IN THE KWAZULU NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

CASE NO. 7587/2008

In the matter between:

CC GOODMAN N.O **PLAINTIFF**

and

FIRST NATIONAL BANK LIMITED **FIRST DEFENDANT**

THE MASTER OF THE HIGH COURT **SECOND RESPONDENT**

JUDGMENT

MURUGASEN, J.

[1] The plaintiff, Carmen Cindy Goodman in her capacity as *Curator Bonis* for the estate of her husband, Lance Wayne Goodman ('the patient'), has sued the first defendant, First National Bank Limited ('FNB') for payment in the sum of R2,5 million, interest and costs, on the grounds that FNB is vicariously liable to repay to the patient the financial loss he suffered as a result of the fraudulent conduct of and theft by a financial consultant, Clynton Cotton ('Cotton'), acting in the course and scope of his employment with FNB.

[2] No relief is sought against the second defendant, the Master of the High Court, Pietermaritzburg ('the Master'), who is cited in his official capacity as an interested party.

[3] The plaintiff alleges that Cotton made a false and fraudulent representation to her, in her capacity as *curator bonis* to the patient, that :

1 it was in the best interest of the patient to obtain an alternative investment;

2 Cotton would procure the alternative investment; and

3 the alternative investment would be genuine, reasonable and lawful and was, or would be, approved by the Master.

[4] The plaintiff alleges further that Cotton made the aforesaid representation knowing that it was false and fraudulent, with the intention of inducing the plaintiff to consent to the alternative investment. The plaintiff was induced by Cotton's representation, and allowed the sum of R2,5 million of the patient's monies to be paid to and/or placed in the custody and control of Cotton for the purposes of the alternative investment, which was not repaid to the patient. Alternatively Cotton stole the aforesaid R2,5 million from the patient.

[5] Consequently, the patient suffered a loss in the sum of R2,5 million. The plaintiff alleges that as Cotton had acted in the course and scope of his employment with FNB in causing the aforesaid loss, FNB is vicariously liable for the delict of Cotton and is consequently obliged to repay the money.

[6] FNB alleges that in terms of the written agreement entered into by and between the plaintiff acting on behalf of the patient and FNB represented by Cotton, on the 25 October 2005, it rendered financial planning services to the plaintiff in accordance with the products it was accredited to propose.

[7] FNB contends that the investment or loan to Macro Steel from the patient's funds did not fall within the products accredited as aforesaid. The loss suffered by the patient as a result of the loan to Macro Steel therefore fell outside its obligations which arise from the contract, which regulated its relationship with the plaintiff.

[8] FNB also denies that Cotton was acting in the course and scope of his employment with FNB as a financial planner, as the investment with Macro

Steel was outside his mandate from FNB and contrary to the terms and conditions of his employment with FNB.

[9] It therefore contends that it is not vicariously liable for the loss suffered consequent to the conduct of Cotton.

Summary of Facts

[10] The patient, who had sustained serious injuries in a motor vehicle accident, received a substantial payment from the Road Accident Fund. The funds were to be invested for the benefit of the patient.

[11] The plaintiff, Carmen Goodman, the patient's wife, was appointed *curator bonis* to the patient by virtue of an order of court dated 26 January 2000. The Master of the High Court subsequently issued the Letters of Curatorship on 14 April 2000. At all material times the plaintiff acted in her capacity as *curator bonis* of the patient's estate, and with full knowledge that the powers conferred upon her were to be exercised subject to the approval of the Master.

[12] The plaintiff and patient were represented by attorney Alexander Crockart (Crockart) of the firm Calitz Crockart & Associates (Calitz Crockart) in the action against the Road Accident Fund. The claim and taxed costs were paid to Calitz Crockart by the Road Accident Fund. Crockart also represented the parties in the application for the appointment of the *curator bonis*.

[13] The Master requested a bond of security to cover the full value of the patient's assets and the payment from the Road Accident Fund and compliance with other specific requirements before he would authorise the investment of the patient's funds.

[14] In an attempt to comply with the Master's requirements, Crockart and the plaintiff consulted with Cotton who was employed at the Overport branch of FNB as a financial consultant.

[15] The plaintiff, Crockart and Cotton held several meetings with the Master, during which Cotton, acting in the course and scope of his employment with the bank as a financial consultant, made certain proposals about the security required by the Master, which were accepted by the Master.

[16] Consequent to these discussions, R4 666 740 was invested in a Liberty Excelsior 300 Capital Bond for a period of 5 years ('the Liberty Investment') on 23 September 2004. Only one loan and one part surrender was permitted during the first 5 years of the investment but not in the first contract year.

[17] This investment was made on the recommendation and advice of Cotton. An initial fee of R16 800, 25 was paid to FNB on this investment. The Liberty Life policy number 0027124282 reflects that the following additional charges were deducted from the contribution of R4 666 740 :

Contribution Charge	R23 333.70
Guarantee charge	R46 667.40
Agreed initial advisory fee	R93 334.80

and the net proceeds of R4 649 939.74 invested.

[18] The undisputed evidence of Duncan, who was called by the Plaintiff as an expert witness, was that when advisory fees or commission were paid to First National Bank, the payment would have been shared by FNB and Cotton as FNB would pay the financial consultant.

[19] The Liberty investment was to be 'ceded' to the Master, who required security for an amount of R4.6 million and an undertaking from Liberty Life that in the event any funds were paid or released without the written approval of the Master, it would pay such amount to the Master.

[20] The plaintiff was aware that the investment with Liberty and any subsequent investments made with funds from the Liberty investment required the Master's approval.

[21] On the advice of Cotton, in October 2005 the plaintiff withdrew R2,5 million from the Liberty investment without the authority or approval of the Master. The funds were invested on 26 October 2005 in a Stanlib Multivest product in the name of the patient ('the Stanlib investment'), Account MV 1013876. The net investment, after deduction of the fee of R71 250, was R2 428 750. The investment summary reflects FNB Financial Consultants as the 'consultancy' and Clynton Cotton as 'financial advisor'.

[22] On 25 October 2005 the plaintiff acting on behalf of the patient signed a 'Statutory Disclosure Notice' (Exhibit C 134 – 136) in terms of which FNB and /or its employee, the financial planner, would propose financial products to the plaintiff, in accordance with the bank's business and listed product providers who had accredited FNB to distribute their products. (This notice was referred to during the trial and in pleadings as 'the contract' or 'the agreement' between the plaintiff and FNB which regulated the relationship between the parties.)

[23] The plaintiff also signed a number of other documents at the same time in respect of the Stanlib investment (Exhibit C 137 – 143).

[24] There were 3 withdrawals from the Stanlib investment, after which the investment was closed on 12 December 2006. The plaintiff was aware of and authorised or effected these withdrawals.

[25] The first withdrawal took place on 30 March 2006, when the amount of R2.6 million was withdrawn and paid into a First National Bank Money Market account in the name of the patient. The withdrawal was made by the plaintiff in order to make another investment proposed to her by Cotton in 'Tata Steel'.

[26] On 31 March 2006 an amount of R2.5 million was withdrawn from the aforesaid Money Market account in accordance with an 'authorisation to FNB to issue Bank Cheque and debit clients account' signed by the plaintiff and paid by way of a bank cheque issued by FNB Overport in favour of Macro Steel (Pty) Ltd which was deposited into Macro Steel's bank account on the same day.

[27] The 'investment' was made with Macro Steel after a meeting between representatives of Macro Steel and Cotton, during which Cotton negotiated the terms of the agreement in terms of which the R2.5 million was loaned to Macro Steel, *inter alia* the interest or fee on the loan, and the repayment of capital and the fee.

[28] Cotton represented to the Friedman and Vos, the representatives of Macro Steel, that he was investing on his own behalf and for his own benefit, and they did not enquire about the source of the funds which were to be loaned. Cotton participated in further discussions with Friedman when new terms were negotiated in respect of extension required for repayment and additional fees.

[29] Macro Steel subsequently repaid the amount of R2.5 million together with a 10% fee or interest in the amount of R250 000. On the instructions of Cotton, the repayment was effected by way of payments made into accounts of entities other than the patient. Payments totalling R2 250 000 were made to Securitised Endowment Traders CC ('SET'), which was controlled by Cotton, although his wife held the member's interest, and the balance of R500 000 to Calitz Crockart.

[30] The total sum of R2 750 000 was paid as follows:

1 25 May 2006, R100 000 paid to SET.
2 9 June 2006, R150 000 paid to SET
3 11 July 2006, R1 million paid to SET
4 17 July 2006, R1 million paid to SET
5 4 August 2006, R165 000 paid to Calitz Crockart Trust Account
6 25 September 2006, R335 000 paid to Calitz Crockart Trust Account

[31] The funds received by Calitz Crokart were on the instructions of Cotton paid to a foreign company Hanimex MFG Group, as payment from Cotmoor Traders CC, another close corporation in which Cotton had an interest, and the aforesaid SET.

[32] The R500 000 paid to Calitz Crokart, was dealt with as follows :

1 11 August 2006, R146 828.14 paid to Hanimex MFG Corp

2 28 November 2006, R334 620 paid to SET

3 28 November 2006, R380 debited as bank charges

4 30 September 2006 – 31 January 2007, R16 856. 95 appropriated as fees

5 January 2007, R1314.91 retained in trust

[33] The patient therefore did not receive payment from Macro Steel of the capital and the interest or return on the capital sum, and consequently suffered a loss of R2,5 million.

[34] FNB received no fee or other benefit from this 'investment' with Macro Steel. Further Macro Steel was not one of the accredited financial products or companies included in the Statutory Disclosure Notice signed by the plaintiff.

[35] The second withdrawal of R105 000 from the Stanlib investment was paid into the patient's account with Nedbank.

[36] The balance of the funds from the Stanlib investment in the sum of R107 847. 93 were paid into the patient's Money Market account with FNB on 12 December 2006. The proceeds of another Stanlib investment, MV 1013544 in the sum of R426 725.80 were also paid into this account on 12 December 2006, leaving a balance as at that date of R640 513. 61.

[37] Cotton misappropriated the bulk of these funds in the patient's Money Market account by transferring R586 320 to Securitised Endowment Traders CC and R13 680 as a fee was paid to FNB Financial Consultants on 19 March 2007.

[38] The sum of R600 000, constituted by the R586 320 paid into the account of Securitised Endowment Traders CC and the R13 680 paid to FNB Financial Consultants was repaid by the Bank to the plaintiff on 1 February

2008 as FNB admitted that it was vicariously liable for the fraudulent conduct of Cotton in respect of this sum.

[39] However FNB denied that Cotton acted in the course and scope of his employment in respect of the R2,5 million investment with Macro Steel.

[40] Cotton was charged with the theft of R2,5 million rand and as well as various other sums of money that he had stolen from other clients of the first defendant. He pleaded guilty to the charges and was convicted and a custodial sentence imposed on him. He admitted in his plea in the criminal proceedings that the plaintiff was among the clients he had defrauded and stolen money from.

<u>Issues for Determination</u>

[41] 1 Did Cotton induce the plaintiff to invest R2,5 million rand in an alternative investment as a result of a false and fraudulent misrepresentation?

2 Did Cotton commit a fraud or theft during March 2006 when the R2,5 million was withdrawn from the Stanlib investment?

3 If he did act as aforesaid, did Cotton act in the course and scope of his employment with FNB, thereby rendering the First Defendant, FNB, vicariously liable to repay the R2,5 million to the plaintiff?

<u>The Plaintiff's Case</u>

[42] At the commencement of the trial the court ordered the following amendments to the particulars of claim:

1 the plaintiff's claim was amended to R2,5 million;

2 interest on the claim to be calculated from the 31 March 2006, being the date of the theft.

[43] The plaintiff called four witnesses.

[44] **Witness 1** : Peter Duncan, a chartered accountant, was called as an expert witness. He testified about the passage of funds received by the patient from the Road Accident Fund, with reference to two flow charts, (Exhibit B pages 11(a) and 11(b).

[45] He confirmed that the endowment product, the Liberty Life investment, made on 23 September 2004, permitted one withdrawal during the duration of the policy. On 27 October 2005, R2,5 million was drawn from the Liberty Life investment and invested in a Stanlib Multivest investment.

[46] On 30 March 2006 the sum of R2,6 million was drawn from the Stanlib investment and paid into the patient's First National Bank money market account. According to Duncan, no fraud was perpetuated against the patient up to this point.

[47] The fees paid to FNB in respect of the patient's investments were the sums of R16 800.26 in respect of the investment of R4 666 740 and R71 250 in respect of the investment of R2.5 million. In respect of the R400 000 received as taxed costs from the Road Accident Fund, FNB received a commission or fee of R13 680.

[48] On the 31 March 2006 a withdrawal of R2,5 million from the patient's Money Market account occurred when a cheque made out to Macro Steel bearing the signatures of two authorised signatories was issued by FNB against that account.

[49] The flow of the loan and fee repaid by Macro Steel to entities controlled by Cotton was not disputed.

[50] The evidence of Duncan was undisputed except for when the loss occurred. In his opinion the loss occurred when the money was received by Macro Steel.

[51] Under crossexamination, having had sight of the authorisation signed by the plaintiff, Duncan admitted that the payment of R2,5 million to MacroSteel was authorised by her and effected on her instructions.

[52] He confirmed that no fee was debited by FNB for the payment of R2,5 million with Macro Steel (unlike with previous investments) and no benefit had been derived by the Bank from this transaction.

[53] **Witness 2**: Crockart testified that it had become necessary to appoint a *curator bonis* because of the large sums of money in the patient's estate. Although he had made the plaintiff aware of the responsibilities of a *curator bonis,* she chose to be appointed as curator because of the substantial fee payable to the curator. He had explained the import of the order of court appointing her curator to the plaintiff and advised her to seek expert advice in respect of the monies invested and to revert to the Master for assistance and approval.

[54] Although Crockart's involvement in the curatorship was to end with the appointment of the curator, he had continued to assist because of the difficulties in obtaining the necessary bond of security and letter of undertaking for the Master, which was required to ensure when monies were drawn from the estate without his approval, there would be cover for the recovery of those funds. Crockart unsuccessfully approached various financial institutions to furnish the guarantee or suretyship required by the Master.

[55] Although Crockart initially testified that he knew that Cotton was the branch manager of FNB, Overport branch, he eventually conceded that he did not see any letters or documents describing Cotton as a branch manager. However he had at least two meetings with Cotton at FNB, Overport branch and he had observed Cotton's authority at the bank. He had also received letters sent by Cotton on First National Bank letterheads. Cotton had also informed him that he was a branch manager. Crockart was therefore confident that Cotton had acted in his capacity as employee of FNB when he dealt with the patient's investments.

[56] Crockart approached Cotton, who suggested that Crockart send a letter with the Master's requirements so that FNB could issue the necessary documents in compliance with the aforesaid requirements. On 8 July 2004, Crockart sent to Cotton a proforma copy of the security requested by the Master so that either FNB or Liberty Life could work with the proposal.

[57] On 16 September 2004 Cotton attended a meeting with the Master represented by an Assistant Master, Potgieter, and presented a five year fixed investment with a guaranteed return. The presentation was made by Cotton on behalf of FNB. At this meeting Cotton assured the Master that a suretyship would not be a problem. The initial arrangement was that a suretyship would be obtained from FNB, but was changed on Cotton's advices that a suretyship would be forthcoming from either FNB or Liberty Life.

[58] After various meetings between Cotton and Crockart and Potgieter, the Master approved the investment with Liberty Life subject to Liberty Life furnishing a Bond of Security to the Master. However when it subsequently transpired that Liberty Life would not issue a Bond of Security, the Master consented to accepting a Deed of Cession from Liberty Life for the monies held in the Liberty investment. Potgieter requested further that the Deed of Cession specifically record that any payments made without the authority of the Master would result in liability for Liberty Life. In addition to the deed of cession the Master also requested a letter of undertaking from Liberty Life.

[59] Although there was no written communication to that effect, Crockart testified that the Master was not satisfied that Liberty Life would issue the bond of security but also wanted to create an obligation for FNB as it had an vested interest. The Master therefore wanted a letter of undertaking from FNB so that no withdrawal could be made without the consent of FNB and the Master. Cotton had assured the Master that there would be no problem for First National Bank to issue the letter of undertaking.

[60] However there is no correspondence or other documentation to corroborate Crockart's evidence in this respect. From the correspondence between the Master, Crockart and Cotton, it is apparent that the letter of

undertaking was required from Liberty Life when Liberty Life refused to issue a bond of security. Crockart referred to the proforma surety he had sent to FNB; but the related correspondence indicates that the proforma document was intended to assist with the suretyship from Liberty, not a letter of undertaking from FNB.

[61] Crockart testified that the Master had given verbal approval to the investment with Liberty Life but would not issue a written approval until he was in possession of the Bond of Security and the Letter of Undertaking. This testimony did not accord with the request dated 29 October 2004 from Mrs Rafferty of the Master's office for a bond of security for R4,6 million. Crockart explained that it would have been impossible to obtain the bond of security and any letter of undertaking without the funds first being invested and in the possession of the institution which was to issue the security. It was for this reason that the investment was done without the bond of security being issued and written approval of the Master being obtained. Potgieter had advised that he did not require a bond of security for the full amount as he intended to issue or endorse a *caveat* against the immovable property in the patient's estate.

[62] As Potgieter was insistent in conducting meetings in the presence of the curator, the meeting between Cotton, Crockart and Goodman and Potgieter took place on 14 December 2004. At that meeting the Master was aware that the investment with Liberty Life had already been made, but did not complain. The plaintiff too was aware that the investment had already been made, although the compliance with the Master's requirements was outstanding.

[63] Athough Crockart had been communication with the Master's office when the curator's accounts were lodged, he did not receive confirmation by the Master that the requisite cession was in place. However, because of the assurances by Cotton that the Master's requirements had been complied with, Crockart was satisfied that the necessary security had been provided. It was only when he perused the Master's file subsequent to the discovery that Cotton had stolen clients' monies, that Crockart discovered that the cession

was incomplete and that the further security required by the Master had not in fact not been furnished. (The assistant Master, Potgieter was at the time of the trial, deceased.)

[64] Sometime between the end of November 2004 and the beginning of 2005, Cotton instructed Crockart to represent him in personal and business matters. Cotton had an interest in three juristic entities which were involved in the importing and the selling of golf equipment or products.

[65] The payment of R165 000 from Macro Steel into the trust account of Calitz Crockart was related to the purchase of golf related products from a foreign company. When the further sum of R335 000 was paid into the trust account of Calitz Crockart, Cotton advised Crockart that the money was paid in error by Cotton's client. The monies were then paid into SET's account. Crockart subsequently discovered that the members of SET were Cotton's wife and her father. Crockart however had only received instructions from Cotton.

[66] **Witness 3** Doron Neal Friedman ('Friedman'), a director of and shareholder in Macro Steel, testified that Macro Steel, a private company trading in steel, raised funds it required for its transactions and projects from various sources. About February 2006 Macro Steel intended purchasing a parcel of steel for R5 million and required a loan of R2,5 million to furnish the supplier with a letter of credit. It intended repaying the loan of R2,5 million out of the proceeds of the sale of the steel.

[67] A shareholder in Macro Steel at the time, Daniel Vos ('Vos'), informed Friedman that the funds required by Macro Steel could be accessed through a wealthy friend, Cotton. Friedman and Vos met with Cotton in February 2006 and negotiated a loan of R2,5 million to Macro Steel from Cotton, repayable with compound interest at the rate 20%.

[68] Cotton paid R2,5 million into the account of Macro Steel on 31 March 2006. The deposit bore the reference LW Goodman, but Friedman had no idea at that stage who Goodman was.

[69] Friedman's understanding of the transaction with Cotton was that Cotton was a wealthy investment banker who wanted to invest in Macro Steel provided that he received a return from the company. Cotton did not say that he was acting in a representative capacity for a client and the source of the funds was not discussed or disclosed.

[70] The loan was repaid in full to Cotton by July 2006, with an additional sum of R250 000 which, according to Friedman, was not interest but a sharing of profits as it was a fixed fee negotiated with Cotton.

[71] Friedman had during the criminal investigation, furnished the police with detailed accounts and proof that the monies had been paid. The investment with Macro Steel had been a genuine lawful investment with a better than average return. Friedman was also satisfied that the funds had been traceable to Cotton.

[72] At the time when the loan was negotiated with Cotton, Macro Steel was in negotiation with the Tata group of companies, its main supplier of steel, which was considering acquiring a share in Macro Steel. Although no acquisition was effected, as a result of the negotiations Macro Steel had to raise funds in order to increase their facilities.

[73] Friedman could not remember whether Tata or the Tata group was mentioned in the negotiations with Cotton. He believed however, that Cotton would have known of the Tata connection as Vos's wife and Cotton's wife were related and Vos would have mentioned the negotiations with Tata in his business discussions with Cotton.

[74] **Witness 4 :** Carmen Cindy Goodman (the plaintiff) testified that she was present at the meeting when Cotton presented his portfolio to the Master. She had advised the Master that she understood the terms of the investment. She confirmed that she was aware of the Master's requirements, but as Cotton had assured the Master that he would ensure that the requirements were furnished, she accepted that he would ensure that the necessary

security was furnished to the Master’s satisfaction. Cotton also assured her that he was attending to same.

[75] She had further understood that the Master’s approval was required not only in respect of the investment presented by Cotton, but that the Master would have to also approve all investments that may be made from the initial investment.

[76] The plaintiff trusted Cotton ‘absolutely’ as there was no reason not to. She was aware that he was employed by FNB and had been to his office at FNB, Overport. She knew that he had a dedicated secretary. Although she had not noticed any sign on the door of his office, she had always believed that he was the branch manager, because either Cotton himself or Crockart had told her that. She had received correspondence from Cotton on official FNB stationery and other official documents from FNB.

[77] The plaintiff confirmed her signature on the Liberty Cession (Exhibit C 126B), but did not know who had completed the details on the cession as she had signed a blank document.

[78] She had agreed to the change to the Liberty investment because Cotton had advised her that the Liberty policy was doing very well but she ought to take half the funds in that policy and diversify into other financial institutions.. In particular he had suggested the R2,5 million investment with Stanlib. She had relied on Cotton’s advice as he assured her that it was a good investment. She signed the documents Cotton presented to her, even those in blank. Although she was perturbed by the size of the fee that was deducted when it came to her attention in the statement she received after the investment was made, she did not say anything to Cotton.

[79] She also did not concern herself about the Master’s approval as she assumed that as Cotton had met with the Master and the Master had approved the initial investment there was no need to go through the process again. The Stanlib investment had been reflected in the curator’s account lodged with the Master for the year in which the investment was made.

[80] As she knew that the return on the existing investment with Stanlib was good, when Cotton suggested the investment with ‘Tata’, she requested assurance from him that the proposed investment would also yield a good return. Although she knew that ‘Tata’ was a motor vehicle company she did not find it necessary to ask him whether the investment was a product associated with FNB, because Cotton was a consultant with the bank and he was aware of the Master’s requirements.

[81] The plaintiff was aware that the Master did not want high risk investments, which was in accordance with her own risk limitation as a moderate investor, but again she did not question Cotton about whether he had obtained the Master’s consent for thls investment.

[82] When she agreed to the ‘Tata’ investment, Cotton asked her to sign blank documents which he said he would complete. The name of Macro Steel did not appear on any of the documents, which may have alerted her to the fact that the investment was not with ‘Tata’. Nor did Cotton inform her that this was not an investment in an FNB linked product. She presumed that as he was an FNB consultant, his proposed investment would be a product FNB was accredited to recommend.

[83] Under crossexamination, the plaintiff admitted that she was aware of the Master’s requirements and conceded that the responsibility for signing blank documents lay with her, but persisted that she had relied on Cotton as financial advisor and trusted him as she had no experience or knowledge in respect of investments. Her trust in Cotton was enhanced because the Master was ‘happy’ with Cotton, despite the delay with the furnishing of the security.

[84] She agreed that she had signed many documents in connection with the Liberty investment. Cotton presented them to her for signing and explained the contents but she had also read the documents. She knew she would be charged a fee although she was not aware of the amount. Cotton had told her that the fee would be recouped in the interest.

[85] When the Stanlib investment was made, Cotton again did not discuss the fee with her. She did not ask Cotton for details other than the return on the investment. She admitted that she had signed the documents presented to her in connection with this investment, including the 'Statutory Disclosure Notice' ('the notice') which she read and understood and realised that she was bound by the terms.

[86] But when the 'Tata' investment was proposed by Cotton, she did not correlate the investment with the terms of the notice. Although she knew that Tata was associated with motor vehicles, she had assumed that it was also an investment company linked to FNB. She conceded that it was not mentioned in the list of products in the agreement, and not within the mandate given to Cotton by FNB, but was insistent that she had trusted Cotton as he 'was approved by the Master' and did not realise that neither 'Tata' nor Macro Steel was on the list of accredited products.

[87] She had asked Cotton for the investment or policy document for the 'Tata' investment but he told her not to worry; he would make the investment, monitor it and redeem it at a good time. But she admitted that even if he had told her it was an investment with Macro Steel, she would have relied on his advice that it was secure and profitable, and made the investment.

[88] She had frequently signed documents and forms in blank which Cotton would fill in later. But as there were only two documents she signed for the 'Tata' investment, she knew they were blank because she would have noticed the name 'Macro Steel'. Further she did not consider the transaction a loan and would have been alarmed that it was not an investment, but a loan.

[90] The plaintiff insisted that she always interacted with Cotton as an employee of FNB; the description or title of his job whether branch manager or financial planner did not matter to her. While she accepted that it was not within Cotton's mandate from FNB to report to the Master or interact with him, she did not know what his duties with FNB were nor did she know that he had no mandate to propose an investment with 'Tata' or Macro Steel. She only realised there was a problem when Cotton called her and told her that if

anyone from the bank called her she should not tell them about the 'Tata' investment. She asked him repeatedly for the investment documents but Cotton fobbed her off.

<u>The First Defendant's case</u>

[91] One witness, James Ward, employed by the Bank as area manager for the financial planning division for the period May 2004 – end of 2005, testified for the defendant. He had been the area manager while Cotton was employed by the Bank.

[92] The contract of employment and the Articles of Agreement (pleadings 72 – 86) signed by Cotton on 12 October 1999 were standard employment contracts utilised by the Bank, which stipulated the terms and conditions of his employment with the Bank. Similarly Cotton was bound by the Mandate he signed as financial consultant (pleadings 88 -93), and thereby limited to proposing to clients only the specific products listed in the mandates, which are also reflected in the Statutory Disclosure Notices signed by clients.

[93] The objective of the disclosure notice was to inform clients like the plaintiff who required investments, of the available products. The investment with Macro Steel fell outside the list of such products and would not have been authorised by the Bank.

[94] There was a list of investment products and certificates displayed in the office of the Financial Planner at the Overport Branch of the Bank.

[95] Under crossexamination Ward admitted that Cotton's employment contract was not made available or published to the public. He also admitted that the products listed on the Statutory Disclosure Notices were not always accessed as investments in the listed name, although they fell under the listed umbrella body. Further the mandates and the disclosure notices were subject to change as the products that a financial planner could sell were subject to change; the disclosure notices were therefore not always up to date.

[96] Ward was unaware of any specific measure taken by the Bank to safeguard against the commission of fraud and theft by a financial consultant. He admitted he was surprised by Cotton's fraud as he had trusted him.

[97] I turn now to the issues for determination :
The first issue is whether Cotton intentionally induced the plaintiff to invest R2,5 million rand in an alternative investment as a result of a false and fraudulent misrepresentation.

[98] The patient's funds, specifically the R2,5 million, were in an investment with Stanlib which was showing good returns. The plaintiff would have not interfered with or drawn on the investment except for the offer by Cotton of an investment which would yield a better return than the existing Stanlib investment. She was clearly aware of her obligation not only to preserve the patient's estate but to make it grow albeit at moderate rate, which informed her risk limit.

[99] However, despite being a tertiary level graduate, she also lacked the knowledge and experience to make decisions relating to financial investments. She initially relied on Crockart who was referred to her through a financial institution, BOE Bank. When BOE was unable to assist her further with the Master's requirements, she was assisted by Crockart who in turn approached Cotton because of his social acquaintance with him. The basis of the approach was, however, Crockart's knowledge that Cotton was employed by FNB, and Crockart had been unable to obtain assistance for the plaintiff from various other banks.

[100] Therefore the plaintiff's meeting with Cotton was initiated because of his employment with FNB and in his capacity as a person who would offer her financial advice and assistance. Whether he was merely a financial consultant or a branch manager, is in my view, ultimately irrelevant. It is his conduct and the manner in which he engaged with the plaintiff through his employment with the Bank that is significant.

[101] The pertinent, undisputed evidence is that the plaintiff consulted with Cotton in his office at the Overport Branch of the Bank, as an employee of the Bank, who could offer her advice on financial products, specifically investments. Cotton did just that and offered her advice on investment products, which she accepted and acted on without any adverse result or effect on the patient's estate, until the 'Tata' investment.

[102] Moreover Cotton was not only prepared to assist with the Master's requirements but he attended meetings with the Master and made a proposal which was accepted by the Master, and resulted in the investment with Liberty Life.

[103] Although it subsequently emerged that the Deed of Cession requested by the Master was never properly effected, the plaintiff had signed the document, which, together with Cotton's assurances that he was attending to the Master's requirements, allayed her concerns.

[104] Even Crockart, despite his attempts to 'create a paper trail', was not aware of the incomplete cession. It would appear from Crockart's evidence that he found nothing in Cotton's conduct which alerted him to the possibility that Cotton could prove untrustworthy. According to Crockart, he had no knowledge of the further investments, after the Liberty Life investment, an indication that, by this stage, the plaintiff was relying solely on Cotton insofar as investments were concerned.

[105] It was undisputed that the plaintiff had submitted a curator's account which reflected the Stanlib investment made without the Master's approval, which raised no queries.

[106] It is evident therefore, that by the time Cotton proposed the investment with 'Tata', the plaintiff had developed a strong trust in Cotton and his advice on investments and relied on him because of his involvement in the meetings with the Master and his assurances that he would ensure compliance with the Master's requirements. She was fortified in this trust by the Master accepting Cotton's proposal on the Liberty Life investment. As she testified, Cotton 'was

approved by the Master'. She was undoubtedly also influenced by the positive returns on the prior investments which were made on Cotton's advice.

[107] She was consequently susceptible to inducement by Cotton. Not only did she trust and rely on him, the inducement was clearly more attractive because he advised her that the 'alternative' investment which would offer her better returns. Thus although she was risk averse, she was attracted by the opportunity to grow the value of the patient's estate.

[108] The plaintiff admitted that she accepted Cotton's proposal because of the return the investment would bring, but she had also asked Cotton for the investment or policy document for the 'Tata' investment. However he told her not to worry; he would make the investment and monitor it and redeem it at a good time. She candidly admitted that even if he had told her it was an investment with Macro Steel, she would have relied on his advice and made the investment.

[109] Although Cotton did not tell her that he had the Master's approval for the proposed investment, she assumed he did, as he knew the Master's requirements. As already mentioned the withdrawal of funds from the Liberty Life investment and investment with Stanlib had proceeded without query or being problematic.

[110] She also assumed that the 'Tata' investment was a legitimate product falling within the Bank's accredited products. More about this later.

[111] I am satisfied that the evidence supports, on a balance of probabilities, the plaintiff's contention that Cotton induced her to invest R2,5 million rand in an alternative investment as a result of a false and fraudulent misrepresentation. The plaintiff was induced by Cotton's advices that there was a secure alternative investment to the Stanlib investment, which would be to the benefit of the patient. This fraudulent nature of the inducement emanates from Cotton's advices to her that the investment was secure, and it would be made for the patient and for the patient's benefit. It is apparent that this was not the case, as Cotton intended not to invest the money for the

patient in an accredited product, but to lend the patient's money in his ie Cotton's name to a private company without proper security and to benefit from the loan himself. Friedman's undisputed evidence is clear on this score.

[112] Although the plaintiff agreed with the proposition put to her in crossexamination, that, when the investment with Macro Steel was made, no fraud was perpetrated on her, she did not realise that, as the R2.5 million had not been invested in a secure investment for the benefit of or in the name of the patient, the fraud had in fact been perpetrated on her as curator. Cotton had utilised the R2.5 million in a loan Macro Steel, setting himself as the creditor and negotiating the terms of the loan agreement for his own benefit.

[113] This leads on to the second issue for determination, whether Cotton committed a fraud or theft of R2,5 million on 31 March 2006.

[114] On 31 March 2006 an amount of R2.5 million was withdrawn from the aforesaid Money Market account in accordance with an 'authorisation to FNB to issue Bank Cheque and debit clients account' signed by the plaintiff and paid by way of a bank cheque issued by the Overport branch of the Bank in favour of Macro Steel (Pty) Ltd which was deposited into Macro Steel's bank account on the same day.

[115] Although the plaintiff signed the authorisation in blank, she intended the authorisation to be for funds which were to be paid into the alternative investment recommended by Cotton for the benefit of the patient. Her consent cannot therefore negate the theft by Cotton, as her consent was induced by Cotton's fraudulent representation about the alternative investment.
(Dalrymple Frank & Feinstein v Friedman & Another (2) 1954 (4) SA 649 (W) at 664A-C)

'A person commits theft if he unlawfully and intentionally appropriates movable, corporeal property which

(a) belongs to, and is in the possession of, another;

(b) belongs to another but is in the perpetrator's own possession; …….'

See Criminal Law C R Snyman 5th edition at page 483

[116] I am satisfied that the facts herein prove that the R2,5 million from the patient's account was unlawfully and intentionally appropriated by Cotton. The cheque drawn and payment to Macro Steel was for his benefit and under his control. In so doing Cotton intentionally deprived the patient of the control of the funds under a misrepresentation that it would be placed in an investment for the patient's benefit, and continued to lie to her when she requested the documentation for the investment.

[117] Friedman testified that his understanding of the transaction with Cotton was that Cotton was a wealthy investment banker who wanted to invest in Macro Steel provided that he received a return from the company. When he met with Cotton, Cotton did not say that he was representing a client and there had been no discussion or disclosure about where the funds advanced to Macro Steel were obtained from.

[118] It is apparent from the undisputed evidence of Friedman that even prior to the money being paid to Macro Steel, Cotton had negotiated the loan of R2,5 million on his own behalf and for his benefit. From the time the funds were paid over to Macrosteel, only Cotton controlled the terms of the loan and its repayment. Cotton had formed the intention to appropriate the money for his own benefit even before the money was drawn out of the patient's account.

[119] In effect the plaintiff had no control over the money once it was drawn from the patient's account. It is common cause that the R2,5 million was not repaid to the patient, but diverted by Cotton on instructions to Macro Steel to entities which were controlled by him or from which he derived a benefit.

[120] In the premises, I am satisfied that the plaintiff has discharged the onus on her to prove that Cotton committed theft of R2,5 million from the patient on 31 March 2006, the date on which the withdrawal was made from the patient's Money Market account.

[121] I am also in agreement with Mr Harpur that the theft had occurred by the time the loan was made to Macro Steel as Cotton had formed the intention to steal and had possession and control of the patient's funds.
(Cape v Koch 1985 (4) SA 379 (C); S v Dlamini 1984 (3) SA 196 (N))

[122] I find it necessary to record that it is apparent that the plaintiff clearly lost track of the responsibilities concomitant with the office of *curator bonis* and the procedures which must necessarily be followed in dealing with the patient's estate in accordance with the order of court in terms of which she was appointed, because of the trust she developed in Cotton and the reliance she placed on him and his advice. She was undoubtedly vulnerable because of the circumstances surrounding the patient's injuries and incapacity, and her lack of experience with investments. But she chose to be appointed curator with full knowledge of the responsibilities the appointment entailed. She attended meetings with the Master and no doubt fully appreciated that the intention of the Master in demanding security was to ensure that the assets in the patient's estate were not at risk of dissipation or loss. She was aware that she required the Master's approval not only for the initial investment but also for subsequent investments. Further she is an educated woman who ought to have been alive to the risk of relying on others to complete documents which she signed in blank, particularly when the documents related to significant sums of money, the preservation, utilisation and growth of which she was responsible. However, her failure to comply with her obligations and her quest for better returns on the investments do not excuse or negate the unlawful conduct of Cotton and the theft perpetrated by him, who once he obtained her confidence and trust, took full control of funds she released, in the belief that he was going to invest it for the benefit of the patient.

[123] In any event the negligence or contributory negligence of the plaintiff was not pleaded or relied on by FNB.

[124] I turn now to the determination of the issue of whether, in committing the aforesaid theft, Cotton acted within the course and scope of his employment with the Bank, thereby rendering the Bank vicariously liable to repay the R2,5 million stolen by Cotton.

[125] In resisting liability, the Bank relies on the contract or ‘agreement with the patient and the terms and conditions of Cotton’s employment with and mandate from the Bank.

[126] The following comments of Zulman JA in **ABSA Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd 2001 (1) SA 372 (SCA),** at 378 -379 are useful and apposite to the issue for determination herein :

> ‘[5] The standard test for vicarious liability of a master for the delict of a servant is whether the delict was committed by the employee while acting in the course and scope of his employment. The inquiry is frequently said to be whether at the relevant time the employee was about the affairs, or business, or doing the work of, the employer (see, for example, *Minister of Police v Rabie* 1986 (1) SA 117 (A) at 132G: *Minister of Law and Order v Ngobo* 1992 (4) SA 822 (A) at 827B). It should not be overlooked, however, that the affairs of the employer must relate to what the employee was generally employed or specifically instructed to do. Provided that the employee was engaged in activity reasonably necessary to achieve either objective, the employer will be liable, even when the employee acts contrary to express instructions (see, for example, *Estate Van der Byl v Swanepoel* 1927 AD 141 at 145 – 6, 151 – 2). It is also clear that it is not every act committed by an employee during the time of his employment which is for his own benefit or the achievement of his own goals which falls outside the course and scope of his employment. (*Viljoen v Smith* 1997 (1) SA 309 (A) at 315F-G.) A master is not responsible for the private and personal acts of his servant, unconnected with the latter’s employment, even if done during the time of his employment and with the permission of the employer. The act causing damage must have been done by the servant in his capacity *qua* servant and not as an independent individual. (See, for example, *Feldman (Pty) Ltd v Mall* 1945 AD 733 at 742 and *HK Manufacturing Co (Pty) Ltd v Sadowitz* 1965 (3) SA 328 (C) at 336A.) The test in this

latter regard was formulated by Jansen JA in *Minister of Police v Rabie (supra* at 134D – E) as follows:

> 'It seems clear that an act done by a servant solely for his own interests and purposes, although occasioned by his employment, may fall outside the course or scope of his employment, and that in deciding whether an act by the servant does so fall, some reference is to be made to the servant's intention (cf *Estate Van der Byl v Swanepoel* 1927 AD 141 at 150). The test is in this regard subjective. On the other hand, if there is nevertheless a sufficiently close link between the servant's act for his own interests and purposes and the business of his master, the master may yet be liable. This is an objective test. And it may be useful to add that according to the *Salmond* test (cited by GREENBERG JA in *Feldman (Pty) Ltd v Mall* 1945 AD 733 at 774)
>
> > "a master … is liable even for acts which he had not authorized provided that they are so connected with acts which he had authorized that they may rightly be regarded as modes – although improper modes – of doing them…".'

Tindall JA put the matter as follows in the *locus classicus* on the vicarious liability of an employer for the deeds of an employee in *Feldman (Pty) Ltd v Mall (supra* at 756 – 7):

> 'In my view the test to be applied is whether the circumstances of the particular case show that the servant's digression is so great in respect of space and time that it cannot reasonably be held that he is still exercising the functions to which he was appointed; if this is the case the master is not liable. It seems to me not practicable to formulate the test in more precise terms; I can see no escape from the conclusion that ultimately the question resolves itself into one of degree and in each particular case the matter of degree will determine

> whether the servant can be said to have ceased to exercise the functions to which he was appointed.'

(See also the remarks of Watermeyer CJ at 742 and Davis AJA at 784.) The effect of the 'two tier test', as postulated by Jansen JA, is that an employer will only escape liability if his employee had the subjective intention of promoting solely his own interests and that the employee, objectively speaking, completely disassociated himself from the affairs of his employer when committing the act. The nature and extent of the deviation is a critical factor. Once the deviation is such that it cannot reasonably be held that the employee is still exercising the functions to which he was appointed, or still carrying out some instruction of his employer, the latter will cease to be liable. Whether that stage has been reached is essentially a question of fact (see, for example *Feldman (Pty) Ltd v Mall (supra* at 756 -757); *Union Government v Hawkins* 1944AD 556 at 563; *Viljoen v Smith (supra* at 316E – 317A). The answer in each case will depend upon a close examination of the facts.'

[127] Cotton was employed as a financial consultant by FNB. Although the terms of his employment with FNB and his mandate were specific about his obligation only to propose or recommend to clients only products that FNB was accredited to sell, his employment contract and mandate were not public documents. Despite the plaintiff's admission in the course of her testimony that investments with 'Tata' and Macro Steel were not products within the mandate given to Cotton by FNB, she did not have sight of his mandate or his employment contract, which was confirmed by Ward.

[128] However she did have sight of the Standard Disclosure Notice, which accorded in the main with the terms of employment of Cotton and his mandate from FNB. This was confirmed by Ward and is apparent from the mandates and employment contract (Pleadings pages 61 – 94) .

[129] According to the agreement, the business of FNB Financial Planning and Advisory Services consists of :

> ‘providing estate planning, retirement planning and life assurance services, business assurance services and investment advisory services. Usually this entails analysis of the client’s assets, liabilities and financial objectives, an identification on the client’s life assurance needs and investment needs, the submission of recommendations including quotations from various product providers, and the arranging of new life assurance and of new investments with product suppliers as named herein.’

[130] But the notice and the contents of the notice were not consistently disclosed to the plaintiff. She was asked to sign the notice only when the Stanlib investment was made. There is no evidence that she was given a similar notice to read or that she signed a similar document when the Liberty Life investment was made earlier, although she was at that time already a client of FNB’s Financial Planning and Advisory Services and received financial planning services from FNB through Cotton in the course and scope of his employment with FNB.

[131] When the subsequent investment with Stanlib was made, she signed the documents presented for her signature by Cotton, without questioning what they were as she accepted that they were related to the new Stanlib investment. It was at this stage that she was presented with the notice which Cotton explained to her and she read. However as a layperson, she merely read the document as a ‘notice’ and not ‘an agreement’ or ‘contract’, understandably, given the title of the document. Further Cotton did not advise her that she was signing an agreement with FNB when she signed the Statutory Disclosure Notice. Nor did Cotton bring to her attention that the notice applied not only to the Stanlib investment but any product recommended or advice subsequently given to the plaintiff by Cotton, albeit in the course and scope of employment with and within his mandate from FNB.
There was, in the circumstances, no reason for her to be aware that she was signing a document which constituted an agreement between herself and FNB in relation to the financial services rendered to her by FNB through its

employee, which was related not only to the Stanlib investment but also all subsequent investments.

[132] Therefore although the plaintiff admitted that she understood the terms of the notice and that she was bound by it, she associated the notice with the Stanlib investment only. It is not improbable that she, according to her evidence, 'did not think about it' when the documents relating to the 'Tata' investment were presented to her for signature. It is common cause that no further disclosure notice was handed to her with the 'Tata' documents, as FNB relies on the notice signed on 25 October 2005, and the plaintiff's evidence that she signed only two documents in respect of the 'Tata' investment was not disputed; she was in fact crossexamined about why she did not regard the paucity of documents she signed as suspicious.

[133] In relying on the 'agreement' with the plaintiff, FNB has contended that it was accredited to distribute specifically defined products of various financial product providers, listed in its agreement with the plaintiff. But it was also pertinently admitted by Ward, that the names of the insurance companies or financial institutions whose products FNB was accredited to sell as recorded on the notice, did not always correlate with the names of the products sold, although the product was sold under the umbrella company. Therefore the client would not necessarily have known that the product sold by the consultant was a 'legitimate' product. A perusal of the notice indicates that among the more familiar names and names associated with financial products, particularly investments, is a name 'Ashburton' which to those outside the industry may be unfamiliar. More significantly, the name Stanlib does not appear on this list of accredited products or providers in the notice. Therefore, even if the plaintiff did focus on the list of providers, the probabilities that she would have realised Macro Steel was not a product the bank was accredited to propose were remote.

[134] Further, Ward testified that the products and the product providers also changed and while clients would be reliant on the advice of the financial consultant, the consultants would have to check with the area manger or relevant department as to whether the product or provider was current. The

disclosures were not always up to date, although Ward testified that at the time of the investment with Macro Steel, the products listed on the notice were current.

[135] Consequently in his interaction with the plaintiff, Cotton was conducting himself as a financial consultant in the employ of FNB and recommending or proposing the products which ostensibly lay within his mandate. There was no need for the plaintiff to question or be suspicious about the 'Tata' investment. The previous investments had also not been in the name of FNB but two other entities : Liberty and Stanlib, but had been secure accredited and profitable products. As far as the plaintiff was concerned Cotton was representing his employer, although Cotton had through the scope of his employment, intended to unlawfully benefit from the patient's assets. In making the funds for the investment available, the plaintiff was acting in good faith.

See head note in *Chappell v Goal* 1928 CPD 47 :

> "Every act by the agent professedly on his principal's behalf, and within the scope of his actual authority, is binding upon the principal with respect to persons dealing with the agent in good faith, even if the act is done fraudulently in furtherance of the agent's own interests and not in the interests of the principal."

See also: *Sandbank BP v Santa Versekeringsmaatskappy Bpk* 1965 (2) SA 456 (W).

[136] The next question to consider was whether Cotton doing the work of the employer at the time. He was rendering financial service in accordance with his employment with FNB as a financial consultant. Even if he did not act in accordance with the mandate in that he did not restrict himself to the products FNB was accredited to supply, his unlawful conduct was closely allied with his employment with FNB, and his critical 'deviation' not so great as to help the employer escape liability.

[137] I accordingly find merit in Mr Harpur's argument that there is sufficient close connection between the conduct of Cotton and what he was employed

to do activity (see the applicable *Salmond* test in **Feldman (Pty) Limited v Mall 1945 AD 733 at 774** quoted *supra* in **Absa Bank v Bond Equipment)**

See also **Neethling et al *Law of Delict* (4th Edition) at 377 :**

> ' The employer may accordingly only escape vicarious liability if the employee, viewed subjectively, has not only exclusively promoted his own interests, but viewed objectively, has also completely disengaged himself from the duties of his contract of employment'.

Similarly in **Minister of Finance & Others v Gore NO 2007 (1) SA 111 (SCA)** the headnote at page 113 reads :

> '……that a two-pronged test was traditionally applied to determine whether or not to visit the employer with liability for the deliberately dishonest conduct of his employees: (i) Was the conduct committed solely for the employee's own interests and purposes? And, if not, (ii) was there, objectively, a sufficiently close link between the employee's conduct and the employer's business? (Paragraph [28] at 123F – 124A.)'

[138] The plaintiff testified that although fees and commission were debited against the capital invested, of which she was aware, she did not know what these fees were until she received the policy document because Cotton did not discuss the amount that would be deducted as fees or commission with her. She would therefore have not known that no fees or commission were charged on the Macro Steel investment as Cotton did not give her the 'investment documents' although she requested them.

[139] Mr Combrink submitted that FNB received fees and commissions from the first two investments made by the plaintiff on the advice of Cotton. But no fees or commission was earned by the bank in respect of the investment with Macro Steel. In terms of the statutory disclosure notice, the product suppliers would pay commission to the Bank for the business which the financial planner would place with them. FNB therefore also suffered loss as a result of the fraudulent conduct of Cotton. However this assertion does not assist FNB,

as the fact that FNB did not benefit from the investment with Macro Steel cannot relieve the bank of vicarious liability.

[140] In the unreported case **BOE Bank Limited v Standard Bank Financial Services (Pty) Limited t/a Stanfin (WLD) Case No 315/2000 Mailula J** held:

> '62. A principal will be held responsible even where his agent, in concealing or not disclosing material facts, was also committing a fraud on him. The general principle is that where an agent contracting in the course of his employment and within the scope of his authority, fraudulently conceals or otherwise fails to disclose a fact known to him which, having regard to the nature of the contract, he ought to have disclosed to the other contracting party, his principal is liable for and must suffer the consequences of his concealment or non-disclosure. (*Broodryk v Smuts, NO* 1942 TPD 47 at p53; *Ravene Plantations Ltd v Estate Abrey and Others* 1928 AD 143; *Black v le Voy* 1924 EDL 176 at p181; *Mac-Gillivray* 5th Ed, Vol 1 para 978). It is the principal, who selects his agent and represents him as a trustworthy person, and not the other party to a contract who has no say in the selection, who bears the risk of his possible dishonest representations and concealments, as also where the dishonesty assumes such proportions that the agent, in the nature of things, will undoubtedly conceal it from the other party and the principal will have no knowledge thereof.'

[141] Finally, although it was argued on behalf of FNB, that in terms of the notice, the proposed product is only a proposal for consideration by the client, in the practical situation, clients are and will be guided by the advice they receive from the consultant and the confidence they have in the bank which employs him, not in the consultant alone. The advice will be received from the consultant as an employee and representative of the Bank – not as a private person who is acting in his own interests. Therefore it was the responsibility of the bank to ensure that clients like the plaintiff, are protected from risk of harm from its employees.

See **Ess Kay Electronics PTE Ltd & Another v First National Bank of Southern Africa Ltd 2001 (1) SA 1214 (SCA) at pages 1218 – 1219 :**

> ‘[7] Vicarious liability is imposed on innocent employers by a rule of delictual law. The rule in its most simple form is that the liability arises when an employee commits a delict within the course of such employee’s employment. ……….
>
> [8] The reason for the rule is often stated to be public policy. See, for example, *Salmond and Heuston on the Law of Torts* 19th ed at 507. And an underlying reason for that policy has been held in *Feldman (Pty) Ltd v Mall* 1945 AD 733, in a passage at 741, to be the consideration that because an employer’s work is done ‘by the hand’ of an employee, the employer creates a risk of harm to others should the employee prove to be negligent, inefficient or untrustworthy. The employer is therefore under a duty to ensure that no injury befalls others as a result of the employee’s improper or negligent conduct ‘in carrying on his work………….’

[142] Ward was unable to point to any specific safeguards FNB had in place to alert the bank to fraud or theft committed by Cotton and for the protection of his clients.

[143] Arising from the aforegoing considerations, I am unable to find that the plaintiff is precluded by a contract between herself and FNB from recovering the loss suffered by the patient as a result of the investment of R2.5 million in Macro Steel.

[144] In the premises, I am satisfied that the plaintiff has discharged the onus on her to prove that the FNB should be held vicariously liable for the loss suffered consequent to the fraud and theft perpetrated by Cotton.

[145] *Quantum* is not in dispute and there is no reason why costs should not follow the result.

<u>The following order do issue ;</u>

Judgment is granted in favour of the Plaintiff against the First Defendant, First National Bank Limited, for :

1 Payment of the sum of R2,5 million
2 Interest thereon at the rate of 15,5% per annum from 31 March 2006 to date of payment
3 Costs of Suit

MURUGASEN J

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Delivered on:	7 November 2012