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**IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)**

Date: 2011-05-06

Case Number: 5944/07

In the matter between:

FIRSTRAND BANK LIMITED	~~DELETE WHICHEVER IS NOT APPLICABLE~~ (1) REPORTABLE: ☒ YES/NO (2) OF INTEREST TO OTHER JUDGES: ☒ YES/NO (3) REVISED DATE <u>6-5-11</u> SIGNATURE <u>BR. Buthe</u>	Plaintiff
and		
CONRAD FOURIE		First Defendant
JACOBUS SPANGENBERG N.O.		Second Defendant

JUDGMENT

SOUTHWOOD J

[1] The plaintiff seeks an order directing the first and second defendants, jointly and severally, the one paying, the other to be absolved, to pay to the plaintiff:

- (a) the capital amount of R7 340 229,73;
- (b) interest up to and including 31 October 2010 in the amount of R4 167 605,72;
- (c) interest on the capital amount of R7 340 229,73 calculated at the rate of 2 % above the prime rate charged by the plaintiff from

time to time (presently 9.5 % per annum) from 1 November 2010 to date of payment ('the debt').

The plaintiff seeks this relief against the first defendant in terms of section 424(1) and (2) of the Companies Act 61 of 1973 ('the Act') alternatively, on the basis of the *actio lex acquilia*. The plaintiff seeks this relief against the second defendant on the basis of the *actio lex acquilia* only. In order to succeed against the first defendant in terms of section 424 of the Act the plaintiff must establish the requirements for liability in terms of that section and the court must declare that the first defendant is personally responsible to the plaintiff for the company's debt. In order to succeed against the defendants on the grounds of the *actio lex acquilia* the plaintiff must establish all the requirements for such liability which obviously includes damage and causality. For the sake of convenience (for reasons which will appear later) I shall refer to the first defendant as Fourie and the second defendant as Du Preez.

- [2] This case was heard initially for 9 days during May 2009 and, when it could not be completed, was postponed *sine die*. It was set down again for hearing during a further period of 15 days from 11 October to 29 October 2010. On 22 July 2010 Du Preez took his own life and on 5 August 2010 two executors, Jacobus Spangenberg and Cornelius Johannes Nel (who had been acting as the defendants' attorney), were appointed to wind up his estate. After Nel resigned as executor the

Master appointed the present executor, Jacobus Spangenberg, as the sole executor in Du Preez's estate. In accordance with Rule 15 Mr. Spangenberg has been substituted as a party to this dispute. As already pointed out the executor will conveniently be referred to as Du Preez.

- [3] After Mr. Nel and Mr. Spangenberg were appointed executors in Du Preez's estate they decided that the estate should be represented by its own legal representatives (until then Fourie and Du Preez had been represented by Mr. Nel as attorney and Adv. Klopper) and that they required time to consider the estate's position and obtain legal advice. After their request for a postponement was refused by the plaintiff, Mr. Nel and Mr. Spangenberg brought a substantive application for a postponement of the trial. On 29 September 2010 the court dismissed that application with costs, including the costs of two counsel, and gave reasons for the dismissal of the application. Either in chambers or during argument the court expressed concern about the alleged necessity for appointing a second legal team to represent Du Preez's estate, particularly because there was no suggestion that the defendants' counsel was not acting in accordance with instructions or that the defendants' legal team was not able to render the service required. As already mentioned, shortly after the judgment on 29 September 2010 Mr. Nel resigned as executor in Du Preez's estate and resumed his role as attorney.

Section 424 of the Act

[4] The relevant parts of section 424 of the Act read as follows:

‘(1) When it appears, whether it be in a winding-up, judicial management or otherwise, that any business of the company was or is being carried on recklessly or with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the court may, on the application of the Master, the liquidator, the judicial manager, any creditor or member or contributory of the company, declare that any person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct.

(2)(a) Where the Court makes any such declaration, it may give such further directions as it thinks proper for the purpose of giving effect to the declaration, and in particular may make provision ...’

[5] The Supreme Court of Appeal has considered the provisions of section 424 of the Act on a number of occasions and explained its broad purpose and interpreted key words and expressions:

(1) Intention of the Section

Although the legislative intention was to broaden the scope of the precursor to section 424 (i.e. section 185 of the Companies Act 46 of 1946) and to extend the remedy by means of which a

restraining influence can be exercised on persons (particularly 'over-sanguine directors') who knowingly are parties to the carrying on of the business recklessly or with intent to defraud creditors of the company (or any other person) or for any fraudulent purpose, that does not mean that recklessness is lightly to be found – ***Philotex (Pty) Ltd and Others v Snyman and Others* 1998 (2) SA 138 (SCA)** at 142G-H.

(2) Liability created

The object of section 424 is not to create a joint and several liability between the person and the company in the interest of creditors. If the company cannot pay, the creditor is entitled to claim from the person without having to place the company in liquidation or under judicial management. This does not mean that the creditor has to excuss the company before proceeding against the person but only that there must be evidence of the company's inability to pay – ***Saincic and Others v Industro-Clean (Pty) Ltd and Another* 2009 (1) SA 538 (SCA)** para 27.

(3) 'Knowingly'

The person seeking to enforce section 424 must prove that the person sought to be held liable had knowledge of the facts from which the conclusion is properly to be drawn that the business of the company was or is being carried on recklessly or with intent

to defraud creditors of the company or creditors of any other person or for any fraudulent purpose. It is not necessary to prove that the person had actual knowledge of the legal consequences of these facts – ***Howard v Herrigel and Another NNO 1991 (2) SA 660 (A)*** at 673I-674A; ***Philotex*** at 143A-B.

(4) 'A party to the carrying on of the business aforesaid'

Being a party to the conduct of the company's business does not have to involve the taking of positive steps in the carrying on of the business: it may be enough to support or concur in the conduct of the business – ***Philotex*** at 143B-C; ***Howard v Herrigel*** at 674G-H.

(5) The party alleging recklessness must prove it on a balance of probabilities – ***Philotex*** at 142I-J.

(6) 'Recklessly' contains the involvement of a risk whether or not the doer realises it or not and the ordinary meaning of the word includes gross negligence, with or without consciousness of risk-taking and gross negligence includes an attitude or state of mind characterised by 'an entire failure to give consideration to the consequences of one's actions, in other words, an attitude of reckless disregard of such consequences' – ***Philotex*** at 143C-F.

- (7) The test for recklessness is objective insofar as the person's actions are measured against the standard of conduct of the notional reasonable person and it is subjective insofar as one has to postulate that notional being as belonging to the same group or class as that person, moving in the same spheres and having the same knowledge or means to knowledge – ***Philotex*** at 143G-H.
- (8) 'Reckless disregard of the consequences' refers to unforeseen consequences – culpably unforeseen – whatever they might be – ***Philotex*** at 143I-J.
- (9) 'Recklessly' connotes at the very least gross negligence – ***Philotex*** at 144A-B.
- (10) In the application of the recklessness test to the evidence before it a court should have regard, *inter alia*, to the scope of the operations of the company, the role, functions and powers of the directors (i.e. the persons), the amount of the debts, the extent of the company's financial difficulties and the prospects, if any, of recovery – ***Philotex*** at 144B-C.
- (11) Causality

In terms of section 424(1) a court may declare a director (who is knowingly a party to fraud on the part of his company) liable 'for all of the debts or other liabilities of the company' without proof of a causal connection between the fraudulent conduct of the business of the company and the debts or liabilities for which he may be declared liable – *Philotex* at 142I-J; *Howard v Herrigel* at 672C-D. However, it has recently been held that, as far as creditors are concerned, the section must be interpreted to mean that there must be a causal link between the reckless conduct and the inability to pay the debt. In other words it must be due to the reckless conduct that a particular creditor's debt cannot be paid – *L & P Plant Hire BK en Andere v Bosch en Andere 2002 (2) SA 662 (SCA)* paras 39 and 40. Whether this is also true where the business is fraudulently conducted is not so clear. It may just be a consideration to be taken into account when the court exercises its discretion- *Sainsic* para 20 and 29.

Background

- [6] The plaintiff's claims arise out of the conduct of the business of XHRS Investments 71 (Pty) Ltd t/a Supreme Car ('Supreme Car') during the period 16 August 2001 to 20 April 2004. During that period Ms. Ray Naude was the sole shareholder and managing director of the company; Ray Naude's son, Danie Naude ('Naude') was the *de facto* managing director of the company; Du Preez was the auditor; Fourie

was an accountant employed by Du Preez and was required by Du Preez to monitor and control Supreme Car's cash flow and at all times acted within the course and scope of his employment with Du Preez; Johan Schoeman was employed by Supreme Car as its internal accountant and Adele Ferreira was employed by the company as its debtor/creditor clerk. From 16 August 2001 until 20 April 2004 Supreme Car conducted business in Polokwane and Tzaneen as a dealer in used motor vehicles. To enable Supreme Car to conduct its business the company entered into a written Used Car Floorplan Agreement ('the floorplan agreement') with the plaintiff on 15 November 2001. In terms of the floorplan agreement the plaintiff would provide Supreme Car with finance to purchase used cars for resale. At first the facility was limited to R3 million but as the business expanded Supreme Car applied for and was granted increases in the facility to R4 million, then R6 million, then R8 million, then R9.3 million and finally R13 million. From time to time the plaintiff also granted temporary extensions of the facility, the last of which was R3 million (thus increasing the facility to R16 million). The plaintiff cancelled this temporary extension prematurely on 23 February 2004 because of 'Supreme Car's persistent inability to service or liquidate the facility'. Eventually, on 20 April 2004, the plaintiff cancelled the floorplan agreement because it considered Supreme Car to be a credit risk with regard to its obligations in terms of the agreement - which was a material breach of the agreement. On that date there were 136 vehicles subject to the floorplan agreement which the plaintiff had

financed and Supreme Car had not repaid ('settled'). When the plaintiff went to Supreme Car's premises to repossess the vehicles it found only 84 of the vehicles. The remaining 52 were missing and could not be accounted for. At that stage Du Preez and Fourie calculated that Supreme Car owed the plaintiff R13 777 882,55 in terms of the floorplan agreement. To recover the debt the plaintiff sold the vehicles. One vehicle (a Toyota Corolla) was sold to its local manager, Hentie Pienaar, on 20 May 2004 for R40 900 and the remaining vehicles by public auction, 63 on 24 July 2004 and the remaining 20 on dates thereafter, for a net amount of R7 109 353,38 (total sale price inclusive of VAT of R7 309 110 less auctioneer's commission of R199 776,62). The cancellation of the floorplan agreement and the repossession of the motor vehicles effectively put an end to Supreme Car's business.

- [7] On about 13 May 2004 Supreme Car represented by Ray Naude launched an urgent application against Fourie in which Supreme Car sought an order for Fourie's sequestration. Supreme Car alleged that it was a creditor of Fourie because he had stolen large amounts of money from Supreme Car. Fourie opposed the application and on 20 May 2004 filed a comprehensive answering affidavit in which he set out his version. He denied having stolen or misappropriated Supreme Car's funds and alleged that Supreme Car had experienced financial difficulties because of the uncontrolled spending by Ray Naude and Naude, in particular their purchase of seaside properties at Yzerfontein on the Cape West Coast. The application did not proceed because

Supreme Car was placed under provisional liquidation on 17 May 2004 and under final liquidation on 15 June 2004.

- [8] During September 2004 an enquiry was held in terms of section 417 of the Act at which the Naudes, Du Preez and Fourie testified about the roles which they played in the Supreme Car business. It is clear that Supreme Car was hopelessly insolvent when it was placed under liquidation and that it would not be able to repay the plaintiff the money owing in terms of the floorplan agreement.

Wrongful conduct relied upon

- [9] In its particulars of claim the plaintiff relies on three categories of conduct which it contends are wrongful (I paraphrase):

(1) Misappropriation of monies

The plaintiff alleges that Supreme Car purchased motor vehicles in terms of the floorplan agreement, sold these vehicles in terms of instalment sale agreements, ceded its rights in respect of these instalment sale agreements to financial institutions other than the plaintiff, received payment from such financial institutions and then failed to pay the plaintiff what it owed in terms of the floorplan agreement. According to the plaintiff such action by Supreme Car:

- (a) amounted to theft of monies due to the plaintiff;
- (b) amounted to fraud on the financial institution 'in that it was represented to the financial institution, which therefore believed, that it would acquire ownership of the vehicle in question, when in truth and in fact such ownership remained vested in the plaintiff'.

The plaintiff alleges that Fourie committed these acts.

Alternatively, the plaintiff alleges that Fourie was aware that the plaintiff was unaware that Supreme Car was selling the motor vehicles purchased under the floorplan agreement and not settling its indebtedness to the plaintiff in respect of these motor vehicles and fraudulently failed to disclose these facts to the plaintiff and this failure induced the plaintiff to advance further monies to Supreme Car.

(2) Fraudulent conduct in respect of bank accounts

The plaintiff alleges that Supreme Car had a Standard Bank account in the name of XHRS Investments 71 (Pty) Ltd t/a Supreme Car; an Absa Corporate Saver account in the name of XHRS Investments 71 (Pty) Ltd; an Absa Corporate Saver

account in the name of Supreme Car and that Fourie deposited cheques payable to Supreme Car (either in its proper name or in the name of Supreme Car) in the two corporate saver accounts and immediately obtained cheques (for the same amounts) drawn on these accounts and deposited these cheques into the Supreme Car Standard Bank account or transferred the funds electronically into the Standard Bank account and thereby created the false impression that Supreme Car had cash available in the Standard Bank account and that as a result of this fraudulent conduct the plaintiff was induced to extend credit to Supreme Car.

(3) Fraud in respect of Supreme Car's financial statements

The plaintiff alleges that Fourie prepared four financial statements (for the periods ending 28 February 2002, 31 January 2003, 28 February 2003 and 30 June 2003) which to the knowledge of Fourie falsely misrepresented to the plaintiff that Supreme Car's business was growing, was profitable and was financially sound whereas Fourie knew that Supreme Car was not profitable and was not financially sound and in fact was trading under insolvent circumstances; that these misrepresentations were material and were made with the intention of inducing the plaintiff to extend credit to Supreme Car.

[10] The parties prepared a number of bundles to be used during the hearing and documents in these bundles were referred to by the witnesses. Documents incorporated in the bundles were subject to the agreement that they are what they are purport to be save that the truth of the contents is not admitted; that in the absence of contrary evidence, correspondence was deemed to be have been sent and received by the addressor and addressee thereof or on or about the date appearing thereon and all other documents were deemed to have come into existence and/or signed on the dates appearing thereon and to have been written by the ostensible author thereof. The parties also agreed that these trial bundles may be supplemented at any time before completion of the trial. The following bundles were prepared and referred to (where necessary they will be referred to in this judgment):

Bundle A	Pleadings
Bundle B	Pre Trial Bundle – minutes and related documents
Bundle C	Notices
Bundle D	Expert Reports
Bundle E	Exhibits for experts reports
Bundle E1	Exhibits for the plaintiff's Expert's Report
Bundle F	Facility Letters
Bundle G	Supreme Car's application to sequester Fourie
Bundle H	Plaintiff's bundle

Bundle J	Defendants' bundle
Bundle K	Schedule of e-mail correspondence
Bundle L	Compilation of alleged admissions made by Fourie in the application for his sequestration and the section 417 Enquiry

[11] During the trial it became clear that the important *dramatis personae* in the conduct of Supreme Car's business were Ray Naude, Naude, Johan Schoeman, Adele Ferreira, Fourie and Du Preez. Ray Naude passed away before the plaintiff instituted the action, Naude passed away after the matter was postponed in May 2009 and Du Preez took his own life on 22 July 2010. To further complicate matters Mr. Freeman, the liquidator most closely involved in the winding up of the company, passed away and his co-liquidator Mrs. Stroh had to testify on the progress made in winding up the estate and the likelihood of a dividend to be paid to the plaintiff.

[12] The plaintiff tendered the evidence of a number of witnesses and Fourie testified for the defendants. The plaintiff tendered the evidence of Mr. Hentie Pienaar (Wesbank's branch manager in Polokwane from May 2003 until April 2004), Mr. Steven James Harcourt-Cooke (a chartered accountant, certified fraud examiner and specialist in forensic accountancy, who testified as an expert), Mrs. Adele Ferreira (Supreme Car's creditor clerk from about March 2002 until April 2004), Mrs. Jakoba Johanna Maria Coetzee (Wesbank's manager of bad

debts and collections who was Wesbank's legal department manager for the Northern Region during 2004), Mr. Johannes Strydom (a Wesbank employee involved in auctions of repossessed motor vehicles), Mr. Edward Charles Symes (a credit manager in Wesbank's Head Office Credit Control department during the period that the plaintiff did business with Supreme Car) and Ms. Rina Elaine Ströh (an insolvency practitioner and one of the co-liquidators of XHRS Investments 71 (Pty) Ltd). As the trial progressed more and more issues were resolved by agreement and at the end of the trial it appears that a great deal of their evidence is no longer relevant to decide the main issues. In that regard the evidence of Mr Hentie Pienaar, Mrs Adele Ferreira and Mr Edward Symes remains relevant. Fourie is obviously a crucial witness as he is a defendant and was involved in the day to day running of the company although there is a dispute about how closely he was involved and what his responsibilities were. Pienaar, Ferreira and Symes gave important background and/or circumstantial evidence but the evidence of the other witnesses need not be considered. In rebuttal the plaintiff called Ms. Raylene Meyer (the manager of Wesbank specialised collections) to testify about the securities held by the plaintiff for Supreme Car's debts.

- [13] Pienaar was a satisfactory witness although he tended to give long rambling answers and to make assumptions about the facts. Ferreira was a very good witness and I have no hesitation in accepting her evidence. Symes was dependent upon the plaintiff's records and

clearly (and understandably) had no independent recollection of events. Nevertheless he was able to piece together what information was given to the plaintiff for a decision to be taken regarding credit limits for Supreme Car's floor plan scheme. There is no reason not to accept the reliability of these records. Fourie was a most unsatisfactory witness. He gave evidence for 7 days and was extensively cross-examined. There is no doubt that he will say anything to avoid being held liable for Supreme Car's indebtedness to the plaintiff. This became clear when he testified about how he had had to work through the night with his attorney to prepare an answering affidavit in the urgent application for his sequestration. He obviously wanted to provide an explanation in advance for whatever prejudicial evidence would emerge from his answering affidavit. He testified in detail about the fact that he had received the application on 13 May 2004 and had had to prepare his answering affidavit before 10h00 on 14 May 2004 and he was dumbfounded when it was pointed out that he had signed his affidavit on 20 May 2004 which obviously means he had far more time to consider his evidence than he would have the court believe. He also attempted to create the impression that he had spent little time at Supreme Car's premises, that he had not played an important role in the management of Supreme Car's finances and that he had not prepared more than one set of financial statements. His evidence is not credible in many respects: for example the role he played in Supreme Car's business; his role as advisor to the Naude's about property investment/development at Yzerfontein; the preparation

of financial statements for Supreme Car and whether they were in fact financial statements or merely working papers and what happened to these documents after he prepared them. Fourie has testified on three occasions about the events dealt with in this trial and his allegations and evidence have not been consistent. These matters will be dealt with when the main issues are considered.

[14] The first two categories of alleged wrongful conduct may be disposed of quickly. In my view neither the case pleaded nor the evidence given supports a finding that the business of Supreme Car was conducted fraudulently or for a fraudulent purpose or recklessly in the manner alleged.

[15] The evidence regarding the first category of conduct was simply that Supreme Car sold vehicles and failed to settle the amounts due in respect of these vehicles as and when they fell due. Sometimes the purchase of the vehicles was financed by another bank. When amounts were not paid in respect of vehicles the vehicles were said to be in 'conversion'. The failure of a debtor to pay his debt does not constitute theft. There is no evidence of what representation was made to any financial institution when it paid the purchase price of a particular vehicle. There is also no evidence that any failure by Fourie to disclose to the plaintiff the facts alleged induced the plaintiff to advance further monies to Supreme Car.

[16] The evidence regarding the second category of conduct can be summarised as follows: In about March 2002 Supreme Car opened a bank account with the Standard Bank. Because of Supreme Car's mismanagement of its previous account at Nedbank, Nedbank closed the account. According to Fourie who negotiated with Standard Bank the manager at Standard Bank imposed strict conditions for the conduct of the account. There would be no overdraft facility. She insisted that Supreme Car draw no cheques on the account unless it had funds in the bank. She also insisted that a hold of 7 days be placed on all cheques received by Supreme Car and deposited in the account. This obviously applied to cheques issued by banks and other financial institutions which Standard Bank (unusually) refused to treat as cash. The bank also refused to accept cheques payable to 'Supreme Car' and not the name of the company. To deal with the problem which these measures created for Supreme Car's cash flow Du Preez and Fourie arranged for two Absa corporate saver sub-accounts to be opened for the company in Du Preez's office: one in the name, XHRS Investments 71 (Pty) Ltd, and one in the name, 'Supreme Car'. These two accounts were used to collect the funds reflected in the cheques received by the company and ensure that there was no delay in making the funds available. Sometimes Supreme Car used the funds in the account before the cheque was paid and the amounts reflected in the cheque were available and in this way Supreme Car was able to conduct its business without an overdraft facility. This evidence does not constitute a representation of

any kind. Fourie used the corporate saver accounts simply to avoid the delays which the Standard Bank caused by insisting that a hold be placed on all cheques and not receiving cheques payable to Supreme Car. There is on the evidence no reason to reject Fourie's evidence about the need for and the purpose of the two accounts. In this regard his evidence has been consistent and it accords with the probabilities.

- [17] The evidence regarding the third category of conduct can be summarised as follows: When Supreme Car wished to increase the facility available to it under the floorplan agreement it was required to formally apply to the plaintiff's Polokwane manager and provide sufficient information to satisfy the plaintiff that it would be justified in increasing the facility: i.e. increase the amount of money it was prepared to provide to enable Supreme Car to conduct its business. In order to satisfy the plaintiff Supreme Car provided it with its most recent financial statement or statements. The evidence shows that Fourie prepared 9 sets of financial statements during a period of about 2½ years: for the periods ending 30 September 2001, 31 January 2002, 28 February 2002, 31 October 2002, 31 January 2003, 28 February 2003, 31 May 2003, 30 June 2003 and 31 December 2003. The plaintiff relied on the information contained in 5 of these documents and increased the facility available to Supreme Car. It is common cause that these financial statements show that Supreme Car's business was growing, was making substantial profits and was financially sound. The plaintiff has not tendered any evidence to prove

that Supreme Car was trading in insolvent circumstances (as alleged in the particulars of claim) and relies on Fourie's own evidence and the relevant documents to show that the relevant financial statements misrepresented Supreme Car's financial position. In his evidence Fourie contended that save for the financial statements of 28 February 2002 the documents were not financial statements but 'working documents' drawn up to help him monitor Supreme Car's cash flow, that he did not prepare these documents for the use of third parties and that he did not make them available to third parties.

[18] Against that background it must be considered whether –

- (1) The business of Supreme Car was carried on fraudulently or for a fraudulent purpose; and
- (2) Fourie was knowingly a party to the carrying on of the business in this manner.

[19] The two questions are inter-related as Fourie's role in preparing the financial statements is closely related to his role in the management of the company.

[20] (1) Symes testified about floor plan facilities and applications for extension of the credit limits in such facilities. The client would apply to the branch manager who would refer the application to the plaintiff's head office where it would be assessed by one or

more credit managers in the credit department. The application would be made on the plaintiff's application form and would be accompanied by the branch manager's recommendation which would deal with the background of the client's business, the client's expertise and the manner in which the client dealt with his floor plan. The application would also be accompanied by the client's financial statements or management accounts and details of securities held by the plaintiff for the client's indebtedness in terms of the floor plan. Symes emphasised that the client's business must be profitable: it must generate sufficient turnover to justify the credit limit requested: i.e. it must be able to repay the debt. This was of paramount importance and was determined by the plaintiff with reference to the financial statements furnished.

- (2) It is common cause (on the pleadings) that on 15 November 2001 the plaintiff and Supreme Car entered into the floor plan agreement and that on 14 November 2001 the plaintiff issued the first floor plan facility letter which was duly accepted by Supreme Car on 15 November 2001 and which set the credit limit at R3 million.
- (3) It is common cause (on the pleadings) that on 27 June 2002 the plaintiff issued the second floor plan facility letter which was accepted by Supreme Car and that this letter increased the

credit limit to R4 million. Symes testified that on 11 June 2002 (i.e. before this facility letter was issued) Supreme Car applied for an increase in the credit limit from R3 million to R4 million (F11) but it was not granted because of the plaintiff's queries and that when Supreme Car applied again on 26 June 2002 (F12) the plaintiff approved the increase. It appears from the proposal form that the plaintiff had been placed in possession of Supreme Car's financial statements for the period ending 28 February 2002 as the figures for gross turnover and net profit before tax tally. This was done by Fourie on 26 June 2002 when he sent the financial statements for the period 28 February 2002 (E28-40) to the plaintiff under cover of a letter dated 26 June 2002 in which he highlighted some of the figures in the financial statements (J467-468). In this letter Fourie referred to the long term liabilities of R6 026 408 which included an unsecured interest-free loan from Danie Naudé of R2,5 million. The financial statements were signed by Ray Naudé and by Du Preez. In the auditors report Du Preez confirmed that he had audited the figures, confirmed what an audit consists of and confirmed that he had carried out an audit to ensure that there were no material misrepresentations in the financial statements (E31).

- (4) It is common cause (on the pleadings) that on 10 December 2002 the plaintiff issued the third floor plan facility letter which

was accepted by Supreme Car and that this letter increased the credit limit to R6 million. Symes testified that he received the floor plan proposal form dated 9 December 2002 (F24) and he identified the credit manager's handwritten note that the increase was required for the additional outlet and that the current turnover already justified the requested limit.

- (5) Symes testified that on 14 February 2003 Supreme Car applied for an increase of R2 million (to R8 million) for the floor plan facility (F41) and proposed a change in the securities to be held by the plaintiff. According to Symes the application was granted on the strength of the information contained in Supreme Car's financial statements for the period ending 31 October 2002 (E41-49). The notes on the proposal form relating to net worth, director's loans and net profit before tax tally with the figures in the financial statements.
- (6) It is common cause (on the pleadings) that on 3 September 2003 the plaintiff issued the fourth floor plan facility letter which was accepted by Supreme Car and which increased the floor plan credit limit to R9,3 million. The notes on the floor plan proposal form dated 22 July 2003 (F58) indicate that the increase was recommended because of the information contained in the financial statements for the period ending 31

January 2003 (E50-62): i.e. profits of R2,8 million and capital and reserves of R3 million (E57 and 58).

- (7) It is common cause (on the pleadings) that on 23 September 2003 the plaintiff issued the fifth floor plan facility letter which was accepted by Supreme Car and which increased the floor plan credit limit to R13 million. Symes testified that Supreme Car applied for the increase on 9 September 2003 (F81) and it was noted that the large turnover justified the increase; more than 75 % of the stock was paid for; there were good profits and there was suitable security in the form of mortgage bonds. The floor plan proposal form appears to have been accompanied by a lengthy memorandum (F71-78) by Hentie Pienaar (the plaintiff's branch manager) which referred to the figures in Supreme Car's financial statements for the periods ending 28 February 2003 (E63-75) and 30 June 2003 (E89-99). The financial statements for 28 February 2003 appear to have been signed by Ray Naudé and Du Preez signed the standard report of the auditor. The gross and net profit are reflected as R75 477 089 and R2 888 900 respectively. The financial statements for 30 June 2003 are not signed and reflect the gross and net profit as R31 615 135 and R2 919 579 respectively. This was for a period of four months. In his report Hentie Pienaar says –

'What makes me even feel better about Supreme is the fact that Danie outsourced a qualified CA to handle his finances on a

daily basis. This person spends more than 75 % of his day at the dealership, which is good to know that this dealership is in safe hands.

Under 'Recommendation' Pienaar includes amongst his reasons (all appearing from the financial statements) huge growth in turnover; good profits; reserves of R5 921 714 and no overdraft.'

- (8) In addition to the credit limit increases on the floor plan facility Supreme Car applied for increases for specific vehicles. For example, according to Symes, Supreme Car applied for such an increase on 18 June 2003 (F55) and on 20 June 2003 the credit manager wrote a note on the application that the audited financial statements or management accounts for the year ended February 2003 were required. When the request was approved the form (F54) reflects that the credit manager noted that the management account for 11 months to 31 January 2003 showed a turnover of R75,5 million, net profit before tax of R2 888 900 and net worth of R3 002 135. All this information appears in the financial statements dated 31 January 2003 (E50-62).

- (9) To summarise: the plaintiff relied on the following financial statements when deciding whether to grant or increase credit facilities under the floor plan agreement: 28 February 2002; 31 October 2002; 31 January 2003; 28 February 2003 and 30 June 2003.

[21] Nine documents referred to as financial statements are referred to in the evidence. Although it is disputed that these were all financial statements they will be referred to as such. All of the documents are in the proper format for annual financial statements. Some are on Du Preez's letterhead. Du Preez admitted that he signed the financial statements dated 30 September 2001 and 28 February 2002. Although his signature appears to have been placed on the financial statements dated 28 February 2003 and 30 June 2003 Du Preez did not admit this. Fourie admits that he signed the financial statements dated 31 January 2002 and 31 October 2002. Some of the statements were signed by Ray Naudé or Naudé (28 February 2002; 31 October 2002 and 28 February 2003). Four of these documents are annexed to the plaintiff's particulars of claim and five were annexures to the applicant's founding affidavit in the sequestration application. These details can be summarised as follows:

No	For the period ending	Signed by Du Preez	Signed by Fourie	Signed by R or D Naudé	Annexure in particulars of claim (Bundle A)	Annexure in sequestration application (Bundle G)	Page No in Bundle E
1	30/9/01	✓ (Admitted)				"B"	1-14
2	31/1/02		✓ (Admitted)				15-27
3	28/2/02	✓ (Admitted)		✓	"I"	"C"	28-40
4	31/10/02		✓ (Admitted)	✓			41-49
5	31/1/03				"J"	"D"	50-62
6	28/2/03	✓ (Alleged)		✓	"K"	"E"	63-75

7	31/5/03					"F"	76-88
8	30/6/03	✓ (Alleged)			"L"		89-101
9	31/12/03						102-114

[22] Fourie is the only witness who gave direct evidence on the role he played in Supreme Car and whether he prepared financial statements to enable Supreme Car to misrepresent its financial position to the plaintiff in order to obtain financial assistance in terms of the floor plan scheme. It is trite that evidence does not have to be accepted as the truth simply because it is uncontradicted. See ***Siffman v Kriel* 1909 TS 538** at 543-4; ***Shenker Bros v Bester* 1952 (3) SA 664 (A)** at 670E-F. Its acceptability will depend upon its inherent merit, the probabilities, the documentary evidence and any other relevant evidence. Accordingly Fourie's evidence must be assessed in the light of the various versions he has alleged about his role in Supreme Car and the financial statements which were used by Supreme Car to obtain loans from the plaintiff, the documentary evidence, the probabilities and any other relevant evidence.

[23] At the outset it should be noted that according to the evidence of Mr. Hentie Pienaar en Mrs Adele Ferreira Fourie played an important role in managing Supreme Car's finances.

(1) Hentie Pienaar testified that when he became Wesbank's Polokwane branch manager on 1 May 2003, he found that

Fourie was in charge of all financial questions pertaining to Supreme Car. He was told that Fourie of Du Preez's accounting firm had been placed at Supreme Car to look after its financial affairs and that is what he found. Fourie handled Supreme Car's finances each day and Pienaar estimated that he spent more than 75 % of his day at Supreme Car. (That is also what he reported to the plaintiff's head office – see para [20](7)). He also understood that Fourie prepared Supreme Car's financial statements. Pienaar's estimate was not seriously challenged in cross-examination and it was not put to him that Fourie would disagree with him. According to Pienaar Fourie contacted Hentie Pienaar when Wesbank owed money to Supreme Car and he was also involved when Pienaar needed financial information.

- (2) Adele Ferreira testified that Fourie interviewed her for a position at Supreme Car. After this interview she was appointed creditor clerk and reported directly to Fourie. According to Adele Ferreira Fourie was in charge of payments and settlements in respect of motor vehicles. She understood his role to be that of financial manager or chief financial officer. She estimated that he spent about 65 % of his time at Supreme Car. In cross-examination she did not deviate substantially from this estimate. She agreed that on some days he was not at Supreme Car at all but she was adamant that he spent more than 60 % of his time

at Supreme Car. Ferreira testified that Fourie told her which cheques could be issued and that he gave instructions for cheques to be made out in settlement of vehicles. According to Ferreira only Fourie had access to Supreme Car's bank statements which were either taken to his office or given to him at Supreme Car's premises. She also testified that only Fourie did bank reconciliations.

[24] In his plea, while denying that he assumed control of the business of Supreme Car and its daily management, Fourie admitted that he:

- (1) attempted to monitor the cash flow of the business of Supreme Car on information supplied by Mr. Johan Schoeman;
- (2) assisted with arrangements for bank accounts to be opened for the business;
- (3) assisted with paying creditors that were due according to the system of age analysis drawn up by Mrs. Adele Ferreira on information supplied by Mr. Johan Schoeman;
- (4) introduced a petty cash control system;

- (5) attempted to implement a system requiring authorisation for payments of petty cash, only where supported by the necessary vouchers;
- (6) made attempts to limit payments by Supreme Car to Mr. Danie Naudé;
- (7) made attempts to ensure that amounts due to Supreme Car were recovered and banked;
- (8) attempted to introduce a control system for purposes of keeping a proper record of sales, commissions, the receipt of amounts due to the business and the banking thereof. (A119-120/17.2 and 17.3).

Fourie alleged that he preformed these functions as a consultant to Supreme Car on a part-time basis, subject to an hourly rate (A120/17.4).

With regard to the preparation of financial statements Fourie alleged in his plea that –

- (1) he from time to time drew up financial statements, in template form, in respect of the business of Supreme Car on the strength

of information supplied by Mr. Johan Schoeman and/or Mrs. Adele Ferreira;

- (2) the financial statements were drawn up by him by way of interim management accounts to monitor the cash flow of the business of Supreme Car;
- (3) the financial statements were not drawn up or intended for use by third parties, in particular the plaintiff, for purposes of credit being extended in terms of the floor plan agreement (A130/24.2).

And finally, when pleading apportionment of damages, Fourie alleged *inter alia* –

- (1) the plaintiff from time to time advanced monies to Supreme Car on the strength of audits done of vehicles under the floor plan agreement;
- (2) the aforesaid audits of the vehicles under the floor plan agreement were conducted by employees of the plaintiff, acting in the course and scope of their employment with the plaintiff;

- (3) pursuant to the aforesaid audits, the plaintiff ought to have realised that Supreme Car's business was not profitable and was not financially sound. (A132/24.5.1-24.5.3).

[25] In the sequestration application which Supreme Car brought against Fourie Supreme Car's deponent, Ray Naudé, made the following allegations (the translation is mine and all references are to the page and paragraph numbers in Bundle G) –

- (1) Du Preez loaned Supreme Car a sum of money when the company commenced business (6 para 5.1); Du Preez appointed Fourie as his representative to manage the administration of Supreme Car (6 para 5.2); this appointment included control of all Supreme Car's finances and the signing of Supreme Car's cheques (6-7 para 5.2) and Fourie helped himself (i.e. misappropriated or stole) many thousands of rands of Supreme Car's funds, as a result of which Supreme Car cannot pay its creditors, and that she presumes that the forensic audit that was already underway would show that Fourie had stolen a few million rand (7 para 5.2);
- (2) Supreme Car had entered into an agreement with Du Preez in terms of which Du Preez would make available to Supreme Car the sum of R3 500 000 to be used as working capital to pay Supreme Car's overheads and establishment costs and to

purchase trading stock. In addition to this funding it was necessary for Supreme Car to arrange for finance from various commercial banks (9 para 6.6). Supreme Car then entered into the floor plan agreement with Wesbank (9 para 6.7);

- (3) Because it was not possible to provide security for Du Preez's loan they agreed that for a fee of R20 000 per month Du Preez would place one of his staff at Supreme Car's premises to supervise the management of all the finances and administration and that pursuant to this agreement Du Preez appointed Fourie to take charge of the administration of Supreme Car's business. For all practical purposes Fourie was placed in charge of the administration of Supreme Car's business (9-10 para 6.8);
- (4) Fourie had signing powers on Supreme Car's bank account; with a few exceptions he signed all the cheques; he managed all the administration; he saw to payment of all vehicles purchased and sold; he entered into contracts with financial institutions; he prepared the accounting records; he paid the VAT, income tax, regional service levies and he paid salaries and the normal trade expenses. He also prepared the financial statements and figures which were presented to Supreme Car from time to time (10 para 6.10);

- (5) Fourie distinguished himself as an able administrator; over time she and her son became friendly with him and went to him for financial advice in preference to Du Preez; Fourie played a leading role in decisions they took concerning property development in the Yzerfontein area where Ray Naudé lived; Fourie repeatedly assisted Supreme Car in negotiations with various financial institutions and he was responsible for the preparation of financial statements, maintaining control over floor plan items and he presented Supreme Car each month with management figures which indicated that Supreme Car was a healthy, profitable business which was properly administered and earned considerable profits (11 para 6.14). Supreme Car referred for example to financial statements prepared by Fourie for the periods ending 30 September 2001, 28 February 2002, 28 January 2003, 28 February 2003, 31 May 2003 which showed gross profits of R912 970, R3 829 852, R9 311 419, R9 311 419 and R3 659 629 respectively (11-12 para 6.15-6.20);
- (6) Ray Naudé and her son were very excited by the situation shown by the statements and until about the end of 2003 they were under the impression that they had a very healthy business which generated considerable profits which enabled them to acquire other interests. Accordingly they entered into a number of agreements for the purchase of immovably properties in the Yzerfontein area, which was experiencing a boom, with a view

to developing them and disposing of them for a big profit (13 para 7.2);

- (7) At about the end of 2003 she and her son were rudely awakened when Supreme Car received strange queries from *inter alia* Wesbank in connection with Supreme Car's ability to pay Wesbank and the subsequent investigation showed that Supreme Car was for all practical purposes insolvent and that there was a shortfall of about R6 million on the floor plan items (13 para 7.3). With a view to making further funds available Supreme Car requested Du Preez to do a provisional audit which showed that Supreme Car's liabilities exceeded its assets by R6 774 034 (13 para 7.4);
- (8) Ray Naudé and her son who had acted as sales managers were shocked when the allegations were made about shortfalls, particularly with regard to the Wesbank obligations. This was because of the financial statements which had been presented to them which they in turn had presented to various financial institutions with a view to developments at Yzerfontein (14 para 7.5);
- (9) Ray Naudé and her son started to investigate Supreme Car's finances and were told by Du Preez that Supreme Car's accounting records were not limited to Supreme Car's bank

account. Although Supreme Car had a current account with Standard Bank there were two corporate savings accounts in Du Preez's books. One of these accounts was in the name of XHRS Investments 71 (Pty) Ltd and the other was in the name of Supreme Car. The explanation for these two corporate savings accounts was that they facilitated Supreme Car's cash flow: cheques received from the sale of vehicles were deposited into the two corporate savings accounts and a cheque for the amount or amounts deposited was then immediately issued and deposited into Supreme Car's Standard Bank account (16 para 8.3).

[26] In his comprehensive and detailed answering affidavit (deposed to on 20 May 2004) Fourie said the following:

- (1) He was employed by Du Preez and remunerated by way of a commission on fees which he earned (160 para 11);
- (2) During the period September 2001-February 2002, on Du Preez's instructions, he did *ad hoc* accounting work for Supreme Car. By then Du Preez had already advanced R500 000 to Naudé for the capitalisation of the (Supreme Car) business. Du Preez recognised the enormous profit potential of Supreme Car but was concerned about Naudé's exorbitant spending (160 para 11);

(3) When Naudé approached Du Preez again during March 2002 for assistance for Supreme Car (which was in trouble) Du Preez agreed to advance another R1 million to Naudé on condition that:

- (i) Naudé was only allowed an agreed salary and no uncontrolled withdrawals from Supreme Car's funds; and
- (ii) Fourie monitor Supreme Car's cash flow every day as Du Preez's representative.

Pursuant to this arrangement and as from March 2002 Fourie started spending 2 hours per day at Supreme Car (160 para 12);

(4) Fourie's involvement was part time. According to the fees he billed during the period March 2002 to February 2004 he worked at Supreme Car on average for about 2.8 hours per working day (161 para 13);

(5) Fourie discovered that Supreme Car's finances and management were in a shambles (161 para 14);

(6) Fourie found that Absa had closed Supreme Car's bank account and that Supreme Car's new bank, Nedbank, also wished to

close the account because of its gross mismanagement (161 para 152). Fourie then arranged for Supreme Car to open an account with Standard Bank, with whom he enjoyed a good relationship, on condition that –

- (i) Supreme Car would not have an overdraft facility;
- (ii) Fourie would monitor the cash flow to ensure that no cheques were issued without the necessary funds.

Fourie, Ray Naudé, Naudé and Barry Vorster, Naudé's cousin, had signing powers on the account (162 para 15.4);

- (7) Fourie established a system for the payment of Supreme Car's creditors. Supreme Car paid creditors in the normal course of business using an age analysis prepared by Adele Ferreira with information she obtained from the in-house accountant, Johan Schoeman, and Mrs. Leana Naudé, Naudé's ex-wife, the creditor clerk. Fourie resisted payment of creditors of Naudé and Leana Naudé. He instructed that their withdrawals from the business be limited to the amount agreed to by Du Preez (163 para 16.4-16.5);
- (8) Fourie instituted a petty cash control system. Amounts of R60 000 to R80 000 had been paid without any control or vouchers.

Only payments for petty cash purposes that were requested in terms of the system supported by vouchers would be made (164 para 18). For this purpose cash was withdrawn once a week. Despite the institution of this system Naudé persisted in withdrawing cash for his own expenses (165 para 19);

- (9) Naudé did not receive a fixed remuneration. Fourie discovered that Naudé and his ex-wife withdrew large amounts whenever they required funds and despite his efforts to curb this Naudé continued to spend excessively and Fourie lost control of amounts spent by Naudé (165-166 para 20);
- (10) Fourie introduced a system to control the collection of payments for vehicles sold by Supreme Car and for the banking of deposits. In terms of the system a proper record was kept of the receipt of payments, the banking thereof and sales commissions (166 para 21);
- (11) The management of cash flow took up most of Fourie's time at Supreme Car. He also spent a lot of time sorting out other problems (167 para 22);
- (12) Immediately after he started working at Supreme Car Naudé requested Fourie to negotiate with the plaintiff who wanted to cancel the floor plan agreement because a Supreme Car

cheque for R370 000, drawn on Nedbank, had been dishonoured. Fourie persuaded the plaintiff's local manager, Ms. Carlin Morkel, not to cancel the floor plan agreement. He told her Supreme Car had opened a new bank account with Standard Bank and he would assist to ensure that funds were always available to pay cheques issued (167-8 para 24);

(13) From then on Naudé asked Fourie to negotiate on behalf of Supreme Car with financial institutions or to attend meetings with such institutions with Naudé. Naudé impressed upon the institutions that a CA was now assisting him with his finances (168 para 24);

(14) Fourie instituted a 'settlement book' to ensure that payments for vehicles were effected as soon as cash was available (169 para 25);

(15) Standard Bank placed a hold on all cheques deposited into Supreme Car's bank account and refused to accept cheques made out to Supreme Car. The plaintiff made out all its cheques payable to Supreme Car and this caused a cash flow problem. To enable Supreme Car to receive payment of all bank and financial institution cheques without delay and the plaintiff's cheques payable to Supreme Car, Fourie arranged for two corporate saver accounts to be opened in Du Preez's books.

One was in the name of XHRS Investments 71 (Pty) Ltd and one was in the name of Supreme Car. All cheques received by Supreme Car were deposited in the appropriate account and the relevant amount or amounts was or were transferred to Supreme Car's Standard Bank account or a cheque or cheques for the equivalent amount was issued in favour of Supreme Car and deposited into its Standard Bank account. When a cheque was issued this was done on Du Preez's joint corporate saver account called Francois du Preez Kontrole Trust Rekening. The funds were first transferred into that account from the other corporate saver accounts (172-174 para 26-27);

- (16) Fourie attempted to control Supreme Car's cash flow by signing all Supreme Car cheques. However this proved to be impractical because Fourie was not always available. He attempted to resolve this by leaving blank cheques but stopped when the cheques were misused. Naudé then signed cheques in Fourie's absence and this disrupted Fourie's management of Supreme Car's cash flow (175 para 29);

- (17) In about March 2003 Fourie discovered that the gross profit lists prepared by Schoeman were inaccurate. They did not take into account the expense incurred in reconditioning vehicles (177 para 30.5);

- (18) Fourie discovered that in a 11 month period from April 2003 to February 2004 a total amount of R2 835 788,79 was paid to or on behalf of Naudé in respect of his personal expenses: i.e. approximately R257 798,98 per month (179 para 33.1);
- (19) Fourie discovered that in the same 11 month period the Naudés spent approximately R2 934 035 on the development of the Yzerfontein property which was registered in the name of Rantseli (Pty) Ltd and that the total amount paid to or on behalf of the Naudé family amounted to approximately R7 886 935. He ascribes the financial shortfall of Supreme Car to this spending (180 para 33.5);
- (20) According to Fourie the shortfall in Supreme Car's finances was erased by August 2003 but a new and much greater shortfall was created thereafter which led to the closure of the business (181 para 35);
- (21) Fourie received a remuneration from Du Preez for working at Supreme Car of 40 % of fees billed for Supreme Car. Because of the loss he would experience if this was all that he received Fourie agreed with Naudé that Supreme Car would pay him R10 000 per month commencing March 2002 but that payment would be effected only when cash flow permitted. In June 2002 this remuneration was increased by the sum of R1 800 per month as

a housing allowance. When Fourie informed Naudé in August 2003 that the cash shortfall had been made up Naudé decided to increase Fourie's remuneration and Ray Naudé's salary. Her salary was increased from R15 000 to R20 000 per month and Fourie's remuneration from R11 800 to R25 000 per month (the same as Barry Vorster). Later Naudé allowed Fourie to purchase about 11 motor vehicles with his own funds and resell them for a profit through Supreme Car's sales personnel (182-184 para 36);

- (22) Fourie emphatically denied that he was appointed at Supreme Car to manage the administration, control the finances and sign cheques (6-7 para 5.2 and 186 para 42);
- (23) The R3.5 million borrowed from Du Preez was advanced over a period of time and not in one amount. It was not borrowed to establish the business as the business was already established and operating. By the time the money was advanced from Du Preez Supreme Car had already arranged for finance from various financial institutions (187-8 para 47);
- (24) Fourie was not in control of the administration of Supreme Car's business. That was done by Johan Schoeman (189 para 49.3 and 50.2);

- (25) Fourie denies that he prepared financial statements for the purpose of submitting them to the Naudé's (190 para 51.4). He admits that he was responsible for preparing Supreme Car's financial statements but denies that they were ever submitted directly to the Naudé's. He states that he prepared some financial statements for his own purposes to enable him to gauge Supreme Car's progress. He did this with information and figures he received from Supreme Car's personnel, particularly Johan Schoeman and Adele Ferreira. According to Fourie, examples of such statements are those for the period ending 31 January 2003, 28 February 2003 and 31 May 2003. Fourie says he also prepared preparatory statements for audit purposes, examples being for the period ending 30 September 2001 and 28 February 2002. Fourie alleges that in preparing these statements he discovered that the gross profit of the business as calculated from the figures given to him was misstated. Fourie denies that he could have brought the Naudé's under the impression that Supreme Car had a healthy, profitable business which was properly administered and was earning substantial profits. He says Naudé was 'painfully aware of the financial predicament' of Supreme Car and repeatedly assured him that he would see to it that Supreme Car traded its way out of its financial difficulties (194-196 para 54);

- (26) Fourie pertinently denies that the financial statements for the periods ending 30 September 2001, 28 February 2002, 31 January 2003, 28 February 2003 and 31 May 2003 reflected the true financial position of Supreme Car and that he ever presented them as such to the Naudé's (196 para 55);
- (27) Fourie admits that he had signing power on Supreme Car's bank account, that he signed Supreme Car's cheques, and that he saw to the payment of salary cheques of Supreme Cars personnel. He does not dispute that he saw to the payment of all vehicles purchased and sold, entered into agreements with financial institutions, prepared accounting records and paid the usual trading expenses (10 para 6.10 and 190 para 51);
- (28) Fourie denies that he played a leading role in the decisions taken by the Naudé's regarding the Yzerfontein property developments. Nevertheless he admits that he took part in discussions regarding these developments. He points out that the Naudé family, through the Rooskwarts Beleggings Trust, owned a house and undeveloped stands at Yzerfontein. They received attractive offers for the purchase of these properties from which substantial cash proceeds would have become available. Fourie says he supported the sale of the properties as he considered that the proceeds could be invested in Supreme Car's business to improve its cash flow situation. The

Naudés sold the properties and Naudé told Fourie that the Naudés had an opportunity to purchase a partially completed property in Yzerfontein for R1.25 million. Naudé assured Fourie that the proceeds from the sale of the other properties would be more than sufficient to cover the purchase price and costs. Barry Vorster who is also a Quantity Surveyor estimated that it would cost between R800 000 and R1.2 million to complete the new property. This amount would be spent over a period of about 6 months. Naudé told Fourie that, when completed, the new property would be worth between R5 and R7 million. Fourie supported the purchase and development of this new property. He advised that this new valuable property be offered to the plaintiff as security for the floor plan scheme. The plaintiff was then looking for further security. The Naudés purchased the property and the plaintiff registered a mortgage bond of R3 million over the property. The Naudés then proceeded with the completion of the property. Instead of the estimated R800 000 to R1.2 million to complete it it cost R2 934 035 which the Naudés withdrew from Supreme Car's business during the period October 2003 to January 2004. The proceeds from the sale of the other Yzerfontein properties were insufficient to pay the purchase price of the new property and that shortfall also had to be paid by Supreme Car. These property transactions caused a substantial shortfall in Supreme Car's business and Fourie informed the Naudés of this in December 2003. Despite

this warning, without taking Supreme Car's financial position into account, the Naudés purchased further properties in Yzerfontein in 2004. These property transactions amounted to nearly R4 million. In view of Supreme Car's financial position Fourie characterised this expenditure as reckless. He points out that a substantial number of these transactions had to be terminated or altered as a result of insufficient funds (191-194 para 53);

(29) Fourie denies that the Naudés could have laboured under the misapprehension that Supreme Car had a healthy business which generated considerable profits. He says that he informed Naudé during August 2003 that Supreme Car had just made up the shortfall. He says they misled him about the implications of the Yzerfontein transactions (197 para 56);

(30) Fourie agrees that at about the end of 2003 the plaintiff started to question Supreme Car's ability to pay its floor plan obligations and it then appeared that Supreme Car was insolvent and that there was a shortfall of about R6 million on the floor plan scheme (197 para 57);

(31) Fourie states that Du Preez did a calculation of Supreme Car's assets and liabilities and calculated that Supreme Car had assets of R15 million and liabilities of R18 million, without taking

into account the R3.5 million owing to Du Preez. There was accordingly a shortfall of R6 774 034 (197 para 58).

[27] Fourie's role at Supreme Car was not formally recorded by Du Preez or Supreme Car and was somewhat ambiguous. The question is whether his role was simply that of a part-time consultant who was paid according to an hourly rate (as alleged in the defendant's plea at 120 para 17.4). Fourie was an accountant employed by Du Preez who paid him a remuneration (or commission) of 40 % of all fees which he generated, including the fees he generated for his work at Supreme Car. Du Preez required Fourie to monitor Supreme Car's cash flow on an ongoing basis to protect Du Preez's investment in Supreme Car. On the face of it this was a very limited mandate – provided all the financial controls and systems were in place. It is clear however that Fourie performed a number of functions which fell outside Du Preez's mandate and it is obvious that all concerned, including Du Preez, knew that Fourie would be intimately involved in controlling Supreme Car's finances. Almost immediately after he started working at Supreme Car, with Du Preez's consent, Fourie negotiated a remuneration of R10 000 per month from Supreme Car. In June 2002 Naudé inexplicably increased Fourie's remuneration by giving him a housing allowance of R1 800 per month and in August 2002 his remuneration was increased again, this time to R25 000 per month. (It is significant that this was the same as the remuneration paid to Barry Vorster who was a director of the company.) Fourie's inability to explain why Supreme Car would

agree to pay him this remuneration reinforces the inference that Supreme Car regarded him as a very important member of its management team.

[28] At the section 417 enquiry (held in September 2004, long before the plaintiff sought to hold him liable – the plaintiff's summons was issued in February 2007) Fourie testified that:

- (1) the idea was that he have complete control over Supreme Car's finances (L717-8);
- (2) he could not dispute that he was primarily responsible for appointing Adele Ferreira (L603-4) (without whose assistance he would not be able to exercise proper control over Supreme Car's finances);
- (3) he received Supreme Car's bank statements from the Standard Bank every day and he worked on these statements every day (L717 and 707);
- (4) he stopped payment of Supreme Car's cheques even when Naudé signed them (L733);
- (5) he undertook personal liability for the repayment of a loan of R3.25 million from a moneylender, Mr. Chamani, to Supreme

Car (L861-862). (This evidence is of particular significance as it indicates that with the passing of time Fourie's involvement in Supreme Car's affairs became more and not less intimate.)

[29] On Fourie's evidence at the trial:

- (1) he immediately negotiated the remuneration he was to be paid by Supreme Car as from March 2002. It was to be R10 000 per month payable when cash flow allowed;
- (2) he was asked to make arrangements to open a new bank account as Nedbank intended to close Supreme Car's account: he knew the relationship manager at Standard Bank, Petra Hutchinson, and he went to see her and persuaded her to open an account for Supreme Car;
- (3) he was one of four people (two of the others were directors and the third was the de facto managing director) who was given the power to sign cheques drawn on the Standard Bank account;
- (4) he personally undertook (in the presence of the other three) to ensure that Supreme Car's Standard Bank account was conducted properly;

- (5) he signed Supreme Car's cheques issued to pay trade creditors according to a system of age analysis drawn up by Mrs. Adele Ferreira on his instructions;
- (6) he signed Supreme Car's cheques issued to pay Supreme Car's staff members;
- (7) he stopped payment of Supreme Car's cheques (including those signed by Naudé) which were issued without his authority;
- (8) he arranged for the two Absa corporate saver accounts to be opened in Du Preez's office to overcome the cash flow problem created by Standard Bank's conditions for the operation of Supreme Car's account;
- (9) he personally advanced funds to Supreme Car to ensure that cheques which had been issued would not be dishonoured because of a lack of funds;
- (10) he negotiated with the plaintiff when its local manager, Ms. Carlin Morkel, was considering cancelling the floor plan agreement because of a dishonoured cheque of R370 000;
- (11) he negotiated with other financial institutions and banks whenever the need arose. Whenever Naudé went to a meeting

with the financial institution or bank Fourie accompanied him. In February and March 2004 he attended two meetings with the plaintiff when the plaintiff's concerns about Supreme Car's management of the floor plan and its obligations in terms of the agreement were discussed;

- (12) he introduced financial controls so that Supreme Car's cash flow could be properly controlled and monitored: he introduced a petty cash control system which required authorisation for payments of petty cash supported by vouchers; he insisted that all amounts due to Supreme Car were received and banked; he introduced a system for keeping a proper record of sales, sales commissions, receipts of amounts due to Supreme Car and the banking thereof;
- (13) he insisted that the creditor clerk be laid off and selected and interviewed a successor, Ms. Adele Ferreira, who was then appointed;
- (14) he attended meetings of Supreme Car's managers and sales staff and discussed with them the progress of the business;
- (15) at the request of Naudé he attended monthly meetings with Supreme Car's staff to discuss matters relating to Supreme Car's business;

- (16) he prepared statements in the form of financial statements which he used in discussions with Naudé and Supreme Car's staff;
- (17) he allowed his personal motor vehicles to be used by Supreme Car's staff for the purposes of the business;
- (18) he allowed members of Supreme Car's staff to use his personal credit card to pay Supreme Car's business expenses;
- (19) he used the Supreme Car floor plan to purchase and sell motor vehicles for his personal benefit;
- (20) he was involved in the Naudés property speculation at Yzerfontein: he gave advice and he travelled to Yzerfontein to view the properties: at Naudé's request he purchased a property at Yzerfontein using a company of which he was the sole director to purchase and hold the property. In order to do this he applied on behalf of the company for a loan from a bank and bound himself as surety for the repayment of the loan. He regarded this property as an asset of Supreme Car;
- (21) he accompanied Naudé on occasion to negotiate a loan for Supreme Car from a moneylender, Mr. Chamani. When Mr.

Chamani required security for the repayment of the loan he signed a personal acknowledgement of debt in favour of Mr. Chamani.

[30] In the light of all these facts it cannot be found that Fourie's version that he was a part-time consultant who performed certain limited functions at Supreme Car at an hourly rate and that he spent an average of 2.8 hours per day at Supreme Car is truthful or reliable. It is clear that he was much more than a part-time consultant to Supreme Car subject to an hourly rate. This allegation in the plea (120 para 17.4) is disingenuous if not a blatant untruth. The most plausible inference from the facts (see ***Bates & Lloyd Aviation (Pty) Ltd and Another v Aviation Insurance Co 1985 (3) SA 916 (A)*** at 939F-940B; ***Skilya Property Investments (Pty) Ltd v Lloyds of London 2002 (3) SA 765 (T)*** at 780H-781D) is that from the outset Fourie was intimately involved in the management of Supreme Car's finances and that his involvement became more intimate as time went on. He would therefore know when Supreme Car required additional financing and would be involved in the steps taken to obtain such financing, in particular in the procedure to extend the facility in terms of the floor plan agreement.

[31] It will be remembered that Fourie pleaded that he from time to time drew up financial statements in template form by way of interim management accounts to monitor the cash flow of Supreme Car's

business and that he had not drawn up these financial statements for use by third parties, in particular the plaintiff, for purposes of credit being extended in terms of the floor plan agreement. In the sequestration application Fourie said he prepared some financial statements for his own purposes to enable him to gauge Supreme Car's progress. He made not mention of using the financial statements to monitor cash flow. When he testified Fourie confirmed that he prepared financial statements at intervals but it was clear that he had prepared the financial statement dated 28 February 2002 for the purpose of obtaining extended credit from the plaintiff in terms of the floor plan agreement. It was also clear that Fourie knew this to be so as he had furnished the financial statement to the plaintiff under cover of a letter to the plaintiff dated 26 June 2002 (J467-8). (This evidence contradicts the allegations in the plea and the sequestration application. In his answering affidavit he said he prepared the financial statement of 28 February 2002 as a preparatory statement for audit purposes.) With regard to the other financial statements dated 31 January 2002, 31 October 2002, 31 January 2003, 28 February 2003, 31 May 2003, 30 June 2003 and 31 December 2003 Fourie testified that they were working documents. They were a method of controlling cash flow, to see how the business was doing and see that cash flow was positive. Fourie testified that save for the financial statements of 28 February 2002 he did not give one of the statements to the bank, he did not give the documents to anyone to give to the bank and he did not know that any of the documents was

given to the bank. According to Fourie he would take the documents to meetings at Supreme Car and when the meeting was completed he would simply leave the documents lying on the table.

[32] Fourie's evidence about these documents not being prepared for use by third parties and in particular to obtain extended credit from the plaintiff cannot be accepted.

[33] Fourie has been inconsistent and contradictory about why he prepared the financial statements and what they were:

- (1) In his answering affidavit in the sequestration application he said he prepared the financial statements for 30 September 2001 and 28 February 2002 as preparatory statements for audit purposes (G194-5 para 54) and those for 31 January 2003, 28 February 2003 and 31 May 2003 for his own purposes to enable him to gauge the progress of Supreme Car from time to time (G195 para 52).
- (2) In his plea (i.e. the joint plea) Fourie averred that he prepared the financial statements for 28 February 2002, 31 January 2003, 28 February 2003 and 30 June 2003 as interim management accounts to monitor Supreme Car's cash flow and that they were not drawn up or intended for use by third parties (A130 para 24.2).

- (3) At the second pre-trial conference held on 28 April 2009 Fourie stated that financial statements for 31 January 2002, 31 October 2002, 31 January 2003, 28 February 2003, 31 May 2003, 30 June 2003 and 31 December 2003 appeared to be working documents (B41 paras 4.11 and 4.12).
- (4) At the third pre-trial conference held on 10 September 2010 the defendants indicated that some limited parts of the financial statements for 31 January 2003, 28 February 2003, 31 May 2003, 30 June 2003 and 31 December 2003 were prepared by Fourie with information furnished to him by Naudé and other employees of Supreme Car for purposes of private discussions with Naudé and other employees of Supreme Car (B65-66 para 3.6.1).
- (5) When Mr. Harcourt-Cooke was cross-examined the following propositions were put to him with regard to the financial statements:
 - (a) Regarding the financial statement dated 30 September 2001:

‘Sir, I put it to you that this document is a working document prepared for discussion purposes

between Fourie and Naudé and the other employees of Supreme'

- (b) With regard to the financial statement dated 31 October 2002:

'I put it to you that it is an unsigned working document, this document I am referring to you also prepared for purposes of discussions between Fourie and Naudé regarding the business of Supreme and it was simply a work document prepared. We discussed the figures. It never purported or never intended to give out to be financial statements, do you agree?'

- (c) With regard to the financial statements dated 31 January 2003:

'... pages 50-60 is also just working papers prepared for discussion. It was never the intention to be financial statements.'

- (d) With regard to the financial statements dated 31 May 2003, 30 June 2003 and 31 December 2003:

'... the proposition to you is that those three documents are also working papers which were prepared purely for discussion purposes between Fourie and the Naudés and it was never purported to be financial statements?'

- (e) With regard to the financial statements generally:

'I put it to you that the fact that there is no reference to depreciation in the working papers reflect clearly and indicate clearly that they are working papers and only with the intention of determining cash flow'

(6) During the 417 enquiry Fourie said that the financial statements were prepared merely to look at the gross profit situation where the stock becomes relevant (L914-5).

[34] It is clear that the plaintiff's credit department received more than the financial statements of 28 February 2002. Symes' evidence makes it clear that the plaintiff granted extensions of the credit facility on the strength of the financial statements of 28 February 2002, 31 October 2002, 31 January 2003, 28 February 2003 and 30 June 2003. It is significant that either Ray Naudé or Naudé signed the financial statements of 31 October 2002 and 28 February 2003 and that Fourie signed the financial statements of 31 January 2002 and 31 October 2002. There is a signature on the financial statements of 28 February 2003 and 30 June 2003 which seems to be that of Du Preez but Fourie disputes that it is. Fourie's denial is not convincing and in the absence of a clear indication of forgery from a reliable source it must be found that Du Preez also signed the financial statements of 28 February 2003 and 30 June 2003. Signature of financial statements by the auditor and/or the director of the company and/or the accountant who prepared the financial statements is a clear indication that they are not just working documents and it must be accepted that the financial

statements which were received by the plaintiff's credit department were intended to be used by the plaintiff to decide whether to grant extended credit or not.

[35] In its particulars of claim the plaintiff alleges, with regard to fraudulent misrepresentations made in the financial statements, that –

- (1) the financial statements amounted to representations that Supreme Car's business was growing, was profitable and was financially sound; and
- (2) these representations were false to the knowledge of the Fourie in that he knew that Supreme Car's business was not profitable and was not financially sound and that in fact Supreme Car was trading in insolvent circumstances. (A24 para 5.3.2 and 5.3.3). The plaintiff did not tender any evidence to establish that when the relevant financial statements were received by the plaintiff Supreme Car's business was not profitable, was not financially sound and that Supreme Car was trading in insolvent circumstances. The evidence of Fourie suggests that the business was profitable and that Supreme Car was able to pay all its debts when they became due from about March 2002 until December 2003 but that it lacked working capital and that when the finances were not carefully managed there were cash flow problems. The question is therefore whether the business was

not financially sound even though it was not trading in insolvent circumstances.

- [36] Despite the propositions put to the plaintiff's expert, Mr. Harcourt-Cooke, that the figures in the financial statements were correct, and despite Fourie's evidence at the trial that the figures were correct, he clearly admitted in his answering affidavit in the sequestration application that they were not. In relation to the financial statements of 30 September 2001, 28 February 2002, 31 January 2003, 28 February 2003 and 31 May 2003 he said that the gross profit of the business was misstated (because the reconditioning expenses had not been taken into account) (G195 para 54.6 and 177 paras 30.5 and 30.7). In relation to the same financial statements he denied that they reflected the true financial position of Supreme Car and that he ever presented them as such to the Naudés (G196 para 5.5). He also said the following:

'I emphatically deny that I could ever bring Naudé or the deponent under the impression that the applicant had a healthy, profitable business which was properly administered and earning substantial profits. On the contrary, Naudé was painfully aware of the financial predicament of the applicant and assured me repeatedly that he would see to it that the applicant trades out of its financial difficulties.' (G196 para 54.9)

- [37] In addition Fourie admitted at the section 417 inquiry that neither he nor Du Preez ever audited Supreme Car's books and his attempts in

his evidence to retract or qualify this admission were singularly unconvincing and cannot be believed. He purported not to understand the meaning of the word 'audit' and after questioning conceded that he did know what it meant. This evidence means that in both the financial statements of 28 February 2002 and his letter Fourie misrepresented to the plaintiff that the financial statements had been audited. The other financial statements given to the plaintiff and used to extend the floor plan facility make the same misrepresentation.

- [38] The evidence shows that Du Preez lent Supreme Car the sum of R3,5 million in return for interest calculated at the rate of 36 % per annum: i.e. R105 000 per month or R1 260 000 per annum. Neither this loan nor the interest payable and in fact paid were reflected in any financial statements prepared by Fourie or given to the plaintiff. If they had been disclosed they would have reduced the profit substantially, shown that Supreme Car was under-capitalised and that Supreme Car had been funded by a party other than a shareholder at an exorbitant interest rate. Clearly this would have justified a conclusion that the business was not financially sound. According to Fourie (when he clarified his previous evidence) on three occasions Du Preez lent Naudé funds to use in Supreme Car: R1 million in about the middle of 2001, R1 million in September 2001 and finally R1,5 million in May 2002. Fourie also testified that although Naudé was obliged to pay interest to Du Preez he, Naudé, lent the money interest-free to Supreme Car. Fourie claimed to have seen a document of one page

(never discovered) which recorded this loan from Du Preez to Naudé. Fourie also claimed not to have seen the agreement reflecting the loan by Du Preez to Supreme Car until shortly before the trial. Fourie's explanation is simply not credible and is rejected. Firstly, the improbability of Du Preez making the money available to Supreme Car in this way is self-evident. Secondly, the financial statements do not reflect the loan by Naudé to Supreme Car. The financial statements of 30 September 2001 do not refer to the loan of R1 million by Naudé: the financial statements of 31 January 2002 do not refer to the loan of R2 million by Naudé and the financial statement of 28 February 2002 refers only to an unsecured loan of R2,5 million by Naudé (E37). Subsequent financial statements do not refer to loans by Naudé. Thirdly, and most importantly, in his answering affidavit dated 20 May 2004 in the sequestration application Fourie did not dispute that Du Preez lent R3.5 million to Supreme Car (G9 para 6.6 and 187-188 para 47). This puts the lie to Fourie's evidence that he only discovered just before the trial that Du Preez had lent Supreme Car the money.

- [39] Accordingly it is found that the financial statements furnished to the plaintiff consistently misrepresented the financial position of Supreme Car in material respects and for purposes of section 424 of the Act the business was carried on with the intention of defrauding the plaintiff. It is also found that Fourie was knowingly a party to the carrying on of the business in this way. His conduct therefore falls within the ambit of section 424 of the Act and the question arises whether the court should

exercise its discretion in terms of section 424 of the Act and order that Fourie is liable for the debt of Supreme Car to the plaintiff. Fourie's counsel argued strenuously that the court should not make such an order because it had not been shown that there was a causal link between the fraudulent conduct and Supreme Car's inability to pay. Where the fraudulent conduct causes the debt to arise – as in this case, where the plaintiff lent funds on the strength of the misleading financial statements – it is not clear how the plaintiff could ever establish that the same conduct made it impossible to pay the debt. For that reason I have some doubt as to whether the gloss placed on the section in the case of reckless conduct applies in the case of fraudulent conduct. In my view the court should make the order even in the absence of evidence that the inability to pay was due to the fraudulent conduct. However, even if that is not justified there is other evidence which must be considered: that relating to the reckless conduct of the business.

Reckless conduct of Supreme Car's business

- [40] Fourie's evidence shows that during the period June 2003 to April 2004 Ray Naudé, Naudé and Barry Vorster utilised Supreme Car's funds to speculate in seaside properties at Yzerfontein which was experiencing a boom. They first purchased a seafront property on which there was a half completed house. Naudé told Fourie that Vorster had calculated that it would cost R800 000 to complete the house and that when the

house was completed it would be worth between R5 million and R7 million. It was estimated that it would take about six months to complete the house. In the event it cost R2.9 million to complete the house and Supreme Car paid this additional expenditure during the period of six months. When the house was complete it was not sold and the money was not repaid to Supreme Car. According to Fourie this caused a cash flow crisis at the end of December 2003. Apart from this Ray Naudé, Naudé and Vorster purchased six undeveloped seaside properties at Yzerfontein through the vehicle of Rantseli (Pty) Ltd and Supreme Car paid the deposits totalling R200 000 on behalf of Rantseli. This was also not repaid. During the same period Naude used about R2.7 million of Supreme Car's funds to pay for personal expenses. Because of the role he played in managing Supreme Car's finances Fourie must have been aware of this. There is no evidence that he even attempted to prevent or restrict this expenditure.

- [41] Up to this time Supreme Car had never defaulted on its obligations in terms of the floor plan agreement. But in February 2004 the plaintiff prematurely terminated the temporary extension of the floor plan facility to R16 million and shortly afterwards alleged that Supreme Car owed more than R6 million in terms of the floor plan agreement. According to Fourie an audit done by Du Preez showed that only about R4 million was owing but this did not assist Supreme Car. On 20 April 2004 the plaintiff cancelled the floor plan agreement and took possession of all the motor vehicles which were subject to the floor plan agreement.

This brought an end to Supreme Car's ability to conduct the business and its viability as a company.

[42] In my view the expenditure of Supreme Car's funds on property speculation was reckless in view of the company's history of being under-capitalised and its history of cash flow difficulties. In his affidavit in the sequestration application Fourie correctly describes some of this expenditure in respect of the Yzerfontein properties as reckless (G194 para 53.11). The same is true of the use of the company's funds to pay Naude's personal debts.

[43] Fourie obviously knew what the Naudés and Vorster were doing. There is no suggestion in his evidence that he took any firm action to stop them from using Supreme Car's funds or that he ever threatened to resign if they did not desist. On the contrary he appears to have advised them about the investments and at the insistence of Naudé purchased another property through a company of which he was the sole director.

[44] On this evidence the business of Supreme Car was conducted recklessly and Fourie was knowingly a party to the conduct of the business in this way. This is an additional reason for him to be held liable in terms of section 424 of the Act.

[45] It must be recorded, insofar as it is not already apparent from this judgment, that Fourie did not make a good impression as a witness. Neither his demeanour nor the substance of his evidence was such that I am satisfied that he was an honest or a reliable witness. With regard to his demeanour he initially presented as a confident, self-assured professional who had the facts of the case at his fingertips. He was however palpably dumbfounded when his detailed evidence about the limited time he had had to prepare his answering affidavit in the sequestration application and when and where he signed the affidavit was shown to be untrue. When other contradictions and improbabilities in his evidence were pointed out in cross-examination he proceeded as if this was of no moment and gave explanations which were either irrational or improbable. He frequently did not answer the point of questions and had to be requested to do so. He also frequently gave long rambling answers. With regard to the substance of his evidence the contradictions, improbabilities and inconsistencies show that he was not a reliable and credible witness. Merely by way of example the following may be noted:

- (1) his obvious lie about the circumstances under which he prepared his answering affidavit and when and where he signed it;
- (2) his evidence about the purpose and content of the financial statements he prepared;

- (3) his evidence about what he did with the financial statements after he had used them at Supreme Car's premises;
- (4) his evidence about having performed an audit on Supreme Car and his purported ignorance of the meaning of the word 'audit';
- (5) his evidence about his knowledge of Du Preez's loans to assist Supreme Car and when he discovered that Du Preez had in fact lent the money to Supreme Car and not to Naudé;
- (6) his evidence about the alleged loan by Du Preez to Naudé for the purpose of lending money to Supreme Car;
- (7) his evidence about why Du Preez was not reflected in the financial statements as a creditor of Supreme Car;
- (8) his evidence about when the loans were made and the agreements which reflected these loans;
- (9) his evidence about the role he played at Supreme Car;
- (10) his evidence about the admissions made in the answering affidavit in the sequestration application and the section 417 inquiry;

- (11) his evidence about the signature of the financial statements by Du Preez, the Naudés and himself;
- (12) his evidence about the role he played in the property transactions in Yzerfontein;
- (13) his evidence about why he undertook financial liability to Mr. Chamani for the loan of R3.25 million to Supreme Car.

Defendants' special defences

- [46] Apart from denying the plaintiff's allegations Fourie raised the issues of contributory negligence and compromise. There is no merit in either defence. Contributory negligence cannot be raised in respect of a claim in terms of section 424 of the Act and the defence of *transactio* cannot be based on an agreement to which Fourie was not a party.
- [47] The plaintiff is therefore entitled to relief against Fourie based on the provisions of section 424 of the Act and an appropriate order will be made. The question of Du Preez's liability will now be considered.

Plaintiff's Aquilian claim for damages for pure economic loss

[48] The plaintiff's claim against Fourie and Du Preez is a delictual claim for damages for pure economic loss. There is no question of any physical damage to property. The plaintiff's alleged loss is the accrued indebtedness of Supreme Cars to the plaintiff as at the date of the termination of the floor plan agreement. The wrongful act relied upon by the plaintiff is the (repeated) misrepresentation by Fourie and Du Preez of Supreme Cars' financial position in the financial statements provided to the plaintiff when Supreme Cars applied for increases, both permanent and temporary, of the floor plan facility. Even if it is accepted that Fourie and Du Preez prepared financial statements knowing that they were misleading and knowing that Supreme Cars would present them to the plaintiff in support of the applications to increase the floor plan facility there are a number of problems with this cause of action.

[49] At the outset, the claim must be considered on the basis that the two defendants misrepresented the financial condition of Supreme Cars on at least 5 separate occasions. The plaintiff's counsel contend that these misrepresentations must be dealt with globally, i.e. as if one misrepresentation was made which caused all the loss which the plaintiff claims, but readily concede that there is no decided case or textbook which supports such an approach. In my view this approach is wrong and each misrepresentation which allegedly caused loss is a separate cause of action which must be considered on its own.

[50] As pointed out by the court in ***Steenkamp NO v Provincial Tender Board, Eastern Cape 2006 (3) SA 151 (SCA)*** para 27 the general approach of our law towards the extension of the boundaries of delictual liability remains conservative and this is especially the case when dealing with liability for pure economic loss – see ***Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd 1985 (1) SA 475 (A)*** at 500D; ***Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA 2006 (1) SA 461 (SCA)***; ***Premier Western Cape v Faircape Property Developers (Pty) Ltd 2003 (6) SA 13 (SCA)***.

[51] In ***Administrateur, Natal v Trust Bank van Afrika Bpk 1979 (3) SA 824 (A)*** it was recognised that the Aquilian action could be utilised to recover damages for pure economic loss suffered as a result of negligent misrepresentation. (830F-831B). The court emphasised that all the requirements for Aquilian liability would have to be established, including unlawfulness and a guilty mind, and that in every case the court would have to decide whether in the particular circumstances there was a legal duty resting on the defendant not to make a misstatement and whether in those circumstances the defendant exercised reasonable care *inter alia* in determining the correctness of the representation. The Court would also have to keep the ground of action within reasonable limits by giving proper attention to the nature of the representation and its interpretation and by giving proper attention to the question of causality (831B-833C).

[52] In ***International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680**

(A) at 700E-701C the court summarised the principles of causation:

‘... in the law of delict causation involves two distinct enquiries. The first is a factual one and relates to the question as to whether the defendant’s wrongful act was a cause of the plaintiff’s loss. This has been referred to as “factual causation”. The enquiry as to factual causation is generally conducted by applying the so-called “but-for” test, which is designed to determine whether a postulated cause can be identified as a *causa sine qua non* of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff’s loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff’s loss; *aliter*, if it would not so have ensued. If the wrongful act is shown in this way not to be a *causa sine qua non* of the loss suffered, then no legal liability can arise. On the other hand, demonstration that the wrongful act was a *causa sine qua non* of the loss does not necessarily result in legal liability. The second enquiry then arises, viz whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part. This is sometimes called “legal causation”. (See generally ***Minister of Police v Skosana* 1977 (1) SA 31 (A)** at 34E-35A, 43E-44B; ***Standard Bank of South Africa Ltd v Coetsee* 1981 (1) SA**

1131 (A) at 1138H-1139C; *S v Daniëls en 'n Ander* 1983 (3) SA 275 (A) at 331B-332A; *Siman & Co (Pty) Ltd v Barclays National Bank Ltd* 1984 (2) SA 888 (A) at 914F-915H; *S v Mokgethi en Andere* 1989 (1) SA 32 (A) at p18-24 Fleming *The Law of Torts* 7th ed at 173 sums up the second enquiry as follows:

“The second problem involves the question whether, or to what extent, the defendant should have to answer for the consequences which his conduct has actually helped to produce. As a matter of practical politics, some limitation must be placed upon legal responsibility, because the consequences of an act theoretically stretch into infinity. There must be a reasonable connection between the harm threatened and the harm done. This inquiry, unlike the first, presents a much larger area of choice in which legal policy and accepted value judgments must be the final arbiter of what balance to strike between the claim to full reparation for the loss suffered by an innocent victim of another's culpable conduct and the excessive burden that would be imposed on human activity if a wrongdoer were held to answer for all the consequences of his default.”

In *Mokgethi's case supra*, Van Heerden JA referred to the various criteria stated in judicial decisions and legal literature for the determination of legal causation, such as the absence of a *novus actus interveniens*, proximate cause, direct cause, foreseeability and sufficient causation ('adekwate veroorsaking'). He concluded, however, as follows:

‘Wat die onderskeie kriteria betref, kom dit my ook nie voor dat hulle veel meer eksak is as 'n maatstaf (die soepele maatstaf) waarvolgens aan die hand van beleidsoorwegings beoordeel word of 'n genoegsame noue verband tussen handeling en gevolg bestaan nie. Daarmee gee ek nie te kenne nie dat een of selfs meer van die kriteria nie by die toepassing van die soepele maatstaf op 'n bepaalde soort feitekompleks subsidiêr nuttig aangewend kan word nie; maar slegs dat geen van die kriteria by alle soorte feitekomplekse, en vir die doeleindes van die koppeling van enige vorm van

regsaanspreeklikheid, as 'n meer konkrete afgrensingsmaatstaf gebruik kan word nie.'

It must further be borne in mind that the delictual wrong of negligent misstatement is relatively novel in our law and that in the case which in effect brought it into the world, ***Administrateur, Natal v Trust Bank van Afrika Bpk 1979 (3) SA 824 (A)***, Rumpff CJ emphasised, with reference to the fear of so-called 'limitless liability' that this new cause of action could be kept within reasonable bounds by giving proper attention to, *inter alia*, the problem of causation (see at 833B).'

See also ***Standard Chartered Bank of Canada v Nedperm Bank Ltd 1994 (4) SA 747 (A)*** at 764I-J.

[53] In the present case if the misrepresentations factually caused the loss there can be no doubt that the defendants should have to answer for this. The problem lies with the issue of factual causation. There were multiple misrepresentations but none has been shown to have caused any part of the indebtedness as at the termination of the floor plan agreement. The evidence shows rather that this indebtedness and Supreme Cars' inability to meet its obligations in terms of the floor plan agreement was caused by the Naudés' uncontrolled (it may be characterised as reckless) expenditure of Supreme Cars' funds in respect of the property speculation at Yzerfontein which did not produce the anticipated profits and to pay personal expenses. It will be remembered that instead of spending approximately R600 000 during a period of six months in completing the half built house owned by Rantselli (Pty) Ltd the Naudés spend approximately R2.9 million in that

period. Even when Fourie counselled against such expenditure the Naudés continued to spend Supreme Cars' funds and eventually Fourie also became involved in the property speculation.

- [54] Finally it must be determined whether the act complained of (in this case the misrepresentations/misstatements) had a harmful consequence. As pointed out in ***Jowell v Bramwell-Jones* 2000 (3) SA 274 (SCA)** para 22 the element of damages or loss is fundamental to the Aquilian action and the right of action is incomplete unless damage is caused to the plaintiff by reason of the defendant's wrongful conduct. This applies no less to claims arising from pure economic loss than it does to claims arising from bodily injury or damage to property. Whether a plaintiff has suffered damage or not is a fact which like any other element of the plaintiff's cause of action must be established on a balance of probabilities. Once the damage or loss is established a court will do its best to quantify that loss even if this involves a degree of guesswork.

- [55] The question of whether damage or loss has been suffered and, if so, the extent thereof, is answered by the application of a comparative test

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'damage consists in the negative difference between the relevant person's current patrimonial position (after the event complained of) and his hypothetical patrimonial position that

would have been the current position if the event had not taken place’.

See ***Law of Delict* 4 ed Neethling Potgieter Visser** 222 para 4.5 and 4.5.1.

In ***Santam Versekeringsmaatskappy Bpk v Byleveldt 1973 (2) SA 146 (A)*** at 150A-B the court said simply:

‘.. skade beteken die verskil tussen die vermoënsposisie van die benadeelde voor die onregmatige daad en daarna’

and

‘Skade is die ongunstige verskil wat deur die onregmatige daad ontstaan het. Die vermoënsvermindering moet wees ten opsigte van iets wat op geld waardeerbaar is...’

See also ***Union Government v Warnecke 1911 AD 657*** at 665; ***De Jager v Grunder 1964 (1) SA 446 (A)*** at 449E-G and 456G-H.

The date of commission of the delict is generally the decisive moment for assessing damage – ***Law of Delict*** 223 para 4.5.3.

[56] In this case there is simply no evidence to show what loss, if any, was suffered on or immediately after the date of the misrepresentations/misstatements.

- [57] The plaintiff has therefore failed to prove a case against the defendants based on any negligent or deliberate misrepresentation made in the financial statements. Accordingly the claim against the second defendant must be dismissed.

Costs

- [58] With regard to the claim against Fourie in terms of section 424 of the Act costs must follow the result. In view of the size of the claim, the complexity of the facts and the documentary evidence involved the costs of two counsel are justified.
- [59] With regard to the claim against Du Preez costs will not follow the result. There is no justification for a costs order against the plaintiff in favour of Du Preez. The circumstances in which Mr. Nel ceased to act as attorney for the two defendants, was appointed as executor in Du Preez's estate and then resigned as executor so that he could continue to act as attorney in this case have already been referred to. After the executor's application for a postponement was dismissed there was no justification for appointing another attorney and advocate to represent Du Preez's estate. During the first part of the trial one attorney (i.e. Nel) and one advocate represented both Fourie and Du Preez. There was clearly no conflict of interest and it was not suggested that the defendants' legal representatives were inadequate. In the second part

of the trial Du Preez's legal representatives had very little to do and they could make little or no contribution to the resolution of the issues. This is not a reflection on the competence of the attorney and advocate it is merely confirmation of the view I had and expressed at the time of the application for postponement. The appointment of another attorney and advocate was unnecessary and there is no reason why the plaintiff should be burdened with their costs.

- [60] The plaintiff's counsel have calculated Supreme Car's indebtedness to the plaintiff as at 31 October 2010 and have taken into account the further amounts of R435 000 (received by the plaintiff on 26 July 2004) and R200 000 (received by the plaintiff on 13 April 2005); the proper appropriation of amounts received, first to interest and then capital, and errors made in the calculation of interest. The calculation is set out in annexure 'A' to the plaintiff's counsel's heads of argument. The capital amounts to R7 340 229,73 and the interest amounts to R5 361 200,93. Interest will continue to accrue from 1 November 2010 at 2 % above Wesbank's prime rate. At present that rate is 9,5 % per annum. A further dividend of R1 193 595,25 will be received by the plaintiff and the plaintiff's counsel requests that this be deducted from the accumulated interest at the date of judgment.

Order

- [61] The following order is made:

- I In terms of section 424 of the Companies Act 61 of 1973 the first defendant is declared to be personally responsible for the indebtedness of XHRS Investments 71 (Pty) Ltd t/a Supreme Car to the plaintiff, being –
- (i) the capital amount of R7 340 229,73;
 - (ii) interest up to and including 31 October 2010 in the sum of R5 361 200,93 less the sum of R1 193 595,21;
 - (iii) interest on the capital amount of R7 340 229,73 at the rate of 11,5 % per annum from 1 November 2010 to date of payment.
- II The first defendant is ordered to pay to the plaintiff:

- (i) the capital amount of R7 340 229,73;
- (ii) interest up to and including 31 October 2010 in the sum of R5 361 200,93 less the sum of R1 193 595,21;
- (iii) interest on the capital amount of R7 340 229,73 at the rate of 11,5 % per annum from 1 November 2010 to date of payment.

- III The plaintiff's claim against the second defendant is dismissed;
- IV The first defendant is ordered to pay the plaintiff's costs of suit, such costs to include the costs consequent upon the employment of two counsel and the qualifying fees of Messrs. S. Harcourt-Cooke and J. Rhoda.


B.R. SOUTHWOOD
JUDGE OF THE HIGH COURT

CASE NO: 5944/07

HEARD ON: 4 May 2009 to 14 May 2009 and 11 October 2010 to 28 October 2010

FOR THE PLAINTIFF: ADV. A. GAUTSCHI SC
ADV. S. GOUWS

INSTRUCTED BY: Ms. N. Stetka of Lanham-Love Attorneys

FOR THE FIRST DEFENDANT: ADV. H. KLOPPER

INSTRUCTED BY: Mr. M.I. Cronje of Thys Cronje Inc.

FOR THE SECOND DEFENDANT: ADV. G.B. BOTHA

INSTRUCTED BY: Mr. R.W. Smith of Jacques Roets Attorneys

DATE OF JUDGMENT: 6 May 2011