

**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Case number: 5180/2021

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

ANDRE KOCK EN SEUN VRYSTAAT (PTY) LTD

Applicant

And

WILLEM STEPHANUS SNYMAN N. O

1st Respondent

[In his capacity as trustee of the Paradigm Bemarkings Trust]

BEATRIX ENGELA SNYMAN N. O

2nd Respondent

[In her capacity as trustee of the Paradigm Bemarkings Trust]

REASONS: Delivered by email to the parties' legal representatives and by release to SAFLII. The reasons shall be deemed to have been handed down at 11h00 on 27 June 2022.

[1] On 10 March 2022 I granted an order in terms of which the respondents in their capacities as trustees of the Paradigm Bemarkings Trust were ordered to pay

the applicant an amount of R1 021 745.20 together with interest and costs. I thereafter undertook to provide my written reasons in that regard at a later stage, hereunder are my reasons for making the said order.

[2] The applicant, a livestock seller and auctioneer claimed payment of the amount of R1 259 379.74 against the respondents for the livestock sold and delivered and delivered to the Paradigm Bemarkings Trust ("the Trust").

[3] It was common cause that:

3.1. On 17 June 2021 Mr Henry Russel-Brett Wille, the director of the applicant concluded a partly written and partly oral agreement of sale of livestock with the first respondent, Mr Snyman in terms of which Mr Snyman bought 118 calves from the applicant on behalf of Trust for an amount of R1 259 379.74.

3.2. Pursuant to the said agreement, the Trust took delivery of the calves on 22 June 2021 whereafter, an invoice for the sum of R1 259 379.74 was sent from the applicant's email address [...] to the Trust's email address provided by Mr Snyman, [...]. The applicant's email was intercepted by an unauthorised third party, the invoice was reconfigured by replacing the applicant's banking details with the hacker's details then sent to the Trust as if it emanated from the applicant's email account. The Trust then paid the purchase price due to the applicant into the hacker's banking account ("the fraudulent account").

3.3. The Trust reported the fraud to the police and to its banking institution First National Bank. On 7 October 2021, the Trust executed a deed of cession in favour of the applicant in terms of which the Trust acknowledged its indebtedness to the applicant in the amount of R1 259 379.74 and ceded its rights and claims against First National Bank for the recovery of the said amount to the applicant.

3.4. The Trust failed to pay the invoice which led to the applicant instituting these proceedings claiming an amount of R1 259 379.74 plus interest and costs. The Trust responded by paying a sum of R237 634.54, a balance of R1 021 745.20 was still outstanding.

[4] It was the applicant's case that the forensic investigation conducted by the applicant's forensic expert, Professor Daniel Christoffel Myburgh into both the applicant's and the Trust's email accounts determined that the email account that was compromised at the time of the incident was the Trust's email account. The hacker used the Trust's email as a point of entry to mislead the Trust into making a payment into the fraudulent account and it was more likely to have been someone who had knowledge of the transaction. Annexure "DM2" attached to Professor Myburgh's affidavit is the forensic report in that regard. The applicant has nevertheless performed its obligations in terms of the agreement by delivering the calves to the Trust and despite having admitted liability to pay the applicant and also executed a deed of cession in favour of the applicant for the satisfaction of the debt,¹ the Trust has since failed to pay the purchase price.

[5] Relying on *Mannesmann Demag (Pty) Ltd v Romatex Ltd and Another*² and *Galactic Auto (Pty) Ltd v Venter*³ counsel for the applicant, Mr. Van Aswegen argued that the fact that the Trust had made the outstanding payment into a fraudulent account does not absolve it from paying the applicant. The responsibility to seek the applicant as a creditor was on the Trust as the debtor including to ensure that the payment was paid into the correct account. Furthermore, the facts which gave rise to the applicant's contractual right to payment were uncontroverted, the Trust had failed to raise a valid defence to the applicant's claim, a referral of the application to hearing of oral evidence as proposed by the Trust was not necessary as the order is merely sought to provide the Trust with an opportunity to gather evidence to prove that its email was not hacked whereas even if the Trust succeeds in doing so that would not constitute a defence to the applicant's claim.

¹ Annexure "FA12" of the applicant's founding affidavit.

² 1988 (4) SA 383 (D) at 389 F-390D.

³ (4052/2017) [2019] ZALMPPHC 27.

[6] On the other side, the Trust disputed liability to pay on the grounds that there was no conclusive evidence that the fraud emanated from its email account. The findings in the applicant's expert report were inconclusive and had no value until they are challenged by the Trust's own expert and also tested in the trial. The Trust had not been able to obtain its own expert due to time constraints the matter should therefore be referred to trial and only then the Trust's liability can be established. Counsel for the Trust, Mr. Cronje argued that the court might even find that on the basis of the documents that were received by the Trust, it could not be said that they did not originate from the applicant's email address and that payment would be made into a fraudulent account. The court might actually find that it would be fair and just that the applicant bears responsibility for the loss alternatively, that both parties should share the loss.

[7] I was not persuaded by the Trust's contention that the matter ought to be referred for hearing of oral evidence for the reasons that, the Trust's application in this regard was predicated merely on providing the Trust with an opportunity to explore a defence to the applicant's claim because having regard to what was averred in the parties' affidavits, there were no real factual disputes between the parties therefore the matter could be determined on the papers.

[8] Concerning the Trust's liability to pay, the Trust contended that it could not be held liable to pay the outstanding balance including the full purchase price to the applicant due to the fact there was no conclusive evidence that the hack emanated from its email account.

[9] I disagreed with the Trust's contention on this aspect as the Trust's liability to pay the applicant would have only been discharged by payment to the applicant. Where a payment is effected by way of an Electronic Funds Transfer (EFT) as in this case, the responsibility of verifying the creditor's banking details before making the payment lies squarely on the debtor. In this matter, the Trust had merely assumed that the email it received was from the applicant and then went on to make a payment into the banking account provided in the said email without having taken any steps to verify such information. The Trust could therefore not rely on that

payment in defence of the applicant's claim. See paragraph 29 to 50 in *Galactic Auto (Pty) Ltd*.

[10] It was for these reasons above that I held that the applicant had succeeded in making out the case for the payment it sought from the Trust.

N.S. DANISO, J

APPEARANCES:

Counsel on behalf of the applicant:

Adv. W.A. Van Aswegen

Instructed by:

Phatsoane Henney INC.

BLOEMFONTEIN

Counsel on behalf of the respondents:

Adv. P.R. Cronje

Instructed by:

Lovius Block

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