IN THE NORTH GAUTENG HIGH COURT, PRETORIA

REPUBLIC OF SOUTH AFRICA

CASE NO: 20975/2012

30/10/2013

In the matter between:

MOHAMMED ISMAIL TILLY — First Plaintiff

MOHAMED AMIN TILLY — Second Plaintiff

and

(1)	REPORTABLE:	~~YES~~ / NO
(2)	OF INTEREST TO OTHER JUDGES:	~~YES~~ / NO

28/10/13
DATE

SIGNATURE

NEDBANK GROUP LIMITED — Defendant

JUDGMENT

Tuchten J:

1 The plaintiffs live in Ermelo. So did their late brother Mohamed Essop Tilly, who died on 5 May 2009. To distinguish between the three brothers Tilley, I shall refer to them, as was done during the trial, without any disrespect intended, as Essop, Boetie (the first plaintiff) and Amin (the second plaintiff) respectively. Boetie was born in 1937 and is thus 76. Amin was born in 1933 and is thus 80.

2 The three brothers Tilley each had a business in Ermelo. They prospered. They made enough money to invest in property, which on the evidence before me, they held in common. The brothers Tilly are senior members of an extensive family with its own traditions and customs, which are informed by their Islamic faith.

3 But they lived in a community which was by and large not steeped in the same traditions and did not adhere to the Islamic faith. So in their commercial dealings with third parties outside the family, they operated through institutions known to the common law of the land. Thus, despite the fact that their property holdings were as between the brothers Tilly held in common, specific properties were held by trusts,[1] companies and such like. Mr Boetie Tilly made mention in evidence of the Mohammed Ismail Trust, the Tilly Trust, the Zakpark Trust and E Paynter Investments. The property was both commercial and residential and was operated as a letting enterprise, with some 160 tenants.

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1 South African common law trusts, not Islamic trusts such as the wakif.

4 The late Mr Essop Tilley died, leaving a son, Rashid,[2] and a daughter. According to Mr Boetie Tilly, after the death of his father Essop, Rashid worked for his uncles but I suspect that to be an oversimplification. Be that as it may, the plaintiffs and Rashid agreed that Rashid would receive the money from the letting enterprise that formerly went to the late Essop and that Rashid would take care of his sister out of his share of this money.

5 During or about September 2009, Boetie, Amin and Rashid Tilly decided to open a new bank account to be used for the upkeep of the properties within the leasing enterprise. Rashid and the current manager of the defendant's Ermelo branch had known each other for many years. It was decided between the three that the new account would therefore be opened at Nedbank in Ermelo.

6 For this purpose, Boetie, Amin and Rashid Tilley went to Nedbank Ermelo on 9 September 2009. There they met Ms Theresa Roux, who was then manager: small businesses. Boetie Tilly said in evidence that it was explained to Ms Roux why the account was to be opened and that the account was to be in the joint names of the three Messrs Tilly.

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2 His given name according to his identity document was Rased.

7 But Nedbank has separate sets of forms for opening accounts for single individuals and for several individuals jointly. (I shall call the latter partnership accounts although of course such accounts are not necessarily partnership accounts in the strict legal sense). Ms Roux says that although Boetie and Amin Tilly were present at the meeting on 9 September 2009, she talked only to Rashid, who told her that he wanted to open an account in his name, called Rashid Tilly, trading as A.R.M. upon which Rashid and each of the plaintiffs was to operate as a signatory and that signatures of any two of the three Tillys would be required for any transaction.

8 Ms Roux explained that procedure at Nedbank required, before a partnership account be opened, that the bank be provided with a partnership agreement or at least a minute reflecting the wish of the several individual prospective account holders to open a partnership account. She was adamant that she was not asked to open a partnership account and it is common cause that no such partnership agreement or minute signed by the individual prospective account holders was given to the bank.

9 Ms Roux proceeded to implement the request as she understood it and generated a set of forms through her computer. The Nedbank officer has no discretion in relation to these forms. The set of forms generated by the computer is determined by the computer command to open a specific kind of account: eg individual or partnership. The set of forms generated by Ms Roux was for an individual account.

10 I shall describe these forms and the way they were completed in the order in which they appear in the bundle of documents discovered by the defendant, exhibit B before me. The first is headed "Business account - signature card". In the space provided for the name of the account, Ms Roux filled in the name of Rashid: "RA Tilly". In the spaces for the names and capacities of the signatories, she filled in the names of Amin, Rashid and Boetie Tilly, Each of them signed against his name. No mention was made on this page of the capacities of the several signatories.

11 The next page, after reference to the branch, contained the following:

> Ons sertifiseer dat, ingevolge 'n besluit wat geneem is op 'n behoorlik aangestelde vergadering van die trustees/direkteure/vennote/lede/eksekuteurs/komitee van
>
> ....
>
> *(Meld naam van trust/maatskappy/beslote korporasie/vennootskap/boedel/organisasie)*

> Ons, die ondergetekendes, hiermee bevestig dat die volgende tekemagtigings ten opsigte ....
> *(Meld lopende, spaar, deposito ens)*
> Rekening nommer .... vanaf .... van krag sal wees.

12 The section at the foot of this form designed for completion by the customer then makes provision for signatures and capacities. In that section, Ms Roux filled in two instances of the capacity of "Gevolmagtigde" against which she sought the signatures of Amin and Boetie Tilly respectively. She created a field reflecting the capacity of "Eienaar" against which she sought the signature of Rashid Tilly. Each of them signed where designated. Boetie Tilly testified that the designations correctly reflected the position they sought to achieve.

13 The next form is headed "Aims and needs analysis for client in respect of long term deposits (individuals)". This form is designed to meet the requirements of the legislation dealing with the duties of financial services providers. In the section named "Summary of advice", Ms Roux wrote, inter alia:

> Kliënt het bestaande rekening en open net 'n addisionele rekening vir homself, vir eiendomshuur wat inbetaal word.

14 There follows a two page form headed "Application for a transactional current account". This form was completed by Ms Roux and reflects the prospective account holder as "Rased Tilly", the name appearing on Rashid's identity document. Her evidence was that Rashid signed this form in her presence. Boetie Tilly disputed in evidence that the signature on this form was that of Rashid. I shall deal with this dispute later.

15 The form "Application for a transactional current account" was accompanied by a nine page set of "Terms and conditions of transactional current account" which, Ms Roux said, was initialled on each page by Rashid and signed by him at the end.

16 All the bank documents were, according to Ms Roux, completed in the normal course on a single occasion on 9 September 2009. She took copies of the photograph page from the identity book of each of the signatories, had them certified as true copies and passed the whole set of documents along for further processing to a different section within the Ermelo branch of the bank. The account was in due course opened under no. 151 613 1460 and operated as contemplated.

17 In 2011, tragedy struck the Tilley family. Rashid contracted an infection. His leg had to be amputated. In September 2011 he was admitted to the intensive care unit at Benoni Hospital. Three months or so later he was transferred to the ICU at Waterfall Park Hospital in Midrand. Rashid died there on 5 March 2012.

18 On 1 February 2012, the balance in the account stood at R1 112 513,70. On Monday 6 February 2012, there was a transfer of R20 000 out of the account into the personal account of a Mrs Govender, an official at the Ermelo branch of Nedbank. Mrs Govender is the sister of the Rashid's widow, Sumaiya Tilly. The evidence before me is that Nedbank later established that this transfer had been effected fraudulently by Mrs Govender. Nedbank then reversed the entry and credited the account with the R20 000 withdrawn by Mrs Govender. I suspect that there is more to this transaction than has been disclosed in the evidence before me.

19 On the following day, Tuesday 7 February 2012, the sum of R350 000 was withdrawn from the account and placed to the credit of Rashid's Tilly's private credit card account. The same sum was then immediately withdrawn, R150 000 being transferred out of Rashid Tilly's credit card account and deposited into the account of Rashid

Tilly's son-in-law (the husband of Rashid Tilly's daughter) and the rest, R200 000, being withdrawn in cash.

20 The instruction to the defendant to effect the transfer out of the account was effected by a Nedbank form titled "Request for electronic transfer". It purported to be signed by Rashid and Boetie Tilly, thereby apparently meeting the requirement that two of the three authorised signatories authorise the transaction. But the evidence shows that neither signature was effected by the person concerned. In this regard I have the comprehensive evidence of a well qualified expert in questioned documents, Mr Greenfield, and Boetie Tilly himself. Their evidence in this regard was not contradicted.

21 The signature of Mr Boetie Tilly was an outright forgery in the sense that it was signed on the request for electronic transfer form by someone other than and without the permission or knowledge of Mr Boetie Tilly. But the position in regard to the purported signature of Mr Rashid Tilly is less clear cut.

22 The evidence of Ms Anel van Rensburg, currently the manager of the bank's Ermelo branch, is that a week or two before 7 February 2012, Rashid Tilly telephoned Ms van Rensburg from the hospital. He told Ms van Rensburg that he was sending his daughter, Sharmina, to her

and that Ms van Rensburg must help Sharmina. On Saturday 4 February 2012, Sharmina came to the Ermelo branch of Nedbank with the chequebook for the account. Sharmina herself signed and presented a cheque but the bank could not negotiate it because it had not been signed as per the mandate to the bank, ie by two of the three authorised signatories.

23 Ms van Rensburg supplied Sharmina with certain bank forms, including a blank request for electronic transfer form. On Tuesday 7 February 2012, Sharmina returned to the bank with the signed form. Ms van Rensburg phoned the cellphone number given to her as that of the son of Rashid Tilly. Ms van Rensburg inferred that the cellphone must have been handed to Rashid in the ICU because she spoke to Rashid himself. Ms van Rensburg had known Rashid Tilly since she was a child and recognised his voice, which she described in evidence as weak but intelligible. Ms van Rensburg was satisfied that Rashid had authorised the transaction. The transfer was effected.

24 Mr Boetie Tilly said in evidence that he learnt of the R20 000 transfer by text message on 5 or 6 February 2012.[3] He went to the bank to investigate. He could not get clarity on how the transaction had occurred and returned to the bank the following day. He then learnt of the withdrawal of an additional R350 000 from the account.

25 Mr Boetie Tilly then made strenuous efforts to get the two transactions reversed. As I have said, the R20 000 transaction was indeed reversed but the bank declined to reverse the R350 000 transaction. The bank officials told Mr Boetie Tilly that as he was not the account holder, the bank would not entertain his request and said he should stop talking to bank officials about the matter. Finally Messrs Amin and Boetie Tilly consulted their attorney.

26 The plaintiffs sued the bank in contract with an alternative cause of action in delict. I need not analyse the pleadings because counsel for the plaintiffs made his case on the proposition that he had established, on a balance of probabilities and against the defendant's denial, that the plaintiffs were joint account holders with Rashid Tilly.

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3 A dispute developed late in the trial in relation to this text message. The suggestion was that Boetie Tilly's cellphone number was not registered with the bank for the notification of transactions on the account. None of this was put to Boetie Tilly and it was not disputed that Boetie Tilly reacted, when he learnt of the transaction, in the manner which I shall proceed to relate so little turns on this.

If that were not established, counsel accepted, the plaintiffs could not succeed.

27 The basis for the claim was that the transfer of R350 000 had been unauthorised in the sense that the signatures of two of the three authorised signatories did not appear on the request for electronic transfer form. In my view, whatever the position was between Rashid Tilly and the person who signed Rashid Tilly's signature on the form, the plaintiffs have proved that the transaction was unauthorised. This is because the signature on the form purporting to be that of Mr Boetie Tilly was in fact not his signature and was signed on the form without Mr Boetie Tilly's authority. So the form was not signed by two authorised signatories.

28 I accordingly turn to the crucial dispute in the case: whether or not the account was opened by the plaintiffs together with Mr Rashid Tilly. I have before me two irreconcilable versions. The plaintiffs say there was an oral agreement to open a partnership account. The defendant says that Rashid Tilly applied in writing to open an individual account and that the defendant accepted Rashid Tilly's written application.

29 Where, as here, there are irreconcilable versions, I must apply the law as laid down in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell Et Cie and Others* 2003 1 SA 11 SCA para 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.

30 I bear in mind that the plaintiffs and Rashid Tilly intended the creation on 9 September 2009 of two distinct, albeit related, legal relationships: firstly, the contract between themselves under which they would be jointly entitled to operate the account and enjoy the benefits of the money deposited into it from time to time, which I shall call the family agreement; secondly the contract with their banker, which I shall call the banking agreement. I have referred to the nuances and complexities within the plaintiffs' family arrangements in relation to commercial matters. I think the probabilities are affected by the clear purpose of the plaintiffs and Rashid Tilly: to avoid, in their dealings with their banker, those very nuances and complexities. That is why, as I see it, they proposed or acquiesced in the arrangements requested by Rashid Tilly that he, Rashid, be treated by the defendant as the account holder.

31 I think it probable that at the meeting with Ms Roux on 9 September 2009, there was reference to the family agreement. That was why, in my view, the name of the account on the bank statements was RA Tilly, trading as A.R.M. In normal South African commercial custom, when an individual indicates that he trades under a trading name, his purpose is to tell the world that the business operated under that trading name belongs to him alone. In this case, I think, the trading name A.R.M. was intended to operate as a signal to the parties to the family contract that although the account was ostensibly held by Rashid Tilly alone, in fact, as between themselves it was a joint account. But the trading name, I emphasise, was a signal to the parties to the family contract, not to the bank.

32 And I think that the reason for the inability of Ms Roux to recall that there had been any discussion of the family agreement was that she, correctly, regarded it as none of the bank's business. Equally, it was generally none of the bank's business who the owner of the account chose to designate as signatories and what the arrangements were between such signatories except only in so far as such arrangements identified the circumstances in which the bank would pay money out of the account.

33 It is true, as counsel for the plaintiffs submitted, that some of the printed wording on the form from which I quoted in paragraph 11 above supports the plaintiffs' version. But on the same form, Rashid is identified in handwriting as the owner of the account and Boetie and Amin as persons who, while not being the owner of the account, were authorised to operate it.

34 I had the benefit of observing Mr Boetie Tilly in the witness box. This soft spoken gentleman is possessed of substantial commercial acumen. Although he is the younger of the two, Amin defers to his commercial judgments.[4] My impression is that Mr Boetie Tilly has confidence in his own commercial judgment. When he found out that, as he saw it, Nedbank had treated him and his brother wrongly, he doggedly attended at the bank time after time to try to persuade the bank officials of the justice of his case and to get them to reverse the entry for R350 000.

35 If the intention of the three Messrs Tilly had been to open a partnership account, when Mr Boetie Tilly saw, as he said in evidence he did, that Rashid had been described on the form I discuss in paragraph 33 as the "eienaar" of the account and Boetie and Amin as mere "gevolmagtigdes", this astute, strong willed man would not have

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4 It is significant in this context that Amin did not say a word at the meeting of 9 September 2009.

left it at that. He would have raised a polite objection and ensured that what on his version was a mistake was immediately corrected. That he did not raise any objection is to my mind a strong pointer in favour of the defendant's case.

36 And then, too, an experienced bank official in the person of Ms Roux was performing a routine function, one which was well within her area of competence. She was hardly likely to use the wrong forms. The form headed application to open a transactional current account was one of the suite of forms generated by her command to the computer to generate the forms for an individual account. As between the bank and himself, Rashid Tilly needed the new account for his own business, as recorded by Ms Roux on one of the forms as having been told to her by Rashid.[5]

37 I proceed to evaluate the dispute raised by Mr Boetie Tilly's evidence that the signature on this form is not that of Rashid Tilly and that no such form was completed on the day in question, or at least in his presence.

5 See paragraph 13 above.

38 Firstly, on this issue, Boetie Tilly's evidence that the signature was not that of Rashid is not corroborated by Mr Greenfield. Secondly, a form like this one had to be completed: otherwise the officials down the line from Ms Roux would not have processed the paperwork further and the account would not have been opened. But we know that the account *was* opened so such a form must have been completed.

39 If Boetie Tilly's evidence had been correct, then there would have had to be a form similar to the form before the court signed by all three Tillys. But there was no suggestion that such a form had been so completed and signed. And the proposition that there *had been* an equivalent form which would have advanced the plaintiffs' case which was removed from the bank's records and substituted by the form in fact before the court has merely to be advanced to be rejected.

40 I therefore find, on a strong preponderance of probability, that the account was indeed opened by Rashid Tilly alone and was not opened by the plaintiffs and Rashid Tilly jointly. I hold that the parties to the banking agreement were Rashid Tilly and the defendant. The plaintiffs' claims must therefore fail. Costs were not addressed in argument. This is, as between the plaintiffs and the defendant, a commercial case where costs generally follow the result. There is no reason in this case, to my mind, to depart from that principle.

41 As there is a family dimension to this case, I propose to give my provisional views on the underlying probabilities in that regard. I say provisional because I have not heard the evidence of the immediate family of Rashid Tilly or the ICU nursing staff who attended to him during January and February 2012.

42 It seems to me likely that as Rashid neared the end of his life, he became concerned that his immediate family might be left without a cash fund with which to meet necessary expenses; and that he feared that his uncles might in this regard not be as generous as he, Rashid, thought appropriate. He knew roughly how much there was in the account and decided, without consulting his uncles, to take what he regarded as his one third out of the account while he still had the power to do so. R350 000 is roughly one third of the amount standing to the credit of the account on 6 February 2012.

43 I think, subject to what I have said in paragraph 40, that Rashid gave his immediate family certain instructions but that he, Rashid, lacked the physical strength to sign the request for electronic transfer form. So, on this analysis, it was signed for him by one of the members of his immediate family. And then, to complete the transaction, the signature of Boetie Tilly was forged on the form.

44 If I am correct in this analysis, the immediate family of Rashid Tilly owe Mr Boetie and, for that matter also Mr Amin Tilly, an apology. It was wrong to forge their Uncle Boetie's signature no matter how pressing their needs and how much they wanted to fulfil the wish of their dying husband and father.

45 It may therefore be (I put it no higher) that the correct course for the plaintiffs to follow would be to approach the executor of the estate of the late Rashid Tilly on the basis that the deceased has taken his third of the money in the account and most of the balance belongs to them.

46 I make the following order:

The plaintiffs' claims are dismissed with costs.

NB Tuchten
Judge of the High Court
28 October 2013
TillyNedbank20975.12