CLAIMS FOR A STATEMENT AND DEBATEMENT OF ACCOUNT: PRINCIPLES AND PROCESS

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SUMMARY

Where a party is owed a sum of money by another party but is unable to quantify the claim because the relevant information and documentation is in the hands of the debtor, the first-mentioned party will in certain circumstances be entitled to demand, and if necessary institute legal proceedings to compel, the alleged debtor to furnish a *statement of account*, followed by engagement in a *debatement of the account*. However, creditors have no general right to demand that a debtor either provide a statement of account or engage in a debatement. This article examines the circumstances in which a creditor has such a right and the powers of the court in this regard.

1 INTRODUCTION

A party who believes that another party owes them a sum of money, whether contractually or in the form of damages or otherwise, usually has a straightforward course of action and a clear legal remedy to enforce their rights. If demand does not elicit payment, legal proceedings can be instituted to claim the specific amount. If the ensuing proceedings result in judgment for a specific sum of money, the judgment creditor can enforce it in the usual way, up to and including sequestration of the debtor's estate, or liquidation where the debtor is a company.

In some circumstances, however, a person may believe that they are owed money, but may have insufficient information to quantify the amount of the debt because the requisite documentation is in the possession of the debtor. The creditor is then in a quandary, for they are unable to specify in any legal process what monetary amount is allegedly due to them.

Thus, in *Victor Products (SA) (Pty) Ltd v Lateulere Manufacturing (Pty) Ltd*,[1] Moll J said:

> "The question which, therefore, arises is whether in our law a plaintiff who alleges a breach of a contract as a result whereof he has suffered damages, the amount whereof he is unable to prove, is entitled, upon alleging that the

[1] 1975 (1) SA 961 (W) 963A.

> defaulting party is in possession of the requisite information, to claim an enquiry as to such damages and payment of such damages as are found to be due to him."

The answer to that question was pithily expressed in a headnote to a reported decision, as follows:[2]

> "There is no general principle of law that when one party does not know how much he is owed by another he can call upon the latter to render an account."

Thus, it is only in some – but not all – circumstances that a creditor may, as a matter of law, be entitled to require the debtor to provide a statement of account, to be followed by a debatement of the account. If the debtor is unwilling to participate in an extra-judicial process of this nature (or if the creditor is not inclined to pursue the matter extra judicially), the creditor will, in certain circumstances, be entitled to institute legal proceedings, asking the court to make an order requiring the debtor, in the first instance, to provide a statement of account of all moneys received and outlaid by him for the account of the creditor, to be followed in a second phase by a debatement of the account in open court. Payment of the monetary amount (if any) finally found to be due in such a judicial process, with the outcome recorded in a judgment of the court, can then be enforced in the usual way.

It has been held[3] that a claim for the rendering of an account (which was a process known to Roman-Dutch law)[4] is only a means to an end – namely, to ascertain the amount of the debtor's indebtedness, and to secure a judgment for the amount. A later judgment has pointed out that

> "[t]he right to account is at once two distinct concepts. It is both substantive and procedural. It is a right as well as a remedy."[5]

The proposition has been judicially rejected[6] that where a plaintiff claims a statement of account, debatement thereof, and payment of what is determined to be due, an order to render an account constitutes the judgment of the court, and that the subsequent debatement and order for payment constitutes execution of the judgment.[7]

The right to compel a person to furnish a statement of account and thereafter to engage in a debatement of the account is founded on the principle that a person who, as a matter of law, is entitled to an account, but does not receive it, or who receives an inadequate account, has a legal right to press their claim for a due and proper account via a judicial process.[8]

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2 *Rectifier and Communications Systems (Pty) Ltd v Harrison* 1981 (2) SA 283 (C).

3 Per Solomon J in *Krige v Van Dijk's Executors* 1918 AD 110 117.

4 *Doyle v Fleet Motors PE (Pty) Ltd* 1971 (3) SA 760 (A) 762B; *Victor Products v Lateulere Manufacturing supra* 963A.

5 *Doyle v Board of Executors* 1999 (2) SA 805 (C) 813D

6 See the dicta in *South African Iron and Steel Corporation Ltd v Abdulnabi* 1989 (2) SA 224 (T) 234B in regard to the judgment in *HR Holfeld (Africa) Ltd v Karl Walter & Co GmbH (2)* 1987 (4) SA 861 (W).

7 In *Brown v Yebba CC t/a Remax Tricolor* 2009 (1) SA 519 (D) 525E, par 29 it was held that a final judgment "ought not to occur until there has been a proper debatement of the accounts".

8 *Doyle v Fleet Motors supra* 767H.

The claim for such an account may be asserted in legal proceedings commenced by notice of motion where there are no disputes of fact, or by way of action if there are such disputes. Thus, for example, there may be a dispute as to whether, at the relevant time, the parties were in partnership; the relevance in this regard is that partners are subject to a fiduciary duty and such a duty is then a legal basis for the right to demand a statement and debatement of account.

Where a party fails to assert their legal right to a statement of account or has not instituted legal proceedings that compel the alleged debtor to make discovery of all relevant documents, the claimant has no legal right to demand that the alleged debtor produce documents relevant to the alleged debt.[9] Moreover, as has been judicially pointed out, to claim the production of "supporting vouchers" in respect of an account that has not yet been rendered is to put the cart before the horse.[10] In other words, a court

> "cannot simply order the production of documents which the applicant says will be relevant to an account, in circumstances where there is no account and there is no claim for one to be rendered."[11]

A court will not rule that a person is entitled to an account where the claimant has failed to assert their right to such an account,[12] save where such a claim is made and upheld in terms of the Promotion of Access to Information Act[13] or where a partner is demanding to have sight of the partnership books[14] or where a trust beneficiary is demanding an accounting from a trustee.[15]

Although debatement is ancillary to the rendering of an account, a court order for the rendering of an account is not a precondition for debatement;[16] in other words, an extra-judicial process is capable of generating an agreed account and ancillary legal disputes in relation to the account so produced can be resolved via debatement of that account in open court.

It has, however, been held that

> "[t]he right to debate an account is not to be confused with the right to receive the same. The two are not coextensive."[17]

Thus, for example, a ratepayer is entitled, in terms of the Local Government Municipal Systems Act,[18] to receive a municipal account but that does not in itself give him a right to debatement of the account.[19] Hence, an aggrieved ratepayer will have to seek a legal remedy of another kind.

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9 *Lias Mechanicos Building & Civil Engineering Contractors (Pty) Ltd v Stedone Developments (Pty) Ltd* 2015 (4) SA 485 (KZD) par 17.

10 *Ibid*.

11 *Ibid*.

12 *Lias Mechanicos v Stedone Developments supra* par 18.

13 2 of 2000.

14 *Lias Mechanicos v Stedone Developments supra* par 16.

15 As in *Doyle v Board of Executors* 1999 (2) SA 805 (C).

16 *Dale Street Congregational Church v Hendrickse* 1992 (1) SA 133 (E) 143C.

17 *Moila v City of Tshwane Metropolitan Municipality* [2017] ZASCA 15 par 10.

18 32 of 2000.

19 *Moila v City of Tshwane Metropolitan Municipality supra* par 11.

2 THE SUBSTANTIVE CONTENT OF THE DUTY TO ACCOUNT

If the party demanding a statement and debatement of account has instituted legal proceedings to secure an appropriate court order in this regard, and is successful in persuading the court to grant such an order, the judicial order for an accounting should specify with appropriate particularity the nature and extent of what is required in the statement of account, and when and in what manner the subsequent debatement is to take place.

Significantly, the duty to account is additional to and separate from a requirement to make discovery in terms of the Rules of Court,

> "this duty being in no way affected by an action pending between the principal and the agent and by the fact that the principal could obtain similar rights under the Rules of Court."[20]

As to the content of an agent's duty to account, the following proposition has been quoted with judicial approval, namely that an agent

> "must at all times be ready with correct accounts of all his dealings and transactions carried on during the currency of the mandate. It is not enough for him to say: 'Here are my books and vouchers – you are free to use them to make up your own accounts.' In addition he is obliged to allow inspection by the principal of all relevant vouchers and entries in the agent's books, this duty being in no way affected by an action pending between the principal and the agent and by the fact that the principal could obtain similar rights under the Rules of Court. *Pothier* gives details of the proper method of keeping the account. Under receipts, he says, the agent must include, besides money and property which has actually come into his hands, damages for what has been lost or has deteriorated through his fault (only, however, if damages have been suffered thereby ...), and fruits or interest he should have received. Under expenses he will include his necessary payments (and remuneration, if any). The balance of the money entries will be the sum which he must pay over to the principal, or which the principal must pay to him."[21]

In addition, as was noted above, the claimant is entitled in terms of the Rules of Court, to require the defendant, at a specified stage of the litigation process, to make discovery of relevant documents and, if the claimant believes that the documents so provided are incomplete, the remedy is to call for further and better discovery.[22]

In a reported decision,[23] the court rejected a defendant's contention that too many documents over too long a period were being called for in a demand for discovery. It was held that, if the documents were in the defendant's possession and were relevant, they ought to be made available for inspection. Similarly rejected in the same decision was the defendant's objection to the production of documents on the grounds that some were confidential; the court held that the defendant had chosen to enter into a fiduciary relationship with the plaintiff and that the latter was entitled to satisfy itself as to what transactions fell within their agreement.

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[20] *Doyle v Board of Executors supra* 814A–B.

[21] *Doyle v Board of Executors supra* 814A–C.

[22] *Rellams (Pty) Ltd v James Brown & Hamer Ltd* 1983 (1) SA 556 (N).

[23] *Ibid*.

3 ESSENTIAL AVERMENTS

In the leading decision on statements and debatement of account, *Doyle v Fleet Motors PE (Pty) Ltd,*[24] the Appellate Division held[25] that, to ground a claim for a statement of account, the plaintiff should aver:

(a) their right to receive an account and the basis of such right, whether by contract or by fiduciary relationship or otherwise;

(b) any contractual terms or circumstances having a bearing on the account sought; and

(c) the defendant's failure to render an account.

In that decision, it was held[26] that, if such averments are proved,

> "ordinarily the Court would in the first instance order only the rendering of an account within a specified time. The degree or amplitude of the account to be rendered would depend on the circumstances of each case. In some cases it might be appropriate that vouchers or explanations be included. As to books or records, it may well be sufficient, depending on the circumstances, that they be made available for inspection by the plaintiff. The Court may define the nature of the account. The Court might find it convenient to prescribe the time and procedure of the debate, with leave to the parties to approach it for further directions if need be."

It has been held[27] that from that juncture,

> "[o]rdinarily the parties should first debate the account between themselves. If they are unable to agree upon the outcome, they should, whether by pre-trial conference or otherwise, formulate a list of disputed items and issues. These could be set down for debate in Court. Judgment would be according to the Court's finding on the facts. The Court may, with the consent of both parties, refer the debate to a referee in terms of sec. 19 *bis* (1)(*b*) of the Supreme Court Act, 59 of 1959."

4 ENTITLEMENT TO THE RELIEF CLAIMED

An initial question is whether, on the facts of the particular matter, the aggrieved debtor, *as a matter of law*, is entitled to a statement and debatement of account in respect of the disputed debt. This falls to be determined on the basis of the principles, summarised above, laid down by the Appellate Division in *Doyle v Fleet Motors PE (Pty) Ltd*. Creditors thus have no general right to a statement and debatement of account,[28] but it seems that there will always be such a right where the persons concerned are in a fiduciary relationship. Thus, in *Doyle v Board of Executors*,[29] Slomowitz AJ said:

> "Although the case [at hand] involves an *inter vivos* trust, the question at issue is one such as might arise in all circumstances in which persons stand in a fiduciary position to others."

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[24] *Supra*.

[25] *Doyle v Fleet Motors PE (Pty) Ltd supra* 762F–G.

[26] *Doyle v Fleet Motors PE (Pty) Ltd supra* 762G–763B.

[27] *Doyle v Fleet Motors PE (Pty) Ltd supra* 762F–763B.

[28] *Rectifier and Communication Systems v Harrison supra* 287H. .

[29] *Supra* 808E–F.

A cause of action or claim for relief by way of a statement of account, in circumstances outside the ambit of these principles, will be excipiable.[30] Once the right has been established, however,

> "the principle to be applied is that a plaintiff, who is entitled to an account and receives one which he avers is inadequate, is entitled to press his claim for a due and proper account."[31]

Conversely, however:

> "If plaintiff's claim ought to have been a simple one for payment of an amount of money then an order for rendering and debatement of account ... is similarly out of order."[32]

If the aggrieved creditor has received sufficient briefings from the debtor, they may not be entitled to a statement of account, but only to a debatement, and then only if they can show either that they were owed a fiduciary duty encompassing this entitlement (as distinct from merely being in a fiduciary relationship) – as, for example, where they are or were in partnership,[33] or where the claimant is exerting the right as a trust beneficiary against a trustee, or where the debtor had bound themselves contractually to engage in such a debatement, or where the debtor is statutorily obliged to provide a statement of account and to engage in a debatement.[34]

In this regard, it is established that there is no fiduciary relationship between persons merely because they are debtor and creditor respectively,[35] as in the ordinary relationship between a banker and its client.[36]

5 AN AGENT OR TRUSTEE'S DUTY TO ACCOUNT

As to the duties of an agent (and it has been held that the duties of good faith owed by an agent are no different to those of a trustee),[37] the court in *Doyle v Board of Executors*[38] quoted with approval from Kerr's *Law of Agency*[39] where the common-law principles were summarised as follows:

> "An agent is obliged to 'account for everything in good faith'. It is his duty 'where the business in which he is employed admits of it, or requires it, to

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30 As in *Victor Products v Lateulere Manufacturing supra*.

31 In support of this principle, the court in *Doyle v Fleet Motors supra* 815A cited the decisions in *Krige v Van Dijk's Executors supra* (no page reference given), and *Mia v Cachalia* 1934 AD 102 107.

32 *Narayanasamy v Venkatrathnam* 1979 (3) SA 1360 (D) 1362A.

33 See *Absa Bank Bpk v Janse van Rensburg* [2002] ZASCA 7 par 16.

34 *Absa Bank Bpk v Janse van Rensburg supra* par 15; *see also Rectifier and Communications Systems v Harrison supra* 289 H.

35 See *Absa Bank Bpk v Janse van Rensburg supra* par 16; see also *Victor Products v Lateulere Manufacturing supra* 963B where Moll J said, "Allegations which do no more than to indicate a debtor and creditor relationship would not justify a claim for a statement of account".

36 *Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd* 1995 (4) SA 510 (C) 530G–631B and the authorities there cited.

37 *Doyle v Board of Executors supra* 813D.

38 *Supra* 814C–F.

39 Kerr,*Agency* 3ed 186.

> keep regular accounts of all his transactions on behalf of his principal, not only of his payments and disbursements, but also of his receipts; and to render such accounts to his principal at all reasonable times, without any suppression, concealment, or overcharge'. This involves an agent in keeping the principal's property separate; in keeping his accounts up-to-date and allowing the inspection of his books; in giving information when necessary; and, when the transaction is complete, in rendering an account and handing over any balance in his hands plus anything to which the principal is entitled."

The duty of an agent to account to his principal goes further than merely providing an accounting expressed in terms of bookkeeping principles. As Slomowitz AJ said (emphasis as in the original):

> "Inextricably bound up with this by no means exhaustive compendium of obligations is the agent's duty to *give an accounting* to his principal of all that he knows and has done in the execution of his mandate and with his principal's property. I have chosen to emphasise the obligation to give an accounting because I in no way read the authorities to contain this duty within generally accepted bookkeeping principles. That is the least of it. What is owed is, as I have already said, a substantive legal duty. The agent must explain himself. He must justify his actions and conduct. If this, by circumstance, falls to be done in Court, then, to put it in evidential terms, he bears the onus of demonstrating the proper discharge of his office."[40]

It has been held that an agent's duty to account is not satisfied by the formal process of discovery of documents in the course of litigation, for that would be "wholly inadequate".[41] Nor is it a discharge of the duty to account "to begin with unexplained and unvouched opening balances".[42]

Even if a person is, in principle, entitled to a statement and debatement of account, a reckoning that has already taken place between the parties may be such that the debtor is no longer entitled to demand a debatement of that account.[43] Thus, it has been held:

> "If it appears from the pleadings that the plaintiff has already received an account which he avers is insufficient, the Court may enquire into and determine the issue of sufficiency, in order to decide whether to order the rendering of a proper account. Where the issue of sufficiency and the element of debate appear to be correlated, the Court might, in an appropriate case, find it convenient to undertake both enquiries at one hearing, and to order payment of the amount due (if any). In general the Court should not be bound to a rigid procedure, but should enjoy such measure of flexibility as practical justice may require."[44]

If the debtor has paid an amount that has since become disputed, their remedy (if they believe that no such payment was due or that they have overpaid what was due) does not lie in a debatement of account, but in a *condictio indebiti*[45] for, as a judge has remarked, there is no reason that a creditor should be legally obliged to assist a debtor to determine the amount of the latter's claim.[46]

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40 *Doyle v Board of Executors* 1999 (2) SA 805 (C) 813G–I.

41 *Doyle v Board of Executors* 1999 (2) SA 805 (C) 815A.

42 *Doyle v Board of Executors* 1999 (2) SA 805 (C) 815H.

43 As was held to be the case in *Absa Bank Bpk v Janse van Rensburg supra* par 10.

44 *Doyle v Fleet Motors PE supra* 763B–D.

45 *Absa Bank Bpk v Janse van Rensburg supra* par 13.

46 *Absa Bank Bpk v Janse van Rensburg supra* par 16.

A claim for debatement cannot succeed if the debt itself is non-existent – for example, if it has prescribed.[47] If the aggrieved party is not, as a matter of law, entitled to a statement and debatement of account, then, as noted above, they may, in appropriate circumstances, be able to frame their cause of action as a *condictio indebiti,*[48] in which event the onus of proof is that applicable to such a claim.

6 CONCLUSION

In the 1943 decision in *Maitland Cattle Dealers (Pty) Ltd v Lyons*,[49] Millin J said:

> "[N]obody is entitled to sue at common law for an account unless the person sued stands in a fiduciary relationship to him, or some statute or contract has imposed upon him the duty to give an account. Likewise in *Victor Products (SA) (Pty) Ltd v Lateulere Manufacturing (Pty) Ltd* 1975 (1) SA 961 (W) at 963 Moll J said: 'The right at common law to claim a statement of account is, of course, recognised in our law, provided the allegations in support thereof make it clear that the said claim is founded upon a fiduciary relationship between the parties or upon some statute or contract which has imposed upon the party sued the duty to give an account. Allegations which do no more than to indicate a debtor and creditor relationship would not justify a claim for a statement of account.'"[50]

These dicta remain accurate statements of current law.

As was noted, above, certain fiduciary relationships, such as agency, inherently embody a common-law duty to provide an accounting. Where there is no such specific duty, a general fiduciary relationship is usually the basis on which a creditor can, at common law, require an account from the debtor, followed, if necessary, by a debatement. A duty to account may also arise, explicitly or implicitly, from a contract between the parties, and in some instances the duty may have a statutory basis.

The specifics of the duty to account will vary from case to case, and the court that grants an order to account can – and should – provide directives in this regard. If it does not, the parties may have to approach the court to request an amplification of its original order in this regard.

In *Doyle v Fleet Motors*,[51] the law reports record that counsel put forward an argument as to what an "account" entails in this context. Although this argument was not explicitly endorsed in the judgment, counsel's propositions arguably accurately reflect the law in this regard. Thus, counsel contended:

> "By 'account', in the context of this form of action, is meant a full account or 'accounting' by a defendant of his administration or management by disclosure of all moneys received or disbursed by him over the relevant period supported by proper vouchers. An order will be granted unless it is shown that he has thus fully accounted ... Alternatively, if the said statement can be said to be formally in order, our Courts exercise a jurisdiction to determine whether

47 As was held or conceded to have occurred in *Absa Bank Bpk v Janse van Rensburg supra* par 13–14.

48 *Absa Bank Bpk v Janse van Rensburg supra* par 13.

49 1943 WLD 1 19.

50 Cited with approval in *Rectifier and Communication Systems v Harrison supra* 286D.

51 *Supra* 761B–D.

> an account, which an accounting party is obliged to render, is correct or not ... 'Correct' in the sense that it has been drawn up in accordance with the true agreement between the parties and includes a reference to every relevant transaction."

It seems clear that once a duty to account is established, there are several dimensions to the rendering of the requisite "account" – namely, its ambit and detail and its compliance with the agreement between the parties or with the implicit requirements flowing from their legal relationship or with the requirements of the applicable statute.

It seems, therefore, that compliance with a duty to "account" goes substantially further than is involved in the "discovery" of documents in terms of the Rules of Court. Arguably, a proper account is more than just the list of documents (which need not be in any particular order) that is required to be made available for inspection at a given stage in the litigious process.[52] Arguably, an "account" in this context requires (although no court has yet gone as far as to say so) that, taken as a whole, the account must be comprehensible and informative on its face. Thus, for example, the recording of a particular outlay by way of a bookkeeping entry (even if supported by an invoice) may arguably require at least a brief narration to make this item in the account comprehensible in the context of the parties' particular commercial arrangements.

A litigant who is entitled to require his opponent to provide a statement of account, and thereafter to participate in a debatement of the account, has a significant procedural and strategic advantage over a litigant who has no right to demand an account, in that the statement of account will take place at the outset of the litigation, in contrast with the bilateral discovery of relevant documents by all the parties which takes place toward the end of the pre-trial phase of the proceedings. Moreover, a party who is entitled to a statement of account will (it is submitted) be entitled to an order for costs if the demand is rejected, but later upheld by the court, even if the eventual debatement shows that no moneys are owing.

A claimant who wishes to be given, but is not entitled to, a statement of account will have to formulate particulars of claim as best they can, on the available information, and aver that a specific amount is owing to them by the other party. Having done so, they can then, later in the litigation process, compel the other party to make discovery of all relevant documents in their possession. The claimant will have to try to piece together from those documents what amount (if any) can be proved to be owing to them.

As indicated earlier in this article, a duty to account is most commonly a facet of a fiduciary duty. Where there would be no such duty at common law in the particular circumstances, there is scope for a contract draftsperson to write such a duty into a contract at the negotiation stage, and the draftsperson would often do the client a great favour by taking the opportunity to do so.

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[52] As to a trustee's duty to account, see Cameron, De Waal and Wunsh *Honoré's South African Law of Trusts* 5ed (2002) 331–334.