

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 4004/2014

(1) NOT REPORTABLE
(2) OF INTEREST TO OTHER JUDGES
(3) NOT REVISED

[Date] 26 MARCH 2018

In the matter between:

MUNTERS (PTY) LTD

Plaintiff

And

MONENE MAHLATSI SEROTE

1st Defendant

KGOTHATSO SEROTE

2nd Defendant

JUDGMENT

NCONGWANE AJ:

1. INTRODUCTION

1.1 The plaintiff was an employer of the first defendant until the latter resigned from such employment on the 3rd of June 2013. The first defendant is married to the second defendant in community of property. The parties are litigating about the sum of money totalling R934 387.53 that was paid by the plaintiff to the home loan account of the first and second defendants ("the defendants") held in the name of the second defendant at the Standard Bank, due to the fraud or theft plaintiff alleges was perpetrated against it by the first defendant.

2. In its particulars of claim, which were met with a plea of bare denial, the plaintiff's claim against the defendants, is based on the following:

2.1 That the first defendant, whilst in the employ of the plaintiff, had perpetrated a series of thefts and / or frauds on the plaintiff whereby she intentionally and unlawfully

caused sums of money to be transferred from the plaintiff's bank account at Nedbank to a Standard Bank home loan account in respect of immovable property registered in the second defendant's name,

2.2 The first defendant fraudulently, intentionally and with the aim to defraud the plaintiff created various fictitious company documentation on the strength of which the plaintiff made payments,

2.3 These misrepresentations were to the knowledge of the first defendant untrue and were made with the intention that the plaintiff act thereon and caused the plaintiff to transfer monies to the Standard Bank home loan account believing that payment was being made to its suppliers thereby causing the plaintiff to suffer damages in the amount of R 841 332.35, and

2.4 Due to the first defendant having fictitiously created company documentation as set out in subparagraph 2.2 above, caused the plaintiff to make payment of the amount of R93 055 18 to the said Standard Bank account home loan in a *bona fide* and reasonable belief that it was paying a supplier.

3. As pointed out above, the second defendant's indebtedness arises from his marriage in community of property to the first defendant and due to the second defendant having been aware of the first defendant's theft and fraud thereby being a party thereto.
4. Plaintiff therefore seeks judgement against the defendants jointly and severally, the one paying the other to be absolved for an amount of R 938 387.53 being the amount of damages as set out in the particulars of claim, i.e Claim A and B.
5. The first defendant admits that she was employed by the plaintiff as the Receptionist and subsequently promoted to a Creditor's Admin Clerk and that she left the employ of the plaintiff on the 03rd June 2013. Other than this admission, the defendants have filed a plea of bare denial. This type of a plea is not sufficient. In an attempt to make up for a bare denial, the defendants, during the course of the trial attempted to create various versions on which they wished belatedly to base their defence but such versions still had to be supported by evidence. It is trite that a plea to the plaintiff's declaration must set out whatever defence defendants rely upon. The purpose of pleading being to clarify the issues between the

parties,¹ the allegation in the plea must be of sufficient precision to enable the plaintiff to know what is the case it has to meet.² The defendants cannot therefore, rely upon a defence which is not pleaded, or which she or he is not allowed to incorporate into the plea by an amendment. A plea cannot be allowed to direct the attention of the other party to one issue and then, at the trial, attempt to canvas another³.

6. In general there are four ways in which the defendant can answer the plaintiff's allegations in his plea, namely, it can traverse the plaintiff's allegations, confess and avoid, file a dilatory plea or a plea in abatement which raises an objection to the proceedings without providing an answer to the merits or can file a special plea. A plea of a bare denial should therefore be deemed to be an irregular step and the plaintiff is entitled to act in accordance with Rule 23 or 30 of the Uniform Rules. In this case, the plaintiff failed to make use of this remedy. A defence must be pleaded as well as proof, for the courts to sit and try the issue raised by the pleadings. A defendant who has

¹ See notes to Rule 18 (4) *sv* "every pleading shall contain a clear and concise statement".

See also, in general, Vettori and De Beer "The consequences of pleading a non-admission" 2013 46 (2) De Jure 612.

² *Hlongwane v Methodist Church of South Africa* 1933 LLD 165, *FPS LTD v Trident Construction (Pty) Ltd* 1989 (3) SA 537 (a) at 541 H – 542 D.

³ *Nyandeni v Natal Motor Industries Ltd* 1974 (2) SA 274 (D) at 279, *Kali v Incorporated General Insurances Ltd* 1976 (2) SA 179 (D) at 182 (A)

missed pleading a defence, must raise a defence formally and have it placed on record. If no defence is raised, as a general rule, it cannot be adjudicated upon. The defendants by filing a plea of bare denial are regarded to have joined issues on the merits, requiring the plaintiff to prove its cause of action. At the commencement of the hearing, plaintiff's counsel submitted that plaintiff no longer intends to pursue any interlocutory court applications to compel the defendants to comply with the rules in so far as the lack of defence or forcing the defendants to plead on the merits since the defendants have been contumacious to two court orders directing them to discover certain documents on bank statements as well as to provide further particulars to the plaintiff.

7. Plaintiff proceeded to lead evidence in support of its claim. On the other hand, the defendants vacillated between various versions. The insufficiency of the bare denial and the congruency of the defendants evidence as against whether the plaintiff has succeeded in discharging its onus on a preponderance of probabilities must be determined.
8. Defendants' various versions amounted to the following:

- 8.1 That the plaintiff 's attorney did not have the required authority to act for the plaintiff, despite the plaintiff's attorney having filed a reply and a written mandate in terms of Uniform Rule 7 on the 27 May 2014. And that the previous managing director of the plaintiff, Mr John Anderson, was not authorised by a company resolution to testify on the plaintiff's behalf. These two versions were wisely abandoned by the defendants counsel.
- 8.2 That the first defendant was never apprehended of any wrongdoings whilst in the employ of the plaintiff, despite there being no allegations of such nature by the plaintiff , which point was not seriously pursuit by the defendants.
- 8.3 That the management of the plaintiff (the 'managing director', 'the financial manager' and a certain 'Ms Kogie Pillay') had acted recklessly and negligently in that they did not discover the fraudulent activities allegedly perpetrated by the first defendant earlier and to put a stop to it. The defendants also blame the plaintiff's auditors, Ernest & Young for not discovering these fraudulent activities earlier, before the first defendant left the employ of the plaintiff and during their annual audits. This contrived defence assumes an apportionment of

damages based on the contributory negligence of the plaintiff. Such a defence must, however, be pleaded and the appropriate relief of apportionment must be claimed in the plea. This was not done. Apportionment would in any event, not be available to the defendants as the plaintiff's claim is based on a delict intentionally committed⁴- being fraud and theft.

8.4 That the second defendant was never employed by the plaintiff and was at all times unaware of any fraudulent activities. He did not receive any queries, a letter of demand or telephone call from the plaintiff relating to its claim. And that both the defendants have never received any monies from the plaintiff, and

8.5 Various other versions that the plaintiff had to encounter for the first time as the trial progressed, either in examination in chief or during cross examinations. These versions were the defendants' methods of raising defences to the plaintiff's claim.

9. THE PLAINTIFF'S EVIDENCE AND THE DISCHARGE OF THE ONUS

⁴ **Nedco Bank t/a Nedbank v Lloyd – Grey Lithographers (Pty) Ltd 2000 (4) SA 915 (SCA) and Mabaso v Felix 1981 (3) (SA) 865 (A)**

9.1 The plaintiff's witnesses, Mr John Andersen ("Andersen"), the Managing Director of Munters Africa at the time (from 2004 to 18 November 2013), Mr Phillip Dickinson ("Dickinson"), the current Managing Director of Munters Africa and Mr Waren Webb ("Webb"), the current Financial Manager of Munters Africa testified on behalf of the plaintiff.

10. Mrs Lucy Grootboom ("Grootboom"), the Branch Manager of Standard Bank, Greenstone Branch was served with a *subpoena duces tecum* and she introduced the Standard Bank home loan statements (for the period 2nd February 2011 to 2nd August 2013) of the second defendant, Mr KL Serote and these were marked Exhibit A. She testified on the second defendant's home loan statements. Grootboom also introduced a letter on the Standard Bank Greenstone's letterhead addressed to the plaintiff's attorney dated the 8th September 2016. This letter was introduced as Exhibit C and her evidence on the letter was heard.

10.1 A bundle of documents representing colour copies of the original fictitious invoices and change of banking details was introduced by the plaintiff to assist the court with the

visualisation of the evidence surrounding Andersen's blue stamp. This bundle consist of fifteen pages that were marked Exhibit B.

11. Andersen testified in detail and the relevant evidence of his summary went in the following:

11.1 He holds a qualification in Mechanical Engineering and was employed by the plaintiff in June 1994 as a Sales Manager. He worked at the plaintiff's Humi Cool Division, thereafter, in the Dehumidification Division in Johannesburg. In 1999 he was promoted to a General Manager of the plaintiff. During 2001 to 2004 after he had a stint in Europe, he returned to RSA and took up a position of the Managing Director ("MD") of Munters, responsible for South Africa as well as for the Sub-Saharan Africa. He held a position of an MD until he resigned on the 18 November 2013. His period as an MD was stated by him to have been well in excess of 9 years, being April 2004 until 18 November 2013.

11.2 He testified that he knows the first defendant as an employee of the plaintiff, commencing in 2005, first as a receptionist and in 2007 promoted to Credit / Admin

Clerk. As the plaintiff operated an enterprise resource package incorporating financial and sales data and transactions, her duties as the only Creditors Clerk was to load the details of supplier invoices and reference payables against purchase orders which were prepared and generated by the plaintiff and reflecting amounts to be paid by the plaintiff. Simply put, she had to compile documents for payments to be made by the plaintiff. And this was done on a daily basis. She would prepare documents for payments as provided to her by her colleague, Kogie Pillay ("Pillay"), the Office Administrator and a Debtor's Clerk. She would attach the relevant supplier information, proof of delivery / supply of services and prepare the cheque requisition forms for payment by the plaintiff to all the relevant suppliers. Payments to the suppliers were made by the Financial Manager using banking details of the supplier, after verifying the document complied by the first defendant. As a Managing Director, he received and checked the documents from the first defendant and duly stamped and signed them to authorise a Financial Manager to pay.

- 11.2 The first defendant also had to attend to ongoing reconciliations of the payment documentation under her control. She would capture and reference these transactions on the IFC Software System that the plaintiff operated.
- 11.3 In the normal course of business Pillay was tasked with generating plaintiff's orders to the suppliers and would hand to the first defendant all the required documentation to record such orders and effect payments to the suppliers. During the course of the trial these documents were referred to as the "shipping documents".
- 11.4 The first defendant would then take the cheque requisitions to Andersen for him to approve payment and affix a special blue stamp thereon marked with his signature. Once the financial manager receives the cheque requisition with the blue stamp details of Andersen on, he would attend to the payment of the relevant supplier by EFT from the plaintiff's Nedbank account to the supplier.

- 11.5 He testified that the banking details of the supplier were preloaded on the system and remained there even though the supplier service was not used by the plaintiff. The loading was done by financial manager by virtue of what has been given to him as accurate information by the supplier, as banking details. The suppliers banking details remained on the system until intentionally removed. Andersen therefore testified that no alarm bells will go off if payment is requested to a known supplier of the plaintiff.
- 11.6 Andersen testified that first defendant knew that the plaintiff was not using the services of Micor- a division of Super Group ("Micor") at the time because the plaintiff was unimpressed with its services. The plaintiff was using the services of Cargo Compass instead.
- 11.7 The first defendant therefore created which he identified on page 26 of the discovery bundle a fictitious document purporting to be a change of banking details of Micor reflecting the second defendant's standard bank home loan account details as the 'new' banking details of Micor. He described the document as a letterhead with Super Group Micor, showing what should be regarded

as the correct banking details from the company in order that the plaintiff will pay against that document, into the banking details reflected. The banking details are the name of company, Super Group, the bank name was Standard Bank, the branch code was 004255, the account number is [...]050 and the reference number is [...]378. He testified that this document does not exist in reality. According to Mr Andersen the top of the letterhead as against the bottom of the letterhead come from an old document and were copied, using a snap tool of a pdf editor. And he testified that the first defendant, Monene Serote, created this fictitious document.⁵ Grootboom testified that the branch code was that of Standard Bank, the account number was that of the general Standard Bank 'bucket account number' and the reference number was the same as the second defendant's Standard Bank home loan account number⁶.

11.8 Thereafter the first defendant created fictitious invoices purporting to be invoices from Micor with bank details reflecting the second defendant's Standard Bank's home loan account details: the account number is the

⁵ See the record Volume 1 page 27 para 15 - 25

⁶ Plaintiff's discovered bundle page 26 and Grootboom Standard Bank letter dated the 8th of September 2016 Exhibit C on page 2.

Standard Bank 'bucket' account number and reference number is the second defendant's Standard Bank home loan account number. The first defendant attached bogus shipping documents to the invoices that in reality had nothing to do with the fictitious invoices.

11.9 Andersen compared the account number reflected on page 26 of the discovered bundle, the document which he contends was generated by the first respondent to the account number from the Standard Bank subpoenaed documents on page 1 of Exhibit B. It is common course that the latter document is the Standard Bank home loan bond account of Mr KL Serote, the second defendant, with the Standard Bank bond account number reflected thereon as [...]378 held at the Greenstone Branch of the Standard Bank and the reference number on the document is the same as the Standard Bank's subpoenaed documents.

11.10 Andersen further testified that the fictitious invoices on Micor letterhead which were created by the first defendant, purporting that services were rendered by Micor and further attached their company documentation of normal shipments to the said fictitious invoices which

would legitimise the claim for payment. Munters had no reason to question a Micor letterhead bank details change, the fraudulent invoices, on what looked like a Micor letterhead, and Andersen testified that Munters paid for the services of shipments which it had actually received but were done by another vendor, which they were unaware of.

11.11 In the mean time, Micor rendered services to the plaintiff and on or about May 2013 Micor demanded payment of an outstanding amount of R93 055.80 from the plaintiff. Plaintiff on the other hand assumed that a payment of the same amount has already been made to Micor as its records reflected that payment for that sum of money was made. But this was in July 2013. Andersen states that it was at the end of July 2013 when he was advised by a certain Mr Anthony Muller that Micor has requested payment for money and Munters responded by stating to Micor that such payment has been done but Muller noticed that payment has not gone into Micor's account. Immediately after a notification was received from Micor asking for payment, Andersen testified that the first defendant, probably in anticipation of trouble and when the shoe started to pinch, she submitted her resignation

letter.⁷After he was approached by Muller who explained to him that Micor was seeking payment and whilst Munters records indicated that payment had been made into Micor's account. He stated that it was established that the letter used with Micor's banking details was fictitious and Micor's letterhead was used to make Munters believe that the bank account that they were paying into was Micor's. They further established that payments that were made previously to Micor went into second defendant's bank account and theft and fraud had therefore taken place. He pointed out all the frauds / theft or misappropriation by the use of the fictitious invoices, documents and fraudulent cheque requisitions.

11.12 He testified these were generated by the first respondent totalling the amount of the claim. He stated that plaintiff only discovered the frauds and misappropriation in July 2013 and there was no legal basis for the money to have been paid to the second defendant as such payments were not due to him but only occurred by virtue of the fraudulent change of Micor's bank account details.

⁷

11.13 During cross examination he again confirmed, (when put to him that the defendant's version is that he and the other officials of the plaintiff acted recklessly by failing to discover the fraud much earlier), that the system that protected the plaintiff was short circuited or bypassed by the first defendant who presented stamped fictitious documents with his signature to the financial manager creating an understanding to the financial manager that he has approved the entire transaction. When this happen, according to Andersen, the transactions looked authentic. Although the second defendant played no part on the frauds or thefts but ought to have known about the misrepresentation and the theft as the home loan bond account of the second defendant received the funds.

12 Webb testified that the fictitious invoices were so skilfully manipulated (falsified) that it was impossible to detect that they were not legitimate invoices. Webb also testified in detail that the font of the fictitious invoices is different from the legitimate invoice from Micor which the plaintiff had received in May 2013⁸. Webb also testified that the Rand - Dollar and Rand – Euro exchange wasn't correctly entered on the fictitious invoices.

⁸

Plaintiff discovery bundle: Micor's legitimate invoices pgs 66 and 83.

Andersen testified that the legitimate logo, the header and the footer of Micor differed remarkably from the fictitious letterhead created by the first defendant.

13 The fictitious invoices that accompanied fictitious cheque requisitions comprised of the following:

13.1 Cheque requisition dated 18 February 2011 in the amount of R586 981.83 purporting to be payment of three Micor invoices all dated 11 February 2011 in respective amounts of R 246 924. 43 , R178 793.42 and R 164 263.98. On the cheque requisition it was typed written to be "*requested by Monene Serote*". This transaction was referred to by the plaintiff during the trial as "Fraud 1"⁹.

13.2 Cheque requisition dated 3rd June 2011 in the amount of R 175 568.00 purporting to the payment of two Micor invoices both dated 26th April 2011 in the respective amounts of R 96 672.86 and R 78 895.14. On the cheque requisition is was typed written to be "*requested*"

⁹ Plaintiff's discovery bundles pages 4, 5 , 15 and 23

by Monene Serote". This transaction was referred to as "Fraud 2".¹⁰

13.3 Creditor reconciliation/payment requisition dated 29 May 2012 in the amount of R78 782.52 purporting to be payment of Micor invoice dated the 26th April 2012 in the amount of R78 782.52. On the cheque requisition it was typed written to be "*requested by Monene Serote*". This transaction was referred to as "Fraud 3".¹¹

13.4 On the strength of these fictitious invoices the plaintiff paid the amount into the second defendant's Standard Bank home loan account. The payment of each and every transaction¹² was confirmed by Andersen, Dickinson and Webb.

14 Andersen testified that as a result of the first defendant having changed banking details of Micor to that of the second defendant, the plaintiff made a further payment to the second defendant in the mistaken belief that it was paying a legitimate invoice of Micor. He testified that the plaintiff was approached by Micor and asked to utilise their services again. Micor therefore

¹⁰ Plaintiff's discovery bundles pages 29, 31 and 40

¹¹ Plaintiff's discovery bundle pages 52 and 62

¹² Plaintiff's discovery affidavit pages 103 - 115

rendered services to the plaintiff and were entitled to payment. The plaintiff made payment to the second defendant in the amount R 93 055.17 on two invoices that plaintiff had received from Micor¹³. Payment was made from the plaintiff's Nedbank account on the 10th of July 2013. By that date the first defendant had already resigned from the plaintiff's employment. Andersen, Dickinson and Webb testified that the only reason that the plaintiff started investigating the frauds committed by the first respondent, after her resignation and exit from the plaintiff's employ was as a result of Micor's renewed service delivery to the plaintiff. Micor made enquiries why the plaintiff had not effected payment of its invoices whilst the plaintiff had already paid the invoices – only to the second defendant's home loan account and not to Micor.

- 15 Webb testified that it was only the financial manager who could access the plaintiff's bank statements and draw proof of payments from the Nedbank account. Webb testified in detail regarding the financial manager's user code / ID and username that was used to access the Nedbank accounts. Webb also testified that all the proofs of payment and bank statements were only drawn once the investigation into the frauds commenced.

¹³ Plaintiff's discovery bundle pages 64,66 and 83

He referred to the dates on the proof of payments and bank statements all being during July and September 2013.

16. **THE EVIDENCE OF GROOTBOOM ON BEHALF OF STANDARD BANK**

16.1 Standard Bank was served with a *subpoena duces tecum* by the plaintiff on the 5th of September 2016. And the oral evidence of Grootboom was tendered the 09th of September 2016.¹⁴ In the course of her oral evidence she introduced into the record a letter dated the 08th of September 2016 which was received and marked Exhibit “C”.

16.2 Grootboom testified that the Standard Bank home loan statements were those of the second defendant Mr KL Serote. Grootboom also testified that Standard Bank operates its home loan accounts on a ‘bucket account’ system which is a general account to facilitate payment made by home loan clients. She testified that the ‘bucket’ account is the account to which home loan clients will make their monthly deposits.

¹⁴ See Exhibit A (Index to the subpoenaed documents and Standard Bank statements as per the index)

- 16.3 She testified that the bucket account number was: 202151050 and although home loan clients will not know the operation of the 'bucket' account they would know the 'bucket' account number as a number to which their deposits should be made. Their 'bucket' account' was an 'in house thing', a process that was not discussed with clients.
- 16.4 She testified that in the case of Mr Serote the account number into which a deposit would be made, will be a 'bucket account' number: [...]050 and that reference number to be used to allocate the payment to Mr Serote's personal home loan account-would be: [...]378.
- 16.5 Grootboom testified that Mr Serote's account was held at the Greenstone branch.
- 16.6 Grootboom read the Standard Bank explanatory letter to the court in which all her evidence was confirmed. The explanatory letter confirmed the details of the name of the account as Standard Bank, the account number as [...]050, the branch code as 004255, and the reference number as the customer home loan account number.

- 17.1 The first defendant's evidence regarding her daily duties as the only creditors clerk in the employ of the plaintiff, the IFS system operated by her as well as the list of documentation handled by her was very similar (if not exactly) to that of Andersen. The first defendant however stated that Pillay was her supervisor and that Pillay had checked all her work before Pillay took it to Andersen for blue stamp approval and to the financial manager for payment. This evidence, is, however not of real consequence as the damning evidence remains: that the second defendant's Standard Bank detail appear on all the fictitious cheque requisitions and fictitious invoices.
- 17.2 She confirmed that the second defendant is her husband and they got married on the 20th March 2006. They both own their joint assets by virtue of their marriage regime of community of property. They share the matrimonial home even though the home loan account is in the name of the second defendant. She understands that she is liable for 50% of the bond. She resigned from her employment with the plaintiff on the 03rd of June 2013.

17.3 She stated that she does not dispute Grootboom's evidence but she maintains that the home loan account is not in her name, thus it does not belong to her. On the other hand she also admits that both defendants have a Standard Bank home loan registered over their property. She states that the monies were not paid in the Standard Bank home loan account. Without any factual basis, under cross examination, she states that Grootboom's evidence on the Standard Bank home loan account statement reflecting the various payments was false. After being quizzed by the court on this aspects and the ostensible contradiction of her evidence, she changed her testimony and accept the legal position regarding her joint ownership of the joint estate and concedes that the monies siphoned off the plaintiff's Nedbank account went into the second defendant's home loan account which she jointly owns.

17.4 Her attorney, according to her, had not shown her all the documents discovered by the plaintiff (the fictitious invoices and cheque requisitions) on the whole cause of action. The discovery occurred on the 12th of February 2015 and the trial commenced on the 06th of September

2016. She said this was the reason she still denies every allegation made against her.

17.5 She states that plaintiff was reckless and irresponsible by not discovering the acts of fraud and theft earlier. She accepts that the evidence of Andersen, Dickenson and Webb who testified that according to the plaintiff's system, and during 2011 to June 2013, they thought they were paying suppliers of the plaintiff but only to discover that the first defendant generated various fictitious invoices and documents. This evidence was not challenged and the evidence regarding what was termed Fraud 1,2,3 and 4 was not rebutted from the questions during the cross examination. She testified that because she was never caught out by the plaintiff, generating the fictitious documents whilst she worked for the plaintiff, she therefore did nothing wrong. When asked during cross examination as to her husband's home loan account number appearing as reference number with Standard Bank on the fraudulent tax invoices and other documents, her answer was "*I do not know*".

17.6 When all the four instances of fraud occurred, she was in the employ of Munters and the only creditors clerk who

handled the cheque requisition requests and their supporting documents except the shipping documents which were also handled by Ms Kogie Pillay. This evidence was not challenged. All the other employees including Kogie Pillay whom she claimed was her supervisor, did not know her husband's Standard Bank's home loan details and could not access these details. It was put to her that Andersen testified and was corroborated by Mr Webb that the financial manager Mr Casper Larkin loaded the details changing the bank details of Micor, which appear on page 26 of the discovery bundle of documents. When the payments occurred, the financial manager assumed that the change of banking details to have come from Micor therefore there was nothing untoward to pay into the account of Micor. She confirmed that legitimate cheque requisitions were requested by her and that the documents used and her requests are not necessarily different when comparing the legitimate cheque requisitions and the fictitious requisitions on the face of it. Her testimony consisted of new material facts that were not placed in dispute with the plaintiff's witnesses.

16.7 She stated that she could not explain the fraudulent transactions in particular, could not explain why the same amounts that went into the second defendant's Standard Bank home loan account after leaving the plaintiff's Nedbank account were immediately withdrawn from the Standard Bank home loan account. Her husband, according to her has not told her about the money getting into the Standard Bank home loan account. It is the second defendant who could indicate the source of the payments. She did not establish from the plaintiff as to how the plaintiff obtained the second respondent's home loan account or home loan reference number. This she did not do even during the trial. After she resigned in June 2013, the generating of the falsified documents stopped and no further payments went into the second defendant's home loan account from the plaintiff's bank account. She was unable to explain this co-incidence.

17.7 On her own evidence, the first defendant was the last link in the chain with respect to payment of the plaintiff's suppliers or creditors.

18.1 The second defendant Mr KL Serote testified that since he had an access bond with the Standard Bank home loan account, he could withdraw any money from that account if any withdrawal made are allowed by the bank. During cross examination he boldly denied that the first defendant '*did anything wrong*' or that she created any fictitious documentation. He confirms that all the money paid into the home loan account was withdrawn by him on various occasions and immediately after the payments were made. He told the court that he could not explain the startling co-incidence that as soon as the deposits went into the account he withdrew the monies. He conceded that the money did not belong to him as it was not earned by him. He confirms he appropriated the money for their joint benefit. This evidence is indirect contrast to the first defendant's testimony that neither she nor the second defendant received the amounts claimed by the plaintiff.

18.2 The second defendant testified that he received Standard Bank home loan statements quarterly- 3 or 4 times a year. He however testified that he hardly looked at the contents thereof and he often did not even open the statements that he had received.

19 **ANALYSIS AND EVALUATION OF EVIDENCE**

19.1 The first and second defendants evidence necessitate that I evaluate and consider the credibility of the witnesses within the context of the wider probabilities of the plaintiff's case. I enter a terrain of evaluation of credibility of witnesses since I am of the view that the first and second defendants testimony is so inherently improbable that any version (or versions) they attempted to pursue in the course of giving evidence, is incredible.

19.2 The plaintiff's witnesses, Andersen, Dickenson and Webb gave clear, convincing and consistent evidence. All three of them remained uncontroverted and under protracted cross examination their evidence corroborated each others'. The credibility of all three of these witnesses was not undermined in cross examination.

19.3 Grootboom's oral and explanatory letter could not be attacked by the defendants. Grootboom had nothing to gain by giving false evidence. Although Grootboom was

subpoenaed by the plaintiff she is not classified as a witness of the plaintiff.

19.4 The plaintiff's witnesses confirmed that all three of the payments requested by the first defendant on the fictitious cheque requisitions (Fraud 1,2 and 3)¹⁵ totalling the amount of R841 332.35 were paid into the Standard Bank home loan account of the second defendant and identified the credits on the subpoenaed Standard Bank home loan account statements. The three payments were received respectively on the same day into the second defendant's Standard Bank home loan account as the days that the amounts left the plaintiff's Nedbank account.¹⁶

19.5 Andersen, Dickenson and Webb also confirm and identify the last payment (Fraud 4) in the amount of R93 055.18 being credited to the second defendant's Standard Bank home loan account as per the statements. This last payment was received by the second defendant in his Standard Bank home loan

¹⁵ Plaintiff's discovery bundle pages 4, 25 and 52

¹⁶ Plaintiff's discovery bundle pages 104, 108 and 112

account on the same day that the amount left the plaintiff's Nedbank account.¹⁷

19.6 On the other hand, the evidence tendered by both the first and the second defendants was not coherent, the first defendant's testimony is riddled in self contradictory statements, was inconsistent and blatantly misleading. Although the first defendant testified that neither she nor the second defendant received the amounts claimed by the plaintiff, first defendant's evidence was that she has no access to or knowledge of the second defendant's financial affairs. Both the first and second defendants testified that they did not discuss work or financial matters with one another. They did not have an idea what the other was earning. In my view, it is very unusual for the parties married in community of property not to have any knowledge of the other spouse's financial affairs. Their marriage regime requires that they share liabilities and they are core owners of the joint estate.

19.7 The first defendant, contrary to the counsel's version put to the plaintiff's witnesses, testified that the second

¹⁷ Plaintiff's discovery bundle page 117

defendant did receive Standard Bank home loan statements at the address where they reside, but she had never opened them. This was corroborated by the second defendant's testimony that he received the said statements quarterly but he hardly looked at them. I am not persuaded by this piece of evidence and find it highly improbable and false. The second defendant's testimony clearly suggests he knew the movements in the home loan account more so , taking into account the evidence that every time after there was payment made into the account, he was able to withdraw these huge amounts of money. In the light of his evidence that he made so many withdrawals against the credit in his home loan account, his evidence that he did not open home loan bank statements cannot be believed.

- 20 The second defendant persisted with his evidence that he never received the amounts credited to his Standard Bank home loan account, but the bank received it, despite him conceding that Standard Bank home loan accounts related to his home loan account and he withdrew the funds. His evidence in this respect does not make any sense at all and should be rejected. He further conceded that the total amount of R 934 387.53 was paid into his Standard Bank home loan account. The nail to the

second defendant's case is a factual evidence that all the withdrawals that he made from the Standard Bank home loan account were made by him within a day or two of receipt of payment. The second defendant's explanation, during examination in chief, that he had an access bond account and as such he could make withdrawals from that account as he pleased and irrespective of the time limit of the home loan (granted in 2005 in the amount of R500 000.00) is preposterous , devoid of all truth and illogical attempt to justify his large and other withdrawals from the account. In view of the foregoing I make a finding that the second defendant's evidence is false, cannot be believed and he is an untrustworthy witness.

- 21 The first defendant, similarly, attempted to mislead the court by claiming that she had done nothing wrong regarding the generating of falsified invoices, requisitions as well as the document on page 26 of the plaintiff's bundle, that made it possible for her to achieve the changing of Micor's banking details to that of her husband, the second defendant. She never bothered to quiz the plaintiff regarding this issue because she knew, in my view, what would exactly follow from enquiries that she had to make. Her performance in court on this issue left the court in no doubt that she was willing to lie, prevaricate and mislead the court in order to advance her own and the second

respondent's financial interests. Her conduct was deceitful not only to the plaintiff who has put her in a position of trust whilst she was in the employ of the plaintiff but also to the court. Her actions clearly disregarded the interests of the plaintiff and abused her position of trust to the prejudice of the plaintiff. She clearly used the position of trust in which she was placed by her employer, the plaintiff, to cause harm to the plaintiff.

- 22 In disputably, the defendants wilfully abstained from enquiring either from the plaintiff or from Standard Bank with regards to these fraudulent payments as they knew what the answer to their enquiries would be. They knew that they will be informed that fraud and theft has occurred and the first defendant was answerable. It is indeed so that if you fail to make enquiries where common sense basically tells you something and you do not act in accordance with cognitive appreciation of what common sense tells you, the only inference that can be drawn from that, is that you doing so in a dishonest capacity. You are not asking the questions because you know the answer. And in the same parenthesis, the defendants' wilful abstention from making enquiries either from the plaintiff or Standard Bank amounts to dishonesty on their part and I find this conduct to be warranting a finding of dishonesty and lack of integrity.

23 In **R v Myers 1948 (1) SA 375 (D)** it was said that a belief if not honest which though infact entertained may in itself have been the outcome of a *'fraudulent' diligence in ignorance – that is, of a wilful abstention from all sources of information which might lead to suspicion, and a sedulous avoidance of all avenues to the truth, for the express purpose of not having any doubt thrown on what'* the person concerned *'desires and is determined to and afterwards does (in a sense) believe'*. In my view, similar reasoning applies in the present case.

24 The conclusion to which I am driven is that, *prima facie* , the defendants consciously closed their minds in pursuing lines of enquiry which could have informed them better but which could also have demonstrated to them that they chose to believe was in fact and law is mistaken. The absence of any evidence to contradict that inference renders it the most probable one in the circumstances.

25 ONUS

25.1 In order for the plaintiff to be successful in the claim it has to prove the following:

25.1.1 That it had suffered the monetary loss in the amount of R934 387.53,

25.1.2 That the loss of R934 387.53 was due to the conduct of the defendants, and

25.1.3 Fault or blame worthiness on the part of the defendants.

26 The wrongful infliction of pecuniary loss as a form of delictual conduct can generally be defined as the wrongful and culpable conduct which causes patrimonial harm to the plaintiff. The plaintiff's remedy for the recovery of the damages is the *actio legis Aquiliae*. For the purpose of finding an aquiliaen liability, plaintiff can prove either negligence or intent on the part of the defendant.¹⁸ The plaintiff must also be able to prove a calculable pecuniary loss.¹⁹

27 For all practical purposes the general principles underlined delictual remedies comprehensively cover the whole field of delictual liability. There is therefore no need to specify the action in terms of which the claim is brought. Provided facts are alleged in the pleading which justifies the relief sought in accordance with the principles of our law. The pleading will disclose the cause of action without delict being named.²⁰

¹⁸ **Mathew v Young 1922 AD 492**

¹⁹ **LAWSA, Delict Volume (15) (3ed) Lexis Nexis para 2**

²⁰ **Minister of Finance and Others v EBN Trading (Pty) Ltd 1998 (2) SA 319 (N) at page 324 B – D, referred to and agreed with in Media 24 Ltd and others v/s SA Taxi Securitisation (Pty) Ltd (Avusa Media and Others as *Amici Curiae*) 2011 (5) SA 329 (SCA) at para 9 at page 334.**

28 It was demonstrated, during the cross examination of the second defendant that the following crucial facts occurred and were established:

28.1 That the starting debit balance of the home loan on the 2nd February 2011 was the amount R388 734.24. On the 22nd February 2011 after the first payment was received from the plaintiff in the amount of R586 981.83, the balance of the home loan was R198 247.59 – in credit. With one single payment from the plaintiff the home loan was paid in full.

28.2 The second defendant made two large withdrawals thereafter on the 23rd February and 24th February 2011 in the amounts of R 210 000.00 and R138 000.00 respectively. The total of R348 000.00. On questioning how he knew he could make such large withdrawals on a R500 000.00 bond, he testified that he could make it because he paid his monthly bond premiums.

The same *modus* is followed on all of the withdrawals with emphasis on large withdrawals very shortly one or two days after payment is made by the plaintiff.

28.3 On the three pages of the second defendant's Standard Bank home loan account he had made withdrawals between the period 23rd February 2011 to 24th February 2013 in the total amount of R796 000.00. The second defendant withdrew the amount of R348 000.00 after the first payment by the plaintiff in the amount of R 586 981 38. He withdrew the amount R364 000.00 after the second payment by the plaintiff in the amount of R175 568.00.

28.4 He withdrew the amount of R84 000.00 after the third payment by the plaintiff in the amount of R78 782.52. The second defendant was therefore at all times very much aware of the payments being made by the plaintiff. No other inference can be drawn judging by his large withdrawals and timing thereof. This clearly suggests that there was communication between the defendants about these payments and the withdrawals.

29 Despite the total amount of the withdrawals the balance of the second defendant's home loan's account as at the last date on the statement being 02nd August 2013 is the amount of R193 428.42 less than the opening balance on the first page of the statement dated the 02nd February 2011. Despite the second

defendant's simulated protests that he did not know where the money came from, that he was not expecting money from anywhere or anybody he conceded to the court when questioned that he knew the money did not belong to him. He also conceded that the amounts that the plaintiff paid into his Standard Bank home loan account are no longer in the account and have been utilised by him. Both defendants conceded that the plaintiff did not owe either of them any money for any reason. Upon being questioned if the second defendant would instruct Standard Bank to repay the plaintiff the amount of R934 387.53, as he knew where the amounts came from, his answer was that he will not and in any event he has appropriated the monies for himself.

- 30 It is therefore evident, in my view that both defendants planned their theftuous conduct and knew that the money came into the second defendant's Standard Bank home loan account by way of fraud or theft. The first respondent skilfully created and manipulated the relevant documents at her place of employment with the plaintiff with the intention to cause the plaintiff financial harm. After she exited from the plaintiff's employ, the payment to the second defendant bank account stopped. The creation of the falsified documents and cheque requisitions also stopped. On a balance of probabilities, I am

satisfied that the court can draw an inference that the defendants knew that the money is stolen from the plaintiff and due to that act of stealing, it was paid into the second defendant's bank account to the credit of the second defendant who had no entitlement to the money so paid into his home loan account. In **Nissan South Africa (Pty) Ltd v Marnitz NO and Others 2005 (1) SA 441 (SCA) at 449 paras 26**, Streicher JA dealt with this question by stating that an appropriation on the funds transferred to the bank account with knowledge that the thief is not entitled to the funds, would constitute theft of such funds. Under the circumstances, the plaintiff would then be entitled to payment of the monies from those who were not entitled to it when they appropriated the monies.

26. *"In this case, FNB , as agent of the appellant, intended to effect payment to TSW, and Standard Bank an agent of Maple intended to receive payment on behalf of Maple. There was no meeting of the minds. In the circumstances, Maple did not become entitled to the funds credited to its account. Any appropriation of the funds by Maple, with knowledge that it was not entitled to deal with the funds, would have constituted theft. The transfer of the funds the receipts account and thereafter to the payments account of Maple did not change Maple's position concerning those funds. Just like Standard Bank, FNB received funds to which Maple was not entitled. An appropriation of these funds by Maple, with knowledge that it was not entitled to the funds, would likewise have constituted theft thereof. The first and second respondents, consequently, have no claim against FNB in respect of the funds.*
27. *"It was common cause that, in the event of its being found that the first and second respondents were not*

entitled to the funds, the appellant was entitled to payment thereof.”

- 31 In casu, Standard Bank would not be in position to reverse any credit in the account of the second defendant since, the money has been appropriated by the second respondent. And in any event, this is not a case before me.
- 32 Accordingly, the plaintiff has discharged its onus and has proved that the first defendant fraudulently and intentionally and with the aim to defraud the plaintiff created fictitious supplier invoices and other supporting documents including the document that was used by the first defendant to change a suppliers banking details loaded on the plaintiff's system. I am also satisfied that on the preponderance of probabilities, the fraudulent activities perpetrated by the first respondent were done with the knowledge of the second respondent. The second respondent's withdrawal and appropriation of the monies that went into his Standard Bank loan account accords with the circumstantial evidence from which an inference, on the probabilities, is drawn by the court that the first defendant defrauded the plaintiff and stole the money. Plaintiff has proved the allegation regarding both claim A and B for R934 387.53 and its entitlement thereto.

33 **COSTS**

33.1 It is settled law that costs follow the result and that the general rule is that the successful party is awarded costs as between party and party.

34 Plaintiff's counsel submitted that defendants did not have *bona fide* defence in the action instituted by the plaintiff she bemoaned the recalcitrant conduct pursued by the defendants leading up to the eventual hearing. It was submitted that it would be just and equitable for the defendants to pay the plaintiff's costs on the scale of attorney and client. It is not disputed by the defendants that the background to the litigation has a peculiar history. The defendants were placed under bar to file their plea on the 30th March 2015, when the plea was eventually filed as stated elsewhere in this judgement, it was a bare denial. The defendants attempted to stall the matter by persisting with the point that the plaintiff's attorney was not authorised to act on behalf of the plaintiff despite the plaintiff's attorney having filed her mandate and an authority in terms of Rule 7 on the 27th of May 2015²¹.

²¹ Pleadings bundle notices indexed item 6-7 and pages 8 to 21.

35 It was further submitted that the defendants attitude and persistence in court that they did not receive plaintiff core documents upon which the claim was founded, despite plaintiff's reply to a Rule 35 (12) Notice with all the documents attached and delivered on the 12th February 2015. The defendants neglect to make discovery of documentation after an order to compel was granted by both Honourable Justice Makhanya on the 1st of December 2015 and by Honourable Justice Wright on the 3rd of June 2016, compelling the defendants to deliver further and better discovery. The defendants are said not to have complied with those two court orders. And have not replied to the plaintiff's request for further particulars for trial in terms of Rule 21 served on defendants attorneys on the 10th of August 2016.

36 In addition thereto, the plaintiff's request during the pre-trial conference held on the 29 August 2016 to which the defendants undertook to revert by the 3rd of September 2016 were not responded to until trial commenced on the 06th of September 2016.

37 The defendants introduced new versions throughout the trial that the plaintiff have not heard before as they were not formally pleaded. The plaintiffs were therefore ambushed

throughout the trial to meet every new version put by the defendants.

- 38 It is indeed so that the defendants had increased the scope of litigation in this matter to such an extent that the expenses to which the plaintiff was put in, in pursuing its rights, were multiplied. The court frowns upon this conduct as it is unjust and would unjustly leave the plaintiff with a heavy attorney and client liability.²² The AD as it then was in **Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging 1946 AD 597**, it was held by Tindall JA that:

“The true explanation of awards of attorney and client costs seem to be that by reason of special consideration arising from the circumstances which gave rise to the action or from the conduct of the losing party, the court, in a particular case considers it just by means of such an order, to ensure more effectually than it can do by means of a judgement for party and party costs that the successful party will not be out of pocket in respect of the expenses caused by him by the litigation. And Awards of attorney and client costs are used by the court to mark its disapproval of some conduct which should be frowned upon”.

- 39 None of the essential features of the plaintiff's case were disputed or could be disputed, yet the defendants persisted in resisting the merits on the basis of a bare denial. Under the circumstances it will be iniquitous to expect the plaintiff to bear any portion of its costs. As a mark of disapproval of the

²² Law of Costs, Cilliers, Issue 30 para 4.06 page 4 - 8

defendants approach to the matter the court will therefore award the plaintiff attorney and client costs. Before I conclude, I have to apologise to the parties for the time it has taken to get the judgement out. This was not aimed at undermining the hardships that a delay in the delivery of the judgement caused to the parties.

40 **CONCLUSION**

40.1 In the result I make the following order, against the first and second defendants jointly and severally, the one paying the other to be absolved for:

40.1.1 Payment of the total amount of R934 387.53 being the amount of damages that the plaintiff has suffered in respect of claim A and B;

40.1.2 Interest on the said amount at the applicable rate per annum, *a tempore morae*;

40.1.3 Costs of suit on a scale as between attorney and client.

NCONGWANE AJ

ACTING JUDGE OF THE HIGH COURT**Dates of Hearing:**

6th September 2016 – 09 September 2016,

27 and October 2016,

12th December 2016 – 13 December 2016, and

4th April 2017 – 7th April 2017.

Judgment Delivered: 26 March 2018

APPEARANCES

On behalf of the Plaintiff : Adv T. Halgryn

Instructed By: Rina Caldeira Attorneys

Johannesburg

On behalf of the Defendants: Adv B.T. Ngqwangele

Instructed By: Matsepe Attorneys

Johannesburg