Case Comments

Much Ado about Nothing? Legal Principles on Money, Banks and Their Clients after *Joint Stock Company Varvarinskoye v ABSA Bank Ltd*

JOHANN DE JAGER
South African Reserve Bank
Pretoria
Research Fellow of the College of Law
University of South Africa

1 Introduction

Roman-Dutch law, broadly referred to as the common law of South Africa, constitutes an authoritative subsidiary source of law in our legal system and is utilised in the interpretation, explanation and application of legal principles, especially in private law. English law, on the other hand, has had a major influence in general on South African commercial law, particularly in banking law. (See WG Schulze 'The Sources of Southern African Banking Law – A Twenty-First Century Perspective (Part I)' ('Schulze Part I') (2002) 14 *SA Merc LJ* 438 at 458 and WG Schulze 'The Sources of South African Banking Law – A Twenty-First Century Perspective (Part II)' ('Schulze Part II') (2002) 14 *SA Merc LJ* 601; *IPF Nominees (Pty) Ltd v Nedcor Bank Limited & Basfour 130 (Pty) Ltd* 2002 (5) SA 101 (W); *ABSA Bank Limited v IW Blumberg & Wilkinson* 1997 (3) SA 669 (A); and *First National Bank of Southern Africa Ltd v Perry NO* [2001] 3 All SA 331 (A). See also Michael Blair QC, Ross Cranston MP, Christopher Ryan & Michael Taylor *Blackstone's Guide to the Bank of England Act 1998* (1998) at 108 for similarities between the Banking Act 1987 (c. 37) in the United Kingdom and the Banks Act 94 of 1990 ('Banks Act') in South Africa.)

Yet South African banking law in general does not constitute a coherent and restricted field of law as may, eg, be evidenced by the multifaceted nature of the bank-client relationship. It invariably involves various types of contract such as mandate, loan for consumption, depositum and deposit-taking, all of which include aspects of private law. Banking law therefore mostly depends on the application of general legal principles to the peculiar facts of the matter under consideration. So Roman-Dutch law also applies in municipal law to matters of a banking nature mostly when considerations of private law are

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involved, to which extent it has proved particularly flexible in that its structure is built on principles (in contradistinction to the more rigid structure of English law which is based on judicial precedent). In this regard, Roman-Dutch law has been described as a living virile system of law ever seeking to adapt itself consistently with its inherent principles to deal effectively with the increasing complexities of modern organised society (see J Wessels 'The Future of Roman Dutch Law in South Africa' (1920) 37 *SALJ* 265 at 267; *Pearl Insurance Co v Union Government* 1934 AD 660 at 563; Schulze Part I op cit at 458; Peter Havenga, Michele Havenga (gen ed), Roshana Kelbrick, Marié McGregor, Heinrich Schulze & Kathleen van der Linde *General Principles of Commercial Law* 6 ed (2007) ('Havenga et al *Principles*') at 371; *S v Graham* [1975] 3 All SA 572 (A) at 578; and *Nissan South Africa (Pty) Ltd v Marnitz & Others (Stand 186 Aeroport (Pty) Ltd Intervening)* [2006] 4 All SA 120 (SCA) ('*Nissan*') in par 24 at 127).

A fairly recent case that involved important issues pertaining to money, banks and their clients was *Joint Stock Company Varvarinskoye v ABSA Bank Ltd & Others* ([2008] 3 All SA 130 (A) ('*Joint Stock*')). In my analysis I will discuss the role and nature of money and banks, as well as important features of relevant legal principles of banking law. The judgment is considered against this background in order to determine its potential impact and influence on banking law and in general on the business of banks.

2 The Role of Money and Banks in the Economy

In monetary economies, finance is intimately bound to the unique services of money. Although fiat money has no intrinsic value, it fulfils an essential role in every economic transaction in a monetary economy, either as a medium of exchange, a liquid store of value or as a unit of account. Money's role as a medium of exchange is unique and defining in that fiat money, in its capacity as legal tender, alone embodies the finality of payment in transactions in the economy. But the distribution of money in an economy usually does not perfectly match the trade and exchange needs of participants, and leads to the situation in which certain participants may have more, and others less, than the amount required. Moreover, the effectiveness of money in providing a store of value service is normally not guaranteed, and so it cannot be taken for granted that its purchasing power would be maintained through time. In these circumstances, members of society with a shortage of funds would be willing to pay something for the use of the medium of exchange services of money to obtain purchasing power that they do not have, but that they expect to earn in future. These loans would normally be funded by money obtained from other members of society with surplus funds who prefer not to store value for long periods in the form of money but elect to exchange it for a duly valued promise that it will in due course be returned (see Garry J Schinasi *Safeguarding Financial Stability: Theory and Practice* (2006) at 29; I Partington *Applied Economics in Banking and Finance* 4 ed (1989) at 23;

Frederic S Mishkin *The Economics of Money, Banking and Financial Markets* 8 ed (2007) at 181; and CD Campbell, G Rosemary & EG Dolan *Money, Banking and Monetary Policy* (1988) at 6).

For society's long-term economic prospects to be best served, some institutional mechanism is needed through which the savings of persons in the economy may be collected and channelled into productive investments, such as loans to deficit units that are able to repay them. Since potential savers will naturally perceive risk in parting with their money, they will be induced to entrust their savings to such an institutional mechanism only when they regard it as a safe and convenient outlet for their savings. Such an institution should at least maintain some fraction of their savings in the form of highly liquid assets and should be adequately funded to be able to effect payments for goods and services on behalf of their clients. The single dominant class of institution that has emerged worldwide to fulfil this crucial role of intermediating between savers and borrowers is the commercial bank (see JJ de Jager *The Management of Banks in South Africa: Legal and Governance Principles* (unpublished LLD thesis, Rand Afrikaans University (2000)) at 1 ('De Jager *Management of Banks*') and JJ de Jager 'Recognition of the Interests of Bank Depositors: The Corporate Governance Dilemma (Part 1)' 2002 *Tydskrif vir die Suid-Afrikaanse Reg* 205).

In the intermediary process, banks, predominantly in terms of loan contracts for liquid deposits ('liquid deposit contracts' – not to be confused with the Roman law concept of 'depositum', see below), borrow and invest their clients' money to earn a return for their shareholders and to meet the credit needs of the community. Loans may be in terms of a current account, which affords the client the right by means of cheques or money transfers to pay money from the account, or by means of savings accounts. In all these instances the bank commingles the amounts paid into accounts by customers with its general pool of funds and uses the amount accumulated to grant credit. As an aside to its main business, a bank may also offer a service in terms of which clients may hand their valuables to the bank for safe-keeping on the understanding that the bank returns the same valuables to the client at a future date. These valuables do not commingle with other property of the bank, do not become its property and are not in the normal course of banking business used for loan agreements with third parties. Consequently, this type of facility is not in the normal course of banking business utilised for the acceptance on deposit by a bank of normal legal tender money received from the general public, and does not form part of the general intermediary function of banks.

Banks normally utilise the proceeds of their liquid deposit contracts to finance the acquisition of illiquid assets of uncertain value that are subject to various risks. Their management has the discretion to determine their risk profiles, and the generation of a return to shareholders with funds originating from clients creates the framework for determining the risks that banks may undertake. The eventual redemption values of the liquid deposit contracts, however, are

independent of the performance of the banks and the assets involved. In the process, banks act as the custodians of the means of payment of the general public and serve as a place for the safe storage of the financial savings of the community. Banks are therefore, in the public interest, subjected to supervision worldwide by regulatory authorities who enforce minimum standards and prudential requirements to ensure that banks conduct their business within acceptable parameters of risk (see David H Pyle 'Bank Risk Management: Theory' in: Dan Galai, David Ruthenberg, Marshall Sarnat & Ben Z Schreiber (eds) *Risk Management and Regulation in Banking* (1999) at 7; Anthony C Valsamakis, Robert W Vivian & Gawie S du Toit *Risk Management* 3 ed (2005) at 25; JJ de Jager 'Recognition of the Interests of Bank Depositors: The Corporate Governance Dilemma (Part 2)' 2002 *Tydskrif vir die Suid-Afrikaanse Reg* at 713 and De Jager *Management of Banks* op cit at 3).

3 Prevalent Principles of Banking Law

The relationship between a bank and its client is regarded as a contractual one that comes into existence at the stage when there is consensus between the bank and its client and an account is opened in favour of the latter party. In terms of principles of the law of agency, such a contractual relationship between a client and a bank may be created, altered or extinguished by the actions of a duly authorised third person (agent) acting on behalf of the client. Accordingly, when a duly authorised agent on behalf of his or her principal opens an account with a bank on the latter party's behalf and deposits the principal's money into that account, the principal, in contradistinction to the agent, could be vested with the relevant client rights embodied in the banking contract. Moreover, a mandatory might perform certain tasks on a bank account (ie, the collecting and managing of payments) for a mandator. Thus, depending on the peculiar nature of a particular bank-client contract, the name of the account holder may not necessarily be decisive in the determination of either the de facto client of the bank, or the de jure holder of the rights in respect of the particular bank account under consideration (see Eliahu Peter Ellinger, Eva Lomnicka & Richard Hooley *Ellinger's Modern Banking Law* 5 ed (2009) ('Ellinger et al *Banking*') at 123; FR Malan, JT Pretorius & SF du Toit *Malan on Bills of Exchange, Cheques and Promissory Notes* 5 ed (2009) ('Malan et al *Bills*') at 132; Havenga et al *Principles* op cit at 371; AJ Kerr *The Law of Agency* 4 ed (2006) at 6; Schulze Part II op cit at 623; *Goodriche & Son v Auto Protection Insurance* 1967 (2) SA 401 (W); *McEwen NO v Hansa* 1968 (1) SA 465 (A); *Nissan* supra at 120; *Dantex Investment Holdings (Pty) Ltd v National Explosives (Pty) Ltd (in Liquidation)* 1990 (1) SA 736 (A); and *Gainsford NO, & Others v Gulliver's Travel (Bruma) (Pty) Ltd* [2009] JOL 23787 (W) ('*Gulliver's Travel*')).

In their most basic form, liquid deposit contracts may be classified as contracts of mutuum and effectively come into operation when money is deposited into an account with a bank. These deposits are not in the nature of

depositum as envisaged in Roman law that entail contracts of safe custody in terms of which the depositaries are obliged in due course to restore the very same moneys deposited with them. Deposits of money in terms of liquid deposit contracts constitute loans for consumption and involve commixtio of the money so deposited into the bank account involved with other similar deposits (see *Transitional Local Council of Randfontein v ABSA Bank Ltd* [2000] 2 All SA 134 (W)). Moreover, the concept of 'money' may entail something more than merely tangible notes and coin. Apart from deposits of money in the form of notes and coin or by means of negotiable instruments, money may also be transferred by means of the entry of a credit in the payee's account and the entry of a corresponding debit in the payer's account (see *Commissioner for Customs and Excise v FDR* [2000] STC 672; SF Du Toit 'Die Dematerialisasie van Geld: In die Skadu van die Sakereg' 2009 *Tydskrif vir die Suid-Afrikaanse Reg* 1 at 2; WG Schulze 'E Money and Electronic Fund Transfers. A Shortlist of Some of the Unresolved Issues' (2004) 16 *SA Merc LJ* 50 at 51; and WG Schulze 'Depositum, Deposit and Deposit-taking Institutions – Birds of a Feather? Not Quite' (2001) 13 *SA Merc LJ* 78 at 81).

In terms of principles of private law, an ordinary deposit of money with a bank done by means of a liquid deposit contract causes a real right of ownership to patrimonial liquid property (the amount of money), for the purposes of its consumption by the bank, to shift from the client to the bank. In this process, the money (being consumable res fungibles) loses its separate identity (through commixtio) by commingling with other similar money deposits of the bank. In exchange, the client is vested with a personal patrimonial right of performance against the bank. In simple terms, the patrimonial object of this right entails a right on the part of the client to demand and obtain from the bank the future repayment of a similar amount of money (with or without interest). A salient feature of a contract for liquid deposits is therefore that a real right of ownership is exchanged by the client (or the bank, in the case of an overdraft) for a personal right, which latter right may be subject to various risks relating, inter alia, to non-performance (see in general *Silberberg and Schoeman's The Law of Property* 5 ed by PJ Badenhorst, JM Pienaar & H Mostert (2006) at 43 and AJ van der Walt & GJ Pienaar *Introduction to the Law of Property* 6 ed (2009) at 12; *McEwen, NO v Hansa* supra at 12; *Commissioner of Customs and Excise v Bank of Lisbon International & Another* 1994 (1) SA 205 (W); *S v Kearney* 1964 (2) SA 495 (A); *Ex parte Estate Kelly* 1942 OPD 265; *Willies v Starkey-Howe & Others* 1955 (1) SA 607 (T); and *Fred P Ackerman's Properties (Pty) Ltd & Others v Estate Agents Board* 1980 (3) SA 451 (C)). On this basis, a liquid deposit contract between a bank and a depositor has been described as a contract between the bank as debtor and the depositor as creditor, with the roles reversed in the case of an overdraft. Owing to the bank being vested with the real right of ownership in the money held in terms of a liquid deposit contract, which right requires that others respect the virtually absolute entitlements of the bank regarding the same, the bank may lawfully deal with the commingled

pool of funds as it pleases without any reference to, or interference from its clients. Another important feature of the contract for liquid deposits is the enhanced risk of non-performance by the bank of its repayment obligation towards its client, in that a bank as part of its primary business normally has many similar exposures to other clients, the repayment of which are all not linked to the realisation of any profits or returns by the bank involved (see *Liebenberg v ABSA Bank Limited t/a Volkskas Bank* 1998 (1) SA 303 (C); *Foley v Hill* [1843] 60 All ER 16 at 19; *Volkskas Bank Beperk v Van Aswegen* 1961 (1) SA 493 (A); *Tsaperas v Boland Bank Ltd* 1996 (1) SA 719 (A); EP Doyle *Practice of Banking* 3 ed (1981) revised by JE Kelly at 3; Havenga et al *Principles* op cit at 371; and Ellinger et al *Banking* op cit at 93).

Repayment obligations in terms of liquid deposit contracts may also arise or be discharged as a result of payments by the bank to a person or persons as may be designated by the client, ie, as provided for by means of cheques drawn on a current account. In these circumstances, the bank has a duty to pay cheques drawn by the customer that are in all respects genuine and complete, on demand, provided that sufficient funds or credit for their payment are available on the client's account. In paying cheques, the bank needs to adhere strictly to the customer's instructions and must perform its duties with the required degree of care, generally, in good faith and without negligence. Once a bank has duly paid another party in accordance with its client's instructions, the bank is entitled to debit its client's account with the amount of the payment. Owing to such additional rights and duties attached to the underlying liquid deposit contract, which go much wider than the features of mutuum, the concomitant relationship between a bank and its client may more correctly be classified as a contract of mandate (see Malan et al *Bills* op cit at 296; Pretorius '*Commonwealth Trading Bank v Sidney Wide Stores (Pty) Ltd* (1981) 55 ALJR – Die Verhouding tussen 'n Bank en sy Kliënt' (1982) 45 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 333; JT Pretorius 'Aspects of the Collecting of a Cheque Cleared Through an Automated Clearing Bureau' (1998) 3 *SA Merc LJ* 326 at 334; and Schulze Part II op cit at 623).

Another manner by means of which repayment obligations may be reduced or expunged is by way of set-off. It may generally be applied in circumstances where similar debts or obligations of a liquid nature (ie, monetary claims) are due and payable between the same parties. On this basis, a bank is entitled to apply set-off between credit and debit balances of the same client, held in different accounts, even if they are held at different branches of the same bank (branches are not separate legal persons). The process entails the setting off of the personal patrimonial right of the bank to claim repayment of money from its client against a similar personal patrimonial right of the client against the bank, arising from existing contracts of liquid deposits between the two parties. In the process, the names on the accounts do not necessarily have to be the same, as long as the accounts de facto refer to one and the same client of the bank. When applied between bank accounts, set-off may be applied with retrospective effect to the date that the respective debts became legally

enforceable (see *Great North Farms (Pty) Ltd v Ras* 1972 (4) SA 7 (T); *Netherlands Bank of SA v Stern NO & Another* 1955 (1) SA 667 (W) at 669G-H; *Barclays Bank v SA Paper Processing Ltd* 1956 (2) SA 349 (T); *Barclays Bank Ltd v Okenarche* [1966] 2 Lloyd's Rep 87; *In re White v Brown* (1883) 4 NLR 88; and Coenraad Visser, JT Pretorius, Robert Sharrock, Marlize van Jaarsveld *Gibson South African Mercantile & Company Law* 8 ed (2003) at 103).

4 The Facts in *Joint Stock Company Varvarinskoye v ABSA Bank Ltd*

Joint Stock Company Varvarinskoye ('V') was a duly incorporated joint stock company tasked with the establishment of a gold and copper mine and processing facilities in Northern Kazakstan. In September 2005 it appointed a South African company styled MDM Ferroman (Pty) Ltd ('MDM') as project engineer and lead contractor to assist in establishing the mine and related facilities. In terms of the agreement between V and MDM, MDM was authorised to appoint sub-contractors. In this matter, V had an interest in ensuring that sub-contractors were paid in order to keep the enterprise on track. To ensure that MDM and such sub-contractors would be duly paid, V deposited funds into a current account number 1313 ('Account 1313') with ABSA Bank Limited ('ABSA'). Account 1313, a dormant account at the time with a nil balance, had some three years before been opened by MDM. As a safeguard, V entered into a written agreement with MDM ('the Agreement') which instituted a mechanism to ensure that payments by MDM from Account 1313 were made conditional upon certain formalities being met. A copy of the Agreement was supplied to ABSA and it was aware of the arrangement. Moreover, only money due to the sub-contractors and money earned by MDM were deposited by V into Account 1313.

MDM also maintained another bank account number 7348 ('Account 7348') with ABSA. In December 2005, Account 7348 was overdrawn with a debit balance of some R60,15 million (despite a limit of R17 million set by ABSA). At the time the debt was covered by a written agreement (dated 23 May 2005) in terms of which MDM agreed that any credit balance on any of its accounts might at any time, in the discretion of ABSA, be set off against any money owed by MDM to ABSA as well as a deed of cross-suretyship provided by MDM and others in favour of ABSA. Under these circumstances, ABSA, purportedly on the basis of set-off, reduced the debit balance in Account 7348 with the credit balance of some R28,24 million held in Account 1313. At the time, none of the credit balance on Account 1313 was owed to MDM. The funds were earmarked for the specific purpose of meeting the claims of sub-contractors.

V claimed that the money in Account 1313 rightly belonged to it and that ABSA was not entitled to apply set-off. It maintained that Account 1313 was utilised to warehouse money destined for MDM and its sub-contractors until

formalities were complied with entitling either or both to withdrawals of money. V maintained that at the time that the money was appropriated by ABSA, there was no money due to MDM and that the sub-contractors were the only persons who had a claim to what was in the account. V demanded that ABSA return the money to it. ABSA refused and based its refusal on the fact that money deposited into a bank account became the property of the bank and that only the account holder (MDM) had any right to contest the appropriation. ABSA maintained that a third party such as V had no right to the money that stood to the credit of MDM's account. The interest of V in Account 1313 ceased the moment it discharged its obligations to MDM by paying the money into the account.

V approached the Johannesburg High Court for an order declaring that the rights to the moneys in Account 1313, at the time of ABSA's purported appropriation thereof, vested in V, and compelling ABSA to repay an equal sum of money to V plus interest. The Court refused to grant the order. On appeal, on 28 March 2008, by unanimous decision (Howie P, Navsa, Ponnan, Maya and Cachalia JJA) the appeal was upheld and an order similar to that originally applied for was granted. Although Cachalia JA agreed with the result of the majority judgment delivered by Navsa JA ('majority judgment'), he came to the same result via different considerations ('minority judgment').

5 Ratio of the Judgment on Appeal

In the majority judgment in *Joint Stock* (supra) it was found that it was not a universal and inflexible rule that only an account holder may assert a claim to money held in an account with a bank. It was held that the proposition that money deposited in an account becomes the property of the bank did not necessarily militate against a legitimate claim by another party. The funds in an account may also 'belong' to someone other than the account holder or, for that matter, the bank or institution holding the money.

It was further held that the basis of ABSA's claim was nothing more than the right to appropriate set-off in relation to money owed to it by its debtors. Since ABSA was aware of the Agreement, the bank and MDM merely acted as the agents of V to warehouse the money in Account 1313. Since no parties other than V had any interest or claim to the money, it was held, with reference to *Nissan* (supra), that V was entitled to the relief sought. Since the appropriation in question was effected by a book-keeping entry, there was no impediment to the granting of the relief, such as that the money could not be followed to where it was kept on the basis that it was not the same coinage.

In the minority judgment it was held that the knowledge of ABSA with regard to the intended purpose of the amount held in Account 1313 was irrelevant for the purposes of set-off. The bank owned the funds in Account 1313. When an agent opens a separate account on behalf of a principal and deposits money into that account, the agent, or anyone claiming title through

him or her, has no vested right to the money. It follows that if the account holder has no title to the money deposited, then the bank also has no title. In the case of a dispute regarding entitlement to funds in an account, the intention of the parties to the agreement must be determined. The intention with which the bank holds the funds is of no relevance, unless the bank is a party to the agreement. Although the account was held in the name of MDM, it had no personal claim to the money in Account 1313. Properly construed, the Agreement required the money in Account 1313 to be held in trust to be dealt with only in accordance with V's instructions.

6 Discussion

Although issues involving banks and their clients are multifaceted and may involve complicated issues and various types of contract, the legal principles applicable to the facts in *Joint Stock* (supra) do not appear unduly complicated.

MDM was the holder of Account 1313, a current account against which cheques could be drawn in its favour and in favour of the sub-contractors. Typically, Account 1313 involved a contract of mandate combined with a contract of mutuum in terms of which ABSA borrowed some R28,24 million from its counterparty lender in terms of a liquid deposit contract for consumption. In exchange for the loan, the counterparty acquired a personal patrimonial right to demand and obtain from ABSA the future repayment of a similar amount (with or without interest) as envisaged in terms of the conditions of the relevant current account. At the time of its deposit into the account, the money commingled with other similar funds in the possession of ABSA became its property and could in due course, in accordance with the bank's intermediary role by means of totally unrelated loans, be channelled to deficit units in the economy.

Although Account 1313 was in the name of MDM and it was the account holder, this did not ipso facto qualify MDM as the counterparty of ABSA, vested with all the relevant rights embodied in the account. In the light of the particular circumstances, rules of interpretation and construction needed to be applied to Account 1313 in order to ascertain its true meaning and the intention of the parties to it. In this regard, the source of the money deposited into Account 1313, the purpose of the deposits and the nature of the Agreement were relevant. It is evident from the uncontested facts that the money deposited into Account 1313 was supplied by V and that it was deposited into the account in order to be utilised to meet V's financial obligations towards MDM and the sub-contractors. In terms of the Agreement, cheques could be drawn only once MDM had submitted invoices, V had approved their payment, and a third party had countersigned the cheques together with MDM. ABSA was at all times aware of these specific arrangements.

On these facts, it is evident that V, in contradistinction to MDM (who was clearly an agent and mandatary of V), was the counterparty of ABSA at least

in terms of the liquid deposit contract embodied in Account 1313. Accordingly, in terms of that contract V was vested with the relevant personal patrimonial right of performance towards ABSA. MDM was clearly the counterparty to ABSA in the separate but similar contract evidenced by Account 7348 and thus indebted to ABSA to the tune of some R60,15 million. As a result thereof, ABSA, in turn, was vested with the personal patrimonial right to demand and obtain repayment of that debt from MDM.

ABSA would have been entitled to set off MDM's personal obligation towards ABSA against ABSA's personal obligation towards V (and thereby reduce MDM's liability towards ABSA), only if MDM and V were one and the same counterparty. However, since they constituted separate independent legal entities, set-off could not legally be applied as attempted by ABSA and V was entitled to the relief sought by it.

It is acknowledged that for a system of law to survive, it must adapt itself to changing circumstances, while retaining its essential features. However, this should apply only in circumstances where a clear need exists for change, which was clearly not the case in *Joint Stock* (supra). As indicated above, common-law principles of banking law catered more than adequately for the peculiar facts of the case. The judgment should therefore as far as reasonably possible be construed in accordance with these relevant principles of common law, whilst bearing in mind that there was no apparent need here to justify a change of sound, well-established and essential principles of South African banking law.

In the majority judgment the refusal to allow set-off against the money in Account 1313 was based on the premise that MDM and ABSA, as agents of V, were merely 'warehousing' the money in the account for specific purposes (par 36 at 138). The fact that ABSA was aware of the Agreement and the specific arrangements was regarded as 'highly relevant' in indicating agreement between the bank and MDM to hold the money in Account 1313 as agents on behalf of V (par 37 at 138). Whilst 'warehousing' is not a generally recognised and defined legal concept in terms of common law, the concept of agency is, and is used in a variety of legal contexts to refer to contracts of agency and mandate. In these circumstances, the Agreement could also have constituted an agency agreement between ABSA and V, in terms of which ABSA (as V's agent) would have extinguished legal relationships of V (as principal) when paying MDM and the sub-contractors. This contract of agency would have been in addition to the contracts of mandate between V and MDM in terms of the Agreement and between ABSA and MDM as the account holder of Account 1313.

The finding in the majority judgment that it was not a universal and inflexible rule that only an account holder may assert a claim to money held in an account with a bank merely confirmed the existing legal position as evidenced in cases such as *McEwen* and *Dantex* (supra). These cases, as well as the judgment in *Nissan* (supra), also illustrate that the concept of money deposited in an account becoming the property of the bank did not necessarily

militate against a legitimate personal claim by another party to the money. In terms of common law the personal patrimonial right of performance against the bank arising from money deposited with it may also vest in, or 'belong' to someone other than the account holder. That notion was evidently what Navsa JA, in delivering the majority judgment in *Joint Stock* (supra), had in mind. Nevertheless, the common law also caters for a situation where (as the majority judgment acknowledged (par 33 at 137)), money with a bank could belong to someone other than the bank. In such a case, if banks were to act as agents in respect of money deposited with them, then in terms of common law the money must be deposited as a corpus (ie, be enclosed in a separate receptacle or sealed in some way) so as not to commingle with other money (see J Voet *Commentarius ad Pandectas* 20.4.13, as quoted in *Dantex* (supra)). Such a deposit would be in the nature of a depositum in Roman law, where the depositor entrusted the money to another person for safe-keeping on the understanding that the same money be returned in future.

The judgments in *Dantex*, *McEwen* and *Nissan* (supra), all referred to with approval in *Joint Stock* (supra), dealt with the personal rights of parties other than the account holder to claim payment of money held in an account with a bank. In *Nissan* (supra) the Court took into account that it was common cause, if it concluded that the account holder in that case was not entitled to the contested funds, that the third party from whom the funds originated was entitled to payment thereof; and the Court made an order accordingly. The case dealt with an account holder's entitlement to claim money from a bank because of an amount mistakenly transferred to the account holder's bank account (par 25 at 127). In these circumstances it was held that the ownership of the money did not pass from the bank paying the money to the bank receiving the money and, consequently, that the account holder in question never obtained the right to claim payment of the funds from the receiving bank. If the account holder knowingly drew these funds from the account and utilised them for the account holder's own purposes, it would be tantamount to theft (see Malan et al *Bills* at 252 for a critical discussion of the case). The majority judgment in *Joint Stock* (supra), with reference to this ratio in *Nissan*, held that as no person other than V had any *interest or claim* (emphasis supplied) to the money appropriated by ABSA, V was entitled to the relief sought (par 42 at 140). The facts in *Joint Stock* (supra) should, however, be differentiated from the facts in *Nissan* (supra) on the basis that it dealt with a regular, wilful and deliberate deposit of money by V into Account 1313 with ABSA, with the intention that the bank receive the funds and utilise them to pay creditors of V. Unlike *Nissan*, *Joint Stock* did not deal with the validity and enforceability of the personal patrimonial right of an account holder arising from an unjustified or wrongful deposit of funds into the bank account of the account holder in question, but merely dealt with a purported set-off of existing personal patrimonial rights between parties arising from ordinary liquid deposit contracts with ABSA. Although the real right of ownership in the money in Account 1313 was irrelevant for the purposes

of dealing with set-off, the concept of money deposited into Account 1313 becoming the property of ABSA would nevertheless not have militated against the vesting in V (in contradistinction to MDM) of a legitimate personal claim to the money. The concept of deposits in a current account with a bank belonging to someone other than the bank could therefore not have been of real significance in the adjudication of the issue in *Joint Stock* (supra).

In the minority judgment, it was held that the knowledge of ABSA with regard to the intended purpose of the amount held in Account 1313 was irrelevant and that the Agreement required the money in Account 1313 to be held in trust to be dealt with only in accordance with V's instructions. However, the payment of the money by V into Account 1313 was a bilateral juristic act requiring the meeting of its mind with that of ABSA. For that reason, ABSA's knowledge of the purpose of the account was not only relevant, but essential (see *Burg Trailers SA Pty Ltd & Another v Absa Bank Ltd & Others* 2004 (1) SA 284 (SCA) and *Nissan* (supra) at 126). The Agreement also constituted a contract of mandate between V (as mandator) and MDM (as mandatary) and evidently an agency agreement between ABSA and V. Furthermore, the classification of either the money as 'trust money' or the Account 1313 as a 'trust account' would in the ordinary course of business neither change the nature of the account, nor the rights embodied therein or the rights of creditors (*Dantex* supra; *Ex parte Estate Kelly* supra at 272; *Fred P Ackerman's Properties (Pty) Ltd* supra at 451; and *Kayser & De Beer v Estate Liebenberg* 1926 AD 91 at 97).

7 Conclusion

As indicated above, banks operate as financial intermediaries in terms of liquid deposit contracts by placing themselves as principals between the ultimate lender and ultimate borrower in the economy. They are best suited for this role and have a competitive advantage since they enjoy economies of scale and have better information. In the process they write debt contracts as principals on both sides of their balance sheet: on the liabilities side, the liquid deposits contracts are for money-certain deposits, and on the other side, the debt contracts are non-marketable and of uncertain value, subject to risks. These risks are mitigated by diversification. On the liability side, banks conduct an investment function by assessing investment opportunities, investing and monitoring subsequent investment strategies. In effect, they exercise control over the behaviour of borrowers to the indirect benefit of depositors. Since much of the information about borrowers is not public knowledge, a bank enables lenders to select better investments and to monitor their performance much better than the lenders would have been able to do themselves. In the process, lenders in terms of liquid deposit contracts obtain personal patrimonial rights against the bank which, owing to official regulation and prescribed prudential requirements, are more certain. On the

other hand, borrowers, through banks, obtain more certainty of funds in exchange for the kind of assets that they are willing to exchange. Without the intermediary function, lenders may not lend because they may not be aware of the potential borrowers, are unable to conduct proper risk assessments, do not have sufficient money, or the assets offered by the borrowers in return for the loan may be unacceptable (see De Jager *Management of Banks* op cit at 389). Accordingly, banks, as a general feature of their normal business of accepting deposits from the general public and on-lending it, conduct principal business. On that basis, inter alia, deposits are commingled, prudential requirements are introduced, and banks are supervised in terms of the Banks Act. Moreover, depositors in a failed bank are required to queue in the concursus creditorum as regards the repayment of their deposits.

Any recognition of a general principle that deposits in a normal current account with a bank may belong to someone other than the bank is clearly not in accordance with sound, well-established and cardinal principles of South African banking law. Depositum as envisaged in Roman law would simply not allow for the payment of third parties as contemplated by means of money on a cheque account. Since banks in such a scenario would merely act in a representative capacity and the money deposited with them would not be susceptible to commixtio with other similar funds, it is evident that banks would not be able, as principals in the ordinary course of banking business, in their sole discretion, to on-lend the same in such denominations and amounts as may be required to creditworthy deficit units in the economy.

Owing to the potential detrimental effect that a deviation of such nature from generally accepted banking law principles may have on the normal day-to-day business of banks and their intermediary role, the majority judgment in *Joint Stock* (supra) should as far as reasonably possible be construed against the background of existing principles of banking law. Such an approach is justified on account of the fact that *Joint Stock* (supra) did not require any change to existing legal principles in order to suit its circumstances, as was contemplated in *S v Graham* (1975 (3) SA 569 (A) at 573E-H) and in *Nissan* (supra in par 24 at 127). As indicated above, set-off could not be applied by ABSA in *Joint Stock*, not because the bank was not the owner of the funds deposited with it, but because MDM and V were separate independent legal entities and for the purposes of set-off, similar liquid debts must be owed by two persons each to the other. In casu, ABSA was vested with a personal liquid claim against MDM as a result of the latter party's debit on Account 7348, and V (a person different from MDM), was vested with a similar personal liquid claim against ABSA arising from the credit on Account 1313.

Against the above background, the somewhat vague and unrelated reference in the majority judgment to the possibility that funds in an account with a bank may belong to someone other than the bank should not be construed as a change of, or amendment (for no apparent reason) to the sound, well-established and essential principle in South African banking law that

money deposited with a bank in terms of a liquid deposit contract becomes the property of the bank. It may be evidenced by the following passage from the judgment by Saldulker J (in *Gulliver's Travel* supra in par 99 at 39), delivered on 7 April 2009:

> 'What Navsa J was postulating in *Joint Stock* was who was intended to be beneficially entitled to the monies in a bank account. That is the enquiry. It does not matter if the account is in customer X's name. The mere fact that you are the account holder does not mean that you are entitled to assert against the bank your entitlement to the money standing to the credit of that account. That is the *ratio*. In simplistic terms because you are the account holder does not mean that you can claim. The monies paid into an account is not necessarily money to which the account holder is entitled. . . .'

Consequently, the remark in question by Navsa JA in the majority judgment in *Joint Stock* (supra) should at most be regarded merely as an obiter dictum that the Court could in future be prepared to acknowledge an exception to the long-established, widely implemented common-law principle of banks' real rights of ownership to deposits on their accounts whenever changing circumstances in the field of banking, for some substantial reason, indicate a clear need for a change of that long-established legal principle. This is in line with the concept of Roman-Dutch law being a living virile system of law ever seeking to adapt itself consistently with its inherent principles to deal effectively with the increasing complexities of modern organised society.