Reportable:	YES / **NO**
Circulate to Judges:	YES / **NO**
Circulate to Magistrates:	YES / **NO**
Circulate to Regional Magistrates:	YES / **NO**

IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

Case no.: CIV APP FB 20/2023

In the matter between:

WILLEM JACOBUS VAN HEERDEN **First Appellant**

ALANA VAN HEERDEN **Second Appellant**

and

MT EARTHMOVING CC **First Respondent**

MELCHOIR JACOBUS TERBLANCHE **Second Respondent**

BRENDA TERBLANCHE **Third Respondent**

Date Heard: 02 August 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives *via* email. The date and time for hand-down is deemed to be **06 January 2025 at 10h00**.

ORDER

Consequently, the following order is made:

The appeal is dismissed with costs, which costs shall include the costs attendant upon the employment of counsel.

JUDGMENT

PETERSEN J

Introduction

[1] This appeal against the whole of the judgment of the court *a quo* handed down on 30 June 2023, served before the Full Court on 02 August 2024, with leave of the court *a quo*. The citation of the parties in the court *a quo* is generally adopted in this judgment, where the appellants were cited as the first and second plaintiffs, and the respondents as the first to third defendants.

[2] The issues in this appeal extrapolated from the grounds of appeal, are:

(i) whether the defendants were permitted to apply set-off for the delivery of a FAW truck and trailer at an agreed amount of R1 150 000.00 against a loan ('the set-off issue');
(ii) whether the defendants were entitled to rely on the defence of *adjectus solutionis gratia/solutionis causa adjectus* ('the *adjectus* issue); and
(iii) the failure of the court *a quo* to deal with or record the tender by the defendants of a sum of R176 140.00 to the plaintiffs ('the tender issue').

Background

[3] The plaintiffs instituted action against the defendants for payment of an amount of R 2 301 140.00, claiming the amount to be the balance due in terms of a written loan agreement concluded by the parties on 1 March 2018. The liability of the second and third defendants in terms of which they bound themselves as sureties and co-principal debtors, is founded on a written suretyship agreement incorporated in the loan agreement.

[4] The defendants defended the action and raised three distinct defences in their plea:

(i) that the first defendant made substantial payments to the plaintiffs, resulting in an amount of R1 376 140.00 (which

includes interest) remaining due and payable, from the R2 301 140.00 claimed by the plaintiffs;

(ii) that an amount of R1 150 000.00 was set-off against the loan amount in terms of an oral sale agreement of the FAW truck and trailer, in terms of which the first defendant as represented by the second defendant, sold to the plaintiffs the said truck and trailer for an agreed purchase price of R1 150 000.00; and

(iii) that an amount of R50 000.00 was to be set-off in terms of an oral service agreement in terms of which the first defendant, as represented by the second defendant, would render services to the plaintiffs, for the transportation of a loader from Rustenburg to Cape Town.

[5] Ultimately the defendants alleged that the only amount owing to the plaintiffs was an amount of R176 140.00, constituting interest on the loan amount. The defendants therefore by formal offer, tendered payment of this amount to the plaintiffs, which tender was rejected by the plaintiffs.

[6] At the opening of the trial, an application was made in terms of Uniform Rule 39(11) for a ruling by the court *a quo*, upon the onus of adducing evidence, or otherwise stated in the context of the present matter, which party had the duty to begin. The court *a quo*, pursuant to Rule 39(11), after hearing argument, ruled that the duty to begin rested with the defendants. The court *a quo* specifically formulated this issue as follows, which is important for purposes of the grounds of appeal:

‘Prior to commencing with the trial there was an application in terms of Rule 39(11) of the Uniform Rules of Court in relation to the duty to begin.

The plaintiffs argued that the defendants had the duty to begin as the dispute was whether payment was made or not. The defendants pleaded that payment was made to the plaintiffs in settlement of the loan. On the other hand, the defendants submitted that the onus rests with the plaintiffs as they need to prove what they received and what is outstanding. The claim by the plaintiffs is based on non-payment in terms of a loan agreement. The defendants' plea that payment was made attracted the duty to the defendants to prove that payment was indeed made to the plaintiffs contrary to what is alleged in the particulars of claim. It was for that reason that I ordered that the defendants had the duty to begin."

The evidence adduced in the court *a quo*

[7] The defendants relied on the evidence of Melchior Jacobus Terblanche Jr, the son of the second and third defendants, who at the time held a majority interest of 34% in the first defendant. The plaintiffs in turn relied on the evidence of the first plaintiff and his son Willem Jacobus van Heerden, also known as Wimpie. No issue is taken by the parties with the tenet of the summary of the evidence by the court *a quo*.

[8] For the defendants, Melchoir Jacobus Terblanche Jr represented the first defendant at the time the written loan agreement was concluded. The plaintiffs and defendants were close family friends for a long time, had hunted and fished together, and had successful business dealings in the past.

[9] The business of the first defendant involved the dismantling of plants and equipment. It was also a role player in the scrap metal industry. The first defendant concluded an agreement with Ikapa Mine in

Kimberley, to purchase the mine for R7 million, and to dismantle plant and equipment at the mine, to the sole benefit of the first defendant. The first defendant initially secured funding for the mine deal from a certain Mike Opper, subject to the first defendant selling the scrap metal to him.

[10] When the sons of the first plaintiff, Wimpie and Riaan (as nomenclature employed in the court *a quo*), gained knowledge of the aforesaid deal from a certain Martin Esterhuizen; and the profit sharing in the deal, they reached out to the defendants. They proposed securing a deposit of R3 million from their father, the first plaintiff. Consequently, two joint venture agreements (JVs) were concluded independently with Bosveld Vervoer & Konstruksie (a company run by Wimpie); and Van Heerden Auto Engineering (a company run by Riaan). The JVs preceded the loan agreement.

[11] The terms of the JVs which were similar in nature, pre-empted the written loan agreement, with the salient terms being:

"***Capital Loan***

Mr Willem Jacobus Van Heerden Id: 4[...] who is not part of this JV agreement, commits and agrees to the following:

Mr Van Heerden agrees to finance the start-up funds needed for this project.

Loan Amount agreed upon:

R3 000,000.00 (Three Million Rand) Deposit to secure the Purchase Agreement with Petra Diamonds.

R500,000.00 (Five Hundred Thousand Rand) for start-up Running cost towards this project.

Security for the outstanding R4 000,000.00 (Four Million Rand) will be provided.

Mr Van Heerden shall be reimbursed fully before distribution of profits.

MT Earthmoving will be held liable for payment of Loans to Mr Van Heerden.

Distribution of profits

Bosveld shall receive a total amount of R1 000,000.00 (One Million Rand) Excluding VAT from the income generated from this project. Bosveld shall supply MT with a VAT invoice."

[12] Melchoir Jacobus Terblanche Jr, representing the defendants, subsequently concluded the written loan agreement with the plaintiffs. Consequently, an amount of R3 400 000.00 rather than the R3 325 000.00 as agreed in the written loan agreement, was advanced to the defendants.

[13] The written loan agreement made no provision for banking details for repayment of the loan amount. Melchoir Jacobus Terblanche Jr was instead referred to a pre-agreement quotation which provided that the plaintiffs would confirm the banking details for payment, from time to time. This resulted in certain payments being made directly to the

first plaintiff and the rest to the different companies as instructed by the first plaintiff.

[14] The deal with the mine failed and resultantly the profit-sharing agreement with the JVs failed as well. Melchoir Jacobus Terblanche Jr testified that several payments were made to the plaintiffs, which were allocated by the plaintiffs in reduction of the loan, these included allocations to the JVs concluded with Wimpie and Riaan, which JVs were distinct and separate agreements from the loan agreement. This, contends the defendants, was a tactical choice by the first plaintiff, since Wimpie and Riaan would have been left without recourse because of the failed agreement with the mine.

[15] The loan amount was to be repaid by 18 November 2018. According to Melchoir Jacobus Terblanche Jr, the loan amount was repaid to the plaintiffs, albeit late. No issue is taken with the summary by the court *a quo* that *"It is common cause that payment was made in cash in the amount of R2 200 000-00 into the different accounts, R1 150 000-00 from the sale of a FAW Truck and Trailer. The amount of R50 000-00 was from the transportation of the plaintiffs' loader to their farm in Uniondale. The total amount paid was R3 400 000-00. The only outstanding amount is the interest of R176 140-00."*

[16] For the plaintiffs, the essence of the evidence of the first plaintiff and his son Wimpie is that the loan amount was not paid by 18 November 2018 as agreed. The first plaintiff whilst not a party to the JVs, availed the finance for his sons to conclude the JVs by way of a loan agreement with the defendants; and he was to be paid first before any profit sharing in terms of the JVs. He specifically described himself as the administrator of the JVs, to ensure payment was made

to his sons' companies; and to ensure payment to himself, before the distribution of profits.

[17] According to the first plaintiff, the payments made by the first defendant were, inter alia, to service the loan account, Van Heerden Auto Engineering, Bosveld Vulstasie and Bosveld Vervoer. On his version, the first defendant was in terms of the JVs to pay his sons' entities an amount of R1 000 000.00 each excluding VAT. Payments in amount of R 1 000 000.00 were in fact made to the account of Bosveld Vervoer in terms of the JV with the first defendant.

[18] The first plaintiff, whilst admitting that the defendants offered him a truck in lieu of payment, denied any payment by agreement made towards the loan agreement by way of the FAW truck and trailer by the defendants. Wimpie, however, who was present at the said meeting pertaining to the truck, informed the defendants that he would take the truck in lieu of payment in terms of the JV with Riaan's company. The FAW truck was therefore in lieu of payment in terms of the JV with Van Heerden Auto in an agreed amount of R1 150 00.00 and not towards the loan account. According to the plaintiffs the total amount payable by the defendants in terms of the loan and the JVs was R5 801 140.00, and the outstanding amount due was R2 301 140.00, as claimed from the defendants.

[19] Under cross examination, the first plaintiff made several concessions. He conceded that the defendants were guided by his letters as to where payment on the loan was to be made on the basis that he was the administrator of his sons' companies. Whilst he allocated the amounts paid to specific companies, it was not in reduction of the loan. He could not advance an answer for the fact

that the defendants would not have paid his sons companies as there were no invoices received from them in accordance with the terms of the JVs.

[20] According to Wimpie, an amount of R1 000 000.00 was paid into his company's account by the defendants as income generated from the JV. He testified that he did not communicate with the defendants regarding where the money should be paid since his father, the first plaintiff, made all the arrangements regarding the payments. He confirmed his father's version that the truck was offered in lieu of payment, which his father declined. He decided to receive the truck on behalf of his brother Riaan's company in terms of the JV. The R50 000.00 for transportation of the loader according to him, was deducted from the amount he was still owed by the defendants in terms of the JV, which amounted to VAT in the sum of R150 000.00 calculated on the R1 000 000.00. He conceded that there were no invoices issued to the defendants since the amount due to him was not paid in full.

The issues identified by the court *a quo*

[21] According to the court *a quo* the only issues for determination were:

(i) whether the defendants made payment towards the loan amount in full to the plaintiffs; and
(ii) whether there was a set-off because of the transfer of the truck and trailer.

[22] The first issue identified by the court *a quo*, although making no reference to *adjectus* issue, inextricably encompasses the *adjectus* issue, even though not pleaded with such specificity by the defendants. The court *a quo* nonetheless expressed its views on the *adjectus* issue. The plaintiff took issue with the failure of the defendants to plead the *adjectus* issue in the court *a quo* and similarly takes issue therewith in this appeal. I deal with this contentious aspect later with reference to several authorities of the Supreme Court of Appeal.

The adjectus issue

[23] The plaintiffs accept as common cause that the defendants as alleged in their plea, made certain payments to the plaintiffs in terms of the loan agreement, which amounts were not deducted from the balance of the loan amount due. The plaintiffs contend that the *adjectus* defence which was not pleaded, arose during the course of the trial, when the defendants contended that payments in an amount of R1 million were made to a third party on behalf of the plaintiffs.

[24] On this score, as alluded to above, the plaintiffs take issue with the ruling of the court *a quo*, in allowing the aforesaid evidence despite an objection raised at trial to the evidence being adduced. They contend, with reliance on *Barkhuizen v Napier* 2007 (5) SA 323 (CC) and *EC Chenia and Sons CC v L Van Blerk* 2006 (4) SA 574 (SCA) that it is trite that the matter should have been adjudicated on the pleaded version of the defendants and the duty of the court *a quo* was to adjudicate on those disputes alone.

[25] The plaintiffs further contend that the defendants were required not only to allege, but present evidence of an agreement between the first defendant and the plaintiffs to pay what is due to the plaintiffs in terms of the loan agreement to a third party. This contention they make based on paragraph 13 of in *Stupel & Berman Inc v Rodel Financial Services (Pty) Ltd* 2015 (3) SA 36 (SCA), that a *solutionis causa adjectus* is a person whom the debtor is entitled to pay by virtue of an agreement concluded with the creditor.

[26] The plaintiffs therefore contend that the evidence presented by the defendants at trial, failed to establish any agreement between the first defendant and the plaintiffs, to pay what is due to the plaintiffs in terms of the loan agreement to a third party. For this reason, they submit that the court *a quo* should have found that the defence of *adjectus solutionis gratia* was not pleaded; and that the defendants in any event failed to prove the existence of an agreement between the first defendant and the plaintiffs to pay what is due to the plaintiffs in terms of the loan agreement to a third party.

[27] The defendants, however, contend otherwise on the *adjectus* issue. They contend the issue cannot be considered in isolation from the set-off issue. In essence, the defendants construe the payment instruction of the first plaintiff, who designated the banking details for payment to third parties, as an agreement between the first plaintiff and the first defendant, as an agreement *solutionis causa adjectus*. The mere designation by the first plaintiff of where payment was to be made on each occasion, submit the defendants, establishes an agreement in each instance.

[28] The defendants, in advancing the argument on the maxim *adjectus solutionis gratia*, and its applicability *in casu*, refer, inter alia, to the Roman Dutch authorities on the issue. They contend that it is well established in our law that performance may be rendered to the creditor himself (Grotius 3.39.13; Voet 46.3.2; Pothier Obligations para 465, Wessels para 2153), to his agent if the agent's authority extends to such matters (Grotius 3.39.13; Van Leeuwen CF 1.4.32.5; Voet 46.3.3; *Baker v Probert* 1985 (3) SA 429 (A) at 438 H-I; re-affirmed in *Minister van Justisie v Jaffer* 1995 (1) SA 273 (A) at 280B-C; Wessels para 2164 ff; Agency 72-73,295), to his servant if the servant holds "an express or implied mandate to receive performance" (Voet 46.3.4; cf Huber 3.38.22), or to "any person authorised by the creditor" to receive performance" (Pothier Pothier Obligations para 480, ff), an *adjectus solutionis gratia* (Voet 46.3.2; Pothier Obligations para 480, ff), or *adjectus solutionis causa* (D 45.1.56.2). A person *solutionis causa adjectus 'is the only person to whom, by agreement with the creditor, payment is to be made. He does not step into the shoes of the creditor as the person to whom the debt is owed.'*

[29] The court *a quo* dealt with the *adjectus* issue very briefly and in a cursory manner at paragraphs 25-26 of its judgment, in essence aligning itself with the same argument advanced by the defendants in this Court. The court *a quo* said:

> '[25] The plaintiffs argued that the defendants could not rely on making payment to a third a third party as that was not proven. The defendants on the other hand submitted that payment to a third party or *adjectus* is applicable in this matter. In the case of *Stupel & Berman Incorporated v Rodel Financial Services (Pty) Ltd* 2015 (3) SA 36 (SCA) at par [13] the following was stated

about an *adjectus*: "*An adjectus, according to its generally accepted definition, is an entity, other than the creditor, to whom, by agreement between the debtor and the creditor, the debtor is entitled to pay what is due to the creditor and so discharge its obligations (see eg. Susan Scott The Law of Cession 2 ed (1991) at 161).*"

[26] In this matter the first plaintiff as the creditor nominated the different bank accounts into which the defendants had to make payments. Those accounts included that of Bosveld Vulstasie which was not involved in any of the JVs with the defendants. That goes to say that the first plaintiff regarded the said companies as an *adjectus* for the debt due to him by the defendants.'

[30] An exposition of the relevant law on the *adjectus* issue is necessitated, to appreciate the true issues in this matter. Notably in *Stupel & Berman Incorporated v Rodel Financial Services (Pty) Ltd*, as in the present appeal, the defendant did not plead the defence of *solutionis causa adjectus*. The court *a quo* in that matter and the SCA nonetheless dealt with same. To appreciate the nature of the defence and why the SCA engaged it on appeal, it is apposite to have regard to the discussion of the SCA, and not only paragraph 13 as the court *a quo* did; or as the plaintiffs or defandants in this appeal have. Paragraph 13 of the judgment re-affirms the principle which is trite. The following discussion evinces from the decision of what constitutes a *solutionis causa adjectus*, relevant in *Stupel & Berman Incorporated v Rodel Financial Services (Pty) Ltd*:

"[13] In deciding that Stupel & Berman were neither compelled nor entitled to withdraw the undertaking, which formed the basis of Rodel's case, the court *a quo* began from the premise that the undertaking constituted part of a tripartite agreement between Amber Falcon, Rodel and Stupel & Berman. In terms of this tripartite agreement, so the court's

reasoning went, Stupel & Berman was the debtor, Amber Falcon was the creditor while Rodel was cast in the role described in Roman law as that of an *adjectus solutionis causa* (*adjectus*). An *adjectus*, according to its generally accepted definition, is an entity, other than the creditor, to whom, by agreement between the debtor and the creditor, the debtor is entitled to pay what is due to the creditor and so discharge its obligations (see eg Susan Scott *The Law of Cession* 2 ed (1991) at 161).

[14] Based on the assumption that Rodel was an *adjectus*, the court a quo held that, as a matter of law, Amber Falcon could not withdraw its instruction to Stupel & Berman to pay Rodel. As authority for this thesis, the court referred to the following statement by Pothier *Obligations* para 489, which was quoted with approval, inter alia, in *Norman Kennedy v Norman Kennedy Ltd; Judicial Managers, Norman Kennedy Ltd NO v Reinforcing Steel Co Ltd & others* 1947 (1) SA 790 (C) at 802:

'A person to whom the creditor has indicated the payment to be made by the agreement itself, is very different from one who has merely an authority from the creditor to receive. The power of paying to a person having a simple authority ceases by revocation of the authority notified to the debtor, which the creditor may make at pleasure …
On the contrary, the right of paying to the person indicated by the agreement being founded upon the agreement itself, of which it constitutes a part, and which cannot be derogated from, but by mutual consent, the creditor cannot deprive the debtor of it, and the debtor, notwithstanding any prohibition of the creditor, may according to the law of the agreement, pay to the person indicated …'

[15] **I accept that, as a general rule, once an *adjectus* has been contractually nominated, the creditor cannot unilaterally change its**

instructions to the debtor and that the debtor can insist on paying the *adjectus* (see eg also *Administrator, Natal v Magill Grant & Nell* 1969 (1) SA 660 (A) at 699H). But my problem with the court a quo's reasoning lies in its fundamental premise. As I see it, there are a number of reasons why Rodel simply cannot be regarded as an *adjectus*. **First of all, the assumption that the undertaking relied upon by Rodel was part of a tripartite agreement, is unfounded. Albeit that it formed part of a larger transaction governed by a whole battery of agreements – including also the agreement of sale, the discounting agreements and the agreement of mandate between Amber Falcon and Stupel & Berman – the undertaking itself constituted a 'stand-alone' agreement between Rodel, on the one hand, and Stupel & Berman, on the other from which certain obligations arose for Stupel & Berman**. **The content of those obligations depend on a construction of the stand-alone agreement**. Second of all, and in any event, Stupel & Berman was never in the position of a debtor. Nor was Amber Falcon in the position of its creditor. In terms of the agreement of sale, Amber Falcon was the creditor in respect of the purchase price while the debtor was the purchaser. In terms of the agreement of mandate, Amber Falcon as principal appointed Stupel & Berman as its agent to do two things: (a) to transfer the property to the purchaser and (b) to pay the net proceeds of the purchase price to Rodel. **In fact, if Rodel was truly an *adjectus*, it would have no claim against Stupel & Berman at all. This conclusion derives from the rather trite principle formulated thus in 2 *Lawsa* 2 ed para 17**:

'The creditor may direct his or her debtor to render performance to a third party. The debtor is under no compulsion to do so. But if the debtor does agree, performance to the third party (the *solutionis causa adjectus*) absolves the debtor. Such an agreement is not cession. The right does not pass. It remains with the creditor. The

third party obtains no right of action to enforce performance. Failure on the part of the debtor to perform to the third party would accordingly not invest the third party with an action against the debtor . . . .'

[16] I now turn to the construction of the undertaking as a stand-alone agreement. In terms of clause 8 Stupel & Berman plainly undertook to pay the net proceeds of the sale to Rodel within 72 hours of registration of transfer and receipt of the purchase price. But to me it is clear that it did not do so in its personal capacity (as happened for example in *Ridon v Van der Spuy & Partners (Wes-Kaap) Inc* 2002 (2) SA 121 (C) at 137I-138C), but in pursuance of its mandate as the agent of Amber Falcon. I say this because the undertaking made it clear that it was given on the instructions of Amber Falcon (clause 7) and that Stupel & Berman would let Rodel know if Amber Falcon terminated or tried to terminate its mandate (clause 9). It stands to reason that, if the undertakings to pay were personal, termination of the mandate would be of no consequence to Rodel."

(own emphasis)

[31] In *Mutual Life Insurance Co of New York v Hotz* 1911 AD 556, the Appellate Division made the following observations regarding a *solutionis causa adjectus*:

"Stipulations to the effect that payment should be made to some third person were indeed permitted; but the name of such person was inserted merely for purposes of payment (*solutionis causa adjectus*). He was simply the representative of the stipulator and could make no claim for himself. And it was to arrangements of that nature that *Pothier* referred in the passage quoted. The Roman law in such a case held the stipulator

strictly to his agreement, and the *promissor* was justified in making payment to the *adjectus*, even though the *stipulator* changed his mind and demanded the money himself (Dig. 46.3.12. Sec. 3; Inst. III. 19, sec. 4). ***Pothier*** **in a subsequent paragraph (Pt. III c.1., Art. II., Sec. 4) draws attention to this; but adds that if the creditor alleges that he has reasons for objecting to payment being made to the person indicated, and if the debtor has no contrary interest, then for the latter to insist upon paying the person indicated "would be a degree of ill-humour and unreasonable obstinacy which justice must disapprove." He does not say, however, that such a payment would be invalid**. *Voet* on the other hand (46.3.2.) takes up the same logical position as the Roman jurists. The "*promissor*" he says, is entitled to make payment in terms of the contract, in spite of the stipulator's prohibition…

In *Tradesmen's Benefit Society v Du Preez* (5 S.C. p. 269) it was held that a contract might be validly entered into for the benefit of a third party, and that the latter, if he adopted the stipulation made in his favour, could sue upon it. This case was followed upon that point by the Transvaal Court in *Evans v Wolf and Simpson* (T.S. 1908, p. 78); and I am not aware of any South African decision to the contrary. The principle is supported by a considerable weight of Roman-Dutch authority, and may be regarded as now firmly established in our law.

But if the third party desires to enforce a stipulation made in his favour, he must accept it; for until he has notified his decision to the promissor, there is no *vinculum juris* between them. The stipulation, however, may be accepted at any time while it remains open…So that the present dispute really turns upon the question whether it is still open to the representatives of Jacob Pelunsky to accept the benefits of the policy. If that question be answered in the affirmative then the position taken up by the Company is impregnable; if in the negative, then the amount of the surrender value should upon demand have been paid to the plaintiff…

The result was that the sum of £55 became payable by the Company, not as the outcome of any new contract, but in terms of the policy itself… All the obligations of the Company under the policy were for his benefit, and the liability to pay the surrender value was one of them. It is still open to the representatives of Jacob Pelunsky to accept and claim the advantage of this stipulation, and that being so, the attitude of the Company has been correct throughout, and the appeal must succeed."

(own emphasis)

[32] In Mahomed v Lockhat Brothers & Co Ltd 1944 AD 230, the Appellate Division, with reference to the Roman Dutch authorities, made the following observations regrading a *solutionis causa adjectus*:

"It was argued by Mr. *Horwitz* on behalf of the plaintiff that Duff figured in the agreement merely as *solutionis causa adjectus*. That expression seems to be derived from *Digest* (46.3.96.5), a passage which deals with the question whether anyone could stipulate as follows: "Do you promise to pay 10 *aurei* to me or to my son, or as follows: to me or to my father?" **In the former stipulation, it is stated, the son is added, not with reference to the obligation but for the purpose of payment** (*et in proposito maifestum est non obligationis sed solutionis gratia filii personam adjectam*). See also *Institutes* (3.19.4), comments by Sandars. ***Sohm* (secs. 81 and 89) speaks of a person *solutionis causa adjectus* as "a person whom the debtor is entitled (by agreement with the creditor) to pay instead of paying the creditor himself**." Goudsmit (vol, 2, sec. 55), in enumerating the persons to whom payment may validly be made, mentioned "hem wien by de vestiging van de verbintenis, de schuldeiser gemachtigd heelt betaling te doen" (him to whom, at the making of the agreement, the creditor authorised the debtor to make payment). See

also *Pothier*, *Oblig.* (sec. 480), who states that **"sometimes the person to whom I direct a payment to be made is not my creditor but is to receive the money for me as, my mandatory or as my donator if I intended to give it to him. It is such who are properly designated by the Roman jurists "*adjecti solutionis gratia*."** In sec. 489 *Pothier* draws attention to the difference between **the case where the creditor has indicated in the agreement itself the person to whom payment is to be made** and the case of a person who has merely an authority from the creditor to receive. The learned author, referring to two passages in the *Digest* (46.3.12.3 and 46.3.106), states that, **in the former case, as the right of paying to the person indicated in the agreement is founded upon the agreement itself of which it constitutes a part and which cannot be derogated from**, but by mutual consent, the creditor cannot deprive the debtor, of it and the debtor, notwithstanding any prohibition of the creditor, may according to the law of the agreement, pay to the person indicated. But, *Pothier* adds, "if the creditor alleges that he has reasons for objecting to the payment being made to this person indicated by the contract, and the debtor has no interest in paying to that person rather than to the creditor himself or any other indicated by him, in lieu of the person indicated by the contract, to insist upon payment to the person indicated would be a degree of ill-humour and unreasonable obstinacy on the part of the debtor which justice must disapprove." *Pothier* quotes no authority for the last-mentioned view, but the principle underlying it may be that in such a case payment to the person mentioned in the agreement is stipulated for the convenience of the creditor.

It does not seem to be desirable to attempt to decide the present appeal by determining whether Duff was an *adstipulator* or merely *adjectus solutionis gratia* for these are terms which are used in the technical rules in regard to stipulations in the Roman law;

see *Voet* (45.1.3). Duff was a party to the contract. But the question is what rights and duties did the contract confer and impose respectively on Duff, the debtor, the guarantor and the creditors; and the scope of those rights and duties can only be ascertained by considering the terms of the contract itself.'

[33] In *Fethard International Ltd v Rwayitare* 2010 JDR 0408 (GSJ), the Full Court dealing with performance in terms of contract, held that the appellant was, in the circumstances, the only party who was entitled *ex contractu* to payment, on the basis that the appellant was not a *solutionis causa adjectus*, but an *adstipulator* and as such entitled to receive payment under the agreement. The Full Court stated as follows in respect of the second defence raised in that matter:

"[13] The second defence upheld by the Court a quo was that the appellant was a *solutionis causa adjectus* and not an adstipulator. In para [24] of the judgment the learned Judge first quotes from Wille's Principles of South Africa Law 8th Ed at 472 where the following is stated:

"Performance must be made to the creditor, or to an agent of his who has been duly authorized to receive performance, or to an adstipulator, that is, a person who has an interest in the contract entitling him to demand payment. A third person whose name is inserted in the contract for the purpose of receiving payment is known as an *adjectus solutionis gratia* (or *solutionis causa adjectus*). The debtor is justified in paying the *adjectus* and such payment discharges the debt. The debtor, however, is not obliged to pay the *adjectus* for the latter is not entitled to sue as his right is limited to the receipt of payment."

He then quotes the following passage from *Cassim v Latha* 1930 TPD 659 at 662:

"Then Mr Mulligan has referred the court to Sohm's Institutes of Roman Law ... where at p. 438, solutio is dealt with in the following words:

'Nor again is it essential that solutio should be made to the creditor himself. The debtor may be just as effectually discharged by solutio to another person, to a creditor of the creditor, for example, or to a sotutionis causa adjectus, i.e., to a person whom the debtor is entitled (by, agreement with the creditor) to pay instead of paying the creditor himself. In a footnote on the same page, an adjectus solutionis causa is distinguished from an adstipulator. Having said (at p. 389), that **'If the creditor in a stipulatio associates with himself another person who, in the interest of such creditor, stipulates for the performance of the same act by the debtor, this other person is called an adstipulator,'** the learned author (on p. 438) goes on to say:

'A solutionis causa adjectus is a person whom the debtor is entitled to pay by virtue of an agreement concluded with the creditor; the correal creditor, **on the other hand, e.g., an adstipulator, supra, p. 389), is a third party whom the debtor is bound to pay (jointly with the other creditor, namely). A solutionis causa adjectus cannot sue the debtor; an adstipulator can'"**.

[14] Applying the law reflected in these passages, I find that the appellant was in terms of the agreement between the parties entitled to payment, and MV3 was not. The adjectus is someone who is not entitled ex contractu to payment, but who may properly be paid. In casu the appellant was the only, legal person entitled to payment. This defence ought accordingly to have failed."

[34] Applying the principles enunciated in authorities above, the first plaintiff was in terms of the JVs and the loan agreement entitled to payment for the loan amount, and not Wimpie and Riaan. In the JVs, the Wimpie and Riaan in their capacity as directors of their companies, in a *stipulatio* relevant to the first plaintiff specifically stipulated that the first plaintiff "*Mr Van Heerden shall be reimbursed fully before distribution of profits."* The *stipulatio* then makes it clear that "*MT Earthmoving will be held liable for payment of Loans to Mr Van Heerden."*

[35] As a third party (*adstipulator*) identified in the JVs, the first plaintiff accepted that he was entitled to payment before any profit sharing in terms of the JVs by his sons Wimpie and Riaan. Having been stipulated as being entitled to payment in the JVs, the first plaintiff not only accepted such stipulation, but he formalised it through a written loan agreement.

[36] Applying the law applicable to a *stipulatio*, Wimpie and Riaan, duly representing their respective companies associated themselves with the first plaintiff who, in their interest as 'creditors', stipulated for the performance of the same act by the first defendant. The first plaintiff was therefore an adstipulator and not a *solutionis causa adjectus*.

[37] The first plaintiff not being a *solutionis causa adjectus* (a person but an *adstipulator*, is a person whom the first defendant (as debtor in terms of the loan agreement) was entitled to pay by virtue of the JVs concluded with the creditors (the companies of Wimpie and Riaan).

Otherwise stated, as an adstipulator, the first plaintiff was entitled to payment from the first defendant who was bound to pay the plaintiffs.

[38] As a basic premise, if the first plaintiff were to be construed as a *solutionis causa adjectus*, he would not have been entitled to sue the defendants as debtors on that basis; but as an *adstipulator* who accepted that he was to be paid first in terms of the JVs, together with the written loan agreement which formalised his interest, he was entitled to sue as he did.

[39] As to the JVs, it failed, and any contentions that Wimpie and Riaan were entitled to any payment, in the absence of any profits generated from the JVs is simply fallacious. The only payment that remained due and payable, despite the failed JVs was the loan agreement.

[40] In the final analysis, the ground of appeal predicated on the *adjectus* issue is nothing more than a red herring, muddying the waters. It is therefore unsurprising that the defendants did not raise the *adjectus* issue as a defence; and their belated reliance thereon without pleading same is inexplicable. The only defence raised by the defendants is what the court *a quo* initially identified, before itself being sidetracked by the defendants' submissions of the *adjectus* issue.

[41] The only issues which should have engaged the court *a quo* are the defences raised by the defendants, which are interrelated. Simply put, the defences holistically are that payments were made by the first defendant in reduction of the agreed loan amount; with set-off through the alleged agreement on the FAW truck and trailer and the transport agreement.

[42] The *adjectus* issue is without merit and falls to be dismissed.

The payments towards the loan and the set-off issue

[43] I re-iterate that the plaintiffs accept as common cause that the first defendant made payments to them in terms of the loan agreement. At trial, however, they claimed that there was not set-off of the FAW truck and trailer and the transport of the loader, towards settling the loan. The issues related to the FAW truck and trailer, and transport of a loader they claim were to the benefit of Wimpie and Riaan in terms of the JVs.

[44] To contextualise the matter, it must be accepted that payments made by the first defendant, totalling R2 100 000.00 are indisputable. This much is clear from the written document compiled by the first plaintiff dated 28 May 2019, Exhibit "C" admitted at trial, titled *"Opsomming van Rekeningstaat"* (Summary of Statement of Account).

[45] The contentious issue therefore is not so much the payments made in general, but the alleged set-off related to the FAW truck and trailer and transport agreement for the loader, relevant to Wimpie.

[46] It bears mentioning that the court a quo failed to deal tangentially with the set-off defence with reference to the applicable legal principles and the evidence relevant thereto. In fact, the court *a quo* in a single paragraph in concluding its judgment, at paragraph 29, upheld, inter alia, the set-off defence, where it said:

"[29] It is the defendants' version that the balance of the loan repayment was paid by means of a sale of a truck and trailer to the plaintiffs in settlement of the loan. The plaintiffs' case is that the truck and trailer was transferred to Wimpie on behalf of Riaan's company. This version is highly improbable. In the plaintiffs' own version, if Wimpie's company had already been paid an amount of R1 000 000-00 in terms of the JV, why would the defendants agree that the truck and trailer be transferred to him. The plaintiffs' evidence that there was a family loan between Wimpie and Riaan was not disclosed to the defendants and there was no proof of such. The defendants' version that the first plaintiff indicated to them that he no longer wanted to wait for his money and that the truck be transferred to him is more probable and should be accepted. The same goes for the transportation of the loader in the amount of R50 000-00. It was clear that the first plaintiff had to be paid first and it was the defendants' intention at all material times to ensure that the plaintiffs are paid in full. Every payment made by the defendants was done in settlement of the loan. The defendants in my view have succeeded to show on a balance of probabilities that there were payments made towards the loan except for the amount of R176 140-00 which was tendered and rejected by the plaintiffs."

[47] The set-off defence merits further and detailed scrutiny. It is common cause that the defendants rely on the written document referred to above, Exhibit "C" titled *"Opsomming van Rekening staat"* (Summary of Statement of Account), as the high watermark of their case on the set-off defence. The Summary of Statement of Account references the set-off of a truck and trailer and the transport of a loader, as follows:

"2. Vervoer van Loader (Transport of Loader) - R 50 000.00

3. Betaling van FAW en Sleepwa met PWS - R1 150 000.00
(15% BTW ingesluit – 2018 Model)
(Payment of FAW and Trailer with PWS)"

[48] In addition to the Statement of Account, a summary of account dated 27 June 2019, records a credit for the FAW truck and trailer in an amount of R1 150 00.00 and transportation of a loader in an amount of R50 000.00 on 18 June 2019, with a further payment of R100 000.00 on 21 June 2019. An amount of R2 056 000.00 was recorded as still being due and payable, as was the case on 28 May 2019.

[49] The plaintiffs in this Court still take issue with the set-off defence, with reliance on the essentials for a defence of set-off as adumbrated in Harms, Amler's Precedents of Pleadings 2018, 9th Edition; Set-Off (Essentials) and *Karob Boerdery (Pty) Ltd and Another v Griewaland Wes Korporatief BPK* (34/2020) [2021] ZANCHC 70, that:

"To rely on set-off, a defendant must allege and prove:

a) The indebtedness of the plaintiff to the defendant;
b) That the plaintiff's debt to the defendant is due and payable;
c) That both debts are liquidated;
d) That the parties are indebted to each other in the same capacity.

[50] The plaintiffs contend that the defendants failed to adduce evidence, relevant to requirement (b) for a defence of set-off, that the purchase price of R1 150 000.00 for the truck and trailer was due and payable by the plaintiffs to the defendants. In expounding

on this contention, the plaintiffs maintain that it is trite that the purchase price in terms of a sale agreement could only be due and payable if the goods were delivered in conformity with the terms of the contract; there is a tender of delivery against payment, or the contract provides for payment on a specific date independently of the seller's obligation to make delivery.

[51] In assailing the evidence of Melchior Jacobus Terblanche Jr, who testified for the defendants, the plaintiffs contend that whilst the defendants in their plea alleged that the first defendant complied with the terms of the agreement regarding the sale of the truck and trailer, which would entail that the defendants were required to prove delivery of the truck and trailer to the defendants in order to be in a position to claim that the purchase price is due and payable, he conceded during his evidence that the truck and trailer were required to be registered into the name of the purchaser, after being delivered to the purchaser. He was however unable to provide any evidence that the relevant truck and trailer was at any time registered in the name of the plaintiffs.

[52] The plaintiffs make much of the fact that Melchior Jacobus Terblanche Jr conceded that the truck and trailer were registered in the name of Wimpie. To this end they contend that the evidence of the two witnesses on behalf of the plaintiffs confirmed that Wimpie had agreed with the second defendant that the truck and trailer would be sold to him, with an agreed amount of R1 150 000.00 due in terms of a joint venture agreement with the first defendant. This contention does not account for the fact that the JV failed and there could accordingly be no talk of profit sharing as agreed in the JV

with Wimpie. The subsequent delivery of the truck and trailer to Wimpie, which was subsequently sold with the plaintiffs receiving no benefit from it, does not avail the plaintiffs.

[53] It also matters not as contended by the plaintiffs that there was never even an allegation made on behalf of the defendants that the third party to whom the truck and trailer was delivered and in whose name the truck and trailer was registered, acted as agent for and on behalf of the plaintiffs.

[54] The ultimate contention by the plaintiffs is that, if it is accepted that the defendants failed to present any evidence that the truck and trailer was delivered to the plaintiffs, it reasonably follows that the defendants failed to prove that payment of the purchase price of R1 150 000.00 was due and payable by the plaintiffs and the defendants were therefore unable to set-off this amount against the admitted amount due to the plaintiffs in terms of the loan agreement.

[55] Regarding the alleged agreement relevant to the transportation of a loader for an agreed amount of R50 000.00, the plaintiffs contend that the defendants were required to adduce evidence of the conclusion and terms of the agreement and that the service was indeed delivered for the plaintiffs to successfully rely on a defence of set-off.

[56] Whilst the defendants failed to adduce any evidence of the conclusion of the transport agreement; and with Melchior Jacobus Terblanche Jr, the only witness for the defendants vacillating on whether he was present at the time such agreement was concluded, the plaintiffs skirt the fact that at trial, the first plaintiff confronted with

the documents alluded to above, conceded the existence of the set-off agreement and the deductions relevant to the truck and trailer and the loader, reflected on its own documentation.

[57] The plaintiffs instead seek to discount their own documents as being relevant to the JVs and all amounts due in terms of those agreements. This submission is fallacious since the very same documents also attest to the payments of R2 100 000.00 relevant to the loan agreement.

[58] The appeal predicated on the set-off issue cannot be sustained and falls to be dismissed.

The tender issue

[59] The only remaining issue is the tender issue. It is common cause that the court a *quo*, failed to make any pronouncement on the tender. The defendants submit that the failure of the court *a quo* to record the tender does not invalidate its existence; and that as in the past, they continue to tender the amount of R176 140.00 and honour same.

[60] An offer to settle is succinctly dealt with in Uniform Rule 34. Given the stance of the defendants, and the plaintiffs appeal on the merits of its claim, this Court need not engage on the issue which remains extant within the purview of Rule 34. The offer from the defendants stands for consideration by the plaintiffs.

Conclusion

[61] For all the reasons stated above, the appeal stands to be dismissed with costs, which costs shall include the costs attendant upon the employment of counsel.

Order

[62] Consequently, the following order is made:

The appeal is dismissed with costs, which costs shall include the costs attendant upon the employment of counsel.

A H PETERSEN
JUDGE OF THE HIGH COURT,
NORTH WEST DIVISION, MAHIKENG

I agree.

S MFENYANA
JUDGE OF THE HIGH COURT,
NORTH WEST DIVISION, MAHIKENG

I agree.

T MASIKE

ACTING JUDGE OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG

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