

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

Case no: 3813/2011

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED

Plaintiff

and

MOKOENA NTAU LUCAS

Defendant

CORAM: JAJI, AJ

HEARD ON: 3 JUNE 2014

DELIVERED ON: 4 DECEMBER 2014

[1] This is an action where the plaintiff, Standard bank of South Africa, a bank duly registered and incorporated in accordance with the provisions of the *Bank Act 94 of 1990*, as amended, sues the defendant for an amount of R571 590.27, being the overdrawn balance of a current account.

[2] The defendant is a certain Ntau Lucas Mokoena, an adult businessman of 64 Schenehage Drive, Fichardt Park, Bloemfontein.

- [3] The plaintiff alleged that the defendant's current account was credited twice with amounts of R690 000 and R693 526.93 respectively. The duplicated transfer to the defendant's current account was reversed by plaintiff on the 2nd of March 2011, leaving the current account overdrawn with an overdrawn balance of R571 590.27.
- [4] The plaintiff contended that the defendant is obliged to pay the alleged due amount of R571 590.27 with costs.
- [5] The defendant only admitted: the parties as appearing in the papers, the accounts it held with plaintiff, the request for early repayment of his 32 day notice, bank statements attached as Annexure "B" and "C", that its current account was credited twice and that the defendant caused to be transferred to an account held with Absa bank limited an amount of R693 526.93.
- [6] All other allegations and averments were denied and the plaintiff was put to the proof thereof. Consequently, defendant prayed for the plaintiff's claim to be dismissed with costs.
- [7] Prior to the commencement of the proceedings, the following issues were confirmed and agreed:-
- (i) *Locus standi*, jurisdiction, identity of defendant, balance in the current account and the transactions. The above were not in dispute.

The following were in dispute:-

- a) The authority to transfer the amount of R690 000.00;
- b) The cash amount of R600 000.00 given and handed over to Joanine Schoeman, an employee of the plaintiff.

The plaintiff alleged that the transfer was authorised and denied that there was ever a cash amount of R600 000.00 handed over to its employee.

The defendant disputed that the transfer from the 32 day account into the current account was done with his knowledge and permission.

PLAINTIFF'S EVIDENCE

- [8] Plaintiff called its first witness, a certain Amanda De Villiers, a sales consultant employed by the plaintiff. She had been working for the plaintiff for almost fifteen years and has been in Loch Logan branch of the plaintiff for the last two years.
- [9] She was aware of the transactions that led to the present action. The defendant was her customer at the Southern centre branch. She had referred the defendant to a certain Joanine Schoeman for business. The interest rate and type of portfolio Ms Schoeman was offering was better than 32 day offered by Standard bank. Ms De Villiers referred to page 162 of the bundle of documents, being the e-mail dated 15/02/14 addressed to Janine Schoeman at 10h51.

[10] She alleged that she introduced the defendant to Ms Schoeman through the mail. She sent a mail to Joanine Schoeman whilst the defendant was sitting in front of her. She claimed not to have any involvement with the dealings of defendant and Joanine Schoeman. She alleged to have received a call in the beginning of March from Joanine advising that she was struggling to get hold of the defendant. The witness got hold of the defendant the same day and told him that Joanine was looking for him and that he should contact her urgently.

CROSS EXAMINATION

[11] On page 162 of the bundle, witness stated that the hand written note (16/026) looked like Joanine's handwriting. She claimed to have tried to call Joanine but not sure of the time and date. She could not tell whether she contacted her on the day in question. The new lead, which was an email tracking the defendant was sent to Joanine the same time the defendant was sitting in front of Amanda De Villiers (witness). She looked into the defendant's profile within the bank system to get some of the defendant's details. She advertised the product "MAE" which was better compared to the 32 day notice the defendant had with Standard bank. The MAE product started with 8% interest or more whilst 32 day was not more than 3%. She claimed that throughout her experience with the defendant, he was not accessible, sometimes she got hold of him and sometimes not. He was glibberige.

[12] She claimed that the defendant had Mzansi Account for his employees. This she knew because the defendant was a Standard bank customer.

[13] Upon being asked about the contents of her mail sent to Joanine where she said the “Hy ken my nog net nie”, she stated that she did not mean to threaten the defendant. She was asked about the meaning of “hoop kry hom gehaak.” She insisted that this was not a threat to defendant.

[14] The witness could not say whether the defendant and Joanine knew each other before. She was not aware whether Joanine and defendant called each other before the time of her meeting with the defendant. She did not think of Joanine but her interest was on the defendant who would make better interest rate. It was put to her that the mail (15/02/2014) suggested that the defendant was known to both of them as it mentioned “Ek het met Mnr. Mokoena gepraat.....” It does not say a certain Mr. Mokoena. She was not aware if Joanine and defendant knew each other at the time. Witness was excused.

[15] Plaintiff called a second witness, a certain Joanine Schoeman. She started working for Standard bank in 1991. She resigned in 1996 and worked for Liberty life and was re-employed by Standard bank in 2003. She was currently a financial planner working in Standard bank dealing with financial planning, life cover, wills, estate planning and investment planning.

[16] She was aware of the dispute between plaintiff and defendant. She claimed that she got to know the defendant after the mail received from Amanda De Villiers. The mail is in page 162 of the bundle of documents. She claimed not to have known the defendant at the time. She wrote a hand note on the mail regarding the date and time of the appointment with the defendant (10H00 on 16/02).

[17] She contacted the defendant but does not remember the exact details. She was certain that the appointment was scheduled for 10h00. The defendant did not pitch for the appointment on the 16/02/11. She re-scheduled for the 18/02/11. The defendant did not arrive for both re-scheduled appointments on 18/02/11 and 21/02/11 respectively.

On 28/02/11 the defendant simply pitched up without an appointment. Ms Schoeman was busy with a client at the time, a certain Mrs Mopadi. The defendant allegedly demanded to see her urgently. Apparently Mrs Mopadi understood. All this time, it is alleged that there was never a prior dealing with the defendant. She went through the proposal with him, went through the liberty advice fee mandate, upfront fee (commission) included, working on commission (including the meeting they had). The documents were signed on the 28/02/11, had contended that she normally prepare documents for client and this explanation was given to clarify the different dates on the documents.

[18] Documents were shown to the witness and explanation was given i.e. 1st page of liberty life application relating to the plan sold to the defendant. In the beneficiary nomination form, an amount of

690 000.00 was scratched and altered to read 6000.00. She submitted that the reason for the change was that the defendant decided to change and invested R600 000.00. The defendant needed other funds for something else and was only willing to invest R600-00. The defendant signed the last page of the application on the 28/02/14. Pages 163-194 of the bundle of documents is the copy of the application. Witness insisted that the 28/02/11 was the first date that she saw the defendant. She confirmed the signatures of both herself and the defendant on the application at various pages. At pages 182 – 184, legal disclosure form and details of the adviser is signed at the bottom by both witness and defendant.

- [19] In the document where the customer acknowledges that he understands the disclosure and appointment of broker, the customer's permission part was signed by the defendant on the 16/02/11 even though Ms Schoeman claimed that it was signed on the 28/02/11. In the initial proposal form signatures of both defendant and the witness appeared and were dated 15/02/11. The document formed part of documents that the Ms Schoeman alleged to have pre-prepared. At page 189 dealing with financial products, an entry was made by Ms Schoeman and both the signatures (herself and defendant) appeared on the form, signed at the same time (see page 190, 191, 192, 193, 194 and 195.

The document (page 198) dated 01/03/2011 is signed by Joanine Schoeman on behalf of the defendant and was handed to the back office of the plaintiff.

[20] An amount of R690 000.00 from the 32 days notice was transferred to cheque account. The document regarding the transfer from 32 notice to current account was not signed by the defendant but by Ms Schoeman purportedly on behalf of the defendant on the 01/03/11. In page 200 of the indexed documents, the application for transfer of money showed defendant being debited and Liberty life made a beneficiary. This was a transfer from defendant's current account to Liberty life account at 16H39 on 01/03/11. The signature of the defendant does not appear in this document.

[21] Ms Joanine Schoeman prepared a document cancelling the product (liberty life) because it was claimed that the defendant was not happy with it. She claimed that defendant had phoned and advised that his wife was not happy because of the initial fee. The cancellation did not proceed because defendant went to Liberty life and stopped the cancellation.

[22] She advised that defendant surrendered his policy and repaid an amount of R599 051.81 which was paid to him on 14/06/14. Ms. Schoeman denied that the transfer of R690 000.00 was done without defendant's permission and insisted that she carried defendant's instruction. She also denied that she met the defendant on the 28/02/11 and further denied ever been given an amount of R600 000.00 in cash by the defendant. She claimed that she was not allowed to carry cash, defendant would then had to go to a teller to deposit the money. Ms. Schoeman denied that she paid R600 000.00 to Liberty Life because Liberty does not even occupy the same building with them in Loch Logan. She would not

have paid it there. She also advised that she could not think of any circumstances where defendant would have given money to somebody else thinking it was her.

- [23] She summarised her evidence as per the summons. She alleged that Amanda De Villiers gave her lead and defendant did not arrive. She had pre-prepared the documents, there was no policy, no cash. She saw defendant on the 28/02/11, completed documents with him, agreed on R600 000.00 to be transferred from 32 day account to Liberty. The defendant apparently gave instructions. She claimed that on the 04/03/11 defendant phoned wanting to cancel the policy with Liberty Life and was later advised that the defendant had instructed personally that the policy should not be cancelled. She has never heard from defendant again.

CROSS-EXAMINATION

- [24] She submitted that she was representing the plaintiff when dealing with clients. Bank practises were applicable in her dealings with clients. The first time that he had made contact with the defendant over the phone to make appointment was on the 15/02/11. She conceded that she went in the bank system without defendant's permission to his profile uplifting his name, surname, identity document etc. In any event defendant was Standard bank's client and it was her job to contact him when he did not turn up for the appointment. She insisted that the defendant was Standard bank's client and denied that she wanted him as a client.

[25] Upon being asked about pages 196 and 197 in the bundle of documents where defendant provided proof of address and identity document, she claimed not to have any idea why defendant brought such documents. She did not know who asked him to bring those documents because they were in the system already. She claimed that the document in page 163 of the bundle of documents (application) was to be sent to Liberty and did not have to be signed. She was asked if she was serious and whether she wanted the court to believe what she was saying. She insisted that the application did not have to be signed. The defendant, however, signed the application on the 28/02/11 and his copy was not counter signed by Ms. Schoeman. She could not explain the why the defendant was asked or allowed to sign if it was not necessary.

[26] The allegations that the date 28/02/11 on page 168 of the bundle of documents was changed were put to her. Only the defendant signed this document but on other pages (173) the date is not tampered with and the document is counter signed by Ms Schoeman. The document on page 184 of the bundle of documents is signed on the 16/02/11. She was confronted that this document created impression that the document was signed on the 16/02/11. She claimed that the document was pre-prepared and that they were generated on the 16/02/14 but signed on the 28/02/11.

[27] She insisted that she got information from Amanda De Villiers through their contact and this enabled her to pre-prepare the documents. She was asked how could she have known of the

amount of R690 000.00 that she put in page 186 (bundle of documents) when the mail from Amanda De Villiers in page 162 (bundle of documents) makes mention of R700 000.00. She could not answer when it was put to her that she unlawfully got information from another source. She denied that she hacked the defendant with R690 000.00 without his knowledge as per the mail (page 162) to Amanda. She denied and submitted that as she was pre-preparing the documents, she was in a position get a round figure and insert it in the documents. She was asked if it was not suppose to be a situation where client tells her of how much he could afford to invest rather than her putting her round figure. She replied that the client could change that on date of signature where she could sign or decline.

[28] Certain pages and dates of signature which were in dispute were put to the witness. The following:-

- a) Page 187(bundle) was completed on the 15/02/11. The proposal letter which was a separate document was signed on the 16/02/11.
- b) On page 186 (bundle) the document with personal details was signed 15/02/11.
- c) Page 189 (bundle) is signed on 16/02/11 but according to witness signed on 28/02/11 and further at the bottom of the page (page 5 of 5) document is dated 15/02/11.
- d) Page 190 (bundle) documents were printed on 15/02/11. However, document for permission to get information from defendant is dated 28/02/11. It was put to the witness that all

other things in this application were done without defendant knowing. She denied the allegation.

- e) Page 194(bundle), the date of signature as per the document was 15/02/11 but according to the witness was signed on 28/02/11.
- f) The documents, page 195 (bundle) prepared and signed on the 16/02/11 but according to the witness, it was signed on 28/02/11. It was put to her that nowhere in the document appears 28/02/11 but she was adamant that it was signed on the 28/02/11.
- g) On page 198 (bundle), Ms Schoeman signed on behalf of the defendant. She was asked where in the document does it say that she could sign on behalf of the defendant. She could not respond. It was put to the witness that according to the document, clearly under customer's signature, it is stated that "where a customer's account is to be debited the signatures must be in accordance with specimens and or mandates held by the bank.

[29] On page 182 – 184 (bundle), in the "legal disclosure form", the space reserved for signature by defendant was left blank, unsigned. This is the space where one signs upon given permission to act on behalf of defendant. This suggested that there was no permission given to transfer or debit. Ms. Schoeman denied and she expected the court to accept the document as authorising the bank to debit. It was also put to her that the document in page 184 (bundle) compared to page 198 (bundle) is supposed to be for disclosure, appointment of

representative and to obtain information not authorising transfer. She insisted that the bank accepted it as mandate to act.

Ms. Schoeman, transferred the money without permission or mandate from the defendant but she denied the accusation. It was further put to her that the transfer was done through the back-office and that someone might have assisted her fully knowing well that there was no permission to transfer. She denied that she was assisted by anybody else.

- [30] The document in page 198 (bundle) signed by Ms Schoeman on behalf defendant was prepared on the 01/03/11 and she could not answer why the document was not prepared a day before (28/02/11) when defendant was right in front of her. The question was in light of what the document required i.e. mandate, specifications etc., she could not respond and give a clear answer. She was requested to precisely show in the document where defendant gave her permission to transfer R690 000.00 from one account to another. The permission did not appear from any documentation before court. She could not point in the document where it showed R600 000.00 is to be transferred from one account. She conceded that the document in page 198 (bundle) required the bank officials to compare signatures so as to prevent unlawful transfers. She was asked how she managed to deposit and transfer R600 000.00 after hours. She alleged that the instruction was given to the back-office. She was asked which document did she rely on because none of the documents gave her permission to transfer the amount from the 32 day account to

any account. She claimed to have relied on disclosure documents but not to a specific document.

[31] On page 200 (bundle), the document showed that monies were transferred from the 32 day account of defendant to his Liberty account, done at the back office after business hours (16H39). The said document (on page 200, bundle) had provision for defendant's signature but his signature did not appear there. There was no explanation from Ms Schoeman's side. The balances of both current and 32 day account were shown and at the time, 0.00 balance reflected on the 32 day account. She could not explain how money was transferred from this account (in debit) to current account.

[32] The version of the defendant was put to her and she denied that the defendant visited the bank in November 2010. She disputed that she phoned and visited the defendant in 2010 November. Ms. Schoeman further denied that she had advised the defendant that it would be better for him and more beneficial if he could invest more than R500 000.00 in the product Ms Schoeman was selling. She rejected the defendant's version and denied that there was an agreement that the defendant would make a cash payment of R500 000.00. She denied the following:

- a) That she phoned defendant before the period of February 2011 and made appointment and met subsequently on 15/02/11;
- b) That the defendant brought cash raised during the festive period;

- c) That the defendant handed her cash in the amount of R600 000.00 with intention that the policy be paid from it;
- d) That on two or more occasions i.e. 16/02/11 and 28/02/11, defendant visited the bank to see the her;
- e) That the defendant did not attend the bank on 01/03/11 and made request for R690 000.00 to be transferred to the 32 day notice-account. She denied that the transfer was made at defendant's absence and without defendant's permission. She vehemently denied that on the 15/02/11 she received cash of R600 000.00 from the defendant and paid it to Liberty life directly in the plaintiff's branch.

[33] She claimed in cross-examination that when documents are pre-prepared, the dates on it might not be correct i.e. date is pre-populated and set-up on work in the system. If for instance document say the date (14/02/11) it would imply that it was not concerning a date for defendant. It was possible that the same date was applicable to another client because it was pre-populated. Plaintiff closed its case.

DEFENDANT'S EVIDENCE

[34] The defendant is a businessman and a farmer and had approximately 15 (fifteen years of farming). He has been plaintiff's client since 1993. His current account with the plaintiff was presently dormant and overdrawn from March 2011 and had not used it since then. He stated that he knew Mrs. Schoeman as he had done business with her. He claimed to have been phoned in November 2010 by a certain Amanda De Villiers, a close acquaintance of his who told him that she knew someone with

better investments. A lady by the name of Joanine Schoeman called on his cell phone towards November and agreed with him on a date and time for the appointment. She told him that in her investment it would be better if he accrued an amount of R500 000.00 because then he would not be charged anything but if he deposited small amounts, it would not be with it.

[35] In January 2011, Ms. Schoeman phoned and asked defendant jokingly when he would be depositing further money because she had realised that he had just deposited in his call account an amount of R300 000.00. They spoke of an amount of R700 000.00 to be deposited. He alleged that on the 15/02/11 he had R600 000.00 in cash with him and Schoeman showed him different portfolios. He handed the money to Ms. Schoeman who went out to the back office to deposit it. The defendant claimed that he asked for proof when he was told the documents handed over to him were proof enough to confirm the purchase of the policy. On the 28/02/11 he arranged and went to see Ms Schoeman.

[36] The defendant alleged that on the 01/03/11 he went to Preller Square, branch of the plaintiff when he realised that an amount of R693 000.00 was deposited in his current account. Late on the same day the amount in his account was 1.4 million instead of R500 000.00. He notified the bank manager of the said deposit. The bank manager apparently said he would follow up. The following week he went on to see the manager to ask him what was happening because the money that was deposited was now transferred from his account and his account was now in overdraft. The plaintiff only responded in May 2011 when defendant was

advised that he was in overdraft. He claimed that he has never asked and never obtained overdraft from the plaintiff. The plaintiff sued him initially and wanted to attach but that judgment was rescinded. The defendant's attorney wrote to the bank on 04/03/11 and the bank only responded on 10 May 2011, almost two months later. The other case by the bank was rescinded and the present one, the defendant is defending .

[37] The defendant claimed to have generated R600 000.00 in December 2010. He alleged that he raised this amount from his transport business, minibuses, bakkies, speculating, buying and selling of sheep. He stated that during December, people send their children to circumcision. They need transport and sheep to perform certain cultural rituals and this had an effect of boosting his earnings. He claimed that even before christmas, judging from the deposit he normally made, the plaintiff knew that he could generate such large amounts of cash. The defendant denied that he authorised payment as alleged by Ms. Schoeman. He alleged that there was no need for authorisation because cash payment was already given to Ms. Schoeman on the 15/02/11. The deposit in page 199 (bundle) of R600 000.00 was unfamiliar to him. He did not have knowledge of the transaction from his current account to Liberty life as depicted in page 200 (bundle). He insisted that he made cash payment and never authorised the other payment.

[38] He received a phone call from Liberty life claiming that the defendant wanted to cancel the policy. The defendant denied and he visited Liberty life and was shown a letter from Ms. Schoeman advising that the defendant had given instruction to cancel the

policy. The defendant denied and told Liberty life that the statement was not true and wrote to them for purposes cancelling the so called instruction to cancel by Ms Schoeman. The defendant had a problem with the contents of the letter cancelling the instruction to cancel especially telling Liberty that he was cancelling his first request. The defendant insisted that there was no first request. He never requested cancellation at all. The defendant claimed that he never spoke to Ms. Schoeman after 28/02/11. He surrendered his policies with valued of R599 017.98. He claimed that the reason for surrendering his policies was that he wanted to pay a deposit for the farm that he was purchasing with value of 3.4 million.

CROSS EXAMINATION

[39] He stated that his business involved a number of businesses, transport, farming, livestock and speculating. He advised that it was not quite successful business. On the 15/02/11, he had an amount of R600 000.00 cash with him. He did not get a receipt from Ms. Schoeman instead was advised that the documents he got from her were proof that money was paid and policy activated. He claimed that Ms. Schoeman advised that the money must be paid in cash as this would save the defendant on service fee. The defendant never received policy documents instead he was told he would get statements.

[40] The defendant further said that he has never dealt with Ms. Schoeman before but Ms. Amanda De Villiers. He saw Ms Schoeman in November 2010 when she explained and presented

different portfolios. He rejected the assertion by Ms. Schoeman that she was off sick from October 2010 as a result of operation and came back in January. He insisted that he saw her at the bank November 2010 and 15/02/2011. The defendant further denied submissions by Amanda De Villiers and averred that he was sitting with her when she sent the mail to Ms. Schoeman as per page 162 (bundle).

[41] The defendant advised that he took up the issue of the transfer with a certain Willem and subsequently took the matter up with his attorney. He explained that he gave permission to Ms. Schoeman in November 2011 to view his Liberty life profile there and then at her office. This permission was not for future transactions. He disputed that in November Ms. Schoeman was sick. She actually offered him an interesting policy but suggested an investment of R500 000.00. He claimed that he spoke telephonically with Ms. Schoeman and the documents signed 28/02/11 were the same documents given to him on 15/02/11 by Ms. Schoeman. The documents are marked Annexure "C" and are only signed by the defendant. They are the same documents as those on pages 147, 148, 149, 150, 151, 152 and 153 of the bundle. He claimed the document in page 144 (bundle) dealing with beneficiary details for procedure was not handed to him.

[42] The document on page 98 (bundle) titled [Vroeë terugbetaling van beleggings] was done at the defendant's instruction at the advice of a lady at the bank, apparently in order to save penalties. The defendant claimed that the reasons given for early re-payment and the claim that he was opening an investment with them was false.

The early repayment was done for the building nothing else. The defendant was advised by bank officials in order to beat the system. He claimed that on account of the advice he intentionally made a statement that created an impression that he needed an investment when in essence it was a lie. He did not show any documentation but just to say he needed money for building. He was shown the way to go by the bank official.

[43] It was put to the defendant that his version was unlikely and improbable because at the time he alleged to have made appointment with Ms. Schoeman, she was in hospital. The defendant replied that there was no proof of that submission before court. He went to the manager and complained when he detected the anomaly in the transfers upon being asked the reason for not summoning Liberty, he claimed to have approached people who knew what to do. He went to see the attorneys and he could not object if they wrote letters to the bank. The defendant claimed that he was asked to sign the document at page 187 (bundle) product replacement questionnaire because Ms. Schoeman asked him to sign. He was brought a package as it was standard practise in a bank to be asked to sign the documents. You just sign because you normally trust the bank.

[44] He gave evidence that he never spoke to Ms. Schoeman about the 32 day notice account. He claimed to have trusted her and that's the reason he did not ask for receipt. He claimed that Ms. Schoeman stole the money i.e. R600 000.00. He alleged that the money was clearly not deposited and hence he went to the attorneys to lodge a fraud complaint. He said his concern at the

time was the R693 000.00. He insisted that his version was honest and that he had trusted Ms Schoeman. According to him when Ms. Schoeman sent a letter to cancel his Liberty life Policy without his instruction, that was done to stop and reverse the process because she knew she stole the money. He insisted that he gave instructions to the attorney to attend to the issue. He claimed that his version is not fabrication because there's no document before court to infer that he stole money or was fraudulent. He alleged that Amanda De Villiers and Ms. Schoeman conspired to steal.

- [45] The defendant mentioned that there two summonses issued by the plaintiff against him. The first are under case number 3936/11 was rescinded and summons withdrawn. He was defending and still busy with the present case. He had deposed to an affidavit opposing the summary judgment already on 19th January 2012. In paragraph 15, of the affidavit he mentioned that on the 15/02/11, he went to Standard bank to meet with Joanine Schoeman to invest R600 000.00 in one of the portfolios. In paragraph 16 and 17 of the affidavit, he confirmed the meeting with Ms. Schoeman. In paragraph 12, Ms Schoeman advised the defendant that he would be charged a lot in deposit fees if he deposited the money using his personal account. She would rather handle the deposit herself where she would open a Liberty Life investment account on defendant's behalf and there would be no deposit fees at all. In paragraph 18, defendant alleged that Ms. Schoeman printed a number of documents for signature as acceptance of new policy. He signed the documents which were handed to court as Annexure "C," where all the pages were signed by defendant with the exception of the last page. The defendant showed that the

document, Annexure “C”, given to him was similar to pages 174 – 180 of the bundle. The only difference is that the bundle pages had dates and signature of Ms. Schoeman. Page 8, of Annexure “C” is similar to page 190 of the bundle. The difference is that in the bundle at page 190, a signature is added of both defendant and Ms Schoeman. The documents received from Ms Schoeman similar to Annexure “C” especially in comparison to page 191 of the bundle, is the same document and the same date appears (15/02/11) but the signature of Ms Schoeman also appears in page 191 of the bundle. The defendant claimed that when he got the documents, Annexure “C”, it was at the time when he met with Ms Schoeman on 15/02/11 at approximately 15H15 when she printed the documents in his presence.

[46] Plaintiff’s witness, Ms Schoeman denied that she met with the defendant on the 15/02/11 at 15H15. The defendant closed its case.

CLOSING ARGUMENTS

[47] Plaintiff claimed that the case was not necessary on legal point but on dispute of facts. He asked the court to give judgment in favour of the plaintiff as per the particulars of claim for an amount of R571 590.27 plus interest at 15.5% from the date of summons, 26/02/11 as well as costs of suit. Plaintiff claimed that *locus standi*, identity of parties, jurisdiction and the amount involved were not in dispute. The overdrawn balance of the defendant’s current account was apparent in the statement.

[38] The plaintiff argued that the items which were in dispute was:

1. Whether Joanine Schoeman was advised to transfer the amount from 32 day notice account to current account;
2. Did the defendant hand to Joanine Schoeman R600 000.00.?

Plaintiff alleged that the enquiry is not the same. It claimed that the liberty life policy was issued, an attempt to cancel, defendant wanted to proceed after two months surrendered the policy and the defendant got the benefit. The amount paid for policy came from defendant's account. It alleged that the R693 000.00 balance in the 32 day call account was an authorised transaction. The reversal was justified and the transfer was made. Both updates and duplication is discovered resulting in the reversal. It argued that the defendant knew that his liberty account was paid from his current account not from cash. It claimed that it was extremely unlikely for the defendant to leave the bank without receipt, without policy and proof of deposit, leaving only with documents that do not relate to the R600 000.00. Plaintiff claimed that a reasonable person would never have left the bank without proof. It claimed that the defendant was educated and there was no argument that he did not understand. He had other policies with the bank. It argued that the only reasonable conclusion was that the defendant did not have R600 000.00 with him at the time. It claimed that there was no theft reported to the police or referral to ombudsman etc. The letter from the attorneys did not even mention theft at all. Plaintiff argued that no person with an acumen of the defendant would hand over R600 000.00 without receipt. It claimed that no reasonable person would believe as the defendant did that the documents it was given at the meeting with Joanine Schoeman

especially when the defendant had policies was proof of payment.

[39] Plaintiff claimed that the version of the defendant was unlikely compared to the plaintiff's witnesses. It submitted that Joanine Schoeman was an honest witness. She did not waive, did not shake and had reasonable explanation. She alleged to have seen Mokoena on the 28/02/11. She pre-prepared documents as is normal procedure. It was signed on behalf of plaintiff and that it was highly unlikely that she would jeopardise her job. She did not accept cash and the defendant got benefit of the transfer. It was further argued that Ms. Amanda De Villiers as a witness was not shaken as well. She argued that Ms. J. Schoeman did not speak to Mokoena before the 15/02/11. Plaintiff submitted that Ms. J. Schoeman had an operation in 2010 November / December. She was off for eight weeks, 2010 (December) to early January 2011. Plaintiff alleged that it is in fact required to show that the defendant is in overdraft. On the defences raised, it submitted that the onus was on the defendant to establish its defence on balance of probabilities. It claimed that the plaintiff's version was plausible accurate. It claimed Ms. De Villiers was not shaken in cross-examination and gave reasonable answers to all questions. Plaintiff claimed that defendant's version was highly implausible and cannot sustain a defence. It prayed for judgment in its favour as per the summons and particulars of claim.

DEFENDANT'S CLOSING ARGUMENT

[40] It raised three issues which were in dispute i.e.

- a) Transfer of the amount of R600 000.00 on from 32 account to current account,
- b) Transfer of R600 000.00 from current account to liberty account.
- c) Payment of R600 000.00 to Schoeman on the 15/02/11.

Defendant submitted that Ms. Schoeman was an official of the bank and as such employed by the bank and subject to its rules. In paragraph 6 of its particulars of claim, the plaintiff alleged that on the 01/03/11, and at the plaintiff's Loch Logan Branch, an amount of R690 000.00 was transferred from the defendant's 32 day Notice account into the defendants current account at the defendants request." This appears on page 202 of the bundle of documents clearly after close of business. Ms Schoeman admitted that she completed documents that made this transaction possible. The transfer made earlier that day of 01/03/2011) of 693 526 96 as per paragraph (8) of particulars of claim was not a duplication. The transfer at page 201 of the bundle at 11H43 on the 01/03/2011 and available balance was 69.131.13. The transfer was correctly made because there were funds available according to annexure "C" of the Particulars of claim, there was a balance of R1 207 463 86, on the account on 11/02/2011. The email from Ms De Villiers at page 162 of the bundle confirms that there was money on the 32 day call account so the transfer to current account was lawful since there was a balance.

[41] The defendant raised the question and asked how was it possible that Ms Schoeman was successful to transfer later that day an amount of R600 000.00 on the 01/03/2011 from the 32 account to

current account when there was only R 69.131.13 balance available. The documents at page 198 of the bundle purportedly signed on behalf of the defendant by Ms Schoeman at the “back office” would never have been honoured because of the lawful transaction earlier that day. Ms Schoeman must have had some form of assistance from another employee of Standard bank which happened after hours as the transaction showed. The transaction was unlawful as the document at page 198 of the bundle was supposed to have been signed by the owner to prevent fraud or any unlawful activity. The document is clearly stated under customers signature that “where a customer’s account is to debited, the signatures must be in accordance with specimens and/or mandates held by bank.

How did Ms Schoeman successfully manage to transfer R 600 000.00 to the current account? The 32 notice account clearly from page 201 of the bundle had no overdraft. She transferred money totally against the rules of the bank. She must have had some form of assistance *ex facie* the documents.

- [42] The plaintiff’s case as per paragraph 6 of the Particulars of claim, is pleaded but there was no evidence before court that the defendant requested the transfer. The document in page 195 purporting to be the authorisation signed on behalf of the defendant by Ms Schoeman on the 28/02/11, a day preceding the 01/03/2011. Upon being asked for an explanation, Ms Schoeman said it was not necessary because she had authority to sign on behalf of the defendant. She did not tell the defendants that she would sign (pp) on his behalf. It was evidently clear that she

neither had mandate nor permission to do so and it was clearly an unlawful transaction. Money was transferred without the 32 notice given. No evidence of 32 notice was given to transfer from 32 account to current account. Ms Schoeman was successful with the transaction without notice or reason for not giving notice. There is no reason at page 198 (bundle) why she could not do the transaction because it had been done before with another. The R600 000.00 on current account to liberty account must also have been done without authorisation or with a slip similar to the one at page 198 of the bundle containing details of account holder. Everything in page 198 (bundle) that appear on the document was done by Ms Schoeman. The defendant argued and submitted that there should have been a similar transfer document from current account to liberty account. It was not before court and was not even discovered. Defendant submitted that in page 200 of the bundle, the document is supposed to be proof of payment according to Ms Schoeman but there is no signature by the defendant. Clearly the proof of payment was not authorised as well hence the portion or gap for the signature by defendant is left blank. The transaction was done after hours (16H39) leaving the current account overdrawn. The unauthorised transfer after hours had the effect of leaving account overdrawn. At the time there was no overdraft facilities in the account. So the transfer of R600 000.00 from current account to liberty life was unlawful. There was no authority, no attempt from Mr Schoeman claiming she was authorised and there was no attempt from her to show that there were documents authorising withdrawal. There is the document before court to say it was done as per a certain document. The transfer, clearly was done

orally. Ms Schoeman conveyed to a colleague at the back office. This withdrawal left the current account with a minus balance.

[43] The defendant version was that he handed to Ms J Schoeman an amount of R600 000.00 cash on the 15/02/2011. The defendant submitted that there were two versions in this case. The defendant said that he is a man of means and could pay R600 000.00 in cash. Amounts are clearly seen being paid cash in his account an amount of R45 000.00 is paid cash on 08/02/2011 as per Annexure "B" of the Particulars of Claim. This evidence was never disputed that he could afford large sums of money. Both De Villiers and Schoeman were so interested with his money that they wanted to do business with him. When the defendant came without an appointment, it was not a problem. Ms Schoeman denies receiving the cash and consulting on the 15/02/2011. The document at least must show that there was a consultation on the 15/02/2011. There are too much document carrying the date 15/02/2011. Pages 185,186,187,188 and 189 in the bundle signed by both parties have a date of 15/02/2011. Page 187 also signed by both parties had also a date of 16/02/11 affixed. In page 188, both parties signed next to the date 15/02/2011 and above it. Page 190 signed by both parties at 15:15 on the 15/02/2011. Annexure "C" is dated 15/02/2011 at page 8 and 9 signed only by the defendant.

[44] The documents discovered by the plaintiff had two signatures. All documents handed over to defendant as annexure "C" carry no date except page 8 and 9 with only defendant's signature. The

equivalent is that the same document by plaintiff are signed and dated. The document, "C," must have been handed by Ms Schoeman on the 15/02/2011 as per the opposing papers in the summary judgment application. Ms Schoeman does not want to admit that on the 15/02/2011, she made contact with the defendant. The court will accept as per the defendant that the amount might have been handed to her. She was not strong witness and did not take the court into her confidence. The two transfers i.e. R693 000.00 transferred without authorisation and an amount of R600 000.00 transferred without any documentation but Ms Schoeman succeeds with those transfers. Defendant submitted that plaintiff carried an onus in this matter. The version placed before court by defendant is sufficiently probable. The plaintiff still carried the onus on the facts, judgment cannot be granted in any amount, plaintiff's claim should be dismissed with costs.

- [45] In reply, the plaintiff submitted that the defendant took benefit of the transfer knowing that there was no deposit in his account. He could have raised alarm. The plaintiff asked why no complaint of payment of R600 000.00 to liberty account from his current account. It claimed that the withdrawal from 32 notice account could be done without incurring penalties. Plaintiff alleged that defendant was a party to a dishonest transaction. It conceded that there were two versions but Ms Schoeman was supported by Ms De Villiers. It submitted that defendant's version be treated with caution. It conceded that defendant was a man of means. Plaintiff claimed to have discharged the onus because it proved that the defendant was in overdraft. It claimed that there was no proof of

R600 000.00 cash from defendant. Plaintiff asked for judgment and submitted that it discharged the onus.

ANALYSIS OF EVIDENCE

[46] In the opposing papers opposing summary judgment application filed on the 19/01/2012, the respondent (defendant) alleged that he received a call from a lady from Standard bank on or about November 2010. This lady, clearly from the papers was Ms Joanne Schoeman. He alleged to have met her again on the 15/02/2011 after receipt of a call from Ms Schoeman to come and invest and also questioned him whether he had managed to raise the money. The respondent (defendant) submitted in the application for summary judgment that parties would have to avail themselves on trial to answer the mystery of transactions that took place on respondent's (defendant) account. The respondent (defendant) in the application for summary judgment raised the question as to the fact that the two transactions were conducted in the 32 day account on the same day and neither of the two employees from both banks could see that the respondent's account had no funds. Yet, the transaction is done and authorised. He further alleged that he was surprised by the fact that the claim is on his main account (current account) rather than the 32 day notice account which was the cause of action.

[47] The email by Ms De Villiers to Ms Schoeman was sent at the same time whilst the defendant was sitting with Ms De Villiers. The concerns raised in the mail were misleading in the sense that the message was that the defendant was hard to find when in essence he was sitting with Ms De Villiers. She looked at the profile of the

defendant in the system. When asked on what capacity was she doing that because she was not authorised to do that, she merely alleged that on her capacity as sales consultant. The question that faced her was whether she was authorised to do that as per bank practice. When asked about the meaning of the mail sent to Ms Schoeman i.e. “now he will find who I am”. Ms De Villiers denied that she was threatening the defendant. It was further put to her that the mail suggested that both Ms De Villiers and Ms Schoeman knew the defendant. It (mail) read “I spoke to Mr Mokoena. It does not say she spoke to a certain gentleman who is a businessman. Clearly it suggested that they knew each other. It is also not clear what was the interest of Ms De Villiers in defendant purchasing the product because Ms Schoeman was the one selling the product. Her answer to the effect that she thought only of the client making better interest does not make sense. Why would she look at the defendant’s profile as sales consultant and sends threatening mail if she had no interest in the matter. She stated that she did not know whether the defendant and Ms Schoeman know each other before. The mail suggests otherwise.

[48] Ms De Villiers claimed that she does not have input in terms of which products Ms Schoeman sells. If this is correct, why would Ms De Villiers write a mail (page 162) of the bundle stating “Ek sal hom vastrek!!!,Hy ken my nog net nie.”?

[49] Ms Schoeman involvement with Liberty life was that she resigned in 1996. She worked for Standard bank in 1991. She resigned in 1996 and was re-employed by Standard bank in 2003. She was currently a financial planner. The link between Liberty life and

Standard bank was very important if she had resigned in 1996 at Liberty life. She claimed to have never knew Mr Mokoena before the mail sent to her by Ms De Villiers. The mail suggested that both knew Mr Mokoena ("I spoke to Mr Mokoena about his R700 000 that is in his 32 day notice account."

Ms Schoeman alleged that Mr Mokoena finally arrived without an appointment on the 28/02/11. She was busy with client at the time, a certain Ms Mompadi. This Ms Mompadi was never called to collaborate this version. Ms Schoeman ought to have known or at least the plaintiff ought to have been aware from previous application (summary judgment) that the defendant had contended that he met Ms Schoeman on the 15/02/2011. The date 28/02/2011 was in dispute from the beginning because the defendant insisted it was the 15/02/2011. In light of the dispute, it was prudent to call Ms Mampadi. Ms Schoeman does not explain why she attended to the defendant without an appointment to the extent that she excused a potential client if she never knew who Mr Mokoena was and had never dealt with him before. Why would Ms Schoeman request permission from the so called Ms Mompadi to see a stranger without an appointment.?

- [50] If Ms Schoeman saw the defendant for the first time on the 28/02/2011, how would she have discussed as per the summary of transaction proposal in page 195 (bundle) on 16/02/2011 referring to the discussion that had already taken place? In this mail she stated that she explained various options. The defendant said after long presentation on the 15/02/2011, he finally agreed to purchase the policy. The summary on the 16/05/2012 seems to

suggest the discussion with the defendant on the 15/02/2011. It could not have been the other date. The defendant disputed that he gave permission for Ms Schoeman to sign on his behalf as per page 198 (bundle) debiting the 32 day notice and crediting achiever account. The contention by Ms Schoeman that she had permission could not be sustained. This happened a day after the defendant saw her on the 28/02/2011. Why could it not have been done on the 28/02/2011, is not explained. The transfer on the 01/03/11 was procesed after hours when the bank was closed at 16H39 and there is no signature by defendant. The defendant disputed that he arranged with Liberty life to cancel the policy. He went to re-instate the policy upon being told of the alleged instruction to cancel.

[51] When the plea of the defendant was placed before Ms Schoeman, she vehemently denied that she met the defendant on the 15/02/2011. If she is indeed correct, how does she explain the summary on page 195 of the bundle. This bundle and its contents has not been put in dispute. It has been accepted by both parties. Ms Schoeman makes no mention of the meeting of the 15/02/2011. She alleged that the defendant did not arrive for the appointment on 16/02/2011, 18/02/2011 and 21/02/2011. This is now her evidence in chief. The summary (summarising the previous discussions regarding different portfolios) at page 195 (bundle) say something else.

[52] In cross examination, only then Ms Schoeman alleged that on 15/02/2011, he made contact with defendant in mid-morning to make appointment. She claimed that she got the details of the

defendant on the system without defendant's permission. She claimed the defendant was Standard bank's client assumedly no permission was needed. Strangely without permission, gets details and particulars of Standard bank client so that she could sell the policy of Liberty life which according to her evidence was not been based at the same building as Standard bank as Loch Logan. Is this acceptable bank practices? In any event this version at cross examination still does not explain the summary at page 195 (bundle). The contact on the 15/02/2011 according to her was to arrange appointment for the 16/02/2011. He did not pitch on the 16/02/2011, 18/02/11 and 21/02/11 as per her evidence. Why would there be a summary on the 16/02/2011 if there was no meeting and presentation on the 15/02/2011 or any other day before the 15/02/11?

- [53] It is clear that the defendant, a Standard bank client was pursued by a Standard bank employee for her Liberty client. Ms Schoeman responded that the application for Liberty policy did not have to be signed upon being asked why it was never signed on page 165 and 166 of the bundle. When she was asked why in the application dated 28/02/2011, was signed, she could not give a clear response. Upon being asked of the amount to be invested (R690 000.00) when Ms De Villiers advised her of R700 000.00. How did she know the amount to be invested was R690 000.00 if he was not told by defendant on the 15/02/2011. The document is dated 15/02/2011. Clearly that information she did not get from Ms De Villiers. It was put to her that she got the information from another source. She disagreed and claimed that it was pre-preparation where she got a round

figure to be inserted. It was put to her that the client is supposed to tell her how much he can afford not her inserting a round figure. She argued that on the date of signature, client could always change the amount. This was now a contradiction from her previous evidence that the application does not have to be signed. Why would client change the amount inserted on signature if the application was not supposed to be signed. The dates appearing on the documents should be the dates of actual signature for formality purposes. This enables the bank to verify and follow a trail of documents whenever there was a dispute relating to any transaction. Proper dates would make it easy to trace the root of any challenge especially regarding certainty about the dates the transaction took place. The date of 28/02/2011 which Ms Schoeman is alleging to be the date of signature and meeting with the defendant does not appear on the documents. The 15/02/2011 is the date that appears in most documents. The document in page 194, the date of signature as per the document is 15/02/2011 but according to Ms Schoeman it was signed on the 28/02/2011. The document in page 195 (bundle) clearly a summary of discussions that took place before the 16/02/2011, signed on 16/02/2011, Ms Schoeman insists it was signed on the 28/02/2011. Clearly, this submission cannot be correct.

- [54] Nowhere in the document at page 198 (bundle) does it appear that Ms Schoeman was authorised to sign on behalf of the defendant. To the contrary, there is a safety measure in place where the bank clearly stated on the document that a "signature must be in accordance with specimen of mandate held by bank

where client's account has to debited." This measure is clearly written underneath the place where the signature of client had to be affixed. This is a safety measure by the bank to prevent fraud. The defendant submitted that there was no authority given to Ms Schoeman to debit defendant's account. Nowhere in the document is the authority shown or signed. She did not deny that there was no permission to transfer the amount of R690 000.00 which is altered and replaced with the amount of R600 000.00. Even though Ms Schoeman disagreed, the defendant version corroborates the contents of page 194. Ms Schoeman disputed the evidence by the defendant that on two or more occasion, he visited the bank to see her especially on 16/02/2011 and again 28/02/2011. Strangely on her evidence the defendant saw her on the 28/02/2011. Why would she now dispute the date 28/02/2011.

- [55] Ms Schoeman denied the allegation put to her in respect of the plea in page 43 of the index to pleadings. She denied that the transfer at page 198 (bundle) was made without the defendants presence and knowledge. It is confusing and difficult to understand why Ms Schoeman signed on behalf of the defendant for the transfer if it denies the allegation that the transfer was made without the defendant's presence and knowledge. Ms Schoeman denied the contents of paragraph 8.3 of the plea at page 44 where it was alleged that she took the R600 000.00 and paid it to Liberty account within the plaintiff's branch. She even alleged in her evidence in chief that Liberty life does not even occupy the same building in Loch Logan so she could not have paid it there. In light of this denial, Ms Schoeman would have to explain the deposit slip

at page 199 of the bundle, a deposit slip of R600 000.00 directly to Liberty life. This deposit slip is undated, without a teller's signature and date stamp. There is no explanation forthcoming regarding this anomaly. Is this standard practice that deposit slip are not stamped, no date stamp, no signature etc.?

[56] She argued that the bank used a system where it pre-populates dates, meaning that a date in the document would not necessarily mean that it was applicable to that particular transaction. It would imply that it was not concerning a date for Mokoena (defendant) but it was possible that the same date was applicable to another client. Clearly, this strange system did not create certainty. It therefore meant the bank could not keep proper records if a date of transaction in another client's application in the system might actually not refer to that client but to another. Ms Schoeman had previously advised in her evidence that the application did not have to be signed. Now the court is told that certain information regarding dates in the system might actually refer to another client. The defendant alleged that on the 15/02/2011, Ms Schoeman showed him different portfolios, this is corroborated by her summary at page 195 (bundle). Defendant alleged that Ms Schoeman took the money and went to deposit at the back office. Page 199 (bundle) there is a deposit slip of R600 000.00 without date stamp, teller's stamp and signature.

[57] The defendant claimed that Mrs De Villiers was a liar. In her mail to Ms Schoeman she created an impression that it was difficult to get hold of the defendant. The mail did not say that the defendant (Mokoena) was sitting with Amanda and as such Ms Schoeman

could arrange appointment there and then. There is no explanation from Ms Schoeman regarding annexure "C" handed to court. The documents were handed to the defendant on the 18/02/2011 and were only signed by the defendant and were undated. However, the same documents in the bundle (pages 147,148,149,150,151,152 and 153) are signed by both parties and are dated 28/02/2011. In the document at page 98 (bundle) (vroeër terug betaling van beleggings) the defendant is advised by a bank employee/ official how to save penalties. He wanted the money for building but was advised to mislead and claim that he needed the money for investment with Stanlib. It was accordingly written on the document (investing with us at Stanlib). At the bottom it was written (referred authorised since investing with us at Stanlib). Clearly, the bank employee was misrepresenting the facts when making these entries. This official told the defendant that was the way to go to get the money. The defendant argued that there was no proof that Ms Schoeman was in hospital and was on leave from December 2010 to late January 2011. Ms Schoeman should have brought proof of hospitalisation or sick leave notes submitted to the plaintiff to corroborate her version. The defendant had raised this issue of dates when he met with Ms Schoeman (November 2010 and February 2011) in the affidavit in January 2012 already. The plaintiff ought to have brought forward evidence to challenge this assertion as alluded above. Evidence before court showed to the meeting of the 15/02/2011. The defendant went to the manager and complained of the transaction which was not authorised amounting to R690 000.00. The defendant claimed that he never applied for an overdraft. He signed all the documents that Ms Schoeman asked

him to sign because he had trust in the bank. When one looks at page 195 (bundle), the summary of what transpired before the 16/02/11, it make sense to say there was a meeting on the 15/02/2011. The defendant took reasonable steps and went to see the manager of the bank. He said he trusted the bank but conceded that he knew the office of the manager and his face but not his name. He could not be accused of taking very little steps. He was assisted to draw the money by bank official. The entry in the document for the early withdrawal was clearly incorrect. The defendant neither invested with Stanlib nor was there evidence showing that he invested with Stanlib. Why would Ms Schoeman advise Liberty life that the defendant wanted to cancel the policy when he clearly did not give such instruction to cancel. He went and cancelled that instruction personally at Liberty life. The defendant contended Ms Schoeman wanted to stop the process because he knew that she stole the money. The defendant consulted his attorneys when he established the unauthorised transactions. He did not read the complaints procedure resolution. He had already complained with the bank manager. He left everything for his attorneys to sort.

[58] There is no explanation from the witness (Ms Schoeman) regarding the difference in signature and documents in the bundle, similar in nature and form with those she handed over to the defendant marked Annexure "C". These were handed to defendant and were only signed by him and were undated. The documents in possession of court in the bundle are signed by both parties. Ms Schoeman had inserted the date of the 28/02/2011 in these documents. In her evidence in cross-examination, she had

argued that the documents or the application did not have to be signed. If these documents were pre-prepared as Ms Schoeman would like the court to believe, why then the difference? The documents which were handed to defendant as annexure "C" are not dated but are supposed to have been pre-prepared before his appointment. However the same documents in the bundle handed as part of the application are dated and signed by both parties on the 28/02/2011. The defendant alleged that the reason he was asked to hand over the R600 000.00 to Ms Schoeman was to avoid high fees. He contended that if Ms Schoeman deposited the money herself there would be no such fees. The plaintiff did not dispute the existence of this type of reprieve of payment of fees from its side. It only disputed that the amount of R600 000 was handed over to Ms Schoeman.

- [59] There is no explanation from the plaintiff given the electronic nature of transfers in bank business. How is it possible that there was a transfer of large amounts of money from an account which had a debit balance to another account? Why the plaintiff did not discover immediately the alleged duplicate of transfers that led to the reversal. There is no onus to be discharged by the defendant. The plaintiff had to discharge the onus and prove that the defendant was liable for the monies claimed. Plaintiff cannot rely on what was supposed to have been by the defendant or actions not take by defendant. The defendant has submitted that in the bank one is normally given lot of documents to sign. He signed without asking questions because he trust the bank. The plaintiff had argued that Ms Schoeman had seen the defendant for the first time on 28/02/11 and had pre-prepared the

documents as is normal practice. The question is why the documents corroborate the defendant's version? Why is there so much the date of the 15/02/11 in the documents compared to the 28/02/2011? The summary made by Ms Schoeman on the 16/02/2011 belied her version that there was no meeting on the 15/02/2011. Clearly there was a meeting before the 16/02/2011 as the summary of Ms Schoeman at page 195 of the bundle narrated by plaintiff as summary of transaction of proposal from Joanne Schoeman to the defendant. This is very important and crucial but the plaintiff chose not to explain.

- [60] The plaintiff argued that Ms Schoeman was unlikely to have done something that could jeopardise her job i.e. she was not allowed to take cash etc. Clearly from the evidence she acted against bank practices. Why did she sign on behalf of the defendant when clearly she had no authority to do so? The plaintiff clearly put in its documents that only the client should sign and the specimen and mandates should correspond with the one's held by the bank. These were safety measures designed to avoid unlawful transactions. Mr Schoeman conceded this point but went on to sign on behalf of the defendant. She argued that she was authorised but does not produce proof of this alleged authority. She referred the court to disclosure forms as proof. These clearly *ex facie* were not proof of authority.

How is it possible for Ms Schoeman to have successfully transferred large amounts of money from a debit account of Liberty life to current account. If Ms Schoeman was unlikely to jeopardise her job, how did she manage to transfer from a 32 notice account

without giving the required 32 day notice? Is it allowed or permitted as per bank practice that a deposit slip of such a large amount of money (R600 000.00) as per page 199 of the bundle is issued without date stamp, signature and itself undated?

[61] The plaintiff submitted that the defendant made benefit of the transfer. The defendant went to attorneys in March 2011 already. The attorneys' letter is dated 11/03/2011. Why would he report this to his attorney if he had benefits from the transfer? He had asked the plaintiff to correct the error in March 2011 already. Why would he ask for the correction if the transfer was benefitting him? The version by Amanda De Villiers that she did not know if Ms Schoeman spoke to the defendant before the 15/02/2011 cannot be true. The content of her mail to Ms Schoeman clearly showed that both knew who they were talking about. In her mail, she referred to an amount of R700 000.00 lying in the account but in the application Ms Schoeman put the amount of R690 000.00 that the defendant was to invest claiming that it was a round figure. What a coincidence, clearly this information she got from the defendant on or before the 15/02/2011. Strangely, Ms De Villiers whilst sitting with the defendant, on her own evidence and admission, that the defendant was sitting in front of her when she sent the mail to Ms Schoeman on the 15/02/2011. Why did she say she was having difficulty to get hold of Ms Mokoena when he was sitting with him in front of the computer? The defendant has consistently maintained in his papers from the opposition of summary judgment to this present action that he had made contact with Ms Joanine Schoeman in November/December 2010. This averment is known by the plaintiff or plaintiff ought to have been

aware of it. The question is why is there no evidence from the plaintiff to corroborate Ms Schoeman version that at the time she had an operation and was off sick. She could in the circumstances not have had an appointment with the defendant. Where is the evidence besides this bold statement. It was easy to get a hospital file, sick note or sick leave documents from the plaintiff's human resource department to corroborate Ms Schoeman version but to no avail.

[62] The plaintiff claimed that it had an onus to show that the defendant was in overdraft. If further claimed that it had shown that the defendant is indeed in overdraft. It seems to escape the plaintiff that the defendant had no overdraft facility with it. It had not applied for one and did not have credit facility. The plaintiff in its particular of claim especially at paragraph 15 " the defendant's current account was reversed on the 2nd of March 2011, leaving the current overdrawn." The question is whether the defendant can be held to be responsible for the negligent conduct of the plaintiff? Clearly from the evidence, it is not only negligence but fraudulent misrepresentation of facts by plaintiff's employees that lead to the overdrawn account. There is no onus resting on the defendant showing on the balance of probabilities that his version is possible correct. The onus lies with the plaintiff who had a duty to discharge and prove its case by showing that its evidence is true and the other is false (see *Mbilini vs Minister* 1988(3)SA 705(A), See also the case of *National Employers Mutual & General Association v Kenny* 1931 at pg 187-189. The court held that where there are two stories mutually destructive before the onus is

discharged, the court must be satisfied that the story of the litigant upon whom the onus rests is true and the other is false.

[63] It is not allowed to transfer from the 32 day notice without notice being given. The plaintiff's witness (Ms Schoeman did not give or show evidence that the required notice was given. There is no reason given for not giving the notice Ms Schoeman inspite of that is successful in doing the transfer. Clearly this must be against established bank practices. Proof of payment of policy is not even signed by the defendant and should have been .signed Clearly, the payment without signature was not authorised. It shows again that the bank procedures were seriously compromised putting the plaintiff at serious risks of loss. Strangely, these transactions are done "after hours at the back office". During these times "after hour's transactions", there was no overdraft facility in the account of the defendant. The transfer of R600 000.00 was done orally. There are no documents signed by the defendant authorising withdrawal. This was not legal bank practice and there is only one inescapable conclusion to make in the circumstances that Ms Schoeman was assisted by a colleague at the "back office, after hours". At page 201 (bundle) electronic interbank payment, at the bottom of the page written by somebody that "16:31 Loch logan (override). One would have thought that these kind of transactions to override needed the attention of someone in higher authority, especially in light of the amounts involved. Again plaintiff's established procedures were not adhered to. The crux of the matter is that a minus balance was as a result of these unlawful transactions.

At page 188 of the bundle, the document is signed by both Ms Schoeman and defendant twice. It is signed above the date 15/02/2011 and next to it. This showed that parties were clearly aware of the date on which they signed the document. It can be the only reason they signed twice and again next to date. There is no proof for the allegation by the plaintiff that defendant was party to a dishonest transaction. He was advised by bank employees against established practices of the bank for instance, what information to put so as to avoid incurring penalties upon withdrawing from the 32 day notice early (vroee terugbetaling van beleggings) at page 98 of the bundle. The evidence shows that the bank employees acted against their fiduciary duty to the bank and clearly against the interest of the bank. Bank practices were seriously violated which ultimately led to the loss to the bank. A conflict of interest between bank employees and Liberty was clearly visible. It is not clear whether Mr Schoeman was working or moonlighting for Liberty or was employed by Standard bnk. The evidence show that she had influence in both the plaintiff and Liberty.

[64] The parties especially the plaintiff was supposed to avail themselves on trial to explain the mystery of transactions that took place on the defendant's account. The plaintiff had the onus in this respect. The evidence pointed to one direction alone. There is an important aspect which was pointed out by the court during the hearing of the application for summary judgment. The plaintiff did not deal with it to its detriment if I may say. The learned Judge stated the following in her judgment:

“Me Groenewald conceded that the plaintiff’s operating system are electronic and that in the ordinary course of business, the systems would not allow the withdrawal or transfer of funds that are not physically available in an account. However, no explanation was forthcoming as to how the plaintiff’s Preller Square branch authorised the transfer of such large amount of money when funds were clearly not available in the 32 day account by the time the defendant requested payment as he did. No documentation or other evidence has been placed before this court to indicate who applied for and authorised the transfer of R690 000.00, from the defendant’s 32 day account into his current account, or who authorised the payment of R600 000.00 to Liberty Life on 01/03/2011. In view of the defendant denial that he authorised these transactions, it may well be established that he did not indeed authorise these transactions and consequently that he does not owe the plaintiff the amount that it claims”.

- [65] In the present case, clearly as conceded by both parties, there was a dispute of facts. In the case of **Mabena & Another v Minister of Law & Order** 1988 (2) SA at 654, it was held that when the court is faced with two conflicting versions, only one of which can be correct, then the onus is on the plaintiff to prove on preponderance of probabilities, that his version is the truth. The onus is discharged if the plaintiff can show by credible evidence that his version is the more probable and acceptable version.

The bank’s duty to prevent loss of funds by adequately monitoring and managing accounts was clearly stipulated in the case of **Paterson & Another NNO v Absa Bank Ltd** 2011 (5) SA 484 (GNP). It was stated that the respondent (bank) had a statutory duty under Financial Intelligence Centre Act 38 of 2001 (Fica) to report a suspicion. “when C opened banking accounts and

transferred large sums of money from one account to another, the transfers necessitated reporting in terms of FICA and inquiry to the account holders. In the event that the bank had complied with its obligations in respect of the proper management and monitoring of the accounts concerned, it would have established that the activity thereof had flagged internal risk procedures in respect of the high value and volume of transactions and should accordingly have been treated as high risk” In the case at hand and applying the sentiments echoed in the Paterson case, large sums of money (R690 000.00, R600 000.00) were juggled from one account to another and ultimately withdrawn in large sum. A bank had to be vigilant where the transaction was out of the ordinary.

[66] The article titled “Compliance in bank matters” (De rebus June 2012, page 38, by Felix Majoni.

“The banking industry is a regulated industry mainly because of the important functions banks fulfil. Further, it is trite that banks should be solid and regulated in such a manner as to prevent systematic risk through prudential regulation

The Mutual Banks Act of 124 of 1993 allowed banks to fulfil the role of building societies.

“Consumer protection issues became paramount and as a result, corporate government rules, disclosures transparency and accountability became the key concepts of regulation”.

“Internet controls, such as compliance, risk management plans should be implemented so as to monitor compliance with regulatory provisions and

to achieve the objectives of the legislations and regulatory requirements by creating an effective compliance regime.”

Very importantly and applying to the present case, the following is true of the plaintiff “avoiding reputation – damaging incidents can deliver financial rewards, including higher margins, as well as lower perceived risk and can attract capital. A bank without compliance problems also attracts customers because like shareholders customers prefer a trustworthy brand”.

[67] The conduct of the bank employees in the case at hand clearly compromised the bank. Established practices and compliance issues were not followed. The plaintiff did not heed the warning given by the Judge in the application for summary judgment. Clearly it has not been shown that the defendant authorised the alleged transactions and consequently as initially highlighted by the judge does not owe the plaintiff the amounts claimed. Both witnesses of the plaintiff tried to cover for each other. There were so many unanswered questions which were not explained. The incorrect dates changed in the documents, failure to explain transfers successfully made in an account on debit, after hours transfers, unsigned and undated deposit slips without bank stamp, signing of important documents and transfer of large sums of money without authority from defendant, failure to show authority to do what the plaintiffs witnesses did in this matter. There is a litany of breaches committed by bank employees which ultimately compromised the bank. The defendant had no duty to assist the plaintiff to prove its case. The plaintiff failed to discharge the onus and as such the defendant does not owe plaintiff anything. The plaintiff should seriously look at the conduct

of its employees ranging from touting plaintiff's existing clients to Liberty whilst employed by plaintiff. These employees owed plaintiff duty of care but conducted themselves in a manner that had a potential to compromise plaintiff's reputation. They were not honest witnesses and the evidence showed that. Ms Schoeman changed her evidence as she went along. Their evidence could not be relied upon. In the famous **Stellenbosch Farmers Winery Group Ltd & Another v Martell Et CIE & Others** 2003(1)SA11 SCA, on determination of irreconcilable versions, it was stated "that the technique generally employed by the courts in resolving factual disputes of this nature maybe conveniently summarised as follows" to come to a conclusion on disputed issues a court must make a finding on (a)the credibility of various factual witnesses(b) their reliability, and (c)the probabilities. In the case at hand, clearly the probabilities of the evidence of plaintiff's 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.

[68] The resultant effect is that the plaintiff's claim is dismissed with costs. The following order is made:

- 1) The Plaintiff's claim against the defendant is dismissed;
- 2) Plaintiff is ordered to pay costs on a normal party and party scale.

N. P. JAJI, AJ

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