Group in the implementation of the process. It is equally clear from correspondence written by Ferreira to the bank that he regarded his role to include advising the bank on what he considered would be in its best interests in the carrying out of the agreed plan. On a consideration of the conspectus of evidence I am left with the impression that Ferreira was probably an independent consultant charged with devising a resolution to the seemingly intractable difficulties with the Muller Group accounts to the benefit, if possible, of both of the protagonists.

[49] Reverting, with those considerations in mind, to the Ferreira affidavit; there is no indication of apparent bias in the document whatsoever. On the contrary, its narrative content is closely supported by a number of annexures, the authenticity of which was not called into question. The content of the affidavit also lends support to material aspects of the evidence of the plaintiff himself. There is no plausible indication that Dr Ferreira had any relevant proprietary or pecuniary interest in any matter related to the content of the affidavit, or in the resolution of any dispute that

might conceivably arise in respect of the state of the plaintiff's accounts with the defendant bank.

[50] I am satisfied by the evidence of Messrs Eybers,[15] Strydom and Tintinger that the photocopy of the affidavit deposed to by Dr Ferriera on 16 February 1998 is a true copy of the original document. In the circumstances I am also satisfied that it falls to be admitted in evidence in terms of Part VI of the Civil Proceedings Evidence Act, 1965.

[51] Defendant's counsel argued that if the copy of the affidavit was not admissible in terms of the Civil Evidence Proceedings Act, it should then be admitted in terms of s 3 of the Law of Evidence Amendment Act 45 of 1988. It is unnecessary in the context of the admission of the affidavit under the Civil Evidence Proceedings Act to deal with this argument.

Rectification

[52] The plaintiff alleged that the executed deed of agreement did not correctly reflect the common intention of the parties as a result of 'a mistake in the drafting of the document in respect of

[15] Incorrectly described as 'Eyvers' in the transcript of evidence.

clauses 2.4.5 and 3.4 thereof'. Both of these clauses have been set out earlier in this judgment.

[53] Clause 2.4.5 is merely a recordal; it has no operative function in the agreement. Consequently, if the deletion of it sought by the plaintiff (or indeed the rectification thereof pleaded by the defendant to include within the concept of 'the Muller Group' the plaintiff in his personal capacity) were to be granted, it would not affect the parties' respective rights and obligations vis à vis each other in terms of the contract. The evident reason why the plaintiff seeks the removal of the provision is that its content - ostensibly a recordal of background circumstances - is at odds with his evidence explaining the underlying reason for the conclusion of the contract.

[54] The result of the claim for rectification is dependant on the determination of the contesting versions of how and why the agreement was concluded. In particular, the notion that the agreement provided that the bank would assume (i.e. effectively write off) a substantial debt by the Muller Group in its books is plausible only if one accepts Muller's account of the genesis of the agreement. The effect of the rectification of the agreement in the

manner claimed by the plaintiff is that the agreement would fall to be read as providing that the plaintiff had to settle all of the liabilities of SA Trucking, SA Trucking (Cape) Pty Ltd and Transaf as disclosed to the bank on 30 April 1988, save for those to Boland Bank, and that the bank would assume all such liabilities.

[55] According to the bank, the agreement was concluded to afford a means of resolving the unsatisfactory debt situation of the plaintiff and various of the companies under his control. These problems were perceived by the bank as being bound up with intractable cash flow problems in the transport business conducted by the plaintiff personally and through the vehicle of various companies constituting what was referred to as 'the Muller Group'.[16]

[56] According to the plaintiff's evidence on the other hand, the agreement was entered into at the instance of the bank to address his complaint that the bank had erroneously failed to cancel its record of his indebtedness in respect of what he chose to call 'fictitious' or 'questionable' hire purchase transactions. The

[16] It would appear that Muller and the companies had traded indiscriminately under the umbrella of the designation 'SA Trucking'.

plaintiff's evidence in regard to the alleged factual basis for this contention went as follows.

[57] He had started transacting business with the Kroonstad branch of Boland Bank in the early 1980's. The bank had approached him to purchase an almost brand new truck which they had repossessed from a defaulting debtor. The relationship had grown because Boland Bank agreed to grant him credit on competitive terms. Some time after an established relationship with the senior management of the Kroonstad branch had come into being, the plaintiff encountered a serious difficulty with the impoundment by the Railways Police of a number of the vehicles in his fleet in about mid 1985. After taking advice from his attorney, the plaintiff approached the management of the bank's Kroonstad branch and concluded an arrangement with them to sell the vehicles that were liable to impoundment to the bank. The bank would in turn immediately on-sell these vehicles on hire purchase to SA Trucking (Pty) Ltd and Transaf (Pty) Ltd (which it will be recalled are companies in the Muller group subject of the sale recorded in the May 1988 agreement). To this end the plaintiff signed a number of blank pro forma hire purchase contracts and

provided van Zyl and Boonzaaier with an EA Muller trading as SA Trucking invoice book to be completed by the bank officials to record the sales of the vehicles involved to the bank. It was left to the bank officials to calculate the amounts of the purchase price of each vehicle in respect of each hire purchase agreement. The total purchase price of the vehicles involved in the transaction had to be sufficient to settle all of the plaintiff's indebtedness in the books of Boland Bank as at that date. This indebtedness entailed the plaintiff's personal indebtedness and that of Two Way Transport (Pty) Ltd and Heavy Transport (Pty) Ltd in respect of certain hire purchase contracts.

[58] The intended result of this transaction, apart from providing a means to the immediate release of the impounded vehicles, was to transfer all of the plaintiff's personal debt to the bank to SA Trucking (Pty) Ltd and Transaf (Pty) Ltd. Those companies would take over the debt in the form of their liability under the hire-purchase agreements in respect of the impounded vehicles. The plaintiff was to stand as surety for the companies.

[59] Shortly after the aforementioned scheme was put into place the plaintiff and the Kroonstad branch bank officials involved were

arrested. A lengthy period intervened during which time the plaintiff said he had no interaction with the bank or its officials because of the nature of the bail conditions imposed on him.[17]

[60] After the finalisation of the criminal proceedings, upon the state's acceptance of a guilty plea by the plaintiff to a charge described by him as having been the 'uitgif van 'n vervalste dokument', the plaintiff arranged a meeting with a senior management official, one Mr JAP Hickman, at Boland Bank's head office. The purpose of this meeting, according to the plaintiff, was to deal with the fact that the bank had not implemented the arrangement as it should have done; more particularly, by not having credited him with the proceeds of the sale of his vehicles. Instead the bank was maintaining that the plaintiff's pre-existing obligations remained in place and in addition, and by way of duplication, was also maintaining that SA Trucking and Transaf were in debt to the bank in respect of the aforementioned hire purchase transactions to which they had been party as purchasers.

[17] Muller claimed that the period involved was of about a year or more; whereas Mr Francois van Zyl, the manager of the Kroonstad branch at the time, who was also criminally charged, said it was no more than 6 months, between November 1985 and April 1986. Van Zyl impressed me as having a more coherent recollection of the time periods involved than Muller. Van Zyl was not aware at the time of the bail conditions described by Muller, but confirmed that there had been no contact by him with Muller during this period and that Muller had informed him about the bail conditions after the completion of the criminal proceedings.

In short the plaintiff appears to have been alleging that the bank was trying to have its cake and eat it.[18]

[61] The plaintiff testified that during the course of the meeting with Hickman the bank's chief executive officer, Mr Gert Liebenberg, was called into the meeting room. According to Muller, Liebenberg appeared to grasp the problem immediately. He informed Muller that the bank would introduce someone to him who was experienced at resolving problems of this kind. This person turned out to be Dr Charles Ferreira. Shortly after the meeting, so the plaintiff testified, Mr Hickman informed him that Dr Ferreira would be the bank's official on site at the Wadeville headquarters of the plaintiff's transport business.

[62] It is convenient to interpolate at this stage that it would appear from the available documentation that the meeting with Hickman and Liebenberg took place on 28 November 1986. Its content was summarised in a letter by Mr Hickman to Muller, dated 12 December 1986. The letter contains a number of indications

[18] I gained the impression from Muller's evidence that he appeared to consider that the effect of the criminal proceedings was to characterise the hire purchase contracts concluded in terms of the scheme devised by him and the bank as invalid. The basis for any such impression was not explained. It appears from the evidence of Mr Van Zyl (the then manager of the bank's Kroonstad branch), who was also criminally charged and convicted of a single count of 'uitgif van 'n vervalste dokument', that the basis of the charge was the falsification of the date of the transaction and not the transaction itself.

that the bank was very concerned about the unsatisfactory state of the Muller group's account. Having referred to certain issues such as Muller's cashflow problems, the arrears on payment obligations and the absence of financial statements, Hickman concluded his letter by saying: 'In die lig van al die probleme hierbo genoem en dan meer spesifiek die finansiële bestuursprobleme het ons die moontlikheid bespreek om dr Charles Ferreira aan u bekend te stel. Ek het sedertdien telefonies met dr Ferreira afgespreek om met u 'n afspraak te verkry.' In his affidavit, Ferreira testified that after an initial meeting with Muller and the latter's former wife he was appointed by them to assist with the resolution of financial and management problems in their business, and in this regard to negotiate with Boland Bank.

[63] Dr Ferreira became practically involved in Muller's business affairs in December 1986 or January 1987. He was in possession of a list of vehicles, being the vehicles in respect of which the so-called 'questionable' hire purchase agreements had been entered into. Dr Ferreira enquired from Muller whether the vehicles (being subject to the questionable hire purchase agreements) could be sold and what the proceeds of such sales would be. Muller

estimated that the vehicles could be sold in the market for approximately R9 500 000 in total. A figure of R12 million was however mentioned by Dr Ferreira and he explained to Muller that as company tax was 50% at that point in time, the bank needed approximately R6 million (after tax) 'to clean their books'.

[64] Muller then added approximately 47 of his own trucks (not having been subject to the so-called 'questionable' or 'fictitious' hire purchases transactions) so as to make feasible the achievement of the realisation amount of R12 million required by Ferreira. The vehicles in question were, save for one which appears to have been damaged and written off, those listed in appendix 1 to the agreement.

[65] The scheme to realise the vehicles and thereby 'clean the bank's books' and resolve Muller's actual and ostensible indebtedness to the bank was conceived by Ferreira. Muller contended that Ferreira had acted as the bank's agent or representative in this regard. According to the plaintiff he had no dealings with anyone at the bank, other than Dr Ferreira, during 1987. He testified that during that period Ferreira worked from an office at the plaintiff's premises in Wadeville outside

Johannesburg. Ferreira was assisted by a Mr Lubbe (no doubt the Boland bank representative referred to in appendix 3 to the May 1988 agreement, as mentioned earlier).[19]

[66] Ferreira's evidence on affidavit was that when he became engaged in Muller's business affairs he found that Muller's accounting records, although not lacking in information, were somewhat chaotic in that they drew no distinction between Muller's personal finances and those of the several companies in the Muller group. One can infer that Ferreira's initial principal task in order to redress the problems he had been engaged to address was to reconstruct sets of financial accounts. Ferreira found that the companies in the Muller Group did not actually trade. Their sole function was to own or possess the vehicles in the fleet. Any instalment sale instalments owed on these vehicles were paid by SA Trucking; i.e. by Muller personally. No proper internal group accounting had been kept in this regard. Ferreira observed that Muller nevertheless appeared to know precisely what the state of affairs was within the group; of what instalments were due, and to

[19] See clauses 3.1.5 and 11 of Appendix 3 to the May 1988 agreement, and para.s 6 and 7 of Dr Ferreira's affidavit.

whom. Muller was also abreast of the outstanding balances due to creditors of the group.

[67] Ferreira eventually submitted a comprehensive proposal on behalf of Muller and the Muller Group to Boland Bank in April 1988. It was set out in a memorandum from Ferreira to the general management of Boland Bank, dated 20 April 1988. In that report Ferreira quantified the indebtedness of Muller and the Muller Group to the bank as being in the amount of R11 620 872. The memorandum would appear to have been considered at a special meeting of senior management convened by the managing director, Mr Liebenberg, on 25 April 1988. The proposal clearly presaged the terms of the May 1988 agreement. It is confirmed in Ferreira's affidavit that at the time of the conception of the scheme which inspired the May 1988 agreement he believed, on the basis of advice obtained from Hofmeyr van der Merwe attorneys, supported by a partner of accountants and auditors, Theron Du Toit, Mr S. Rossouw, that its implementation would bring certain income tax advantages for Boland Bank.

[68] The notion of a tax advantage was predicated on the assets of the businesses acquired in terms of the agreement being

acquired by the bank by means of dividends *in specie* upon the voluntary liquidation of the companies involved. The considerations involved, which were based on a construction of s 22 of the Income Tax Act, as it then was, and the characterisation of the acquisition by the bank of the shares and assets as a scheme of profit making by a trading company, were addressed in two legal opinions from Hofmeyr van der Merwe that were produced in evidence. Whether or not the tax advice was sound was the subject of some debate between the expert witnesses, Messrs Barnes and Greenbaum. I do not consider it necessary to enter into that debate. Suffice it to say I have seen nothing in the documentation produced in evidence that the bank considered the object of the exercise put in train by the May 1988 agreement as a scheme of profit making in the sense assumed in part of the amplified advice furnished in the memorandum from attorneys Hofmeyr van der Merwe, dated 20 April 1988. More pertinently, there is nothing in the opinions which postulated (at least expressly) a writing off of any debt.

[69] It is not apparent that anything about the scheme contemplated by Dr Ferreira was inspired by an identified need to

correct the effects of a failure by the bank to account to Muller for the proceeds of the 'questionable' hire purchase transactions, as alleged by the latter; nor does it appear in any way to have been directed at accommodating an assumption by the bank of the liabilities of SA Trucking (Pty) Ltd and Transaf (Pty) Ltd, as contended by the plaintiff on the basis of his construction of the executed agreement. Indeed, Mr Rossouw from Theron Du Toit, who gave evidence at the trial, testified that Ferreira had made no mention to him of any such issues when they consulted prior to Rossouw's production of a letter, dated 19 April 1988, in support of the tax advice furnished by Hofmeyr van der Merwe and the scheme of realisation devised by Ferreira.[20] (Rossouw's evidence explained that a direct realisation of assets by Muller to reduce his indebtedness to the bank would not have been tax efficient, as Muller would have incurred an income tax liability on any surplus achieved over the written down book value of the assets concerned.)

[70] It appears to me that Dr Ferreira considered the tax advantages outlined in the opinions provided by Hofmeyr van der

[20] Rossouw was appointed as the liquidator of the companies in the Muller group that were placed into voluntary liquidation in the course of the implementation of the May 1988 agreement.

Merwe to have been a factor which would support structuring the liquidation of a large part of Muller's business in the manner proposed and assist to make the proposal more appealing to the bank than a compulsory liquidation / sequestration. The evidence is clear that Ferreira's expectations of the realisation process were, in the event, overly optimistic, due, according to him, to Muller having provided him with inflated estimates of what the assets would realise and a misdirectedly rosy assessment of the ease and speed with which they could be sold. In any event, Ferreira refers to the Kritzinger letter in his affidavit in the context of recounting the implementation of the realisation process. It is apparent that Ferreira did not perceive any conflict between the appropriation of the purchase price as described in the Kritzinger letter and his understanding of the scheme endorsed by Hofmeyr van der Merwe, or the terms of the subsequently concluded May 1988 agreement.[21] I agree with the opinion of Mr Greenbaum, who testified on behalf of the bank, that it does not appear that the bank acted on the basis of the advice furnished by Hofmeyr van der Merwe in the manner that such advice was construed by the plaintiff's expert witness, Mr Barnes.

[21] See para. 11 of Dr Ferreira's affidavit.

[71] Mr Hickman, who was the most senior of the bank's officials directly concerned with the management of Muller's account at the relevant time, testified that the bank's management did indeed have concerns about the tax implications of the proposal put together by Dr Ferreira. Hickman stated the bank's concern was to be assured that the proceeds of the sale of Muller's fleet should not be taxable in the bank's hands because any such taxation would undermine the set-off effect that was fundamental to the contemplated redemption of Muller's indebtedness to the bank to be achieved in terms of any implementation of the proposal.

[72] The plaintiff's case was that the effect of clause 3.3 of the agreement was that Boland Bank would assume the liabilities of Transaf (Pty) Ltd and SA Trucking (Pty) Ltd to the bank. Muller conceded during his evidence that the sum of these liabilities was in the amounts of R1 027 989,82 and R5 245 496,09, respectively. The cogency of this concession was confirmed by the evidence of a chartered account, Mr Claude Barnes, who, as mentioned, was called as an expert witness in the plaintiff's case and had analysed the relevant transactional history. It is common ground that the liabilities in question arose from a number of hire purchase

contracts concluded by the companies with the bank.[22]

[73] On the day that the agreement was signed by the bank (9 May 1988), the bank immediately paid the R12 million purchase price provided in terms of clause 4. This payment was effected by settling certain debts owed by Muller and the entities in the Muller group to Boland Bank. The appropriation of the R12 million payment by the bank in May 1988 was described in a letter by the manager of the bank's Johannesburg branch which was addressed to Muller at the address given by him for the purpose of notices in terms of the agreement.[23] This letter was 'the Kritzinger letter' to which I referred earlier.[24] (The appropriations described in the Kritzinger letter related, according to the tenor of the letter, to an indebtedness by Muller and certain companies in the Muller group in the amount of R11 525 952,38 – that is in an amount close to that reported in Ferreira's aforementioned submission to the bank on 20 April 1988.) Muller was unable to dispute that the Kritzinger letter had been sent to him. At some stage in his evidence, albeit when testifying on a different point, Muller claimed not to be a good

[22] The defendant made an admission to this effect recorded in the minutes of a pre-trial conference held between the parties' respective legal representatives on 21 November 2008.
[23] It is not in dispute that the participation mortgage bond ('deelnemingsverband') liability referred to in the Kritzinger letter remained in place (as indeed indicated in the text of the letter).
[24] See para. [13].

reader and not to be inclined to give particular attention to documents. He claimed, however, that the first time he had witting insight into the content of the Kritzinger letter was during the insolvency enquiry in the late 1990's. (Even if Muller's evidence in this regard were to be accepted, it still begs the question why the appropriation of the R12 Million purchase price could not, and was not, addressed by him effectively much earlier. That is a question to be addressed in the consideration of the defendant's special defence of extinctive prescription, with which I shall deal later.)

[74] The scheme of payment and appropriation described in the Kritzinger letter was strictly not in accordance with the scheme provided in the agreement for the settlement of the purchase price. In my view nothing turned on this in the overall implementation of the realisation exercise because of the reconciliation between the 37T and 38T accounts undertaken at its completion.[25] This was also the opinion of Mr Greenbaum.

[75] Mr Muller's evidence in respect of the background to the May 1988 agreement was directly contradicted by the testimony of Mr

[25] It will be recalled that in terms of clause 4.3, the payment of the purchase price was to occur 'as and when realisation of the Muller Group is effected and cash received via the realisation process in terms of clause 6.'

Francois van Zyl, who had been the manager of the Kroonstad branch of Boland Bank at the time the so-called 'questionable' hire purchase transactions were effected. Van Zyl had been transferred to Springs in 1986 and had thereafter resigned from Boland Bank to go into business with a colleague at the end of 1989. He was not involved in the meeting that Muller had with Hickman and Liebenberg and he had no role on behalf of the bank in the realisation scheme devised by Ferreira.

[76] Van Zyl recalled that the main reason for the conclusion of the hire purchase contracts was to afford Muller protection against seizures by the Railways Police. With Boland Bank becoming the owner of the vehicles involved, and Muller's companies the hire purchasers thereof, the transport operation would be freed from exposure to the seizure of vehicles on the road. These seizures caused Muller's business damage because the disrupted deliveries wrought havoc to the efficiency of his operations, with adverse effect on the business's cash flow.

[77] Van Zyl testified that he was persuaded by Muller's attorney, Mr Eugene Marais, as to the viability of the hire purchase scheme proposed. The proceeds of the sale of some 15 to 18 vehicles by

Muller to the bank were, according to van Zyl, deposited in a fixed deposit account in Muller's name which was in turn used to provide security for the obligations to the bank of the hire purchaser companies in the Muller Group. Van Zyl also ventured that some of the proceeds had been applied to settle other accounts in respect of which Muller or his companies were indebted to the bank. Van Zyl was adamant that there had been full counter-prestation by the bank. He pointed out that as a consequence of a suggestion by officials in the bank's head office that he had exceeded the limits of his authority in concluding the relevant hire purchase contracts, and of his subsequent arrest in relation to allegations that he and Muller had falsified the dates of certain of the transactions to procure the release of certain vehicles seized by the Railway Police, a detailed internal audit of the Kroonstad branch had been carried out, apparently at the instance of Mr Liebenberg, the managing director. No material irregularities were uncovered in the audit.

[78] Van Zyl's evidence was not entirely clear in all respects. I consider that he cannot really be criticised on this account having regard to the passage of 25 or so years between the relevant

events and the trial. In general, and despite the attention drawn to his two convictions of offences involving dishonesty, he impressed me as impartial and, subject to the understandable effect of the intervening passage of more than 20 years since the relevant events, dependable.

[79] Van Zyl confirmed the evidence of Hickman and Ferreira, which finds objective support in the bank's accounting records, to the effect that by 1985 Muller was experiencing significant cashflow difficulties, which reflected in the Muller Group falling into arrears on its periodic payment obligations to the bank. This evidence on the other hand highlights the implausibility of the suggestion by Mr Barnes that clause 2.4.5 of the May 1988 agreement had been worded as it was in order to create a false impression to the revenue authorities. Mr Barnes's hypothesis does not explain on any approach why Muller should have entered into a transaction for the realisation of his business for an indeterminable sum merely to correct an alleged error in the bank's books. (I must confess that I was in any event unable to understand Mr Barnes' reasoning in support of the suggestion, which was that clause 2.4.5 had been worded to (falsely) paint a

picture that the Muller Group was in difficulty so as to render more plausible the bank's decision to liquidate the companies 'instead of merely selling the assets' and using the proceeds to settle the outstanding debt to the bank'.)

[80] The plaintiff's counsel tackled van Zyl with the content of a memorandum produced by one of the bank's attorneys in late 1988 in the context of exchanges with the Receiver of Revenue in Bloemfontein in respect of general sales tax assessments that had been levied by the Inland Revenue department on the Bank arising out of the contentious hire purchase transactions. The submissions advanced on the bank's behalf in this memorandum suggested that the transactions had in fact not been hire purchase sales, but loans instead. Van Zyl had no knowledge of the memorandum, and testified that he had not been consulted in regard to the matter by either the attorney concerned, by Dr Ferreira, or by the bank's senior in-house legal officer, Mr Van der Merwe, all of whom appear to have had a role in formulating the bank's submissions to the Receiver. He disputed the correctness of the suggestion in the memorandum that the hire purchase transactions concluded by him arising out of Muller's aim to avoid

the impoundment of his vehicles had not been genuine and were merely disguised loans to Muller. Van Zyl's evidence was consistent with that of the plaintiff himself in this regard. Van Zyl's evidence is also consistent with that of Muller on the number of transactions involved – between 15 and 18; and not 69, as set out in the memorandum.

[81] In the circumstances it is not clear to me what assistance the plaintiff's counsel sought to derive from the memorandum. It is apparent from the documentary evidence that Ferreira must have considered that the realisation process that was the central feature of the rescue package he had been mandated to devise would be assisted by the 'conversion' of the hire purchase transactions into loans. An argument with the revenue authorities on the proper characterisation of the transactions does not affect the question of the existence of the underlying debt, howsoever characterised.

[82] There is evidence that a proposal about re-characterising the debt from hire purchase debt to one based on loans secured by notarial bonds had been put to the bank's board of directors during June 1987 and accepted in principle. It is also clear that Muller and his former wife were privy to this strategy, as they signed a

letter, dated 11 June 1987, requesting its implementation.[26] The content of the letter, which deals with a number of other issues, and in itself contains indications of continuing liquidity problems being experienced by the Muller Group, states that the request was made arising out of discussions between Charles Ferreira and the executive managers ('uitvoerende bestuurders') of Boland Bank. Ferreira's view might well have been inspired by the fact, if it was a fact, described in the memorandum to the Receiver of Revenue that the sales were not recorded as sales in Muller's accounts. Nothing much can be inferred from that omission, however, if regard is had to the description by Ferreira in his affidavit of the state of Muller's accounting system. The content of the memorandum by the bank's attorney to the Receiver of Revenue on the sales tax dispute does not advance the plaintiff's case that the May 1988 agreement was directed at remedying a non-payment to him by the bank of the proceeds of the purchase from him by the bank of vehicles for the hire purchase

[26] In a letter to Hickman, dated 20 November 1987, Ferreira enclosed draft financial statements as of 30 June 1987 in respect of SA Trucking (Pty) Ltd, Heavy Transport and Plant Hire (pty) Ltd and Two Way Transport (Pty) Ltd and commented thereon, *inter alia*, as follows: 'Die meeste van die huurkoopooreenkomste moet gekanseleer word, retrospektiewelik, en vervang word deur notariële verbande. As u dus die verandering van sekuriteite goedkeur, sal die notas dienooreenkomstig verander maar die syfers sal nie in totaal verander nie.' At that stage Ferreira would appear, judged by the content of this letter, to have had in mind a consolidation of all Muller's debt, including amounts owed to other banks, in Boland Bank's books, on the basis that the consolidated debt would be redeemed by monthly payments commencing at R50000 per month in 1988 and rising to R100000 per month in 1990 and following years.

transactions. It merely goes to argument as to the correct legal characterisation of those transactions; as to whether they consisted of sales properly so called, or loans.

[83] Mr Muller dismissed the documentation that suggested that the reason for the involvement of Ferreira and the scheme to realise his assets to redeem his indebtedness to the bank was the Muller Group's inability to service its debt as 'window dressing' devised by the bank's officials to disguise the fact that Muller had in fact been swindled by reason of the Bank's failure to set off the payments due to him in respect of the assets allegedly acquired by it from him in terms of the so-called questionable transactions. As Mr *Carstens* SC, who appeared for the bank, justifiably contended, Muller's assertions in this respect amounted to an allegation of fraudulent conduct by the bank. It is trite that fraud is not readily assumed (cf. e.g. *Gates v Gates* 1939 AD 150 at 155; *Loomcraft Fabrics CC v Nedbank Ltd and Another* 1996 (1) SA 812 (A) at 817G-H). It is inherently improbable that the bank would have engaged in the chicanerous subterfuge conjured by Muller's evidence. No plausible reason for its officials to have done so was demonstrated, and no objective basis to question the genuineness

and integrity of the bank's documentary records was proven.[27] On the contrary, it was Muller's version that impressed as inherently most improbable. There is no documentation, or indeed anything whatsoever, to support his claim to have raised the bank's alleged failure to credit him with the proceeds of the questionable transaction sales in 1986.

[84] Muller may to a certain degree lack sophistication, but the evidence irrefutably demonstrates him to be a shrewd and astute businessman. His own evidence showed him to be a man who was not afraid to litigate to protect and advance his rights, or what he might perceive to be his rights. He testified to having taken one matter to the Appellate Division during the 1980's. I am unable to accept that in the circumstances described in his evidence before this court Muller would not have promptly insisted on a proper accounting for the questionable transactions and a rectification of the bank's accounts if that was what he considered to be his due. For the same reason I have no doubt that he would have been contemporaneously aware of the conduct and results of the realisation process and that, in the course thereof, he probably

[27] These included the agenda of the board of directors' meeting at which the bank considered the proposal put up on Muller's behalf by Ferreira in April 1988. The motivation set out in the agenda document makes no mention whatsoever of the writing off of debt, or the assumption by the bank of any of the debtor companies' liabilities.

knew about and understood what was recorded in Kritzinger's aforementioned letter of 9 May 1988.

[85] The free residue of R474 047,62 that remained after the setoff exercise described in the Kritzinger letter was transferred into a current account conducted in Boland's books in Muller's name. This account was referred to in evidence as the '36T account', as an abbreviated form of the applicable account number.[28] Two of the debts redeemed in the set-off were the aforementioned debts of Transaf (Pty) Ltd and SA Trucking (Pty) Ltd. Muller contended that this was in breach of the agreement and that the amounts should have remained credited to him as part of the R12 million purchase price payable by the bank. He was supported in this view by Mr Barnes. Mr Barnes' approach was premised on his understanding of the realisation exercise as a tax scheme by Boland and by his interpretation of the abbreviation 'v/gesette finansiering' in Boland's accounting records.

[86] Barnes formed the opinion that the abbreviation denoted 'vrygesette finansiering' (*Eng*. released financing). Under cross-examination, however, Barnes had to concede that he had never

[28] It was in this account that the facility to settle Muller's exposure to the Wadeville branch of the Standard Bank referred to in clause 4.4.2 of the May 1988 agreement was provided.

come across the expression ‘vrygesette finansiering’ in any previous context. When his attention was drawn to the use by bank officials (in fact by Mr Kritzinger the manager of the Johannesburg branch of Boland Bank at which the 36T and two other relevant accounts - the 37T and 38T accounts – were conducted) of the expression ‘voortgesette finansiering’ (*Eng*. extended or continued financing), he was constrained to concede that his interpretation of the abbreviation might have been incorrect. Why Barnes should have construed the abbreviation in the manner in which he did is by no means clear to me. Indeed, in my judgment, it was somewhat indicative of an *a priori* approach to the case by the witness. After all, the agreement itself contemplated that there might be a need for the bank to continue to finance Muller and his operations after the conclusion of the realisation process. In any event his concession destroyed the first basis asserted in his summary of evidence for his construction of clause 3.3 and 3.4 of the May 1988 agreement.

[87] There was no evidence that the agreement was implemented in a manner consistent with any intention by Boland Bank to take a tax advantage of the nature postulated by Barnes. The realisation

process certainly did not take place in the expeditious manner or in a way to achieve completion within the tax year, as appears to have been a material aspect of the attractiveness of the mooted scheme. (Indeed the realisation process appears to have been brought to a somewhat contrived conclusion, when another company of which Muller had control, SA Trucking Plant Hire and Rental Company, purchased 82 unsold units for R3 075 000, of which R3 million was financed by Boland Bank. It goes without saying that this transaction in itself brought about a situation quite inconsistent with the notion propounded by Muller that the common intention was that at end of the realisation process he and the bank would go their separate ways. This, of course, in addition to the express provisions in the May 1988 agreement itself that contemplated a continuing debtor-creditor relationship between Muller and the bank after the completion of the realisation process.)

[88] Mr Barnes in fact conceded that the writing off of Muller Group owed debt by Boland was not a necessary feature of the propounded tax advantage scheme. There is not a single reference anywhere in the contemporaneous documentation to

which attention was drawn in evidence to suggest any consideration whatsoever by the bank of the voluntary incurrence of a tax loss by a writing off of debt. It seems a most improbable scenario that the complicated realisation process should have been undertaken by Muller and Boland Bank if the principal basis for the exercise was, as Muller alleged, the mere correction of a failure by the bank to credit him with the proceeds of the so-called questionable transactions. The allegedly fundamental role of these transactions finds no support in the voluminous documentation consisting, amongst other things, of accounting records, minutes of meetings, or correspondence that was put in by both parties during the course of this part of the trial. Mr Hickman testified that he had not heard of the allegations made by Muller based on the questionable transactions until his involvement, many years after his retirement, in pre-trial consultations in late 2008 and early 2009. Mr Hickman stressed that Muller's allegation that he had not been accounted to in respect of the hire purchase contracts was just not credible in the context of the double entry accounting system used by the bank. Had Muller not been accounted to, the Kroonstad branch's books would not have balanced.

[89] I find it beyond belief that Muller should have consented to the liquidation of a substantial part of his business merely for the purpose, as he would have it, of correcting an erroneous reflection of the state of his financial affairs in the books of Boland Bank. Muller's attempts to address this difficulty in cross-examination by referring to 500 criminal cases pending against him at the instance of the Railways police in the Balfour magistrate's court and the proprietary demands of his then wife in the pending divorce proceedings in which they were involved were bald and singularly unconvincing. Mysterious references to a 'red file' on Muller's affairs allegedly kept by Mr Hickman, or even the expungement by the Master (on grounds that were not identified in the evidence) of certain significant claims advanced by Boland Bank against Muller's insolvent estate might hint at possible grounds for the exploration of certain avenues, but in the vague manner in which they arose in the evidence they did nothing to advance the plaintiff's case. The most readily comprehendible rationale for the scheme reflected in the agreement was the orderly winding up of a commercially insolvent business in a manner that would maximise returns on the sale of assets and avoid some of the costs of a judicially ordered compulsory liquidation.

[90] It should be mentioned that three banking accounts in Boland Bank's books were opened in connection with the exercise that followed on the conclusion of the May 1988 agreement. These have already been referred to earlier in this judgment. They were the 36T account, the 37T account and the 38T account. The 36T account was apparently established to contain the R3 million facility contemplated in terms of the agreement to make provision for the redemption of Muller's overdraft at the Wadeville branch of the Standard Bank. The 37T account was used as the business's operational account during the realisation period. It was referred to as 'the administration account'. The 38T account was the account to which the proceeds of the sales of the vehicles sold during the realisation process were credited. It was the account debited with the R12 million purchase price due by the bank in terms of the May 1988 agreement. The 38T account was also referred to as 'the realisation account'.

[91] I have already mentioned the manner in which the realisation process was brought to a conclusion under the supervision of Dr Ferreira by the sale of the remaining vehicles to SA Trucking Hire and Rental (Pty) Ltd for R3 075 000. According to a report

written by Dr Ferreira to the manager of Boland Bank's Johannesburg branch, dated 3 July 1989, the proceeds generated by this sale were applied to settling the debit balances on the 37T (the businesses had run at a loss during the realisation period) and the 38T accounts, which were then closed. A remaining indebtedness in the sum of R9 813,72 was debited to the 36T account. It is quite clear from the tenor of the 3 July 1989 letter that it was regarded by Dr Ferreira as a final accounting by him to the bank in respect of the outcome of the realisation process. The final paragraph of the letter, which was accompanied by various schedules, went as follows: 'Ek vertrou dat hierdie inligting vir u duidelik is en ek sal dit met Mnr E.A. Muller bespreek en verder aan u rapporteer, indien nodig.'

[92] The impression that the report by Dr Ferreira represented the conclusion of the realisation process under the agreement is supported by the evidence by Muller that it was at about this time that he was informed by Mr Kritzinger that all the debt had been settled. His evidence was to the effect that Kritzinger had written him a letter to this effect, but no such letter was produced in evidence. In a sense one can understand that Kritzinger might, in

the context described, have given Muller to understand that the debt which had given rise to the realisation process had been settled. That indeed was the effect reported in Dr Ferreira's letter to the bank of 3 July 1989. It would, however, have been opportunistic of Muller to construe any such advice as tantamount to an intimation that he was no longer indebted to the bank. On the contrary, the realisation agreement expressly contemplated such continuing indebtedness, and that it would arise in regard to the overdraft facility extended in terms of the agreement. As I have explained, that facility was in the 36T account; and it is indeed in that account that the indebtedness that Muller professes surprise at being confronted with by Mr Hickman, sometime in 1990, existed.

[93] Muller's evidence with relation to the alleged receipt by him of a letter from Kritzinger to the effect that he had settled his debt to the bank was in any event inconsistent with his evidence that he had in fact been led by Ferreira to believe that at the end of the process he could expect to be in receipt of a payment of between five and six million Rand. The point of referring to this inconsistency is to emphasise the remarkable failure by Muller in

the circumstances described by him to take any action to ascertain and enforce what he considered, or had been led to believe, were his rights. The most appropriate action would have been that which he instituted in the current proceedings eight to nine years later, namely for a statement and debatement of account and payment of such amount as might be shown to be due to him on such debatement.

[94] What Mr Muller did instead was to apply for additional facilities from the bank. It is significant that that application was supported by a statement, to which he owned with his signature on 22 January 1990, in which the history of his relationship with the bank is reviewed. In the application, in which the realisation process is described as a 'consolidation', the following material admissions are made:

1. That at the end of February 1988, Muller owed Boland Bank R12 million and Standard Bank R3 million.
2. That at the end of the 1988 financial year 'it was decided to consolidate for a number of reasons, the most important being:

   -the age of [his] trucks.

   -high interest rates on short term loans (HP.s).

   -problems encountered in obtaining suitable transport permits

   -at this time Mr. Muller was divorced from his wife and had to pay her an amount of R1 million

> 3. A total of 100 trucks (without trailers) were sold and an amount of R12.9 million was realised. At this time Mr Muller was under the impression that he had repaid his entire obligation to Boland Bank. The bank, however, had continued to debit Mr Muller's account with interest and due to the disputes arising from this had turned down his application for a long-term bond on his fixed properties in the Wadeville area.

Notably, Muller would appear to acknowledge in these statements that the realisation process had occurred in the context of liquidity constraints and an overall indebtedness to Boland Bank of about R12 million. This is wholly inconsistent with the position advanced by him in evidence at the trial. Equally notably, the statement in support of the application for additional finance does not contain any assertion that the realisation (or 'consolidation') process was directed at addressing an erroneous state of affairs in the bank's books of account.

[95] Shortly after the institution of proceedings in this action, in 1998, the bank's attorneys commissioned KPMG forensic and investigative accountants to undertake a 'reconstruction' of the realisation account 'as it was originally intended in clause 6.3 in the agreement of sale'. It is apparent from the KPMG report, a copy of which was annexed to the summary of Mr Barnes's evidence, that its compilers consulted with Dr Ferreira in the course of producing it. In this connection, in a letter to KPMG, dated 6 February 1999,

Ferreira confirmed the content of his affidavit made on 16 February 1998. There is no suggestion in the KPMG report that the realisation exercise was not carried out essentially in accordance with the agreement. The KPMG analysis confirmed that at the conclusion of the realisation process, there was a shortfall of more than R3 million.

[96] As to the meaning of 'liabilities' in clause 3 of the agreement, I consider that the amendments effected to the draft signed by Muller in April 1988 reflected in the actually concluded agreement signed by both parties a week or so later are significant indicators of the parties' common intention.

[97] In this regard, the insertion of the recordal in clause 2.4 is important. As I have already observed, with reference to clauses 2.4.4 – 2.4.6, quoted in paragraph [4], above, those provisions give a clear indication of the apparent object of the conclusion of the agreement; namely to 'enable Muller to settle his debts' to his 'major creditor', Boland Bank. They also point clearly to the reason for the exercise; being the liquidity problems experienced by 'the Muller Group' which had resulted in it finding it difficult 'and more recently impossible to meet its monthly payments to Boland'. I

have also remarked earlier on the poor draftmanship. It is evident if regard is had to the sub-clause as a whole that the references therein to Muller must comprehend Muller and the Muller Group and those to the Muller Group must include Muller personally. Clause 2.4 is significant because its content is entirely incompatible with the plaintiff's case; while at the same time being congruent in important respects with the situation that falls to be inferred from contemporary documentation and the evidence of witnesses such as van Zyl, Hickman and Ferreira.

[98] Seen in that context it seems most improbable, in my view, that the common intention was that the exercise was to facilitate the writing off in Boland Bank's books of real or putative indebtedness to it by Muller or the Muller Group.

[99] Clause 2.4 is also significant in that it records (in clause 2.4.2) that 'the assets of the Muller Group are substantial, having an approximate value of R26 000 000 (Twenty Six million Rand)'. It was no doubt this estimation of value which gave rise to the evident possibility contemplated in the agreement that the realisation exercise might render a surplus that would fall to be shared between Muller and the Bank. As already mentioned,

however, clause 4.4.3 of the agreement contemplated that any surplus would be insufficient to settle Muller's liabilities and provided for the affording by the bank of a R2,5 million facility to assist him in this regard. Coupled with the R3 million facility contemplated in terms of clause 4.4.2 in respect of the transfer to Boland of Muller's indebtedness to the Wadeville branch of Standard Bank, it is evident that a significant continued exposure by Muller to the bank after the completion of the realisation exercise was expressly contemplated. This is inconsistent with the underlying theme of Muller's version which is to the effect that it was contemplated that at the end of the exercise he and the bank would each be in a position to go their 'own merry way'. (It is evident that such an optimistic result could have eventuated only if the realisation proceeds exceeded R12 million by a considerable margin.)

[100] The addition of clause 3.4 to the signed agreement is also significant. Clause 3.3 and 3.4 have been quoted in paragraph [13], above. As mentioned there, the draft signed by Muller at the end of April did not contain a clause 3.4. In my view the intended effect of the insertion of clause 3.4 is reasonably (and

I use the qualification advisedly) clear if, and only if, the provisions of clauses 3.3 and 3.4 of the agreement are read (as they must be) in the context of the deed of contract looked at as a whole. The plaintiff's counsel's approach to the construction of clause 3.3, which purported to be predicated on the re-statement of 'the golden rule of interpretation' in the oft cited passage from *Coopers & Lybrand v Bryant* 1995 (3) SA 761 (A) at 767E-768E, was flawed in my view by reason of its failure to pay sufficient regard to the rest of the instrument.

[101] Construed in the correct manner it seems evident that the intention was that the only liabilities of the three companies referred to in clause 3.3 at date of transfer to the purchaser would be the amounts owed by them to Muller arising out of his settlement of the companies' liabilities to third parties.[29] The assumption of those liabilities by Boland Bank would result in Boland Bank becoming liable to Muller for the redemption of the resultant credit loan accounts. That liability would, however, be only notional because of the acquisition at face value by the bank,

[29] It would appear from the information in Ferreira's proposal letter of 20 April 1988 that these liabilities were relatively insubstantial. There was no evidence as to whether Muller in fact settled these liabilities. In answer to a question directed by the bank's legal representatives at a pre-trial conference, the plaintiff stated that he had not paid all liabilities of the relvant companies prior to the effective date (1 May 1988).

in terms of clause 4.2.1 of the agreement, of Muller's loan claims against the companies. The intended result would be that after the execution of the sale Boland Bank would be the only creditor of the companies (except in respect of any operational expense related debt incurred in the running of the businesses during the realisation period, which was to form a charge on the realisation account). This intended result is understandable in the context of the scheme that the companies should be voluntarily liquidated at the instance of Boland Bank and their assets then distributed to the bank as a liquidation dividend *in specie*.

[102] Clauses 3.3 and 3.4 make no sense at all in the context of the evident object of the transaction identified earlier (with reference to clauses 2.4.4 – 2.4.6) if construed to connote that Boland Bank would assume the debt owed to it by the three companies. That would entail a writing off of the debt, not a repayment of it. Significantly, Dr Ferreira's memorandum to the bank, apparently telefaxed on 20 April 1988, contains no suggestion of any such incidence. Although not entirely comprehensible to Messrs Barnes, Greenbaum or Hickman in all respects, the memorandum discernibly sets out the conceptual

proposal which led on to the conclusion of the May 1988 agreement.

[103] The plaintiff accepted that he bore the onus of proving that the agreement fell to be rectified in the respects claimed. In this respect the plaintiff's counsel referred to Brand JA's summary of applicable principle in *Soil Fumigation Services Lowveld CC v Chemfit Technical Products (Pty) Ltd* 2004 (6) SA 29 (SCA) at 38J - 39B:

> 'It is a settled principle that a party who seeks rectification must show facts entitling him to that relief ' in the clearest and most satisfactory manner' (per Bristowe J in *Bushby v Guardian Assurance Co* 1915 WLD 65 at 71; see also *Bardopoulos and Macrides v Miltiadous* 1947 (4) SA 860 (W) at 863 and *Levin v Zoutendijk* 1979 (3) SA 1145 (W) at 1147H – 1148A). In essence, a claimant for rectification must prove that the written agreement does not correctly express what the parties had intended to set out therein. (See e.g. *Meyer v Merchants' Trust Ltd* 1942 AD 244 at 253.)'

In *Meyer v Merchants' Trust Ltd* at the place cited it was stated –

> 'Proof of an antecedent agreement may be the best proof of the common intention which the parties intended to express in their written contract, and in many cases would be the only proof available, but there is no reason in principle why that common intention should not be proved in some other manner, provided such proof is clear and convincing.'

[104] For the reasons given, I have not been satisfied that clauses 2.4.5 should be deleted, or that clause 3.4 needs to be rectified as claimed by the plaintiff. I furthermore find that it has not been

proven that the ‘liabilities’ intended to be assumed by the bank in terms of clause 3.3 of the May 1988 agreement included the liabilities of SA Trucking (Pty) Limited in the sum of R5 245 496,09 and of Transaf (Pty) Limited in the sum of R1 027 989,82; put otherwise, it has not been proved that the intended effect of clause 3.3 and 3.4 was to write off the indebtedness of the two companies in the books of Boland Bank. In my judgment the agreement, properly construed, provided for the indebtedness of Muller and his companies in the amount of approximately R11,5 million to be redeemed through the realisation and appropriation of the assets, as defined, for a net amount of not less than R12 million during a contemplated period of three months of the effective date.

[105] The rewording of clause 3.4 of the deed of agreement in the manner sought by the plaintiff would not be incongruent with my view of the proper construction of the word ‘liabilities’ in clause 3.3 thereof. However, no practical purpose will be served by granting the relief sought by the plaintiff in this respect if the result is not to give the word ‘liabilities’ in clause 3.3 the meaning that the plaintiff would seek to attach to it. For the reasons given earlier, a rectification of clause 3.4 as sought would not give that result.

[106] An order will therefore be made dismissing claim A.

Prescription

[107] Turning now to the issue of prescription. The period of extinctive prescription applicable to the plaintiff's claims under claims B and C is three years.[30] These claims, being the money claim founded on the debatement of account in terms of claim B, including, insofar as might emerge on such debatement, any claim for the purchase price (claim C), all arise from the execution of the realisation process in terms of the May 1988 agreement. Therefore, subject to the incidence of s 12 of the Prescription Act 68 of 1969, the debt became due, and prescription started to run, upon the completion of the realisation exercise.

[108] The defendant specially pleaded that a period in excess of three years had intervened since the alleged debts had become due and that the plaintiff's claims had therefore been extinguished by prescription. (It hardly needs mention that the onus of establishing that the alleged claims have prescribed burdened the defendant.) The plaintiff replicated to the special plea. In his

[30] See s 11(d) of the Prescription Act.

replication, Muller pleaded that (i) the realisation process was concluded only on 15 December 1994 when the 36T account was closed;[31] (ii) (in the alternative to (i)) that the defendant 'wilfully represented to the plaintiff that the full amount of the realisation was utilised to liquidate the plaintiff's debt' to the bank; and (iii) (in the further alternative) that the plaintiff only became aware of the fact that the proceeds of the realisation process (described in the replication as 'the purchase price') were utilised to pay the liabilities of Transaf (Pty) Ltd and SA Trucking (Pty) Ltd, in the amounts of R1 027 989,82 and R5 245 496,09, respectively, for which Boland Bank was in fact itself liable.

[109] Section 12 of the Prescription Act provided (before its amendment in terms of s 68 of Act 32 of 2007), insofar as currently relevant:

> 12 **When prescription begins to run**
>
> (1) Subject to the provisions of subsections (2) and (3), prescription shall

[31] In this connection it should be mentioned that the plaintiff's estate was provisionally sequestrated on 30 June 1997; provisional trustees appointed on 14 July 1997; a final order of sequestration was made on 18 August 1997 and the appointment of the trustees pursuant to the final order occurred on 20 October 1997. The plaintiff relies on the provisions of s 13 of the Prescription Act, which delay the completion of extinctive prescription in certain circumstances, including when the creditor is under some or other legal impediment affecting its ability to institute proceedings to enforce its claim, to allege that the three year period of extinctive prescription had not expired when summons was served on 29 June 1998 by reason of the legally disabling effect of the intervention of the plaintiff's insolvency before 14 December 1997. In view of the finding, made later in this judgment, that the realisation process was completed during 1989, it is unnecessary to consider this aspect of the plaintiff's reply to the special defence.

commence to run as soon as the debt is due.

(2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.

(3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.

[110] I shall deal firstly with the date upon which the debt became due.

[111] I reject the opinion of Mr Barnes that the realisation process in terms of the May 1988 agreement could not be said to have been completed while the 36T account remained in operation. This evidence was volunteered in the context of the debit balances on the realisation (38T) and operations (37T) accounts having been transferred to the 36T account, which thereafter continued to operate for several years. It is plain from the express terms of the May 1988 agreement that the realisation process was completed when all 'the assets' (as defined) had been realised. That followed from the definition in the agreement of the term 'completion date'. It was not in dispute that this occurred during March 1989.

[112] The finalisation of the realisation process was reported on to the bank by Dr Ferreira in a letter dated 3 July 1989, in which he stated that he would be discussing the content thereof with Muller. Muller would in any event have been well aware of the completion of the realisation exercise by reason of his own direct involvement in the process, culminating in the purchase of the last of the unrealised assets by entities controlled by himself. Muller's evidence was to the effect that he thereafter sought to ascertain from Mr Hickman - Ferreira by then having no further active role in matters - when he could expect to be paid the amount of about R5,5 million he was expecting after the completion of the realisation process. He queried how he could still be indebted to the bank, as it claimed. Muller would not have been addressing any such enquiries to Hickman if he did not understand the realisation process to have been completed.

[113] Muller certainly had no reasonable grounds not to appreciate that the realisation process was complete when all the assets to be realised had been sold. That much was expressly recorded in the May 1988 agreement. (To the extent that Muller claims to have been denied insight into the signed text of the agreement until

1998, it bears pointing out that the text of the draft signed by him in April 1988 does not differ materially in this respect.)

[114] It is unnecessary for present purposes to determine the exact date of the completion of the realisation process. It appears most probable that that the relevant date was during March 1989, but it is without doubt that it was some time in that year, before 3 July 1989.

[115] In my judgment there is no merit in the plaintiff's reliance on s 12(2) of the Prescription Act. In *Jacobs v Adonis* 1996 (4) SA 246 (C), it was found, albeit *obiter*, that the expression 'wilfully' was not necessarily restricted to connoting a fraudulent intention by the debtor to deceive. Assuming the correctness of this construction, the expression 'wilfully prevents' nevertheless unambiguously indicates the doing of something by the debtor deliberately[32] with the intention of thereby preventing the creditor from coming to know of the existence of the debt. The adverb 'wilfully', in the context in which it is employed in s 12(2) of the Prescription Act,

[32] Subject to the rider that there must be an accompanying intention to prevent the creditor obtaining knowledge of the existence of the debt, I agree with the suggestion expressed in Loubser, *Extinctive Prescription* (Juta, 1996) at pp.101-102 'that positive misrepresentation or active conduct will usually be required for the application of s 12(2), but inaction or non-disclosure will be sufficient where a fiduciary relationship exists between the debtor and creditor which imposes an affirmative duty of disclosure on the debtor.'

pertains to the verb ‘prevent’. The wilfulness concerned must, for the provision to apply, be directed to an act of prevention by the debtor. The mere conveyance of an incorrect version of the facts by the debtor, without any intention thereby to prevent the creditor from coming to know of the existence of the debt, would not bring the provision into play. The plaintiff has not proved any intentional act by the plaintiff to prevent him coming to know of the existence of the debt. It is understandable therefore that s 12(2) was only lightly touched upon in the plaintiff’s heads of argument.

[116] The reliance by the plaintiff on s 12(2) of the Prescription Act is in any event something of a red herring if the circumstances are such that Muller could have acquired knowledge of the debt by the exercise of reasonable care. Professor M.M. Loubser identifies the corollary of this axiom in *Extinctive Prescription* (Juta, 1996) at p.102, with his observation that ‘It will usually be unnecessary to determine the precise ambit of s 12(2) because in terms of s 12(3) the prescription period will in any event not begin to run while the debtor is [for good reason] ignorant of the identity of the debtor and of the facts from which the debt arises.[33]

[33] The words within square brackets are my own.

[117] Muller's evidence is to the effect that he was given the run around by bank officials, most notably Mr Hickman, in the period from 1990. According to him, he was also unable to obtain satisfactory explanations from Dr Ferreira, whom he said he visited for this purpose at Ferreira's home in Johannesburg. The proper and available course, if Muller's evidence in this regard is to be accepted, would have been for him at that stage to institute action for a statement and debatement of account and for payment of any amount proven due to him as a consequence thereof.

[118] The plaintiff contended that it was only in the context of his examination of the papers at the enquiry into the affairs of his insolvent estate in 1998 that he could first reasonably have acquired knowledge of the facts from which the alleged debt arises. In argument in support of this contention the plaintiff's counsel relied heavily on the judgment of the Supreme Court of Appeal in *Minister of Finance and others v Gore NO* 2007 (1) SA 111 (SCA). That matter concerned a claim instituted in January 1999 by the liquidator of a company which before its winding up had tendered unsuccessfully for the award of a government tender contract. The claim was one for damages arising out of the

fraudulent and corrupt conduct of certain State employees who had dishonestly secured the award in favour of another tenderer in 1994. A certain Mr Rabie, who would appear to have had a proprietary interest in the unsuccessful tenderer, and who was the principal witness on behalf of the liquidator plaintiff at the trial, was convinced that the successful tenderer must have obtained the award through some or other chicanery. I do not think it necessary to detail the course of subsequent events which are described in the judgment, but it is evident from a consideration of them that the allegations made by Rabie in a series of unsuccessful endeavours to expose the fraud were predicated on no more than a shrewd suspicion; this, despite his conscientious endeavours to get to the truth of the matter. It was only in a report of a forensic investigation undertaken by a government team in 1998, that Rabie eventually found evidence to bear out his suspicion. The Court found (at para. [25]) that Rabie had ‘acquired the minimum knowledge need to institute action only at the end of 1998’. Applying s 12(3) of the Prescription Act, prescription was found only to have commenced to run from that point.

[119] At para. [17] of the judgment in *Gore* the Court pointed out that the SCA and the late Appellate Division had 'in a series of decisions, emphasised that time begins to run against the creditor when it has the minimum facts that are necessary to institute action. The running of prescription is not postponed until a creditor becomes aware of the full extent of its legal rights, nor until the creditor has evidence that would enable it to prove a case "comfortably".' *Van Staden v Fourie* 1989 (3) SA 200 (A) at 216B-F; the minority judgment of Harms JA in *Drennan Maud & Partners v Pennington Town Board* 1998 (3) SA 200 (SCA) ([1998] 2 All SA 571) at 212-213 (SA) and *Nedcor Bank Bpk v Regering van die Republiek van Suid-Afrika* 2001 (1) SA 987 (SCA) 9[2001] 1 All SA 107) at para.s [11] and [13] were cited in support of the proposition.

[120] In the current matter Muller professes that he was dissatisfied with the result of the realisation process; in particular he could not understand why the Bank was claiming that he remained indebted to it, whereas he had been led by Ferreira to expect that he would receive payment of more than R5 million at the conclusion of the process. I have already found that the

evidence does not support any proper basis for Muller's alleged apprehension, but accepting for present purposes the cogency of his evidence in these respects, he had an available remedy. It was the same remedy that he chose to use when action was instituted in 1998: a claim for an accounting, a debatement of such accounting and for payment of whatever sum appeared thereupon to be due to him. He had the knowledge necessary to institute proceedings in pursuance of that remedy. Cf. *Absa Bank Bpk v Janse van Rensburg* supra, loc cit.[34] He was aware that his claim lay against the bank; he knew it was premised on the agreement he had signed; and the outcome of the realisation process that had been carried out in terms of that agreement. He was also aware of the purchase price fixed in terms of the agreement and, to the extent that he may have thought it fell to be paid outside of the realisation process, he knew or should have known that it was payable when the realisation process was completed. He knew, or should have known that the realisation process ended on 'the completion date' as defined in the agreement (it mattered not whether he had regard to the April draft or the May 1988 agreement signed by both parties) and that he was thereupon

[34] See para. [18], above.

entitled to an accounting. The provisions of s 12(3) of the Prescription Act offer the plaintiff no succour in the circumstances.

[121] In the result the defendant has established that claims B and C, if they had any basis in fact, were extinguished by prescription during 1992, many years before action was instituted in 1998.[35]

Claim D

[122] Claim D is in respect of the repayment to Muller of certain sums of money allegedly mistakenly paid by him to the bank after the conclusion of the May 1988 agreement. These payments were made allegedly as a consequence of certain misrepresentations made to him by officials of the bank. The claim is pleaded in the form of a *condictio indebiti*. The amount claimed was amended twice during the course of the plaintiff's counsel's opening address. The effect of those amendments was substantial. The sum claimed was amended from R18 309 579 to R11 780 980, and then to R15 780 980. (In the original particulars of claim, the amount claimed under this head had been R15 534 192. My

[35] This conclusion rendered the determination of the plaintiff's claim for rectification strictly unnecessary. I nevertheless considered that, in the peculiar circumstances of the case, it would be in the interests of justice to deal fully with the rectification issue, certainly to the extent that it bore on the existence of the alleged debt in the first place.

attention was drawn by the bank's counsel to trial particulars furnished by the plaintiff which, on analysis, gave a total in yet a different sum in respect of the claim.)

[123] In the course of giving the reasons for making the ruling for a separation of issues in terms of rule 33(4), I mentioned other unsatisfactory features concerning the state of preparedness of this claim for trial and concluded '[I]t is not convenient for the court to embark on [the trial of] a claim that has not been clearly formulated or adequately defined and in respect of which the first defendant will no doubt press for [yet] further particulars.' I therefore stayed the trial in respect of claim D until after the determination of the issues identified for trial separately and initially in terms of the ruling made in terms of rule 33(4). I indicated in the ruling that I would give directions in this judgment in respect of the disposition of any outstanding issues in respect of claim B and in respect of the trial of claim D.

[124] The upholding of the bank's special plea of extinctive prescription has disposed of claim B. It seems appropriate that the plaintiff should be directed, if he wishes to pursue claim D, to convene a pre-trial conference with the first defendant's legal

representatives to identify and address the matters necessary to enable the trial of the claim on the basis of an appropriate state of preparedness for trial by both parties. When the parties are satisfied that the claim is ready for trial, which shall not be before any requests for yet further trial particulars and/or further discovery (if such are to be directed) have been satisfied, they may apply in chambers to the Judge President for the early allocation of a date for the hearing. Having regard to the passage of time, it is clearly desirable that if this claim is to go to trial, that should happen as soon as practicably possible.

Costs

[125] Both sides argued that costs should follow the result. I agree that this is appropriate. The employment by the parties of two counsel was reasonable having regard to the substantial volume of evidential material that had to be traversed and the relative complexity of some of the issues. In the context of the employment by the plaintiff of Mr Barnes, as an expert witness, it was reasonable for the first defendant to have availed of the services of Mr Greenbaum. I intend to allow Mr Greenbaum's qualifying fees as part of the bank's taxable costs of suit.

Order

[126] The following orders will issue:

1. Claims A, B and C in terms of the amended particulars of claim are dismissed with costs.

2. The costs award in favour of the first defendant shall include the costs of two counsel and the qualifying fees of Mr Hilton Greenbaum.

3. The plaintiff is given leave, subject to compliance with the directions given in paragraph [124] of this judgment, and if so advised, to enrol claim D for hearing.

A.G. BINNS-WARD
Judge of the High Court

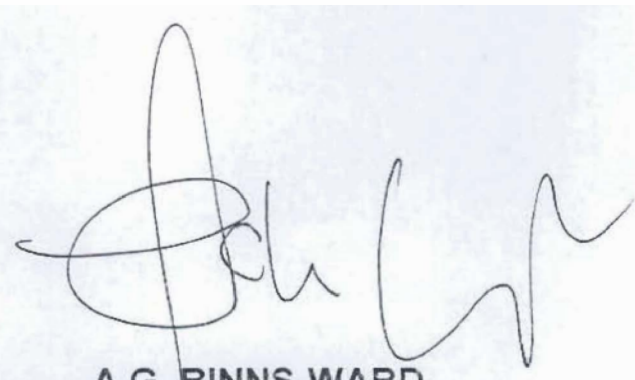
Order

[126] The following orders will issue:

1. Claims A, B and C in terms of the amended particulars of claim are dismissed with costs.

2. The costs award in favour of the first defendant shall include the costs of two counsel and the qualifying fees of Mr Hilton Greenbaum.

3. The plaintiff is given leave, subject to compliance with the directions given in paragraph [124] of this judgment, and if so advised, to enrol claim D for hearing.



A.G. BINNS-WARD
Judge of the High Court