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IN THE COURT OF APPEAL OF BOTSWANA
HELD AT LOBATSE

Court of Appeal Civil Appeal No. 10/01
High Court Civil trial No. 1112 of 1994

In the matter between:

BOTSWANA HOUSING CORPORATION

Appellant

And

FIRST NATIONAL BANK OF BOTSWANA LTD

Respondent

For Appellant: Adv. S. Du Toit S.C. with him
 Dr. H. Lever S.C.

For the Respondent: Adv. Hodes S.C. with him
 Adv. R. Petersen

J U D G M E N T

CORAM: TEBBUTT JP
 KORSAH JA
 GROSSKOPF JA

TEBBUTT JP

An action for damages in the sum of P8,000, 000, later reduced to P2,808,219,18, brought in the High Court by the appellant against the respondent arising from a banker-customer relationship between the parties was dismissed, with costs, by Reynolds J, hence this appeal to this Court.

The appellant, the Botswana Housing Corporation, to which for convenience I shall refer as "BHC" or "the Corporation" is a body corporate established in terms of the Botswana Housing Corporation Act (Cap 74:03) (the Act). BHC does not have a Board of Directors, its affairs being conducted by the Corporation, which consists of a chairperson and not less than six or more than nine other members. It is, however, convenient for the purposes of this judgment to refer to decisions and resolutions of the latter body as those of "the Board", as they were referred to in much of the evidence at the trial of the action. BHC also had a general manager who was its chief executive and secretary and was responsible for the direction of its business and its administration and organization. The respondent is the First National Bank of Botswana Limited, to which I shall refer herein as "the Bank." It is the successor to the Bank of Credit and Commerce (Botswana) Limited, referred to hereafter as BCC.

The background to this action is the following. At some time in 1991 the then chairperson of the appellant, a Mrs Venson, and the then general manager, Mr. J. M. O. Letsholo, conceived of a scheme to have a large and prestigious building constructed as the headquarters for BHC. The building was to cost some P53 million. The Board eventually approved of the project and the expenditure. The project received wide publicity. Architectural competitions in respect of it were held and the eventual launch of the project, towards the end of 1991, became a high profile and gala event. The construction contract was awarded to a firm Spectra Botswana Limited (Spectra).

On 24 October 1991, a letter was written to the Bank, which had by then taken over the affairs of BCC, signed by Letsholo and the manager of finance of BHC at the time, Mr. W.K. Collier, requesting the Bank to open two accounts in the name of BHC to be named (1) BHC Call Deposit (Project) account and (2) BHC Current (Project) account. The letter went on to state that the deposit account would be on daily call and the current account would operate with it, funds for the latter account being transferred to it from the deposit account. It is the BHC Current (Project) Account that features principally in this case and it will be referred to hereafter as "the current account."

The initial deposit to it was P5 million. The letter also stated that "the prescribed forms are duly filled in and signed are enclosed for you to open these accounts." The signatories to the accounts were to be the general manager, Letsholo, the manager finance, Collier, and two deputy general managers, one Rabana and one Nyirenda. This letter is of the utmost importance in this case and I shall advert to it in some detail later herein.

The Bank on 28 October 1991 duly opened the two accounts. It is common cause that in opening and conducting the accounts the Bank impliedly agreed that it would follow accepted banking customs and practices and would exercise due care and diligence, particularly in implementing the appellant's instructions in regard to them.

In a letter dated 21 January 1992 signed by Letsholo and Collier, the Bank was instructed to transfer P2 million to Spectra and to debit the current account with the amount. The Bank was also instructed to inform Spectra of the transfer "being payment of progress amount No. 3, BHC office Block Contract". On 6 February 1992 the Bank received three letters all dated 3 February 1992 and all signed by Letsholo and Collier instructing it in each case to transfer P2 million to Spectra and to debit the current account with the amounts. The Bank was also instructed in each letter to inform Spectra of the transfers "being payment of progress amount N.4" (and No.5 and No.6 respectively).

The Bank duly effected payment of the first amount on 21 January 1992 and of the other three amounts on 6 February 1992 and debited the current account accordingly.

It is these payments that form the basis of BHC's claims in its action against the Bank, it being alleged that in effecting the payments the Bank acted in breach of its agreement with BHC and, more particularly, acted negligently and without the due care and diligence expected of a banker. Those allegations were denied by the Bank.

It was against this relatively simple background that the appellant commenced its action in June 1994. However, by the time the matter, following the trial proceedings, ended in this Court in July 2002, it had attained hugely greater and considerably more complex proportions, resulting in a record of pleadings

and oral and documentary evidence of some 1640 pages. Much of this arose from the pleadings and the various amendments of them during the trial and it is to these that I shall now turn in order to define the ambit of the issues that eventually became the subject of dispute between the parties.

Before doing so, however, it is necessary to record a fact of relevance to the pleadings. It is that Letsholo was killed in a motor accident on either 31 January 1992 or 1 February 1992. Following his death serious irregularities were discovered in his conduct of the affairs of the BHC, including the building project, necessitating the appointment of a Commission (the Christie Commission) to enquire into and report on them. Letsholo's death was widely reported in the media, both in the press and on radio.

To the pleadings, then. In its original particulars of claim, which are dated 20 June 1994, BHC set out the fact of the opening by the Bank of the current account in terms of the letter of 24 October 1991 signed by Letsholo and Collier and of the debiting by the Bank of that account with the four amounts of P2 million each in terms of the letters of 21 January 1992 and 3 February 1992, also signed by Letsholo and Collier. As stated above it averred that the Bank had breached the implied terms of the agreement with it by not following accepted banking customs and practices and acting negligently and without due care and diligence in effecting payment of the four amounts. This was because, before doing so, the Bank should have been placed on reasonable enquiry by one or more of the following facts: (i) BHC was capable of issuing cheques for

payment to a local, i.e. Botswana, payee and giving written instructions in lieu of cheques, particularly for such large amounts, was unusual; (ii) "progress payments" on a building contract in such a short space of time –three on virtually the same day – were improbable and unusual; (iii) the instructions to make payments were ostensibly signed by Letsholo after his death or, alternatively, had lapsed on his death. Had the Bank been put on its enquiry by these facts as it should have been, BHC averred, it should not have made payments without seeking clarification which it failed to do. BHC also averred that it was not indebted to Spectra in the amount of P8 million or any other amount when payments were made. It had therefore, BHC averred, "in consequence of (the Bank's) breach of contract," suffered damages in the sum of P8 million which it claimed, together with mora interest and costs.

Numerous requests for particulars and further and better particulars, to which it is not necessary to refer, followed, as did the Bank's plea to the claim. On 15 November 1996 an amended particulars of claim by BHC, dated 4 November 1996, was filed. This occurred after a pre –trial conference was held on 18 August 1995, at which time the parties were apparently ready to go to trial on the particulars of claim as originally drawn and filed.

The amended particulars of claim of 4 November 1996 were filed in order to reduce BHC's claim from P8 million to P2 808 219.18 because subsequent to issue of summons BHC had received payments of P1,3 million and P6.5 million of which it had allocated certain amounts to the reduction of interest on its

claim, resulting in the claim being reduced to P 2 808 219.18. For the rest, the original particulars remained intact. In other words, the claim was still based on the opening of the current account on 28 October 1991, following BHC's letter to the Bank of 24 October 1991, the payments of 21 January 1992 and 6 February 1992 and the allegations of negligence set out above.

In its plea, both to the original and to the amended particulars of claim, the Bank averred that the current account in question was opened "in the context of a pre-existing banker customer relationship between the parties" in terms of which the Bank was obliged and entitled to act in respect of BHC's accounts upon written instructions signed on behalf of BHC inter alia by both Letsholo and Collier. The letters instructing them to pay the four payments were signed by both Letsholo and Collier. In particulars to its plea the Bank said that the pre-existing relationship between it and BHC had come into existence when the Bank was still BCC and probably by October 1989 at the latest. Various accounts of BHC had since then been opened with the Bank (or BCC before it) and operated in terms of a written mandate in prescribed form from the Board of BHC. The Bank was, however, at the stage of plea, no longer able to furnish the original of such mandate. In all these accounts which were described as the SOWA accounts Letsholo and Collier were authorized signatories. Most of these accounts had later been closed, the instructions to the Bank to do so having been given by Letsholo and Collier. One such account, an account described variously as the Sowa (Main) Account and as the BHC (Main) Current account had not been closed when the current account in October 1991 was opened.

Following the filing of the amended particulars of claim on 4 November 1996 and the plea thereto, various requests for particulars, including some for purposes of trial, and the replies thereto, were filed and discovery of documents was made. As a result of such discovery a further amendment to the particulars of claim was made by BHC on 23 March 1999. In applying for leave to file such amended particulars, BHC's attorney, in an affidavit, said that in the course of going through the Bank's discovery, certain documents had come to light in respect of the arrangements between BHC and the Bank's predecessor, BCC, regarding cheque signatories and signing limits. When the original particulars of claim were filed BHC did not have the documents in question in its possession and had no knowledge of them because, following Letsholo's death and the appointment of the Christie Commission, large numbers of documents were removed from BHC's possession and the majority of senior personnel were suspended or dismissed.

The important parts of these amended particulars are the following:

1. In or about 1986 BHC opened a current account with BCC and until BCC was later taken over by the Bank BHC retained one or more accounts with BCC.
2. It was an express term of its agreement with BCC, and maintained when the Bank took over, that the Bank would only effect payment on the accounts by way of cheques or written instructions signed by the authorized signatories of BHC and in the manner specified by BHC.

3. In April 1989 BCC was instructed that (a) cheques over P75 000 had to be signed by either two of the chairman, deputy chairman and chairman of the finance committee (Category A signatories) or one of them and one of the general manager or deputy general manager (Category B signatories); (b) cheques for amounts between P75 000 and P20 000 had to be signed by either a signatory in either the A or B category and any other signatory, which would include Category C signatories, who were the heads of department of BHC; and (c) cheques up to an amount of P20 000 by any two signatories. The Bank was furnished on 19 April 1989 with a written list of the names of the people in the various categories which list, as changes occurred in personnel, was amended from time to time.
4. The mandate of April 1989 to the Bank still stood when the letter of 24 October 1991, signed by Letsholo and Collier, instructing the Bank to open the current account was sent to the Bank.
5. BHC alleged that in opening the account on the basis of that letter and also in effecting the four payments the Bank acted in conflict with BHC's written mandate of April 1989 and in doing so did not follow banking custom and practice or did not act with due care and diligence in that it should have called, but did not, for a resolution from the BHC Board specifying who the signatories on the account would be.

The further particulars of negligence originally pleaded were repeated save that it was also alleged that Letsholo's authority to bind BHC had lapsed on his death and the Bank knew this when it effected the payments on 6 February 1992.

In its plea to the amended particulars of claim of 23 March 1999, the Bank averred that the banker-customer relationship between its predecessor BCC (and later it) had subsisted since at least 1983. This was as a result of further documentation which had then come into its possession.

In a replication to that portion of the plea, BHC admitted that the relationship between it and the Bank (or its predecessor) arose in or about December 1983. It annexed an application by it to open an account with BCC dated 24 November 1983. It therefore alleged that this constituted the mandate to the Bank. It was on that basis that the matter proceeded to trial. The contents of that application are highly germane to the present dispute and I shall refer in detail to it later herein.

The effect of BHC's allegation that the banker-customer relationship between it and the Bank had existed since 1983 was to cause the Bank to raise a number of defences..

The first defence is a factual one. The Bank averred that in so far as the opening and operating of the current account was concerned the terms of its mandate were governed by the contents of the letter of 24 October 1991 and the accompanying list of authorized signatories. It was entitled, the Bank said, to act upon that letter and to the other documents referred to in it as reflecting a decision of BHC inasmuch as, by virtue of section 11 of the Act, it was made by and /or signified under the hand of BHC's general manager. It was also entitled

to effect the four payments as the letters instructing the Bank to do so were signed by Letsholo and Collier who were, in terms of the letter and its annexure, authorized signatories of BHC in regard to them.

The other defences are of a technical nature. They are the following. Firstly, BHC had subsequently ratified the actions of the Bank in opening the account and allowing its operations in accordance with the letter of 24 October 1991 and the list of signatories accompanying it and had thereby validated any defect in the bank's mandate so to act. Secondly, that while denying that the juristic act of Letsholo in signing the letters instructing the making of the payments ceased to bind the Bank upon his subsequent death, BHC was estopped from denying the Bank's right to make the payments because the letters instructing the payments on 6 February 1992 were delivered to the Bank by Collier at the behest of the chairperson, Mrs Venson, and the then acting general manager of BHC, Nyirenda who all knew of Letsholo's death, with the intention of causing the Bank to act upon them and make the payments concerned. The third defence is that the claims of BHC were prescribed. A fourth defence is that BHC's claim for "damages", which is what it is said to be in the pleadings, is misconceived and bad in law and a fifth one is that BHC had not established that it had suffered any loss. I shall deal with these defences at the appropriate juncture.

It is convenient at this point to refer to the various documents and other factors raised in the pleadings and referred to above. The first are the relevant sections of the Act. Section 11 provides as follows:

“11. All documents made by, and all decisions of, the Corporation may be signified under the hand of the Chairman, or the general manager, or any member of the Corporation authorized in that behalf by the Corporation.”

Section 12(1) provides for the appointment by the Corporation of a general manager who shall be, in terms of Section 12(2) (b) -

“The chief executive officer, and secretary to the Corporation and shall, subject to such directions on matters of general policy as may be given, and such other decisions as may be made by the Corporation, be charged with the direction of the business of the Corporation and of its administration and organization and also with the control of the employees of the Corporation.”

In both the foregoing sections the “Corporation” is the “Board” as it is referred to herein.

The next document is the application by BHC to open an account with the Bank, dated 28 November 1983. The relevant portion of that document is Part E which required completion if the application was for a “Club, Society or Association” account and has the words “Certified Copy of Resolution” at the head of it.

It then goes on to read as follows:

BOARD

"At a meeting of the _____
(insert 'Committee of Management' or as the case may be)

BOTSWANA HOUSING CORPORATION
of the _____
(insert name of Club, Society or Association)

held on the 24TH day of NOVEMBER 1983

it was resolved:

1. That the Bank of Credit and Commerce (Botswana) Ltd (BCC) be authorized to honour all cheques or other orders for payment drawn upon any account or accounts for the time being kept with BCC in the name of the Club, Society or Association notwithstanding that any such payment may cause such account or accounts to be overdrawn or increase any existing overdraft provided they are signed by

P. O. MOLOSI J. D. RICHARDSON

(insert Chairman and Secretary for the time being or as the case may be)

2. That BCC be authorized to accept all requests and receipts for the delivery of securities papers or other property if signed by

P. O. MOLOSI J. D. RICHARDSON

3. That BCC be given a list of names of the signing Officers and be advised in writing under the hand of the Secretary of any changes that may take place and BCC be entitled to act upon the signature so given.

4. That these Resolutions be communicated to BCC and remain in force until revoked by notice in writing to BCC signed by the Chairman or the Secretary acting or purporting to act in behalf of the Society Club or Association and BCC shall be entitled to act upon such notice."
(emphasis added)

A space below that which provides for "Specimen Signatures" contains the words "See Appendix". That appendix states that

"At their meeting on the 24th November 1983 the Board agreed that the list of cheque signatories should be as follows"

There followed the names of the then chairman, Mr. P. O. Molosi; of a proxy in his absence; of the general manager, Mr. J.D. Richardson; and of various other officials, including the financial controller.

The arrangement as to the categorisation of BHC's signatories into A, B. and C categories followed upon a meeting of the finance committee of BHC on 9 February 1989, the list of such signatories being supplied to the Bank in a letter signed by the financial controller "for general manager" on 19 April 1989. That list changed from time to time in a series of letters from 22 June 1989 to 19 April 1991, all signed by the general manager and at least three by Letsholo and Collier. The minutes of the finance committee meeting were annexed to the amended particulars of claim of 23 March 1999. The Bank, in its plea to those particulars, denied that those minutes were ever communicated to it, although it admitted receiving the letter of 19 April 1989 and the other letters mentioned.

Finally there is the letter of 24 October 1991. Headed "New Accounts," it reads as follows:

"We wish to open the following two accounts in the name of the Botswana Housing Corporation.

1. BHC Call Deposit (Project) Account
2. BHC Current (Project) Account

The deposit account will be on daily call basis and the current account will operate with the deposit account (i.e. all cheques payment to the current account will be done by transferring funds from the deposit account)

The initial amount of the deposit is P5m (Five million).

The prescribed forms are duly filled in and signed are enclosed for you to open these accounts. Also please find enclosed the panel of signatories, who are authorized signatures to the corporation cheques and their specimen signature."

Those signatories were, as earlier set out, Letsholo, the general manager; Rabana, the deputy general manager; Nyirenda, another deputy general manager and Collier, the financial manager.

The trial before Reynolds J commenced on 9 December 1998. One of the main witnesses for BHC, then the plaintiff, was Collier. I shall refer to portions of his evidence in due course. At the close of the plaintiff's case, the Bank applied for absolution from the instance. This was denied in a detailed and carefully reasoned judgment by Reynolds J on 17 May 1999 and the trial resumed with the case of the Bank, as defendant, on 22nd September 2000. The defendant called three witnesses: Mr. D. G. Price, at the relevant time

managing director of the Bank; Mr Dearlove, the senior manager of the branch of the Bank where BHC had its accounts; and Mr. G Clark, a senior official of the Standard Bank, who testified as an expert witness. Again, portions of their evidence will, where relevant, be referred to.

It is also necessary to refer to certain other factual matters which arose from the pleadings and the evidence. One is an averment by BHC in its particulars of claim that it did not owe Spectra any money when the four payments in question were made by the Bank. For this BHC relied on an allegation that it had no valid contract with Spectra as such contract was ultra vires the powers of BHC. A second factual aspect is that on 19 February 1992 the Bank issued a guarantee, replacing an earlier one dated 12 December 1991 for P5.3million to BHC for "the due fulfillment of the contract" by Spectra. The "contract" is referred to in the guarantee as the contract between Spectra and BHC for the erection of the BHC headquarters building for the sum of P53 million. Spectra was an associate of a group of South African companies known as the Premier Group and the guarantee was issued to facilitate accelerated payment to Spectra as against undertakings to the Bank by the Premier Group giving the Bank recourse against the latter. Pursuant to this the Premier Group from time to time issued to BHC guarantees for recourse in respect of payments to Spectra.

In dismissing the appellant's claims Reynolds J once again, on 14 February 2001, delivered an extensive, comprehensive and closely-reasoned judgment in

which he carefully analysed the evidence of the various witnesses and upon which he made his findings of fact.

The learned judge found that it would have been reasonable for a banker in the Bank's position to have accepted that it was entitled to act on the mandate given to it in the letter of 24 October 1991 and to have made the payments in question without making any enquiries.

He also found that the opening and operation by Letsholo and Collier of the current account were probably unauthorized, but even if the Bank's mandate based on the letter of 24 October 1991 was thus defective, BHC had subsequently ratified it.

In the light of these findings he did not consider it necessary to deal with the other defences raised, including the defence of estoppel. He did, however, deal with the plea of prescription and found that this had not been established by the Bank.

And so the matter came on appeal to this court.

A matter that necessitated the Court's attention when the case came on appeal was the following. The appellant's notice of appeal is dated 20 March 2001 and was received by the Bank's attorneys on 23 March 2001. There was produced, shortly prior to the hearing of the appeal, and then filed with the Court, a notice by the respondent Bank in terms of Rule 22 (1) of the Rules of

the Court of Appeal. Rule 22 (1) provides, in essence, that it is not necessary for a respondent to give formal notice of cross appeal but if it intends to contend that the decision appealed against – in casu that of Reynolds J – should be varied or affirmed on grounds other than those relied on by the court below or that part of it is erroneous, the respondent must within 30 days of service of the notice of appeal, give written notice of its intention and state therein the grounds on which it intends to rely. The Bank's notice in terms of Rule 22(1) is dated 17 April 2002. When the notice was filed with this Court, it was considerably late and out of time. The Bank averred, however, that its attorneys had filed it timeously.

The notice set out that the Bank intended to contend at the appeal that the court a quo erred in (a) not upholding the plea of prescription; and (b) in finding that the opening and operating of the current account by Letsholo and Collier were probably unauthorized. It also intended to contend that there was an additional ground for affirming the Court's upholding the defence of ratification and, furthermore, that the trial court should have upheld the other defences pleaded, including the defence of estoppel.

There was, however, a dispute between the legal representatives of the parties as to whether the notice had been filed timeously. Those of the Bank said it had; those of BHC said it had not. It certainly had not been received by them, they said. The first they had heard of it was during a telephone conversation between Mr. Petersen and Dr. Lever, junior counsel for the Bank and BHC

respectively, on 25 June 2002 (the appeal was set down for hearing on 23 July 2002) following which a copy was faxed to Dr. Lever on that date. As a result BHC, as the appellant, had not dealt with the matters raised in the notice in its heads of arguments which were filed on 28 June 2002.

In response to an enquiry whether the appellant wished to apply for a postponement, BHC's legal representatives said it would not but would ask for an appropriate order as to costs. The various points raised by the Bank in its Rule 22 notice were thereupon dealt with by counsel for the Bank both in their heads of argument and in their oral submissions and the court permitted counsel for BHC to file additional written heads in response to those issues. These gave rise to the Bank's counsel filing, with the court's permission, a further note in reply to the latter heads and additional heads from BHC's counsel in response to that note were filed on 24 October 2002. All the issues have therefore been dealt with by counsel on both sides. I shall advert at the conclusion of this judgment to what, in regard to all the foregoing, would be an appropriate order as to costs.

The legal principles in a matter such as the present are well established and in regard to a banker-customer relationship can be shortly stated. The relationship is a contractual one. The principles guiding it were laid down more than a century and a half ago by the House of Lords in Foley v. Hill (1848) 2 HL Cas 28; (1843 – 1860) All ER 16) where it was held that the relationship was one of debtor and creditor, the banker being liable to repay to the customer the

money which he holds for him when required to do so by the customer. When a customer pays money into his account at a bank it ceases to be his money; it becomes the banker's money and he can deal with it as his own. He is not vis-a-vis the customer in the fiduciary position of trustee. The banker's contract with the customer is that, having received that money, it will repay the customer, when demanded, a sum equivalent to that paid into his hands.

In an oft-quoted judgment in Joachimson v Swiss Bank Corporation (1921) All ER 92, the Court of Appeal re-affirmed, per Atkin LJ, the debtor and creditor basis of the relationship in the following terms (at 100 C – E)

“The bank undertakes to receive money and to collect bills for its customer's account. The proceeds so received are not to be held in trust for the customer, but the bank borrows the proceeds and undertakes to repay them. The promise to repay is to repay at the branch of the bank where the account is kept, and during banking hours. It includes a promise to repay any part of the amount due against the written orders of the customer addressed to the bank at the branch, and such written orders may be outstanding in the ordinary course of business for two or three days. It is a term of the contract that the bank will not cease to do business with the customers except upon reasonable notice. The customer on his part undertakes to exercise reasonable care in executing his written orders so as not to mislead the bank or to facilitate forgery.”

That the relationship is one of debtor and creditor has received recognition in a long line of cases in South Africa, and is accepted as part of the law there. A number of those cases are collected by Selikowitz] in his judgment, also

confirming the debtor and creditor nature of the relationship, in Standard Bank of SA Ltd v Oeanate Investments (Pty) Ltd 1995 (4) SA 510(CPD) at 531 I. See also Liebenberg v Absa Bank Ltd t/a Volkskas Bank (1998) 1 All SA 303 (CPD).

In his judgment Selikowitz J referred to the Joachimson case quoted above and then, in relation to the “written order” of the customer mentioned by Atkin LJ, said this (at 531 F –H)

“The ‘written order’ to which reference is made is usually a cheque, although in modern banking the introduction of electronic communication is not only recognized and given effect to by banks but actively encouraged and promoted by them. When an instrument such as a cheque is used, the customer, acting as principal, instructs the bank, his agent, to perform a specific act, which is usually the payment of a sum of money to the bearer, the payee or his order. As between the bank and its customer a payment by cheque is governed primarily by the law of agency.

Thus even in basic normal and everyday banking activity the relationship described as one between debtor and creditor includes aspects – often described as ‘superadded obligations’ – which are regulated by the law of agency.”

It is accepted that in carrying out the instructions of its customer to make payments from the latter’s account the banker acts as an agent, and that, in respect of its duty to honour its customer’s payment orders, it must not do so out of his account without conforming to the instructions or mandate given by

the customer to it. (See Commercial Banking Law p 36, cited by Traverso] in Liebenberg v Absa Bank (supra) at 301b)

The foregoing principles are, in my view, equally applicable in Botswana. Botswana follows the same banking systems as exist throughout the international commercial world and to suggest any departure in Botswana from those principles would be to import confusion into its banking law, something which would be entirely unwarranted. Moreover it is well –recognised that bankers in Botswana do in fact apply the principles in question.

It is obvious from the foregoing that a bank has a duty under its contract with its customer to exercise reasonable care and skill in carrying out its part of that contract. In deciding whether the banker has exercised the necessary degree of care and skill, the test is an objective one. The duty of care is also not of an absolute nature; it is the degree of care which would be exercised by a reasonable banker, or, put otherwise, by an ordinary prudent banker (see per Steyn] (as he then was) in Barclays Bank plc v Quincecare Ltd and Another (1992) 4 All ER 363 at p 376 H.

In the Quincecare case Barclays Bank, with whom Quincecare had a current account, had on instructions from the latter transferred money to a third party. It appeared later that in giving such instructions, the chairman of Quincecare, one Stiller, had done so with the intention of defrauding Quincecare. He subsequently misappropriated the money transferred by the Bank. It was alleged

that in transferring the funds Barclays Bank had acted negligently. Steyn J, who tried the case, repeated the principle that primarily the relationship between a banker and customer is one of debtor and creditor and confirmed the further principle expressed by Lord Atkinson in Westminster Bank Ltd v Hilton (1926) 43 TLR 124 at 126, that quoad the drawing and payment of cheques as against the money of the customer in the banker's hands the relationship is that of principal and agent. As every agent for reward is bound to exercise reasonable skill and care in carrying out the instructions of his principal (Bowstead on Agency 15th Edn p144), so too the bank has to exercise such skill and care in executing the customer's instructions. Steyn J referred to an earlier judgment of Allott J in Lipkin Gorman (a firm) v Karpnale Ltd (1992) 4 All ER 331 where the latter held that a banker was entitled to treat the customer's mandate at its face value except in extreme cases. It was not obliged to question any transaction which was in accordance with the mandate unless a reasonable banker would have grounds for believing that the authorized signatories were misusing their authority for the purpose of defrauding their principal or otherwise defeating his true intention. Mere unease or suspicion was not enough to justify its refusal to pay and the banker was not required to act as an amateur detective in relation to its customer's affairs.

Steyn J said that one had to reconcile the duty of care with the bank's duty to execute promptly its customer's instructions. He said

"The law should not impose too burdensome an obligation on bankers, which hampers the effective transacting of banking business unnecessarily. On the other hand the law should guard against the facilitation of fraud...."

He opined that a fair balance would require that a banker must refrain from executing an order if and for as long as it is “put on inquiry” in the sense that it has reasonable grounds (although not necessarily proof) for believing that an order is an attempt to misappropriate the funds of the company. That would require the likely perception of an ordinary prudent banker.

The judgment of Steyn J was referred to with approval in the decision of the Court of Appeal in an appeal to it from the judgment of Alliott J in Lipman Gorman v Karpnale Ltd (1992) 4 A IER 409. May LJ expressed the banker’s duty in the following terms at (421 d –e)

“The principal obligation is upon the bank to honour its customer’s cheques in accordance with its mandate on instructions. There is nothing in such a contract, express or implied, which could require a banker to consider the commercial wisdom or otherwise of the particular transaction. Nor is there normally any express term in the contract requiring the banker to exercise any degree of care in deciding whether to honour a customer’s cheque which his instructions require him to pay. In my opinion any implied term requiring the banker to exercise care must be limited. To a substantial extent the banker’s obligation under such a contract is largely automatic or mechanical. Presented with a cheque drawn in accordance with the terms of that contract, the banker must honour it save in what I would expect to be exceptional circumstances.”

The South African courts have also accepted that the test for negligence on the part of a banker is an objective one and have adopted the test that the standard against which the conduct of a banker must be measured is not the highest level of competence achievable by a banker but is the degree of skill that is reasonable having regard to the general level of skill and diligence possessed and exercised by members of the banking profession (per Melunsky J in Powell and Another v Absa Bank Ltd t/a Volkskas Bank 1998 (2) SA 807 (SE) at 819 C–G and authorities there cited).

In regard to the opening of an account for a customer by a banker, counsel for BHC referred the court to a number of cases in which the courts have held that there is a duty on the banker to exercise care in the opening of an account, specifically to guard against the possibility of fraud. The cases cited are, however, not particularly helpful dealing, as they do, in the main with the duty of a collecting banker and referring in most instances to the opening of accounts by it for new customers of whose credentials and trustworthiness the banker was not aware. The cases indicate clearly that different considerations would apply where the customer seeking to open a new account is an existing customer of the banker (See e.g. Columbus Joint Venture v Absa Bank (2002) 1 All SA 105 AD at 110);

I think that it can safely be said, though, that in opening a new account for an existing customer, which is a company or corporate body such as BHC, the Bank is under a duty to ensure that the person seeking to open such an account on its

behalf is authorised to do so. In deciding whether in opening the account there has been a breach of that duty the question is whether it has been shown that the circumstances were such as to cause a reasonable and prudent banker, considering the available information, to have a suspicion about the bona fides of the person or persons seeking to open the account in relation to the opening thereof. Only if the answer to this is “yes” is there any need to make enquiries by the banker, failing which a breach of its duty may arise (See Columbus Joint Venture v Absa Bank (supra at 111 para 15.)

Applying the aforesaid principles and tests to the present case two aspects require consideration (a) the opening of the two accounts i.e. the call account and the current account by the Bank; and (b) the four payments made by the Bank.

As to the first of these, the authorization to the Bank contained in the November 1983 resolution was for it to honour all cheques or other orders for payment drawn upon “any account or accounts for the time being kept with the BCC”, provided they were signed by “P.O. Molosi (Chairman) JD Richardson (General Manager)” The resolution did not state that they both had to sign the documents mentioned. They could act independently of one another. Moreover the very agreement sets out the names of those entitled to sign them, who on cheques up to P20 000 could be any two of those signatories. They need be neither the chairman nor general manager. Only on cheques over P20 000 had either the chairman or general manager to be one of the signatories. It is also

clear from the agreement that amendments to the list of signatories could be made without any resolution by the Board, but on the signature alone of the general manager, who was also the “secretary”.

BHC obviously further considered that any other instructions to the Bank could be given by either the chairman or the general manager. Requests and receipts for delivery of documents (not, it must be noted “requests for receipts”) could be made by either of them (See Clause 2). Again no Board resolution would be required.

This would obviously have been practical. The Board only met from time to time, the Act contemplating three meetings of it a year although more could, where necessary, be held (Section 10(1).) To allow it to conduct its business in the interim and bind it in dealings with third parties, the Legislature enacted Sections 11 and 12 of the Act cited above. The chairman and general manager could conduct the Corporation’s business by signing the appropriate documents. The resolution of November 1983 is in conformity with that.

Indeed, the effect of Section 11 is that the signature of the chairman or general manager in their capacities as such renders a document one as if signed by the Corporation itself and therefore binding on the Corporation. (See Cardboard Packing Utilities (Pty) Ltd v Delta Associates (Pty) Ltd 1961 (4) SA 551 (W) at 552 D – 553 G; Commissioner for Inland Revenue v Malcolmess Properties (Isando) (Pty) Ltd 1991 (2) SA 27 (AD) at 37A – H.

It is clear that acting on the authority as thus set out, the general managers who were Letsholo's predecessors, and Letsholo later, proceeded over the years to give instructions to the Bank without any resolution of the Board in support of them.

The 1989 arrangement in regard to the three –tier system of signatories would not appear to have as its basis a resolution of the Board. It came into being as a result of a finance committee meeting which approved a recommendation by management in order to make it more convenient for management to get cheques signed. The committee gave its approval to management's recommendations. There is no Board resolution to confirm it. The Bank says the minutes of the meeting were not furnished to it, which is hardly surprising as it is unlikely that minutes of meetings of committees of BHC would have been sent to it. Again, however, the communication it did receive on 19 April 1989, being the list of signatories in the A,B and C categories, was signed by the general manager who was obviously putting management's recommendations into effect. It was his instruction to the Bank. Subsequent amendments to the list were similarly signed by him.

After April 1989 a large number of instructions were given to the Bank for the transfer of money from one bank to another and to a third party. These were all signed by the general manager. No reference to any of the signatories in the three-tier system was ever made in causing these transfers to be effected which

BHC's witnesses said were a convenient way of dealing with the matters, avoiding the necessity for cheques. As Collier conceded, there was a course of conduct by BHC with the Bank whereby the Bank operated on the instructions of the general manager.

It was also the then general manager Letsholo who caused the Sowa accounts to be opened. On 7 September 1989 Letsholo wrote to BCC asking that BHC's current account with the Industrial Branch of BCC be transferred to BCC's main branch where the current account was to be in the name of "Botswana Housing Corporation." In the same letter he wrote

"We enclose the necessary documents to open accounts separate from the above which will be titled:

- (a) Botswana Housing Corporation Call Account (SOWA)
- (b) Botswana Housing Corporation Current Account (SOWA)"

BCC duly opened those accounts and they were operated on by BHC until 1990 and 1991.

Once more no Board resolution authorizing the opening of these accounts was produced in evidence. It may well be that the "necessary documents" referred to by Letsholo included a resolution of the Board (one does not know what they were) but even assuming that they had included such a resolution, the actual instruction to open the accounts came from Letsholo. (Collier was a co-signatory)

The SOWA accounts were closed in 1990 and 1991 on the instructions of Letsholo as general manager (again Collier was a co-signatory). And again there does not appear to have been any Board resolution authorizing him to do so. None was ever produced at the trial.

Over the years, therefore, the Bank and its predecessor BCC had acted in regard to BHC's accounts with them, on the instructions of BHC's general managers, including Letsholo. The Bank, when it took over from BCC, had always operated on his instructions.

One turns then to the letter of 24 October 1991. Once again it was Letsholo who wrote to the Bank instructing it to open two accounts on behalf of BHC. The accounts were called "Project" accounts in the same way as in September 1989 the accounts were to be called the "Sowa" accounts. There was nothing untoward in either the opening or operating of the latter. Why then should the Bank have had any suspicion that anything was amiss in the opening of the "Project" accounts? It was well-known that at that time BHC was embarking on its headquarters project. To have accounts specifically for that purpose would not have been unnatural.

It was contended by BHC that the signatories to the accounts should have caused the Bank to be suspicious. But why, one asks? The signatories were all senior officials in the Corporation, the general manager being its chief executive and charged with the direction of its business. The others were his deputies

and Collier the financial controller, who would presumably have held the purse strings in respect of the project. Two of them, Letsholo as general manager and Collier as financial controller had signed all the instructions up to then to the Bank on which the Bank had operated without objection, demur or complaint by BHC.

In his letter of 7 September 1989 Letsholo said that the signatories on the SOWA accounts would be those on the list supplied by him to BCC earlier. In his letter of 24 October 1991 he gave instructions as to who the signatories would be on the new "project" accounts. There was nothing in my view, which was untoward or which should have made the Bank or any of its officials suspicious that anything was wrong.

BHC, through its general manager, was following the same practices that it followed for years in its dealings with the Bank.

It was, however, contended that the signatories would conflict with the signatories on the three-tier system and as none of them were in the "A" category and it was likely that cheques in amounts of over P75 000 would have to be signed, the Bank should have been aware of this conflict and made enquiries in regard to it.

I cannot agree. These were new accounts for a new project. In the SOWA accounts the signatories were designated. For the "project" accounts other

signatories for these accounts were designated. I can see no earthly reason why the Bank should have thought that by the general manager's designating different and separate signatories from BHC's other accounts for those new accounts, anything was amiss. The Bank had no cause to think that Letsholo was anything but an honest man, carrying out his tasks in an honest and trustworthy manner. And if it could have had any doubts as to his motives in opening the accounts, there is no reason why the Bank should have had any suspicions as to the motives of the other signatories. In the light of the very public nature of the project, I can conceive of nothing that would have caused the Bank to have the least suspicion that they were all engaged in a scam on the Corporation.

Sight must not be lost of the fact that in his letter of 24 October 1991 Letsholo says that

"The prescribed forms are duly filled in and signed are enclosed for you to open these accounts."

The forms were not produced at the trial. This evoked much criticism from counsel for BHC, questioning whether they had been purposely not produced as being detrimental to the Bank's case. The Bank's witnesses, and in particular Dearlove, however, testified that they had conducted the most diligent search for them. Many documents had been lost in the transition from BCC to the Bank. Despite all their efforts, however, the forms could not be found. Reynolds] found that the witnesses concerned were reliable and truthful and accepted their evidence as to their inability to find the forms. I can find no justification for differing from his finding.

A fact of which BHC's counsel also made much was that the two Bank officials who had opened the accounts were not called as witnesses and that an inference adverse to the Bank's case should be drawn from this. It would, of course, have been better if they had been called but I do not think that it can be adversely inferred either that no relevant documentation was ever sent to the Bank or that the senior Bank officials realized that matters were not all they should be but turned a blind eye in order to get the business. As to the first, Letsholo's assertion that the relevant documentation had been sent makes it most probable that that had occurred. It is highly unlikely that he would have said so if he had not done so. The probabilities are also great that the Bank received the documents, otherwise it is likely that it would have asked for them. Those documents, again (as in the case of the Sowa accounts) may have contained a Board resolution to open the accounts. But whether there was such a resolution or not the facts are that from all the publicity attached to it, the Board was fully aware of the project, the project was in the process of being carried out and the need for a financial structure in regard to it would not have been unusual. That the opening of the accounts carried the Board's authorization or at least, approval is also evidenced by the fact that on the day following Letsholo's death, the chairperson, Mrs Venson directed that the instructions contained in the letters requesting the payments by the Bank to Spectra should be carried out without delay.

As to the second aspect, the suggestion that the bank officials who opened the accounts may have raised doubts as to their validity is pure speculation for which no basis was ever advanced in evidence.

I therefore find that applying the objective test of a reasonably prudent banker to the Bank's actions in the circumstances in opening the accounts, BHC failed to discharge the onus on it of establishing that the Bank had acted negligently.

On the aspect of whether the Bank was negligent in making the payments, there is no merit in the first ground alleged viz that because the payments were made on the strength of the letters to the Bank and not by cheques drawn on BHC's accounts the Bank should have made enquiries, which it failed to do. The Bank's mandate was to honour "all cheques and other orders for payment" and BHC had frequently given it instructions by letter for payments. There would have been no need for them to make any enquiries in regard to the instructions in the letters in question.

I also find no merit in the second ground of negligence alleged viz that the frequency of the progress payments should have put the Bank on its guard and obliged it to make enquiries which it failed to do. It is clear on the facts that accelerated payments to Spectra were contemplated. The guarantee of 2 February 1992 furnished by the Bank provided for that. The instructions of 6 February 1992, four days later, for the payments came from the general manager. The causes for them i.e. the relevant progress certificates, which

Collier testified were in order, were referred to in the letters and the Bank was further instructed to inform Spectra that the payments had been made. Collier testified that the payments were in order. Mrs Venson directed that the Bank be instructed to make the payments without delay and Collier personally took the letters to the Bank on 6 February 1992 to enable them to do so. There was accordingly nothing arising from the letters which would in any manner have put the Bank on its guard, causing it not to make the payments in question or necessitating any enquiries from it in regard to them.

What of Letsholo's death before 6 February 1992? Should this have put the Bank on its guard? Dearlove, the senior official who dealt with these payments said he was not aware of Letsholo's death at the time. BHC's counsel argued that this was improbable as it was widely reported in the media and other Bank officials knew of it. Reynolds J. who saw him in the witness box, said he believed Dearlove. I have no justification for disturbing that finding. But it is immaterial whether Dearlove knew or not. Letsholo died on either Friday 31 January 1992 or Saturday 1 February 1992. Although the letters requiring the Bank to make payment are dated Monday 3 February 1992, Letsholo must obviously have signed them before his death. The evidence was that Letsholo had signed them on the Friday but the letters had been dated 3 February 1992 to avoid the Bank paying the amounts on the Friday so that BHC would have lost the interest on the amounts over the weekend. When the letters were signed by him Letsholo's signature was valid and therefore so were his

instructions. His instructions did not lose their validity after his death. This ground of alleged negligence must therefore also fail.

I also find that there is no substance in BHC's allegation that the Bank should not have made the payments because BHC's contract with Spectra was invalid and that when the payments were made BHC did not owe Spectra any money. I cannot conceive on what possible basis those facts can give rise to a finding that the Bank did not follow banking custom and practice or was negligent, for that is what this case is about. Whether BHC's contract with Spectra was ultra vires its constitution or was invalid for any other reason is immaterial as far as this case is concerned. How, one asks, could the Bank have had the slightest suspicion, that would have required it to enquire from BHC about it, that the latter's contract with Spectra was invalid? The granting of the contract to Spectra had received the widest publicity, the launch of the project having been a gala event. The letters of 20 January and 3 February 1992 referred to progress payments and gave the numbers of those.

The Bank had been asked to provide a guarantee for the due performance of the work by Spectra which it did on 2 February 1992, mere days before the instruction to make the payments. And Mrs Venson and Nyirenda, acting through Collier as the emissary, pressed the Bank to make the payments without delay.

On what basis then could the Bank have thought, or been suspicious, that BHC's contract with Spectra was invalid or that it did not owe Spectra any money? After all, its own officials, including its chairperson, had told the Bank to pay Spectra. Would this have happened if BHC owed nothing? The suggestion, like the alleged ground of negligence, is absurd.

It follows that I find that Reynolds J was correct in non-suiting BHC.

There are two other defences relied on by the Bank why I also am of the view that this appeal must fail viz ratification and prescription. I turn to them.

The first is that of ratification. Even if it were the case that the Bank acted incorrectly in opening the two accounts in question when it did, it is clear that BHC through its responsible officials ratified its actions in so doing.

It is undisputed that following the opening of the accounts, BHC operated on them right up to September 1992 without demur. Deposits were regularly made into them, including one for P26 million in January 1992, and payments were regularly made out of them. The existence of the accounts and that they were being operated on were obviously known to members of the Board and particularly the chairperson, Mrs Venson, who, as stated earlier, directed that payment of the amounts referred to in the letters of 3 February 1992 be made out of the accounts without delay.

Her knowledge as chairperson of the accounts must be attributed to the Corporation (See Anderson Shipping (Pty) Ltd v Guardian National Insurance Co. Ltd 1987 (3) SA 506 (AD) at 515 H – 516H; Joubert: The Law of South Africa Vol 4 Part 1 “Companies” para 35). In Smith v Kwanonqubela Town Council 1999 (4) SA 947 (SCA) Harms JA at 952 C – F quoted from Reid and Others v Warner 1907 T.S. 961 at 971 – 2 where it was held that for a valid ratification there must be an intention by the principal to confirm and adopt the unauthorized acts of the agent done on his behalf “with the object of confirming the agent’s action in all events, whatever the circumstances may be”.

Ratification can be implied by conduct from which it can be inferred that the person alleged to have ratified intended to adopt or confirm the act.

I have already held that the actions of Letsholo and Collier in opening the accounts were not unauthorized but if they were, they were clearly ratified by Mrs Venson, the chairperson, and thus by the Corporation.

Moreover, until the amendment of its particulars of claim on 3 March 1999 BHC’s case was at all times based on the mandate contained in the letter of 24 October 1991. It was in breach of that mandate that BHC pleaded that the Bank was negligent in making the four payments in question. The decision to sue the Bank was taken on that mandate and in doing so the Board of BHC must have intended to rely on it and to ratify it, whatever defects there may have been in it (cf Smith’s case (supra) at 952 F-E)

Moreover, it is most probable that there was a Board resolution in regard to the opening of the accounts on 24 October 1991 or at least a directive from Mrs Venson, acting on behalf of the Board, to do so.

It was argued that ratification can only take place if the person ratifying knew of the defect in the agent's authority but nevertheless intended that the agent's actions should be confirmed despite the defect. It was contended further in this respect that Mrs Venson, whose actions in directing on 6 February 1992 that the payments be made immediately impliedly ratified Letsholo's authority, was relying on the mandate to the Bank of 24 October 1991 and had no knowledge that this was defective, her not being aware of the mandate of November 1983. In my view this argument can also not succeed. It may well be that knowledge of all the material circumstances is required before ratification can occur (See Neugarten and Others v Standard Bank of South Africa Ltd 1989 (1) SA 797 (AD) at 804 G – H.) However, in my view, the Corporation itself possessed that knowledge.

The knowledge involved had to be the knowledge of the Corporation. BHC cannot, in my view claim to be ignorant of its own resolutions. The resolution of November 1983 was certified in BHC's application to BCC as one that had been duly passed and entered in the minute book of the Corporation and duly signed by the chairman. There is no evidence that BHC, under whatever management, was deprived of access to its own minute books. Those minutes

reflect the state of knowledge of the Corporation. That knowledge does not cease to exist with the change in the personnel who make up the office-bearers of the Corporation from time to time. The Corporation therefore had the required knowledge when it, acting through its chairperson, Mrs Venson, ratified the October 1991 agreement. Reynolds J. was therefore correct in also non-suiting BHC on this ground.

What of prescription? Reynolds J dismissed the Bank's special plea that BHC's claim had prescribed. Was he correct in doing so?

The relevant statutory enactments which are germane to that enquiry are the following

Section 4(1) of the Prescriptions Act (Cap 13:01) provides that

“Extinctive prescription is the rendering unenforceable of a right by lapse of time”

The period of extinctive prescription is in terms of section 4 (2) (c), six years in respect of written contracts. It is common cause that a written contract is involved here with, accordingly, a six year prescriptive period.

Section 6(1) provides that

“Extinctive prescription shall begin to run
(a) in respect of an action for damages

- (i) where the debtor is known to the creditor, from the date when the wrong upon which the claim for damages is based was first brought to the knowledge

of the creditor, or from the date when the creditor might reasonably have been expected to have knowledge of such wrong, whichever is the earlier date."

Section 7 (1) (b) reads thus:

"7 (1) Extinctive prescription shall be interrupted by –

- (a)
- (b) service on the debtor of any process whereby action is instituted."

"Action" is defined as meaning valid legal proceedings for the enforcement of a "right." (Section 2) This obviously means a legal right. The Bank pleaded that when BHC's claim (which, as pleaded by it, was one for damages), founded as it was then on the banker-customer agreement between the parties of November 1983, was introduced by the amendment of 30 March 1999, the claim had already prescribed. The learned trial judge rejected this contention.

As set out above, BHC instituted action by way of summons dated 28 June 1994 for damages for a breach by the Bank on 21 January and 6 February 1992, by negligently making the payments in question, of its contractual agreement with BHC. That agreement, it originally pleaded, came into effect by BHC's letter to the Bank of 24 October 1991 requesting it to open the two "project" accounts and the Bank's written acceptance thereof on 28 October 1991. The issue of the summons on that case as then pleaded clearly interrupted prescription.

By its amendment of its particulars dated 3 March 1999, on 30 March 1999 (Reynolds J. says this was on 6 or 7 April 1999 but the date matters not, it was more than six years after November 1983) BHC based its action on breach by the Bank, in negligently making the payments on 21 January and 3 February 1992, of a banker-customer agreement with BHC in 1986. This was subsequently amended again in BHC's replication to a banker customer agreement concluded in November 1983.

BHC also alleged a new breach of that agreement viz that in opening the accounts in October 1991 on the basis of the letters of 24 and 28 October 1991 the Bank acted in conflict with the terms of the 1983 agreement and in doing so did not follow banking custom and practice or acted negligently in not calling for a resolution of the Corporation in support of the letter of 24 October 1991.

In considering whether a plea of prescription based on the new pleadings can be sustained there must be an investigation into the right as set out in the amended particulars of claim to decide whether this right is substantially the same right as that claimed in the original particulars of claim. If it is the plea of prescription must fail. (See Frol Holdings (Pty) Ltd v Sword Contractors C.C. 1996 (3) SA 1016(O) at 1021 A – C; Evins v Shield Insurance Co. Ltd 1980 (2) SA 814 (A.D) at 836 C-D).

A convenient test is whether if a plaintiff, after losing its claim as originally pleaded were to bring an action on its amended particulars of claim, it could be met with the defence of res judicata (See Willie's Plumbing Supplies CC v Ace Pools (East Rand) Edms Bpk 1996 (1) SA 518 (W).)

BHC's action is for damages based on a breach of contract. Such an action arises from the contract. (See LTA Construction Ltd v Minister of Public Works and Land Affairs 1992 (1) SA 837 (C) at 850 A – C; Brink v Mostert 1954 (4) SA 718 (C) at 722 B - D.) In casu BHC's claim for damages is alleged to arise from its contractual relationship with the Bank concluded in November 1983. This is an entirely different one from that upon which BHC originally based its claim for damages. Moreover, that claim is now also predicated upon a new and additional breach of the Bank's contractual obligations viz an unauthorized or negligent opening of the two accounts in question. It is my view, therefore, that the right on which its claim for damages is based is not the same as the one originally pleaded. The source of the right is not the same (See Voet 44.2.4) . Applying the test of res judicata and whether BHC's claim could be met with that defence the answer in my judgment would be "no".

It was, however, submitted on behalf of BHC that prescription would not run against it even in respect of the amended claim because the first date upon which it might reasonably have been expected to have knowledge of the wrong based on the 1983 agreement was when, in support of its amended plea dated

21 September 1999, the Bank made discovery of the application to open the account in November 1983. BHC had before then, it was submitted, had no knowledge of a banker –customer agreement concluded with the bank before then. In my view this submission must fail. I have already set out in relation to the defence of ratification that the Corporation, through its resolution as recorded in its minute books, had knowledge of the conclusion of the 1983 agreement. It did not lose that knowledge even though the personnel guiding its affairs changed.

In his judgment Reynolds] referred to the evidence that both the Bank's records were in disarray following its taking over the affairs of BCC and those of BHC following Letsholo's death and the events consequent thereon. The Bank said it had difficulty in tracing the 1983 contract. So, too, did BHC, said the learned judge. BHC could therefore only have had the requisite knowledge when the Bank discovered the contract in September 1999. In this I think the learned judge erred. There is no evidence that the minute books were not available to the Corporation. It obviously went nap in bringing its action on the agreement of October 1991 and never gave a thought to the fact that its relationship with the Bank must have existed before then. After all, the Board knew that prior to October 1991 the Bank was its banker. The signature arrangements of 1989 are evidence of that. It knew, too, that those varied previous arrangements. It must – or should - have given thought to the fact that there was a contractual relationship with the Bank before October 1991.

As section 6(1) (b) provides that prescription begins to run when the creditor might reasonably have been expected to have knowledge of the wrong on which it seeks to base its claim for damages, the onus is on the debtor to allege and prove that the creditor had the requisite knowledge on the date it instituted its action (See Gericke v Sack 1978 (1) SA 821 (AD)). The crucial word is "reasonable" BHC could have established with the exercise of reasonable diligence that the commencement of its banker-customer contractual relationship was in November 1983. It had, however, adopted a passive stance, simply accepting that the October 1991 agreement was the operative one, a position from which in March 1999 it sought to resile. As stated by Diemont JA in Gericke v Sack (supra) at 832 C-D, if the plaintiff could have acquired the requisite knowledge by acting diligently, its inertia, ineptitude or indifference will not excuse its delay. He said:

"The creditor who fails to exercise the reasonable care prescribed by the Act must pay the penalty for he is then deemed to have acquired the knowledge necessary for the debt to become due and for prescription to begin to run."

In my view the Bank discharged the onus on it and that accordingly the plea of prescription was established. On this ground, too, the appeal must fail.

The conclusions I have come to, as set out above, make it unnecessary for me to deal with the other defences raised by the Bank, including the defence of estoppel.

Counsel for the Bank, however, invited the court, even if it decided to dismiss the appeal on other grounds, nevertheless to rule on whether BHC's claim for "damages" was not misconceived and unsound in law. This would now be a purely academic exercise for which the Court has scant desire and the invitation is therefore politely declined.

I turn finally to the question of costs. Having succeeded in the appeal, the respondent Bank is entitled to its costs. But what of the costs occasioned by the Bank's Rule 22 notice? The Bank's counsel argue that all the matters set out in that notice were issues which arose and were argued at the trial. No new surprise points were contained in the notice. BHC's counsel, so the argument went, were aware of the issues and could thus have been prepared to deal with them. However, until they were told in the conversation between Dr. Lever and Mr. Petersen on 25 June 2002 of the notice, BHC's legal representatives did not know of it or of what issues the Bank was going to raise in the appeal. I have said that there is a dispute as to whether the notice had been served on the appellant's attorney. He says it was not and I think the probabilities favour his version. I think it is highly unlikely that an experienced, competent attorney, if he had received the notice, would not have informed his counsel of it in instructing them to prepare the appellant's heads of argument. The Bank accepts that BHC's counsel did not know of it until the conversation between junior counsel on 25 June 2002. BHC's heads did not deal with the points raised in the notice. It was not unreasonable for them not to have immediately tried to deal with the points in supplementary heads; they were entitled to wait

and see what the Bank had to say about the issues in its counsel's heads. Those were filed on 11 July 2002, some 12 days before the hearing of the appeal on the 23 July 2002. Again, I do not think it was unreasonable for BHC's counsel not to have prepared replying heads in haste in the short time available to them. They did their best to argue the issues raised in the notice but when it was apparent that they needed to put further argument before the court in reply to the Bank's submissions on those issues, it was agreed by the parties – and the Court – that they could do so in additional written heads, with an opportunity to respond given to the Bank's counsel and a further opportunity for BHC's counsel to reply to anything new raised in such response.

The result is that three sets of additional heads of argument were filed by counsel after the hearing of the appeal on 23 and 24 July 2002. In my judgment the responsibility for that having taken place must be borne by the Bank and that it would only be fair that they should bear the costs occasioned by them. An appropriate order will be made in regard thereto. BHC's counsel have submitted that the Bank should pay them on the attorney-client scale. In my view this is unwarranted and I do not intend to accede to it.

In the result the following order is made;

1. The appeal is dismissed, with costs.
2. The respondent is to pay the appellant's costs in connection with the respondent's notice in terms of Rule 22 (1) of the Rules of Court of Appeal and, in particular all costs incurred by appellant after 24 July 2002, occasioned by the late filing with this Court of the said notice.

DELIVERED IN OPEN COURT AT LOBATSE THIS 17th DAY OF
JULY 2003.



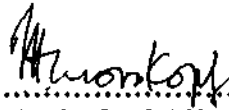
.....
P. H. TEBBUTT
JUDGE PRESIDENT

I agree



.....
K. R. A. KORSAH
JUDGE OF APPEAL

I agree



.....
F. H. GROSSKOPF
JUDGE OF APPEAL