IN THE NORTH GAUTENG HIGH COURT, PRETORIA /ES

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: ~~YES~~ / NO.	
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.	
(3) REVISED. ✓	
6/7/12	[signature]
DATE	SIGNATURE

CASE NO: 29043/07

DATE: 1/8/2012

IN THE MATTER BETWEEN

THE STANDARD BANK OF SOUTH AFRICA LIMITED — PLAINTIFF

AND

KOREA ONE AFRICA CONSTRUCTION CC — DEFENDANT

JUDGMENT

PRINSLOO, J

Introduction and brief synopsis

[1] In February 2006, the defendant entered into a building contract with the Joana Daf Trust ("the borrower") in terms of which the defendant would sell a property known as Erf 265 Sandown Extension 24 to the borrower for some R1,2 million

and also erect a luxury dwelling on the property for the borrower. The total package came to some R3,2 million.

[2] The plaintiff granted a home building loan to the borrower for the full amount of R3,2 million in order to finance the transaction. The defendant was duly paid the amount of some R1,2 million for the property.

[3] In respect of the balance of some R2 million, representing the building costs, the borrower would from time to time submit a Progress Payment Request ("PPR") to the plaintiff's department administering these matters in order to finance the building operations as they progressed. The PPR department of the plaintiff would then send valuators to the site to determine the value of the work done whereupon an amount decided upon by the PPR department would be advanced to the borrower in order to finance the ongoing operations.

[4] On 6 November 2006 such a PPR for an amount of R1,5 million was submitted to the plaintiff for such an advance payment. The PPR was signed by one Kil Jung Kim ("Kim") the member and driving force of the defendant close corporation. He is a man of Korean extraction and during the trial I was told that he is not fluent in English or Afrikaans, neither does he fully understand these languages.

[5] Because of this language barrier, the defendant, which was at all relevant times engaged in extensive building operations, made use of the services of an adviser,

Renier Gous ("Gous"), who assisted the defendant in its dealings with clients, banks and the like.

[6] Also amongst the *dramatis personae*, was one Martie Venter ("Martie") who was a so-called "mobile consultant" in the employ of the plaintiff at the relevant time. As her job description suggests, she was not office bound but moved around recruiting business and advising potential borrowers on various issues. In the course of her activities Martie could make use of the office facilities of the plaintiff.

[7] The PPR of 6 November 2006 (this is exhibit "C1", and will be referred to as "C1") was signed by Kim at the instance of Gous who telefaxed it to Martie for submission to the PPR department of the plaintiff. At that stage the defendant was one of Martie's "clients". It is common cause that Martie would act as an intermediary on this basis but she had no authority to, for example, approve advance payments in response to a PPR received by the bank. She would simply pass on the PPR to the bank's relevant department and/or the valuators.

[8] The PPR had to be signed by the authorised signatory as recorded in the bank's records. In this case Kim was not an authorised signatory. The authorised signatory was Joana Da Fonseca ("Joana"), one of the trustees of the borrower, and the daughter of one Jorge Da Fonseca ("Fonseca"), who also counts amongst the *dramatis personae* in this case.

[9] Through an oversight, the fact that Kim was not an authorised signatory was overlooked by the bank, and an assessor was duly dispatched to the site. The assessor determined the value of the work done up to that stage to amount to R1 316 750,00.

[10] On the strength of the assessor's report, the plaintiff duly credited the defendant's bank account with the amount of R1 316 750,00 on 27 November 2006. The borrower's account with the plaintiff would have been debited correspondingly.

[11] The borrower knew nothing about these developments and the payment that had been made.

[12] When Fonseca found out about the unauthorised payment, he was highly upset and threatened criminal proceedings against Kim and Gous on the grounds of the alleged fraud that had been perpetrated on the plaintiff.

[13] On 8 December 2006 the defendant repaid an amount of R316 750,00 which was duly credited to the borrower's account. This left an outstanding balance of R1 million in respect of the unauthorised payment.

[14] This balance was demanded from the plaintiff bank and meetings took place, in April 2007, between the plaintiff's officials and the borrower's attorney and

Fonseca on the one hand and, later, between the bank's officials and Kim and Gous on the other hand. An interpreter, one James Kim, also attended the last-mentioned meeting, and so did Martie.

[15] According to the plaintiff's officials, Kim undertook, at this last-mentioned meeting of 24 April 2007, to repay the amount of R1 million to the bank. The defendant denies that this undertaking was given. The payment was never made.

[16] In the particulars of claim, the plaintiff relies on the alleged misrepresentations (Kim allegedly misrepresenting to the plaintiff, when submitting "C1", that he was authorised to do so) and also on the alleged undertaking by Kim at the meeting of 24 April 2007 and claims payment of the outstanding balance of R1 million plus interest.

[17] In its plea, the defendant alleges that, on 29 November 2006, it obtained a written authority from Joana, in the form of a PPR to the bank for payment of an amount of R1 million and, with the refund of R316 750,00 that was made in December 2006, there is no money outstanding and payable to the plaintiff because the authorised PPR of R1 million would serve to extinguish the alleged outstanding balance.

[18] It is common cause that Joana signed a PPR for R1 million on 29 November 2006. This document is part of the record, as exhibit "C60" and will be referred

to as "C60". "C60" is a contentious document which received a great deal of attention during the trial.

[19] Neither party called either Fonseca or Joana to give evidence.

[20] The defendant also offered a special plea relating to an allegation that the plaintiff's attorneys were not properly authorised to act on its behalf. This special plea, perhaps not surprisingly, was not proceeded with.

[21] Kim did not give evidence. I was told during the trial that the parties are in agreement that a competent and suitable Korean interpreter was not available to assist the court and to facilitate Kim's evidence.

[22] When it turned out that the defendant was not going to refund the amount of R1 million, the plaintiff, because it acted on the unauthorised "C1", paid the borrower the amount of R1 million plus interest on 25 May 2007.

[23] In July 2007, the plaintiff instituted this action which came before me and, at the same time, instructed the borrower's attorney to launch liquidation proceedings against the defendant, on the basis of the alleged outstanding debt which was not being paid. In September 2007, this court granted a final liquidation order against the defendant, but the latter applied for a rescission of that order, which was granted, and, subsequently, the liquidation application was dismissed.

[24] As a result of the abortive liquidation proceedings instituted by the plaintiff, the defendant also instituted a counter-claim for payment of some R16,8 million. This is in respect of alleged loss of profits because the defendant could not complete a property development as a result of the liquidation neither could it, allegedly, meet its income tax obligations and had to pay penalties. There was also a component of interest which the defendant allegedly had to pay because it had to borrow monies to meet its overheads during the period when it was in liquidation.

[25] At the commencement of the proceedings, the parties jointly applied for an order, in terms of rule 33(4), separating the *quantum* of the alleged counter-claim for later adjudication. The order was duly granted.

[26] So much for the introduction. I now briefly turn to the evidence that was offered by the parties.

The evidence

[27] Athena Pavlakis ("Pavlakis") was employed, at the relevant time, as a legal adviser of the Vehicle and Assets Finance and the Home Loans Division of the plaintiff. She left the plaintiff in December 2007.

[28] On 12 April 2007 she received an e-mail from her colleague, Shuvek Maniram ("Maniram") from the Operational Risk Management section of the Home Loans Division. The message dealt with the dispute which had developed between the defendant, Fonseca and the plaintiff about the unauthorised payment. There was also reference to the "criminal statement" which Fonseca had deposed to with the view to instituting criminal prosecution. Efforts to solve the dispute got underway.

[29] On 18 April 2007 a meeting took place between Pavlakis and Maniram on behalf of the plaintiff and Fonseca and his attorney on behalf of the borrower ("the 18 April meeting").

[30] It was made clear on behalf of the borrower, firstly, that the workmanship offered by the defendant in respect of the building of the residence was unacceptable so that the defendant was not entitled to any payment and, secondly, that "C1" was an unauthorised PPR so that the payment made by the plaintiff was also unauthorised.

[31] Pavlakis kept a minute, by way of contemporaneous handwritten notes, of what transpired at the 18 April meeting. This is exhibit "C32" and the typed transcript is "C32A". The following is a brief summary of what is contained in the minute: the borrower was not happy with the workmanship and Kim was not entitled to money. The borrower thought that Gous had influenced the assessor to find

enough equity for the progress payment. Fonseca and his attorney wanted Kim to rectify the defects in the property and they wanted the plaintiff to get the money back from Kim and to refund the borrower. "C1" was not authorised, and the bank paid without a mandate. The borrower would continue to service the bond, but the plaintiff had to revert to the borrower's attorney by the following Monday.

[32] This development inspired Pavlakis and Maniram to set up a meeting with the defendant. This meeting took place on 24 April 2007 at the plaintiff's Simmonds Street office in Johannesburg ("the 24 April meeting"). It was attended by Pavlakis and Maniram for the plaintiff and Gous, Kim, James Kim (interpreter) and Martie.

[33] Pavlakis knew about the amount of R1 316 750,00 which had been paid on the strength of "C1", and the refund of R316 750,00 which had been made. She knew that the object of the exercise was to recover the balance of R1 million.

[34] At the 24 April meeting Gous admitted that he had advised Kim to sign "C1" in error.

For the first time, it was revealed to the plaintiff that there was another authority for R1 million ("C60") which had been signed by the borrower. This was the first time the plaintiff heard about "C60" and Pavlakis and Maniram asked for the document to be produced. It was not to be seen. They asked for it to be produced later. Gous said it would be furnished.

Some discussion ensued and Kim agreed to repay the bank the R1 million and the plaintiff would be advised by close of business on that day when the payment would be made. They told Gous and Kim that they were not prepared to wait longer than 4 May, which was the following Friday, for the payment.

[35] Another point that was discussed was that the defendant would meet with Fonseca to discuss when the building operation would be completed.

[36] Martie was present. At that stage Pavlakis and Maniram did not know who she was. Upon enquiry, they established that she was a mobile consultant working for the plaintiff. She attended the meeting throughout from the beginning but did not participate in the discussions.

[37] Importantly, as was the case with the 18 April meeting, Pavlakis also kept a minute of what was said at the 24 April meeting. This is exhibit "C33" and the typed transcript is "C33A". "C33A" records the names of those present and the fact that Kim had signed "C1" and that Gous admitted that it was a mistake. There was also a reference to "recent authority to pay to DF's daughter for signature of R1 million" being a reference to "C60". It is stated that "refunded balance to the bank account".

Importantly, the following is minuted:

> "Kim agreed:
>
> 1. Pay SBSA the R1 million.
>
>   Let us know when will pay by close of business today."

Underneath that is recorded

> "Meeting with G (ie a reference to Fonseca) tomorrow to sign agreement to finish building."

[38] After the meeting, and on 25 April 2007, the next day, Pavlakis sent an e-mail to the borrower's attorney in order to report back on the progress made at the 24 April meeting. This is exhibits "C34" and "C35". It is convenient to quote the contents:

> "Dear Mario
>
> By way of update, I advise that we met with Mr Kim, who was accompanied by his interpreter and Renier Gous.
>
> We discussed the matter at hand, and were advised by Gous that:
>
> 1. the Progress Payment Request in the amount of R1,5 million was signed by Mr Kim, in error;
> 2. R1,3 million was paid into the account, but R300 000,00 was repaid by Mr Kim therefore the outstanding amount is R1 million;

3. he approached your client's daughter, the authorised signatory, who apparently signed a fresh progress payment authorisation in the amount of R1 million, which was allegedly submitted to us;

4. he was meeting with your client to finalise and sign an agreement with him with a view to completing the property.

After further discussions, Kim agreed to repay to us the R1 million. Simultaneously, we will reverse any interest, charges and other like costs in order to place your client back in the position that he was in prior to the progress payment having been made.

Gous undertook to advise me, by the close of business today, as to when we may expect the payment into your client's bond account.

Please confirm point 3 above with your client.

I will keep you updated as to any developments.

Kind regards

Athena Pavlakis"

[39] This e-mail message is a clear reflection of what Pavlakis had minuted about the 24 April meeting.

[40] Pavlakis said that Gous did indeed phone her that afternoon but said he would come back the next day, which he never did. Thereafter she did not manage to make any contact with him on his phone. This last mentioned evidence is undisputed.

[41] On 2 May 2007 the borrower's attorney wrote to Pavlakis complaining about the fact that the monies had not yet been paid. He did not deal with her query, in "C34" and "C35", about the alleged other authority for R1 million signed by Joana ("C60") and did not clarify the point as she asked him to do, *supra*.

[42] Importantly, Pavlakis then prepared a letter of demand dated 7 May 2007 and addressed to the defendant. It was delivered by hand by Martie. Martie confirmed this much when she gave evidence. This letter of demand (exhibit "C37" and "C38") was crafted by Pavlakis in consultation with Maniram and other senior officials.

I consider it convenient and important to quote the contents of this letter:

> "Dear Sir
>
> In re Joana Daf Trust ('our customer')
>
> We refer to the above matter and in particular to the meeting held at our offices on 24 April 2007 and confirm the following:
>
> 1. Your Renier Gous ('Gouws') requested you to sign a progress payment request ('the request') dated 6 November 2006, pursuant

to a building loan granted by us, to our customer in the amount of R1 500 000,00 (one million, five hundred thousand rands) in respect of the property currently being erected by your company, which property description is Erf 265 Sandown Extension 24 ('the property').

2. Gous admitted and confirmed that you were not authorised to sign the request, and notwithstanding the aforesaid, required you to sign the same, which you did.

3. Subsequent to our assessors having attended at the property, equity in the amount of R1 316 750,00 (one million, three hundred and sixteen thousand seven hundred and fifty rands) was found therein, which amount was paid to your company on 27 November 2006.

4. On 8 December 2006 your company, repaid to us, the amount of R316 750,00 (three hundred and sixteen thousand seven hundred and fifty rands).

In light of the above facts, it was agreed at the aforementioned meeting that in order to remedy the situation, your company would repay to us the amount of R1 million (one million rand) which would be refunded to our customer. Thereafter, your company would enter into discussion regarding the payment of monies due to you, for work done by your company on the property, which matter would not involve us.

Further to the above, we confirm your undertaking to let us have payment of the amount of R1 million (one million rand) as set out above, which we requested to be placed in receipt thereof, or to have firm commitment as to when such funds would be paid to us by the close of business, Friday, 4 May 2007.

We confirm that we have not been placed in receipt of the abovementioned funds, nor have we been given a firm date of when such funds would be received by us.

In light of the above, we have been left with no option but to consider alternative measures to recover the aforesaid amount.

Yours faithfully"

The letter was signed by Mr Rob Pellizzer a senior official in the Home Loans department.

[43] The following should be said about this letter of demand:

1. Like the e-mail to the borrower's attorney, "C34" and "C35", it is a clear reflection of the minute kept by Pavlakis of the 24 April meeting.
2. The letter was addressed to Kim, c/o the defendant close corporation.
3. Martie gave evidence that she hand delivered the letter to Gous who received it on behalf of the defendant.

4. In cross-examination, Gous admitted having received the letter from Martie, and said he gave it to his attorney.

   Later in his cross-examination, Gous attempted, unconvincingly, to suggest that he may be confusing this letter with another document.

5. The letter was never responded to by the defendant's attorney or anyone else on behalf of the defendant.

6. I considered Pavlakis to be a strong and impressive witness. She is an admitted attorney and an officer of this court. No reason whatsoever could be advanced why she would fabricate not only the minutes she kept of the meeting (at a stage when she would not have anticipated non-compliance with the undertaking to pay), let alone what she said to the borrower's attorney in "C34" and "C35" or what was said in the letter of demand, "C37", which she crafted.

   As it was put in cross-examination to Gous, the only witness who testified on behalf of the defendant, Pavlakis would have landed herself in hot water if she had introduced a false and fabricated version in these documents. Moreover, Maniram would have picked it up and probably taken steps against her. She had no reason whatsoever to falsify the version. On the overwhelming probabilities her version, in my view, must be true, and falls to be accepted.

[44] Pavlakis also testified about "C60". As pointed out, she never knew about its existence until it was mentioned at the 24 April meeting. Requests on behalf of the plaintiff for "C60" to be produced were never complied with. She never saw it, until it became part of the litigation papers. It did not feature as an annexure to any of the affidavits relating to the liquidation application and the application to rescind the liquidation order. Fonseca mentioned at one stage that he would arrange for a PPR to be issued (presumably "C60") once a snag list relating to the unacceptable workmanship presented by the defendant had been attended to. This may explain why, on the overwhelming weight of the evidence, "C60" never reached the plaintiff for purposes of facilitating a progress payment.

[45] Pavlakis was subjected to lengthy and intensive cross-examination. She was not in any way discredited and stood her ground. I will only mention a few aspects of the cross-examination which, in my view, are relevant for purposes of deciding this dispute.

[46] She was confronted with an argument, which was not pleaded, that, on a general reading of the building contract entered into between the borrower and the defendant, there is provision for the defendant, as contractor, to apply for progress payments and to sign the PPR, like Kim did in respect of "C1". Counsel for the defendant, Mr Smit, relied, for purposes of this argument, on clause 4 of the building contract, which is to be found on exhibit "C10". The witness disagreed

with this proposition and maintained that the borrower, who is liable to pay the bond, must authorise the payment.

In my view, there is no merit in this argument. Joana was the authorised signatory. The fact that Kim signed the PPR without authority was never in dispute until this argument was raised during the trial. As appears from the minute which Pavlakis kept, "C33", Gous apologised for having persuaded Kim in error to sign the PPR, "C1". When Gous was cross-examined, he was confronted with the fact that he tendered his apology and did not deny having done so. The relevant passage, according to my notes, of the cross-examination of Gous on this point reads as follows (I paraphrase):

> "Hulle sê u vra om verskoning vir Kim se handtekening? --- Ek kan nie sê of dit so is of nie.
>
> Moontlik is dit so? --- Ja."

[47] With regard to the much debated "C60", which she had no knowledge of as I pointed out, Pavlakis was confronted with the fact that the borrower's attorney, already on 27 January 2007, wrote as follows to the defendant's attorney:

> "8. Our client has since the commencement of the building works only authorised one payment draw, in an amount of R1 million and signed the required Progress Payment Report."

It is common cause that this was a reference to "C60". I pointed out, that, on the evidence, the issuing of "C60" appears to have been subject to a snag list being attended to and unacceptable workmanship being remedied.

In response to this observation in the letter, *supra*, Pavlakis, when deposing to an affidavit during the liquidation proceedings said the following:

> "91. In the aforesaid respect the trust's attorneys made a mistake in their letter to the attorneys of Korea One dated 27 January 2007 because they erroneously stated that the trust had authorised a payment draw in an amount of R1 million in the past.
>
> 92. The error came about as a result of the urgency with which the instruction was received and the facsimile thereafter drafted and transmitted. The court will note that the 27^{th} of January 2007 was a Saturday. The attorney involved quickly attended his offices in order to draft the said letter and unfortunately at the time comprehensive instructions had not been taken."

The borrower's attorney confirmed this state of affairs in a verifying affidavit. The extract from the letter of 27 January 2007 is exhibit "C111" and the extract from the affidavit of Pavlakis is "C332". The statement in the verifying affidavit can be found at "C372".

In any event, the fact that Joana did sign "C60" on 29 November 2006, is, in my view, irrelevant: on the overwhelming evidence "C60" never reached the plaintiff and it is common cause that it was never processed as a PPR. It did not feature as an annexure to any of the affidavits in the liquidation and rescission proceedings. Gous testified that he telefaxed it to Martie. Martie denied it. Diligent searches at the plaintiff bank did not reveal the document and it could not be traced on any of the computers. Gous testified that he traced the original in about June or July 2007 and gave it to the defendant's attorney. It was never explained why the attorney did not make the existence of the document public because the liquidation order was only granted in September 2007.

It should also be borne in mind that Pavlakis testified that at the 18 April meeting between her, Maniram and the borrower Fonseca and his attorney, the existence of "C60" was not mentioned. This evidence is undisputed.

[48] The witness insisted, repeatedly and with some force, that Kim undertook, at the meeting of 24 April, to repay the amount of R1 million. Of course, this is clearly minuted in "C33", and recorded in "C34" and "C37".

[49] It was put to Pavlakis that Martie received "C60" from Gous and that Martie confirmed this much to the witness. This was denied.

I point out that when Martie testified, she denied any knowledge of "C60".

[50] The witness said that if "C60" had been produced timeously, and it had turned out that it was properly authorised, the borrower's account could be debited on the strength thereof and there would have been no difficulty or need for litigation. She admitted having told Gous and Kim at their 24 April meeting that if they cannot produce the authority ("C60") the R1 million had to be repaid. It is perhaps because of the defendant's inability to produce such authority, that Kim agreed to repay the R1 million.

[51] It was put to Pavlakis that Gous would deny having phoned her after the meeting (as undertaken during the meeting) to indicate when payment would be made. In response, Pavlakis referred to an e-mail, dated 26 April 2007, two days after the meeting, which she wrote to the borrower's attorney. It is convenient to quote the contents:

> "Hi Mario
>
> The error made by Gous, was that he knew the processes and procedures in dealing with the bank in respect of development loans, and notwithstanding that knowledge, requested Kim to sign the Progress Payment Request form.
>
> He did phone yesterday, but advised that he would get back to me today, I am still waiting. I'll let you know. Hope you have a good week-end!
>
> Kind regards

Athena"

[52] In my view, this is clear corroboration of the evidence of Pavlakis that Gous did phone her after the meeting. What was put to her to the contrary, must cast a shadow over the credibility of Gous. The e-mail I referred to is exhibits "D236" and "D237".

[53] Pavlakis was also cross-examined about her evidence that, at the 24 April meeting, she made it clear on behalf of the bank that the payment had to be made by not later than 4 May 2007. It was put to her that Gous would dispute that this deadline was set during the meeting. It was put to her, correctly, that this fact was not recorded in the minute "C33". The witness insisted that she set the deadline. Her evidence is corroborated by none less than Kim himself who, in one of the affidavits relating to the liquidation proceedings, said the following:

> "The respondent was advised that the payment of the sum of R1 million had to be made to the applicant by no later than the 4th of May 2007, failing which the applicant would take further action."

This is exhibit "C102". This also casts a shadow over the credibility of the evidence of Gous.

[54] The witness complained repeatedly that despite insistent requests on behalf of the plaintiff for the "fresh PPR" or "C60" (as it later turned out) to be inspected, this

never happened. It would have been a simple matter for the defendant (or its attorney) to produce "C60" in order to avoid liability to repay the amount of R1 million. The defendant's failure to do so, can only lead to the reasonable inference that the defendant had no confidence in "C60". This conclusion is fortified by the fact that, on the overwhelming evidence, "C60" never reached the plaintiff and Martie has no knowledge of the document.

[55] As to the agreement by Kim to repay the money, Pavlakis said that Kim gave this undertaking himself, through his interpreter James Kim at the 24 April meeting.

[56] I repeat that Pavlakis was an impressive witness who dealt with this intensive cross-examination without any apparent difficulty.

[57] Martha Jacoba Herbst is Martie, who was born Venter and later became Herbst.

[58] By 2006 and 2007, she had worked for the plaintiff as a development loans consultant for about ten years. She was with the plaintiff bank for eighteen and a half years by the time she left the bank in 2010.

[59] She impressed me as an honest and satisfactory witness.

[60] As a sales consultant, she spoke to investors about new development loans, and helped them to motivate their applications for such development financing.

[61] She had nothing to do with the approval process, for example, involving the approval of a PPR. The bank had a separate department dealing with progress payments. Upon receipt of a PPR, a valuation would be done and, with the authority of the client's signature, the appropriate amount would be paid to the builder.

[62] She knew the defendant in 2006 and 2007. One of the previous development consultants left and handed the defendant over to her as a "client". She also mainly dealt with Gous. She helped with the preparation for loan applications.

[63] She never had authority to grant loan applications. The defendant also sometimes gave her a PPR to pass on to the bank or sometimes they did so themselves.

[64] She knows about "C1" and the payment of R1 360 750,00 which the plaintiff made to the defendant in November 2006. The document was handed to her, she saw the signature and requested the PPR department to send an assessor to do the necessary.

[65] Importantly, after "C1" she did not become involved in dealings with the borrower and the defendant regarding another PPR (presumably this would have been "C60").

"C60" was shown to her and it was put to her that the defendant said that it was signed by the borrower for R1 million on 29 November 2006. She said that she could not recall ever seeing that document before. She does not recall that it was ever presented to her.

[56] In her evidence in chief, she was asked to comment on paragraph 7.4 of the defendant's plea which reads as follows:

> "7.4 The plaintiff, as represented by Ms Venter, the defendant by R Gous, and at Johannesburg orally agreed, upon presentation of annexure "B" (<u>my note</u>: this is 'C60') to Ms Venter by R Gous, the following:
>
> 7.4.1 that the defendant would not have to repay the full amount of R1 316 750,00 already paid by the plaintiff to the defendant;
>
> 7.4.2 that the defendant would repay to the plaintiff the difference between the R1 316 750,00 and the R1 million namely R316 750,00 and the balance would constitute the payment of R1 million authorised by the borrower as per annexure 'B' hereto."

Martie denied any involvement in such an agreement. She said she would never have been able to make such an agreement because she did not have the authority to do so. She may have, hypothetically, mentioned to the defendant that if there was an authority for the R1 million it may have been reasonable for them simply to refund the balance of some R316 000,00. The agreement as pleaded, was emphatically denied.

[67] Martie did not recall the 24 April meeting but conceded that she may well have been in attendance. It should be borne in mind that when she gave evidence, it was about five years after the event.

[68] Martie remembers that Pavlakis gave her an envelope to deliver to Gous. This was in May 2007 and would have been the letter of demand "C37" although Martie did not read the contents of the envelope. She explained the circumstances under which she did the delivery. She had just come out of hospital and could not drive. Her parents drove her to meet Gous at the BP oasis on the highway between Fourteenth Avenue and the Beyers Naude off ramp. This evidence has a ring of truth. I see no reason to reject it. I have already pointed out that Gous, in his evidence, initially admitted having received the letter of demand from Martie and thereafter tried to suggest that he may be confusing what he received from her with another document. This was unconvincing evidence and I reject it. There was no other evidence by Pavlakis about another document having been sent to Gous by hand through Martie.

[69] In her evidence in chief, Martie was asked to comment on an allegation made by Kim in one of his affidavits in the liquidation proceedings. This is to be found on

"C407". Kim alleged that Martie worked in the Home Loans department and managed and controlled the account. He further said "It was to her that the Progress Payments Reports were presented, she sent out the valuators to the property, processed the claim and gave the approval on behalf of the first respondent (<u>my note</u>: this is the defendant). She was the person that contacted both the first respondent and the DAF trust in the event of any problems or queries in respect of the account."

Martie rejected this evidence out of hand. She did not work for Home Loans and she did not control the account. If she was handed a PPR she only acted like a courier and passed it on to the correct department. She never dealt with the PPR or worked in the PPR department. She never sent the valuators to the property. She only asked the PPR department to do so. She never processed any claims. She never approved any progress payment claims on behalf of the plaintiff. She had never dealt with the DAF trust in her life.

[70] As I pointed out already, she did not recall ever receiving the PPR which was later said to be "C60" from Gous. If she did, she would simply have passed it on to the PPR department and it would have been found in the plaintiff's possession, which it was not, despite a diligent search.

[71] In cross-examination, Martie stuck to her guns. She admitted calling Gous to say that the plaintiff was concerned about "C1" because it was signed without

authority and that the bank wanted the money back. She admitted that Gous told her that he wanted a day or two to sort out the matter.

[72] As to "C60", it was put to her that Gous faxed the document to her. She said that she did not receive it by fax and when the plaintiff approached her she went through her laptop computer and the document was not on those records. Moreover, if it had been faxed to her she would pick it up on the laptop. This she could not do. She does not recall ever seeing the document.

She confirmed having discussed the refund of R316 750,00 with the defendant (Gous) on the basis, as I already pointed out earlier, that if there had been another authority for a R1 million payment it may well be reasonable only to refund the balance of R316 750,00 and employ the authorised R1 million to cover the rest. It all depended on a properly authorised new PPR.

[73] She did not recall the 24 April meeting. It was put to her that on that occasion she confirmed that she received the PPR of R1 million ("C60") from the defendant. She denied any recollection of this.

[74] At the conclusion of her evidence, I was satisfied that Martie was an impressive and honest witness.

[75] Shuvek Maniram was employed by the plaintiff during the relevant time, namely 2006 and 2007. He was attached to the Home Loans department.

[76] Maniram became involved with the matter when he received a message from another official, Johan Strydom, about the "criminal affidavit" which Fonseca had deposed to with a view to instituting criminal prosecution against the defendant because of the alleged fraudulent conduct involving the signature of "C1". He referred the matter to the legal department where Pavlakis became involved.

[77] Maniram testified convincingly about the 18 April meeting and the 24 April meeting which he attended with Pavlakis. He corroborated her evidence in every material respect. He was also an impressive witness.

[78] Martie attended the 24 April meeting from the start. She was not called in later like Gous testified.

[79] At the 24 April meeting Gous indeed said that Kim had signed "C1" in error and that he had asked Kim to do so. Gous apologised. "C60" was mentioned for the first time at this 24 April meeting. The witness asked for the document to be produced but this never happened.

[80] Maniram emphatically stated that Kim, at the meeting, undertook to repay the money. Pavlakis asked when this would happen and Gous said he would let her

know by the end of the day. She said that the bank would not wait longer than 4 May. There was a clear agreement entered into between the parties that Kim would repay the money.

[81] Maniram confirmed that Pavlakis kept a minute of the meeting as it progressed. This was "C33" and "C33A".

[82] The witness confirmed that the defendant never repaid the R1 million and that "C60" was never received by the bank or processed. He was asked about the counter-claim based on an allegation that the liquidation was erroneously applied for and that this led to damages suffered by the defendant. The witness disputed this statement. He said that the bank paid without a mandate as a result of the signature on "C1", had to refund the borrower and had an agreement from the defendant that the monies would be repaid. It was clear that the defendant owed the plaintiff the amount of R1 million.

[83] In cross-examination Maniram stuck to his version. He was in no way discredited.

[84] In cross-examination, it was put to the witness that Gous would say that after he told them about "C60" which had been faxed to Martie, they (Maniram and Pavlakis) summoned Martie to the meeting and this Maniram denied. He said that Martie attended the meeting from the outset and she was never summoned. It was

put to him that Gous would say that Martie told the meeting that she indeed received the "fresh PPR". This the witness denied and said that had she received it, the bank would have had it on record. He stated repeatedly and compellingly that the defendant undertook to repay the money. He hotly disputed a proposition that the defendant would deny having given such an undertaking to repay. He also supported the allegation in the minute "C33" that the defendant indicated that there would be a meeting with the borrower with a view to finishing the building.

[85] He confirmed that after the meeting the plaintiff conducted a diligent search for "C60". All the PPR's are kept in a building loan file and this document was not in the file. He looked through the file himself. He did so to double check. The bank needs the actual document. It was never furnished. The bank needs it to see if the customer (the borrower) authorised the request for the payment.

[86] Maniram testified about the issues I already covered when dealing with the evidence of Pavlakis. I do not intend embarking upon unnecessary repetition. Maniram was a solid and impressive witness. His attitude was that the money is still outstanding, and has to be repaid.

[87] This concluded the case for the plaintiff.

[88] Renier Johannes Frederik Gous was the only witness called by the defendant.

[89] I have already dealt with various aspects of the evidence of Gous. For the reasons already illustrated, I did not consider him a good witness. I question his credibility for reasons mentioned.

[90] In 2006 he had his own business. It involved arranging financing for clients through the plaintiff bank. In 2006 he arranged such financing for the defendant and also helped the latter with administrative duties.

[91] He completed "C1" and got Kim to sign it. He attempted to present the argument, *supra*, that Kim was in any event entitled to sign "C1" because of the provisions of clause 4 of the building contract, which I have dealt with.

[92] He said he gave "C1" to Martie. He faxed it to her.

[93] After the money was received, Martie told him that Fonseca was unhappy and wanted the money back. Martie told him to refund the amount of R316 750,00. I already dealt with Martie's evidence in this regard. He said that he then called a meeting with Fonseca where his daughter, Joana, signed "C60". This he faxed to Martie and he later confirmed with her that she had received the document.

[94] At the 24 April meeting he told the bank's officials about "C60" which he had faxed to Martie. Pavlakis traced Martie and summoned her to the meeting where

Martie confirmed acceptance of the document. The bank was not satisfied, and asked for the document to be produced. He undertook to trace the document.

[95] With reference to what was minuted in "C33", namely that Kim agreed to pay the R1 million, Gous denied that such an agreement was entered into.

[96] With reference to what Pavlakis minuted in "C33" that the defendant would meet with Fonseca the next day "to sign an agreement to finish the building" Gous denied that there was such a discussion at the meeting. On the overwhelming probabilities, I can see no reason whatsoever why Pavlakis would simply invent and minute such a statement if it had no factual basis. To make matters worse for Gous, when he was asked whether there was any chance that the defendant would agree to complete the building for the borrower he answered in the affirmative. He repeated this evidence. This is at odds with the proposition put to Pavlakis in cross-examination that the defendant would at that stage no longer be prepared to complete the building. All this was said by Gous during his evidence in chief.

[97] With further reference to the minute "C33" where it is recorded that "Gous admits mistake" the witness denied having admitted that he had made a mistake.

> "Ek sou gesê het ons het die dokument laat teken maar op versoek van die bank die vorderingsbetaling hersien want ons het 'n goeie verhouding met Standard Bank, en doen soos hulle vra."

Of course, as I already pointed out, Gous changed his tune in cross-examination when it was put to him that he indeed offered an apology and he answered

> "Ek kan nie sê of dit so is of nie.
>
> Moontlik is dit so? --- Ja."

[98] In his evidence in chief, Gous confirmed that the bank's officials, at the 24 April meeting, insisted on repayment of the R1 million. When asked what his reaction to such request was, he said "Ons voel ons skuld dit nie, maar sal eers na ons regsverteenwoordigers gaan en dan terugkom." Gous was asked in chief whether this statement was made at the meeting and he confirmed it. This, of course, is entirely new evidence which was never put to the plaintiff's witnesses.

[99] In chief, when Gous was asked what he did after the meeting, he said he went to the defendant's attorney and reported to her about the meeting.

[100] Importantly, and still in his evidence in chief, Gous was confronted with the letter of demand "C37" and asked whether he had ever seen it before. He confirmed that he did but could not remember when. Significantly, he confirmed that he received it from Martie. He said he gave it to his attorney. He said that the defendant never reacted to "C37", the reason being that they left it to their attorney to deal with. He does not know why his attorney never reacted thereto.

[101] Gous confirmed that he was well acquainted with Kim, had worked with him for some eight years and was still working with him. This raises questions about his objectivity as a witness.

[102] As far as the cross-examination of Gous is concerned, I have already dealt with a number of aspects thereof.

[103] He repeated his argument that the plaintiff knew that Kim was duly authorised to sign "C1" because of the contents of the building contract. I have already rejected this as a fallacious argument.

In this regard, it was put to Gous that Kim offered a different "excuse" in one of his affidavits by blaming the bank for failing "to verify the signature of the representative of the trust, before making payment". Gous simply said that he stuck to his version that Kim had the right to sign "C1". This is unconvincing.

[104] As I already pointed out, he started off by denying the statement in "C33" that he had offered an apology and later he conceded that he may have indeed apologised. He offered no explanation as to why Pavlakis would have fabricated the contents of "C33".

[105] When Martie phoned him to say that Fonseca was unhappy and wanted a refund of the R1 million he did not tell Martie that the defendant had already obtained a

"fresh PPR" as already discussed. He only asked her what to do, and she said the R316 750,00 had to be paid. Of course, Martie denied this.

[106] When he was asked to comment on the question as to why Fonseca would be unhappy because Kim had signed "C1", he said "Ek lewer nie daaroor kommentaar nie."

[107] Reverting to the 24 April meeting, Gous repeated that the bank's officials insisted on payment of the R1 million and also on production of "C60" which they did not have in their possession. He confirmed that he told them that he would look for the document and revert to them. When asked whether the document was traced and sent to the bank he answered in the negative. After the meeting he reported the developments to the defendant's attorney.

[108] As I already pointed out, Gous said in June or July 2007 he discovered "C60" in one of the side-pockets of his briefcase. He phoned the defendant's attorney, told her that he had found the original document and gave it to her right away. It is common cause that this document never featured in the liquidation proceedings even though the liquidation order was only granted in September 2007 and this was followed by lengthy litigation involving a rescission application and a later opposed application resulting in the liquidation not being granted.

[109] I have dealt with the evidence of Gous that the 4 May deadline was not set at the 24 April meeting and that Kim, in a later affidavit, offered the opposite version.

[110] As he did in chief, Gous admitted in cross-examination that he received the letter of demand "C37" from Martie and gave it to his attorney. When asked why his attorney did not respond thereto, he said "Ek kan nie 'n antwoord daarop gee nie." Thereafter he, unconvincingly, suggested that he may be confusing "C37" with another document. He also denied knowledge of the BP oasis where Martie said the document was delivered. I find this evidence unconvincing. The reasons for this conclusion have already been illustrated. The same applies to my reservations, in certain respects, of the credibility of this witness.

[111] When Gous was asked why "C60" never featured amongst the papers flowing from the lengthy liquidation and rescission proceedings, he said "Ek kan geen verduideliking gee nie."

[112] This concluded the case for the defendant.

Conclusions

[113] I have already dealt with my conclusions when analysing the evidence.

[114] I am satisfied, on the overwhelming probabilities, that what was minuted by Pavlakis in "C33", and repeated by her in "C34" and "C35" as well as in "C37" and "C38", is a true reflection of what transpired at the 24 April meeting.

[115] I am satisfied that the plaintiff proved, on the probabilities, that the parties entered into an oral agreement (confirmed in the written minute "C33") that the defendant would pay the plaintiff the amount of R1 million. This is the cause of action pleaded by the plaintiff in the particulars of claim. The plaintiff is out of pocket to this extent because "C1" was submitted to the plaintiff under false pretences. The claim ought to succeed.

[116] As to the counter-claim, there was no evidence whatsoever offered to persuade me that there is merit in the counter-claim. I find no merit whatsoever in the case pleaded in the counter-claim, namely that the plaintiff launched the liquidation proceedings knowing that the allegations relied upon, ie the indebtedness to the plaintiff by the defendant, were false. The counter-claim falls to be dismissed.

The *mora* date

[117] The plaintiff claims interest at the prescribed rate of 15,5% per annum from the *mora* date to date of payment. I debated the appropriate *mora* date with Mr Konstantinides, the plaintiff's counsel. He reminded me that the plaintiff refunded the R1 million to the borrower on 25 May 2007 and submitted that interest should run from 26 May 2007, which appears to me to be the correct approach.

The order

[118] I make the following order:

1. Judgment is granted against the defendant in favour of the plaintiff for:

    1. payment of the amount of R1 million;

    2. interest on the aforesaid amount at the rate of 15,5% per annum calculated from 26 May 2007 to date of payment;

    3. costs of suit.

2. The counter-claim is dismissed with costs.

W R C PRINSLOO
<u>JUDGE OF THE NORTH GAUTENG HIGH COURT</u>

29043-2007

HEARD ON: 15, 16, 19, 20, 22 AND 23 MARCH 2012
FOR THE PLAINTIFF: ADV N KONSTANTINIDES
INSTRUCTED BY: VAN HULSTEYNS ATTORNEYS
FOR THE DEFENDANT: M SMIT
INSTRUCTED BY: OTILIA DE SOUSA ATTORNEYS