

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 6487/2017

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED: YES
22 May 2025	
DATE	SIGNATURE

In the matter between:

EVERTON CONSTRUCTION AND ENGINEERING (Pty) Ltd	First Plaintiff
RAYCAL PROPERTIES INVESTMENTS CC	Second Plaintiff
IDLEWILD PROPERTIES (BENONI) (PTY) LIMITED	Third Plaintiff
RAYMOND JOHN KOEDYK	Fourth Plaintiff
RAYMOND JOHN KOEDYK N.O.	Fifth Plaintiff
RAYMOND JOHN KOEDYK N.O.	Sixth Plaintiff
and	
ACCESS BANK SOUTH AFRICA LIMITED	Defendant
TRACEY-LEIGH MCDONNELL	Third Party

JUDGMENT

Introduction

- [1] In the main action the plaintiffs seek an order directing the defendant (a bank) to reverse debits (and charges) which the defendant has passed over certain bank accounts which the plaintiffs hold with the defendant.
- [2] The plaintiffs contend that these were unauthorised debits and charges and that the defendant bears the onus of proving its entitlement to raise those debits and charges.
- [3] The defendant admits to having debited the plaintiffs' accounts but alleges that it was entitled to do so because the person who issued the instructions to the defendant was authorised to represent the plaintiffs. The defendant alleges further facts which it says provide it with a defence.
- [4] There is a dispute as to which party bears the duty to begin. The plaintiffs have brought an application in terms of Rule 39 of the Uniform Rules for an order in relation to which party bears the duty to begin.
- [5] The plaintiffs' argument is that the defendant bears the duty to begin for two reasons:
 1. On the pleadings, the plaintiffs have made out a prima facie case for the relief sought. The relationship of banker and client is admitted by the defendant, as are the debits. The defendant must therefore demonstrate that the debits were authorised.
 2. The defendant will only be able to avoid judgment being granted against it if it is able to prove its special defence. In other words, if the defendant is able to prove that the third party was authorised to issue payment instructions to the defendant and that the defendant acted upon such valid instructions in debiting the plaintiffs' accounts.

- [6] On the other hand, the defendant contends that the plaintiffs' argument is misconceived, and that they proceed from a wrong premise because they entirely ignore the fact that there are other issues in the pleadings on which the plaintiffs bear the onus and on which in the absence of evidence adduced by them, they would fail. Therefore, they bear the duty to begin.

Applicable Legal Principles

- [7] The determination of which party bears the duty to begin depends upon whether, on the pleadings, there is an "onus to adduce evidence" (evidential burden) on the plaintiff.

- [8] Rule 39(11) provides that-

"Either party may apply at the opening of the trial for a ruling by the court upon the onus of adducing evidence [duty to begin]."

- [9] Rule 39(13) provides that:

"Where the onus of adducing evidence on one or more of the issues is on the plaintiff and that of adducing evidence on any other issue is on the defendant, the plaintiff shall first call his evidence on any issues in respect of which the onus is upon him, and may then close his case. The defendant, if absolution from the instance is not granted, shall, if he does not close his case, thereupon call his evidence on all issues in respect of which such onus is upon him."

- [10] The "onus to adduce evidence" is a reference to the duty to adduce evidence and not to the overall onus. The duty to adduce evidence is merely a procedural device which ensures that parties give their evidence in the most logical order and allows the trial to be shortened by dispensing with the evidence of one party if his opponent has adduced no evidence which could support a finding in his favour.¹

- [11] A party who bears the overall onus may be relieved of the duty to begin where an evidentiary burden is cast on his opponent at the outset of the trial, by reason of admissions the latter has made in the pleadings.

¹ *Intramed (Pty) Ltd v Standard Bank of South Africa Ltd* 2004 (6) SA 252 (W) at 257 D-G

- [12] The defendant will bear the duty to begin where the plaintiff has established a prima facie case on the pleadings, which calls for an answer from the defendant at the outset.
- [13] A prima facie case in this context entails that in the absence of any evidence on the part of the defendant, the plaintiff would be entitled to a judgment. In *Smith's Trustee v Smith*² the court said:

“... there was sufficient evidence before the Court to entitle it to rule that the defendant should begin. If the defendant does not produce any evidence ... it follows that the judgment will have to be in favour of the plaintiff.”

Analysis of Pleadings

- [14] It is necessary to analyse the pleadings in this case in order to determine which party has the duty to begin. The analysis shows that there are issues on which the plaintiffs bear the onus of proof and that in the absence of adducing evidence on those issues, the plaintiffs will not have established a prima facie case. There are at least four allegations pleaded by the plaintiffs on which in my view they bear the onus of proof and on which, in the absence of the plaintiffs adducing evidence, they will not have established a prima facie case calling for rebutting evidence by the defendant.
- [15] The first is the contents of the agreements between each of the first to the fourth plaintiffs and the Trust on the one hand and the defendant on the other hand. The plaintiffs have alleged that each of the first to fourth plaintiffs and the Trust kept a banking account at the defendant's bank and each had an agreement with the defendant embodying certain terms. Whilst it is common cause on the pleadings that the first to fourth plaintiffs and the Trust had bank accounts with the defendant and that each had an agreement with the defendant, the terms and conditions of the agreements are not common cause. The defendant pleads that each agreement was subject to the terms and conditions embodied in annexures P1 to P3 to the plea, and the defendant relies on various terms not

²1927 AD 482.

pleaded by the plaintiffs. The plaintiffs bear the onus of proving the content of each agreement between each of them and the Trust and the defendant.

- [16] Secondly, the plaintiffs contended that it is common cause that there was a relationship between the banker and the client, that the plaintiffs kept bank accounts with the defendant, that when the bank accounts were opened certain specific persons were authorised to sign on behalf of the bank account holders, and that the accounts could only be debited if the instructions were properly authorised. This in my view is not sufficient. The court cannot ignore the rest of the content of the agreements between the parties, because it cannot give judgment without ascertaining the full ambit of each relevant agreement. A factual basis is necessary to determine rights, duties and liabilities.
- [17] The plaintiffs allege that during the period February 2015 to April 2016 the defendant debited each of the bank accounts on the dates and in the amounts reflected in the respective schedules annexed marked "POC6" – "POC12" and that the debits reflected in POC7 – POC12 were not authorised by the account holders. The plaintiffs accordingly allege that they are entitled to a reversal of each of the debits on annexures POC7 to POC12, to be credited with any relevant interest charged on those amounts, and for any charges on those amounts to be reversed. Whilst the defendant admits that it debited each of the accounts, that seems not a blanket admission of the correctness of the schedules relied on by the plaintiffs. Amongst others, the defendant alleges that there are numerous errors in the schedules, and examples are given. Therefore, the relief pleaded by the plaintiffs, namely that each of the debits in annexures POC7 to POC12 are to be reversed, is not established on the pleadings. In the absence of evidence by the plaintiffs, they will not have established that they are entitled to a reversal of each of the debits in annexures POC7 to POC12. It is also not sufficient for the plaintiffs to concede the amounts specifically alleged to have been incorrectly included in the schedules since the defendant has pleaded that the errors in the schedules are not limited to those specifically pleaded. In the absence of any evidence being adduced the court would therefore not know which of the debits it should direct be reversed.

- [18] Thirdly, the plaintiffs have made a positive allegation that the debits reflected in annexures POC7 to POC12 “were not authorised by the account holders in relation to each of these accounts nor were they in accordance with any authorised instruction”. The defendant denies that the debits in those annexures were not authorised by the account holders in relation to each of the accounts. The plaintiffs have made positive averments of lack of authority, which, despite any allegations made by the defendant, it must prove.
- [19] Fourthly, the plaintiffs have furthermore made allegations in their replication. The first is whether the plaintiffs were bound by clause 8 of annexure P1 or clause 7 of annexure P2, on the basis that they were unaware of such clauses and reasonably relied upon the defendant to disclose such clauses to them. The second is that clauses 8 of P1 and 7 of P2 operate unreasonably against the plaintiffs and are contrary to public policy and consequently void. This involves *inter alia* proof that these clauses were not brought to the attention of the plaintiffs, and that the plaintiffs could not reasonably have been expected to monitor the defendant’s actions.
- [20] In order to succeed on any of these defences, the plaintiffs would have to adduce evidence. It does not have the opportunity to adduce such evidence after the defendant has closed its case. Rule 39(13) (quoted above) provides for the situation where there are issues in respect of which the onus is not on the plaintiffs, and in which case it is then entitled to lead evidence only on those aspects on which it bears the onus. However, the rule is clear that it must lead evidence on all the aspects on which it bears the onus, before it may close its case and demand that the defendant proceeds with adducing evidence on issues on which it bears the onus.
- [21] In conclusion, there are a number of aspects on which the plaintiffs bear the onus and are required to adduce evidence in order to establish a *prima facie* case. If the plaintiffs were correct, they would have nothing to prove, and in the absence of any evidence by the defendant, would be entitled to judgment in their favour. They could in other words close their case with the thinking that if the defendant failed to discharge any onus on it, they would be entitled to judgment in their favour. It is clear from the analysis above that the plaintiffs would not

close their case without adducing evidence on those issues they have to prove. I am satisfied that there is sufficient evidence before me entitling me to rule that the plaintiffs should begin.

Order

[22] In the result I make the following order:

1. It is directed that the plaintiffs shall begin to adduce evidence at the trial.
2. The plaintiffs to pay the defendant's costs, including the costs of two counsel where so employed, jointly and severally the one paying the other to be absolved on Scale C.



MB MAHALELO
JUDGE OF THE HIGH COURT
JOHANNESBURG

DELIVERY: This judgment was authored by the judge whose name appears on it. It was handed down electronically by email to the parties legal representatives and uploading on CaseLines. The date and time of delivery is deemed to be 10h00, on 22 May 2025.

DATE OF HEARING: 05 DECEMBER 2024

DATE OF JUDGMENT: 22 MAY 2025

APPEARANCES

COUNSEL FOR THE PLAINTIFFS: ADV SUBEL SC
ADV SPILLER LM

INSTRUCTED BY: EDWARD NATHAN SONNENBURG ATTORNEYS

COUNSEL FOR THE DEFENDANT: ADV GAUTSCHI SC

ADV MELISSA SCHEEPERS

ADV NANDI MAKAYE

INSTRUCTED BY:

WITZ, CALICCHO, ISAKOW AND SHAPIRO

ATTORNEYS