IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Appeal number: A59/2015

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LTD Appellant

and

NTAU LUCAS MOKOENA Respondent

CORAM: VAN ZYL, J, DAFFUE, J *et* REINDERS, J

HEARD ON: 22 FEBRUARY 2016

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 12 MAY 2016

I. **INTRODUCTION**

[1] This appeal is directed against a finding by a single judge of this division dismissing with costs a claim of a banker against its customer in respect of an overdrawn current account.

II. **THE PARTIES**

[2] Appellant is Standard Bank of South Africa Ltd, the unsuccessful plaintiff in the court *a quo.*

[3] Respondent and defendant in the court *a quo* is Mr Ntau Lucas Mokoena.

III. **THE PLEADINGS**

[4] Appellant claimed payment in the amount of R571 590.20 plus interest and costs from respondent, alleging that as on 25 July 2011 respondent was indebted to appellant in the aforesaid amount in respect of the overdrawn balance of a current account held by respondent with appellant's Brandwag branch in Bloemfontein. It should be mentioned at this stage already that respondent did not have overdraft facilities with appellant, but that the current account became overdrawn as a consequence of a series of transactions pleaded in the particulars of claim and confirmed in *viva voce* and documentary evidence.

[5] Respondent pleaded in respect of the series of transactions relied on in the particulars of claim that his account became overdrawn as a result of the "intentional and unauthorised transfer of funds by plaintiff's employees" from his accounts and the reversal of the transfer of R693 526.93 without his consent. It was specifically pleaded that a transaction concluded on 1 March 2011 at the Loch Logan branch of plaintiff (apparently the transfer of R690 000.00 to his current account) was done in his absence, without his approval and to his detriment. Respondent therefore denied that he was obliged to pay the amount claimed by plaintiff.

IV. JUDGMENT OF THE COURT *A QUO*

[6] The court *a quo* appreciated that it was confronted with two conflicting and mutually destructive versions, *i.e*. the version of appellant's witnesses on the one hand and that of respondent on the other.

[7] I shall deal with the court *a quo's* reasons when the judgment is evaluated *infra,* but wish to mention at this stage that the court *a quo:*

7.1 concluded in paragraph [69] of the judgment that appellant bore the onus to prove its case by showing that the evidence of its employees was true and that of the respondent false without at any stage considering the onus of proof pertaining to allegations of payment made by a party;

7.2. found in paragraph [73] of the judgment that both witnesses who testified on behalf of appellant, i.e. Mrs De Villiers and Mrs Schoeman "… tried to cover for each other", "… there were so many unanswered questions which were not explained", "… there is a litany of breaches committed by bank employees which ultimately compromised the bank" and they (Mrs De Villiers and Mrs Schoeman) "were not honest witnesses and the evidence showed that;"

7.3 eventually went so far to state at the end of paragraph [73] that Mrs Schoeman was clearly misleading the court in that it was apparent from her documentation, contrary to her *viva voce* evidence, that she and respondent had a meeting prior to 16 February 2011.

V. THE GROUNDS OF APPEAL

[8] The appellant's grounds of appeal can be summarised as follows. The court *a quo* erred in rejecting the corroborated evidence of the appellant's witnesses and in finding that these witnesses were not credible and attempted to cover for one another. Furthermore it also erred in accepting the uncorroborated and improbable version of respondent, finding by implication that he was a credible witness especially insofar as his version implied gross negligence, fraud and even theft, but notwithstanding this he failed to take action in any forum against Mrs Schoeman in particular whom he accused of theft.

VI. MATERIAL UNDISPUTED FACTS

[9] In order to fully comprehend my evaluation of the court *a quo's* judgment, it is apposite to set out the following factual background.

9.1 At all relevant times during the end of 2010 and beginning of February 2011 respondent was a customer of appellant, he being a customer for several years. At the relevant stage he held an achiever plus current account at appellant's Brandwag branch in Bloemfontein as well as a 32 days' notice deposit account ("the 32 days' account"). He did not have overdraft facilities on his current account.

9.2 On 15 February 2011 at 10:51 Mrs Amanda De Villiers, a sales consultant employed at the time at the Southern Centre branch of appellant wrote an email to Mrs Joanine Schoeman, a financial planner at the Loch Logan branch responsible for financial planning of appellant's customers and I quote :

"Subject: NEW LEAD REF 663993.

Hi Joanine,

Ek het met Mnr Mokoena gepraat oor die R700-000 + wat in sy 32 dae belegging lê. Ek het vir hom vertel van julle MAE produk en hy stel baie belang.
Sal jy hom asb dringend bel. Hy is nogal 'n glibberige ou. Ek sukkel al maande om vir sy werkers Mzansi's oop te maak. Ek het nou sy adres en ek sal hom daar vastrek!! Hy ken my nog net nie! REF663993

Sy details is: N Lucas Mokoena
ID [.........]
TELL NO: [.........]

Hoop jy kry hom gehaak!!!!

Groete
Amanda
Southern Centre."

9.3 A series of documents relating to the purchase of a Liberty Life policy also referred to as a multi access investment plan or multi access endowment or MAE (herein later referred to as "the Liberty Life policy") in the amount of R600 000 forms part of the documentary evidence presented to the court *a quo*. These documents are dated 15 February 2011, 16 February 2011 and 28 February 2011 respectively. Initially the amount to be invested was indicated as R690 000, but eventually a Liberty Life policy was purchased for the amount of R600 000 only. The commission to which Mrs Schoeman as the financial planner would be entitled also changed from R20 700 to R20 520. The different dates were considered by the court *a quo* and my evaluation of conclusions and the evidence will follow *infra*.

9.4 On 28 February 2011 respondent visited the Loch Logan branch of appellant unannounced and without an appointment. He signed documents pertaining to the purchase of the Liberty Life policy at the request of Mrs

Schoeman. The details of his visit that day and the events leading to that visit from 15 February to 28 February 2011 are in dispute and will be dealt with in the evaluation of the evidence as will be the case pertaining to all other aspects in dispute.

9.5 On 1 March 2011 and prior to two transfers on that date of R690 000 and R693 526.93 respectively, the balance on respondent's current account was R69 187.62. The transfers caused the balance to increase to R1, 452 714.55. *Ex facie* the bank statement the R690 000 transfer is described as a "transfer from 103 early repayment Loch Logan 307". The transfer of R693 526,93 is described as a "transfer from [.........] Preller Squa 807". On the same day, that is on 1 March 2011, the amount of R600 000 was transferred from respondent's current account and this is described as "transfer to 103 Liberty Life, Loch Logan 317". On 2 March 2011 the entry in respect of the R693 526,93 transfer to the current account was reversed by appellant.

9.6 It is also apparent from the bank statement of respondent's 32 days' account that on 1 March 2011 the R690 000 was transferred from that account with the description "transfer to early repayment Loch Logan 306", leaving a balance of just R3526.93.

9.7 It is also common cause that on 1 March 2011 a further transfer of R693 526,93 was effected from respondent's 32 days' account to his current account as indicated above, although the bank statement of this account does not reflect the transfer. The 32 days' account is a savings account and it could not and should not have been allowed to become overdrawn. As mentioned above and as reflected in the bank statement of the current account the transaction pertaining to the transfer of R693 526.93 was reversed by appellant the next day.

9.8 Mrs Schoeman arranged the transfer of the R690 000 from respondent's 32 days' account to his current account without respondent signing the prescribed transfer form, whilst respondent requested an early repayment of the amount of R693 526.93 from his 32 days' account to his current account. *Ex facie* the transfer document the following reason was advanced by him:

> "Open an investment with Stanlib and papers have been signed for the payment as they offer higher %."

It is apparent from the document that the bank official who assisted respondent with the transaction declared that no penalty would be charged for early repayment of the investment and I refer to the following inscription:

> "Investing with us at Stanlib." At the bottom of the document the following written consent for early repayment without penalties, apparently by a senior official, is found: "Auth since investing with us at Stanlib."

9.9 It is common cause that notwithstanding respondent's explanation why he required an early payment from his 32 days' account, respondent arranged for the transfer of the amount of R693 526.93 from his current account to an account held by him with Absa Bank.

9.10 The Liberty Life policy pertaining to the investment of R600 000 commenced on 1 March 2011.

9.11 On 4 March 2011 a letter was written and signed by Mrs Schoeman indicating that respondent's Liberty Life policy should be cancelled, the funds to be paid into his current account with appellant. She indicated that she had been instructed accordingly by respondent the previous day. On 7 March 2011 respondent signed a letter which reads as follows" "I would appreciate it if liberty life will **<u>cancel my first request</u>** <u>for an amount of R600 000.00 to be paid to my account.</u> Please continue with investment as it is on your system …" (emphasis added). Respondent's *viva voce* evidence in this regard will be discussed *infra.*

9.12 On 11 March 2011 respondent caused a letter to be written by his attorneys, Messrs Steyn Meyer, to the manager of appellant's Brandwag branch. I quote from the second paragraph of this letter:

> "Our instructions are that client discovered an overdraft/reversal of an amount of R693 526.93 (six hundred and ninety three thousand five hundred and twenty six rand and ninety three cents) made on

2 March 2011 in his above-mentioned account a fact which surprised him."

In the heading of the letter reference is made to the client's cheque account number 240303857 which clearly is his current account. There is no reference in this letter to the transfer of R600 000 to Liberty Life or more importantly, the fact that R600 000 was given in cash to an employee in the middle of February 2011 which cash deposit did not reflect in the client's current account. There is also no reference to the transfer of R600 000 from the current account to Liberty Life which would have been directly contrary to respondent's instructions, bearing in mind his *viva voce* evidence.

9.13 On 10 May 2011 appellant's Mr James, a fraud analyst, responded to Steyn Meyer's letter after having investigated the matter. It was *inter alia* pointed out to the respondent that "he had full knowledge that he had only sufficient funds to either conclude the transfer to Liberty for R600 000 or the transfer to Absa for R693 526,93".

9.14 No criminal charges were ever laid by respondent against Mrs Schoeman or any other employee of appellant.

VII. <u>CERTAIN LEGAL PRINCIPLES</u>

CREDIBILITY FINDINGS OF THE COURT *A QUO*

[10] A court of appeal assumes as a starting point that the trial court's findings of fact were correct and these findings are normally

accepted, unless there is some indication that a mistake has been made. See: Schmidt and Rademeyer, **Law of Evidence** loose leaf edition at 3-40, relying *inter alia* on **R v Dhlumayo** 1948 (2) 677 (A) 696 at 705 and **Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd** 1979 (1) SA 621 (A) at 623 – 624. It is also confirmed that a trial court enjoys a particular advantage when the demeanour of witnesses is of importance. The trial court was, unlike the court of appeal, absorbed in the atmosphere of the trial from start to finish.

[11] Notwithstanding the above comments it cannot be ignored that a court of appeal may often be in a better position to draw inferences, particularly in regard to secondary facts, bearing in mind the benefit of an overall conspectus of the full record. See: **Louwrens v Oldwage** 2006 (2) SA 161 (SCA) para 14 and **Union Spinning Mills (Pty) Ltd v Paltex Dye House (Pty) Ltd and Another** 2002 (4) SA 408 SCA at para 24. If it emerges from the reasons of the trial court that it erred in respect of its findings on the facts, the court of appeal is free to reject the findings in total or in part, including those findings based on credibility and to reach its own conclusions. See: **Santam Beperk v Biddulph** 2004 (5) SA 586 SCA where Zulman JA stated the following in para 5:

> "Whilst a Court of appeal is generally reluctant to disturb findings which depend on credibility it is trite that it will do so where such findings are plainly wrong (**R v Dhlumayo and Another** 1948 (2) SA 677 (A) at 706). This is especially so where the reasons given for the finding are seriously flawed. Overemphasis of the advantages which a trial Court enjoys is to be avoided, lest an appellant's right of

> appeal 'becomes illusory' (**<u>Protea Assurance Co Ltd v Casey</u>** 1970 (2) SA 643 (A) at 648D - E and **<u>Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd</u>** 1979 (1) SA 621 (A) at 623H - 624A). It is equally true that findings of credibility cannot be judged in isolation, but require to be considered in the light of proven facts and the probabilities of the matter under consideration."

I shall in my evaluation of the court *a quo's* judgment deal with the reasons advanced by it in order to come to a conclusion as to whether its credibility findings could be supported.

ONUS OF PROOF

[12] The court *a quo* referred to **<u>Mabena and Another v Minister of Law and Order</u>** 1988 (2) SA at 654 for the conclusion that in the event of two conflicting versions, the onus is on the plaintiff to prove on a preponderance of probabilities that his version is the truth, i.e. "the onus is discharged if the plaintiff can show by credible evidence that his version is more probable and acceptable". The court *a quo* also referred to **<u>SFW Group Ltd and Another v Martell et Cie and Others</u>** 2003 (1) SA 11 SCA and quoted the first part of the conclusion arrived at by Nienaber JA as to how two irreconcilable versions should be adjudicated. In order to give justice to the *dictum* of Nienaber JA I quote the relevant passage in full:

> "[5] On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be

summarised as follows. To come to a conclusion on the disputed issues a court must make findings on *(a)* the credibility of the various factual witnesses; *(b)* their reliability; and *(c)* the probabilities. As to *(a)*, the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to *(b)*, a witness' reliability will depend, apart from the factors mentioned under *(a)*(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to *(c)*, this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of *(a)*, *(b)* and *(c)* the court will then, as a final step, determine whether the party burdened with the *onus* of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

PROOF OF PAYMENT OF R600 000

[13] The court *a quo* never indicated that respondent attracted the onus to prove that he had paid over an amount of R600 000 in cash to Mrs Schoeman. It is accepted that a plaintiff or applicant has to prove all the requirements for his or her remedy and only in exceptional circumstances is a burden placed on a defendant or respondent to prove an issue. Respondent has put in issue the cash payment of R600 000 to Mrs Schoeman; an issue that does not form part of the requirements to be proved by appellant for its remedy. Respondent asserted that he had effected payment of R600 000 and based on the oft-quoted judgment, **Pillay v Krishna** 1946 (AD) 946 at 951 he should have convinced the court on a balance of probabilities that payment had in fact been made by him to Mrs Schoeman. Refer also to the general discussion by Schmidt and Rademeyer, *loc cit*, at 2-10. I take into consideration that respondent did not file a counterclaim, alleging that appellant was vicariously liable to him for the delict committed by its employee, Mrs Schoeman.

BANKER/CUSTOMER RELATIONSHIP

[14] It is trite that the relationship between a banker and customer is regarded as a contractual one. The basic although not sole relationship between a banker and customer in respect of a current account is one of debtor and creditor. If the current account of the customer reflects a credit balance he/she is the creditor and the bank the debtor. The customer is the debtor and the bank the creditor if the current account is overdrawn. The roles of the bank and the customer are then reversed insofar as the bank becomes the creditor and the customer the debtor. In

either of these two situations the bank still acts as agent when carrying out the instructions of its customers to make payment against their accounts. See: **Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd** 1995 (4) SA 510C at 530G – 532C and **Absa Bank Bpk v Janse van Rensburg** 2002 (3) SA 701 SCA at para 16.

[15] In deciding whether the bank could reverse an erroneous entry the court shall examine all relevant facts. See **Oneanate Investments** *loc cit* at 530B.

[16] Regarding unauthorised signatures it is accepted that a bank would be acting in breach of the terms of its mandate if it would honour a cheque that does not bear an authorised signature and consequently debit the customer's account with the amount of the cheque. However such action by the bank does not necessarily mean that payment of the cheque is invalidated. In **Di Giulio v First National Bank of South Africa Ltd** 2002 (6) SA 281 (C) Van Zyl, J with reference to South African and English authorities dealt with the issue and concluded as follows at para [25]:

> "In any event the bank may, at its own risk, honour ostensibly unauthorised cheques in the expectation that their payment will be approved or rectified. This may, in essence, constitute a breach of the mandate, but it will not *per se* invalidate the payment of the cheques."

In submission the same approach should be followed in respect of a transfer of money by the bank from a customer's account.

VIII. <u>EVALUATION OF THE COURT *A QUO* JUDGMENT IN LIGHT OF THE AUTHORITIES AND SUBMISSIONS BY COUNSEL</u>

[17] The court *a quo* referred to the **<u>SFW</u>** judgment *loc cit* and concluded as follows:

> "In the case at hand, clearly the probabilities of the evidence of plaintiffs witnesses was non-existent. Ms Schoeman makes a summary of what transpired in her meeting with the defendant on the 16/02/11 but alleges that she only saw the defendant on the 28/02/11. Clearly, she was misleading the court. On her own summary on the 16/02/11, it was clear that there was a meeting before the 16/02/11."

It is not certain what was meant by the *dictum* that the probabilities were "non-existent." The court *a quo* came to a wrong conclusion as will be shown in more detail *infra*. Nienaber JA concluded as follows in para [34] of **<u>SFW</u>** *loc cit*:

> "In assessing the probabilities, phase by phase as events unfolded, as well as comprehensively and in retrospect, the conclusion seems to me to be inescapable that of the two versions before court as to what the parties agreed to, SFW's is the more probable."

[18] In my view the court *a quo* erred in not considering the probabilities phase by phase as events unfolded, or at all. If it did that, it would have found that Mrs De Villiers, a sales consultant at the Southern Centre branch of appellant in Bloemfontein had a business relationship with respondent and bearing in mind the huge amounts available in respondent's bank accounts from time to time, she regarded it in his interest to arrange with Mrs

Schoeman, a financial planner at appellant's Loch Logan branch, to consult with respondent in order to possibly persuade him to make use of a much better investment opportunity than the 32 days' account provided by appellant. The court *a quo* should have found that respondent was not known to Mrs Schoeman during 2010 as he testified. She obtained her lead pertaining to the new business opportunity on 15 February 2011 and Mrs De Villiers' email quoted in full *supra* is cogent corroboration for the version of both these two ladies. It is apparent that respondent was a difficult customer to get hold of, probably because of his several business undertakings and the contents of the email must be seen in that light. If Mrs Schoeman had contact with respondent in respect of investment opportunities as long ago as November 2010 as he alleged, she would have had all his details and it would be totally unnecessary for Mrs De Villiers to write the email of 15 February 2011.

[19] Mrs Schoeman testified that she was on sick leave at the time that respondent suggested that he had contact with her pertaining to possible future investments. This aspect together with the email referred to and the convincing evidence of both witnesses testifying on behalf of appellant are far more probable than respondent's version pertaining to the events leading up to 15 February 2011. This can be regarded as the first phase of the material events between the parties.

[20] The second phase of events is the period covered by the evidence pertaining to the drafting of the documentation in order to purchase a Liberty Life policy, the contact between respondent

and Mrs Schoeman and the alleged handing over of cash in the amount of R600 000 on 15 January 2011 until the meeting of 28 February 2011 when respondent arrived unannounced at the Loch Logan branch of appellant.

[21] If respondent handed R600 000 cash to Mrs Schoeman on 15 February 2011 as alleged, it is highly improbable that she would fill out the amount of R690 000 as the investment amount on the documents and also calculate her commission on this amount instead of R600 000. The explanation of Mrs Schoeman is not improbable and in my view quite logical. Respondent did not honour the first appointment made for him, but he clearly showed an interest to purchase a Liberty Life Policy with the excess funds in his 32 days' account. This caused Mrs De Villiers to provide a lead to Mrs Schoeman as mentioned and Mrs Schoeman to establish precisely what was available for investment by accessing respondent's 32 days' account with the information provided to her. She prepared draft documents based on an investment of a rounded figure of R690 000 (there was an amount just in excess of R693 000 available on the particular account).

[22] The court *a quo* should have found that the documents pertaining to the purchase of the Liberty Life policy were computer-generated and pre-prepared with the information that Mrs Schoeman had, bearing in mind the lead from Mrs De Villiers and the information that could be obtained from the appellant's systems. It therefore makes sense that some of the computer-generated documents were dated 15 February 2011, the day Mrs Schoeman received the lead per email. Her summary of the

events is dated 16 February 2011. When this was prepared the commission was calculated on the amount of R690 000 to be invested and this was later changed in handwriting to the lower figure. Unlike some other documents bearing the date changes the date was not changed. The same summary is reproduced on another document, the product replacement questionnaire and it is evident that this document forms part of a document referred to as the Customer Record of Advice. All five pages of the document bear the date 15 February 2011 at the bottom of each page. It is apparent from the other documentation that some of the dates have been changed to 28 February 2011 and in several instances the date 28 February 2011 was hand written with pen, this being the date on which respondent actually signed the documents according to Mrs Schoeman once he had decided to purchase a Liberty Life policy in the amount of R600 000 only and not R690 000 as originally anticipated by Mrs Schoeman when she pre-prepared the computer-generated documentation.

[23] Mrs Schoeman's version as to the events on 28 February 2011 is also crystal clear. She was busy with a client when respondent arrived without an appointment. By then he had failed to honour at least two previous appointments. She regarded him as an important client and one she had difficulty to get into contact with, bearing in mind the previous appointments not honoured by him and also Mrs De Villiers' complaint. The customer that she was dealing with at the time was prepared to wait a while for her to finish her business with respondent. Mrs Schoeman's version as to the events and the consequent transfers of money the next day is clear, concise and logical, and although part of the next phase

to be discussed, corroborates her version fully. On the other hand, respondent's version that he brought cash to Mrs Schoeman on 15 February 2011 in the amount of R600 000 is highly improbable. It is highly improbable that Mrs Schoeman would not have insisted that the money be deposited with one of the cashiers for an official receipt to be issued. It is unbelievable that the cash would be handed over to her without it being counted first and without her giving him any proof of the payment. No reliance could be placed on any of the Liberty Life policy documents at that stage as these documents would have indicated an investment amount of R690 000 and not R600 000. It is unacceptable that respondent and Mrs Schoeman would have agreed that she would be the one to take the cash to Liberty Life's offices, where ever that might have been at the time, and to make a deposit on behalf of respondent and in doing so, avoid paying a fee on the cash deposit which would have been the case if the cash was deposited into respondent's account with appellant bank. Surely if Mrs Schoeman was really entrusted with such a huge amount of cash, one would have expected respondent to insist on proof of payment and some assurance that the amount would eventually arrive safely at Liberty Life's offices. Although part of a later phase in the events, it is important to note that the letter of respondent's attorneys, Steyn Meyer, did not refer at all to the missing cash payment. In fact it would have been clear to respondent that an amount of R600 000 was transferred from his current account to Liberty Life on 1 March 2011, but he did not query this transfer at all. It should have been clear to him at that stage, based on his version, that two payments of R600 000 each had been made to Liberty Life whilst he only applied for one policy of R600 000. The failure to query this serves as corroboration of Mrs Schoeman's version. The probabilities are overwhelmingly in favour of appellant in respect of this phase of the events.

[24] I regard the events of 1 and 2 March 2011 as the third phase of the events. On 1 March three crucial transfers took place. R690 000 was transferred from the 32 days' account to respondent's current account which provided sufficient funds for a transfer to be made of R600 000 from the current account to Liberty Life which transfer was then effected. Respondent did not sign any transfer documents to authorise appellant bank to effect the transfers, but Mrs Schoeman testified that the signed documents in terms whereof respondent applied for the policy entitled her to arrange these two transfers. In any event respondent obtained the benefit of these two transactions in that the Liberty Life policy applied for was issued to him. On the same day another transfer was made from respondent's 32 days' account in the amount of R693 526,93. This amount was in actual fact the balance on that account prior to the transfer of the R690 000. Obviously, that account not being a current account with overdraft facilities, two such transfers could not have been authorised and/or effected. Appellant's systems failed in this regard. The two transfers were made at different branches and although it is not clear what the time lapse between the two transfers was, it appears quite extraordinary that, bearing in mind the electronic era in which we live, this could have happened. No evidence was tendered to explain this, but this does not take the

matter any further. As mentioned Mrs Schoeman arranged the transfer of R690 000 and respondent the transfer of R693 526.93.

[25] Contrary to his express undertaking in the transfer form signed by him, respondent did not utilise these funds to invest with Stanlib. His version in this regard is false and his evidence that an employee of appellant bank advised him to advance such a false version is far-fetched and improbable to the extreme. The logical conclusion for relying on this false version is not difficult to fathom. If someone at the bank would be making enquiries, he/she would probably be able to ascertain that respondent did in fact apply for a Liberty Life policy. Instead of using the funds to invest with Stanlib, respondent caused an amount of R693 526,93 to be transferred to Absa bank where he also held an account. *Ex facie* the record this transfer was ostensibly done for "building purpose". This happened on 2 March 2011 and that same day appellant established the irregularities and caused a reversal of the transfer of R693 526,93 from the 32 days' account to the respondent's current account.

[26] The transfer of funds in the amount of R690 000 from respondent's 32 days' account to the current account was not specifically authorised in writing by respondent insofar as the standard transfer form used by the bank does not contain respondent's signature. Mrs Schoeman explained this in her evidence and indicated that she believed that she was entitled to arrange for such transfer bearing in mind respondent's instructions to purchase the Liberty Life policy and his signature on all relevant documents to make the investment. Fact of the

matter is that the transfer was effected and R600 000 of the amount transferred was used to purchase the Liberty Life policy whilst the remainder of the funds remained in respondent's current account. He therefore did not suffer any prejudice as a result of these transactions. It is common cause that the policy was issued to respondent and that he received the benefit of the R600 000 investment. The mere fact that he later – in May 2011 - called up the policy does not take the matter any further.

[27] The fourth phase of events is the period after 2 March 2011. Mrs Schoeman testified that respondent contacted her a few days after the investment had been made with instructions to call up the policy and that she then sent a letter in that regard to Liberty Life. I referred to the letter of 4 March 2011 *supra.* In that letter, Mrs Schoeman, the signatory, confirmed that she had received verbal instructions from respondent the previous day in that regard. Respondent denied this version and testified that he in fact requested Liberty Life not to call up the policy at that stage. I also dealt with the letter of 7 March 2011. In his testimony respondent was cross-examined on the contents of this letter and in particular the allegation that he wanted to cancel his first request for payment of the amount of R600 000. He blamed the employee of Liberty Life for the "incorrect" wording and insisted that he had never given the first instruction to cancel the policy. As was the case with the appellant bank employee who on his version came across a reason why he should not pay a penalty for early repayment, it was just too easy for respondent to unfairly blame an unidentified employee. This issue forms part of the final phase of the events to be adjudicated and must be read with the

letter of Steyn Meyer. The court *a quo* should have found that respondent actually instructed Mrs Schoeman to try and cancel the Liberty Life policy in the hope that the R600 000 could be paid back to him in order to prevent his account from being overdrawn. It is difficult to understand respondent's thought processes at the time, but it is probable that he decided afterwards not to call up the policy and that he would rather face any action to be instituted by appellant based on the overdrawn current account. We also know that about three months later respondent did in fact call up the investment with Liberty Life.

[28] To sum up, I have shown with reference to the documentary and *viva voce* evidence in the four phases or time frames that the court *a quo* did not have any reason to make negative findings against appellant. In fact, it erred in making credibility findings against appellant's witnesses and Mrs Schoeman in particular. If the evidence in its totality is considered the appellant has made out a proper case; not only do the probabilities favour appellant, but respondent's version is untenable, far-fetched and clearly false. This court did not observe the various witnesses in the witness box, but it is apparent from the documentation and the totality of the evidence that the court *a quo* was unnecessary critical of appellant's witnesses. They gave a probable version and corroborated each other. Mrs Schoeman explained satisfactorily how it came about that the documents and her summary in particular bore different dates. It is evident that the respondent was a difficult customer to get hold of and this can be said without any negative connotation as many businessmen often find it difficult to deal with their personal matters due to time

constraints and tight schedules and routines. The email of 15 February 2011 is damning for respondent's version that he and Mrs Schoeman knew each other from the previous year and had already discussed investments at that time. The email is clearly nothing else but a lead given by Mrs De Villiers to Mrs Schoeman and it would be totally unnecessary if Mrs Schoeman had all contact details and information of respondent at that stage. If respondent had R600 000 in cash readily available for investment that day, it would be unnecessary to refer Mrs Schoeman to respondent's 32 days' account, unless respondent was prepared to invest much more than R600 000 which was not the case.

[29] It is correct that Mrs Schoeman was severely cross-examined and that she found it tough to explain the different dates on the documents prepared by her in order to purchase the Liberty Life policy as well as the two so-called unauthorised transfers arranged by her. In my view the cross-examination did nothing to blemish her credibility. Her explanations are probable and logical. If an armchair approach is followed she might be criticised for not obtaining written authorisation from respondent on the bank's standard transfer forms. She did not actually effect the transfers and whoever did that was prepared to accept that there was actual authority based on the signed application for the Liberty Life policy.

[30] Respondent's credibility was not considered at all by the court *a quo*. His version is contradicted by objective evidence such as the email of 15 February 2011 and the fact that the commencement date of the Liberty Life policy was only 1 March

2011 and thus after signature of the documents on 28 February 2011 and the transfer of R600 000 to Liberty Life on 1 March 2011. His allegation that R600 000 in cash was handed to Mrs Schoeman on 15 February 2011 is not consistent with the filling out of the initial investment amount of R690 000. There is no reason why Mrs Schoeman would have prepared documents based on an investment of R690 000 if she only received R600 000 cash from respondent. There is no evidence that the cash was ever counted by Mrs Schoeman on receipt thereof. Taking custody of such an amount without counting, especially by an experienced bank employee, is preposterous. The co-incidence of respondent approaching Mrs Schoeman with R600 000 cash on the same day when the email with the lead was sent to her, especially bearing in mind the difficulty the two ladies had to get hold of respondent, is further confirmation of the improbable and false version that respondent put forward. Respondent's credibility is furthermore blemished regarding his lack of action if his accusations pertaining to the theft of R600 000 are considered. In any event his attorney's letter is objective proof that he did not have any objection at the time to the transfer of R600 000 to Liberty Life. The lack of accusations of theft and/or fraud pertaining to the alleged handling of the R600 000 cash by Mrs Schoeman at the time is further confirmation that respondent made up a false version by the time that action was instituted.

[31] The evidence of appellant's witnesses is reliable if the totality of the evidence is considered. Respondent did have extra funds available in his 32 days' account for investment in another

financial instrument which could provide him with a better return. Mrs De Villiers gave the lead to Mrs Schoeman on 15 February 2011 where after a process was embarked upon to eventually purchase the Liberty Life policy as testified by Mrs Schoeman.

[32] Finally and insofar as the probabilities or improbabilities of each party's version on each of the disputed issues are to be considered, there is in my mind no doubt that the court *a quo* incorrectly considered unnecessary aspects such as the alleged breaches by bank employees of bank policy and the allegation that established bank practices where not followed. It also mistakenly referred to a conflict of interest between bank employees and Liberty Life which was allegedly clearly visible. There was no such conflict. The court *a quo* mentioned that it was not clear whether Mrs Schoeman was working or moonlighting for Liberty Life or employed by appellant. According to him she had influence in both appellant and Liberty Life. This was clearly a wrong assumption to be made. It is evident from the uncontested evidence that Mrs Schoeman was a financial planner at appellant bank and that the particular Liberty Life policy was one of the products which was offered to the appellant bank customers in order to obtain better returns on their investments. It is also clear from the evidence, and the documentary evidence in particular, that appellant bank employees such as Mrs Schoeman marketed various products from several service providers such as *inter alia* the Liberty group, inclusive of Stanlib. I am referring in this regard to the particular disclosure form in terms of the Financial Advisory and Intermediary Services Act

(FAIS) which forms part of the documentation completed and signed.

[33] The court *a quo* should have found that there was an onus on respondent to prove that he made the cash payment of R600 000 and that he miserably failed to do so. The product replacement questionnaire which also forms part of the application for the policy indicates clearly that the name of the existing product is the 32 days call account at the bank and that the replacement product will be the multi access endowment, also referred to as the Liberty Life policy. This questionnaire which bears respondent's signature is in direct conflict with his version of a cash payment and cogently corroborates Mrs Schoeman's version.

[34] The evidence is clear; appellant was entitled to reverse the transfer in the amount of R693 526.93 made by respondent under false pretences and when insufficient funds were available. Whoever reversed this transfer was apparently satisfied with the veracity of the transfer of R690 000 to respondent's current account contrary to the court *a quo's* criticism in this regard. Even if it could have been found that respondent did not authorise the two transfers of R690 000 (to his current account) and R600 000 (from his current account to Liberty Life) respectively, respondent received the benefits thereof in that a policy to the value of R600 000 was issued, whilst the remainder of the money remained in his account.

[35] A legal issue to be addressed in the final instance is the respondent's claim that R600 000 was allegedly stolen. Even if it could be found that the money was indeed handed over to Mrs Schoeman and that she stole it, respondent would have to aver and prove that appellant was vicariously liable to him. It is not necessary to consider this issue any further as no counterclaim based on delict was instituted. Ultimately we are concerned with a banker/customer relationship. I dealt with the applicable principles and authorities *supra* and have no doubt that the court *a quo* erred in asking incorrect questions of fact and the law. Appellant could not be non-suited, even in the event of a finding that bank procedures were not followed strictly. The reversal of the transfer of R693 526.93 cannot be faulted and that being the case, respondent's current account became overdrawn which entitled appellant to institute action to claim the debit amount plus interest and costs.

[36] The court *a quo* should have found that appellant has made out a proper case for the relief claimed in the particulars of claim and should have granted judgment in favour of appellant.

IX. <u>ORDERS</u>

[37] The following orders are made:

1. Appellant's appeal is upheld with costs.
2. The order of the court *a quo* is set aside and replaced with the following: "Judgment is granted against defendant for
   1) Payment of the amount of R571 590.27;

2) Interest on the amount of R571 590.27 at the rate of 15,5% per annum from 26 July 2011 to date of final payment;
3) Costs of suit."

JP DAFFUE, J

I concur

C VAN ZYL, J

I concur

C REINDERS, J

On behalf of appellant: Adv. AE Bham SC
Instructed by:
Liezel David, c/o Honey Attorneys
Bloemfontein

On behalf of respondent: Adv. AH Burger SC
Instructed by:
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/PC