

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

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

Appeal number : A70/2023

In the appeal between:

KARIN FORTEIN N.O.

Appellant

And

IPROP TRADING CC
(Registration Number: [...])

Respondent

CORAM: MBHELE, DJP et VANZYL, J

JUDGMENT BY: VANZYL, J

HEARD'ON: 23 NOVEMBER 2023

DELIVERED ON: 17 MAY 2024

[1] This is an appeal against an order made in the Magistrate's Court, Bloemfontein, in an action wherein the appellant was the plaintiff and the respondent was the defendant.

Background:

- [2] The appellant acted in her capacity as trustee of an insolvent estate of PHR Bornman ("the insolvent estate") and the respondent is an auction house.
- [3] The first claim ("the first claim") against the respondent was for payment in the amount of R58 250.00 in terms of an agreement concluded between the parties. The respondent denied that it failed to comply with the terms of the agreement and pleaded that the amount of R58 250.00 was paid into the bank account of which the details were received via e-mail from the appellant.
- [4] In a claim in the alternative to the first claim ("the alternative claim"), the appellant averred that the respondent or its employees, acting within the scope of their employment with the respondent, had been negligent in failing to take reasonable care in ensuring that payment was made into the correct bank account. The respondent denied same, pleading that the appellant had a legal duty to deal with money of the insolvent estate without negligence and was further obliged to exercise the skill, adequate knowledge and diligence expected of an insolvency trustee. She further failed to have adequate risk mitigation and avoidance measures in place to deal with cyber related risks, despite having been warned about cyber related risks that were on the increase. As a result, the appellant suffered damages in the amount of R58 250.00.
- [5] In the second claim the appellant sought delivery of 530 Norton metal grinder blades, alternatively payment of the amount of R26 500.00, from the respondent. The respondent pleaded that it was in possession of the said grinder blades in terms of a mandate thereto received from the appellant and the appellant has at no stage cancelled the respondent's mandate or requested return of the blades.
- [6] The court *a quo* dismissed both the first claim and the alternative claim.
- [7] With regard to the second claim, the respondent was ordered to return the metal grinder blades to the appellant, alternatively, to pay the amount of R26 500.00 to the appellant within a reasonable time from date of the order. This appeal is, however, not directed at the second claim and I will consequently not deal with it any further.

[8] The court a *quo* ordered that each party was to pay its own costs.

Notice of appeal:

[9] The grounds of appeal as contained in the notice of appeal are the following:

"3. The Honourable Presiding Magistrate erred in finding:

3.1 That there was no contractual relationship between the parties, that needed to be adjudicated;

3.1.1 Especially that the Respondent; as Defendant in the Court a *quo*, did perform in terms of the agreement between the parties;

3.2 In finding that -the personnel, acting on behalf of the Respondent (Defendant in the Court a *quo*), was not negligent in making payment into an incorrect account;

3.3 That a higher duty of care rested on the Plaintiff and the Plaintiffs representatives, than an ordinary person - as one of the Plaintiffs personnel is an admitted attorney - although such person did not act as an admitted attorney, in his dealings with the Respondent;

3.4 In not finding that the preponderance of probabilities, on the evidence led, favoured the Appellant (Plaintiff in the Court a *quo*) and not the Respondent (Defendant in the Court a *quo*);

3.5 In not finding that the Respondent (Defendant in the Court a *quo*) at least had a duty of care, to have its own systems verified as not being 'hacked' or contaminated by malware;

3.6 In that the Appellant (Plaintiff in the Court a *quo*) being the creditor who should have received the monies, should have approached the South African Police Service to open a criminal case;

3.7 In failing to find that the Appellant proved her case on a preponderance

of probabilities.

4. THE LEARNED MAGISTRATE OUGHT TO HAVE FOUND THAT:

- 4.1 There was a contractual agreement between the parties, the Respondent (Defendant in the Court a *quo*) did not perform in terms of such contractual agreement, in not making payment to the Appellant (Plaintiff in the Court a *quo*);
- 4.2 The personnel of the Respondent (Defendant in the Court a *quo*) was negligent, in not confirming banking details, of the Plaintiff, before making payment into an alleged fraudulent account;
- 4.3 Respondent (Defendant in the Court a *quo*) had the duty, as debtor, who made the payment into a fraudulent account, to open a criminal case with the South African Police Service;
- 4.4 No extra duty of care rested on the Appellant in ensuring that payment was made into the correct account, the Appellant being the debtor in the matter before Court;
- 4.5 The Appellant was substantially successful with Claim 2 against the Respondent and should be awarded costs for the action.

Evidence on behalf of the appellant:

Luke Fortein:

- [10] Mr Fortein testified that although he is not in the employment of Karen Fortein Incorporated, he has been assisting the appellant as an insolvent consultant. He only converted to practicing as an attorney in March 2022.
- [11] The respondent is an auctioneer.
- [12] He testified that the respondent offered to purchase certain movable property from the insolvent estate, the goods and the amount as specified in the e-mails attached to the amended particulars of claim ("the particulars of claim") as

annexures "B1" and "B2" respectively, in the total amount of R58 250.00. These e-mails were addressed between Marjoli Engelbrecht, the Financial Department Manager of the respondent, and Mr Fortein, with the appellant included in the said e-mails.

- [13] On 9 October 2020 Mr Fortein addressed an e-mail to Ms Engelbrecht confirming that the Master consented to the sale of the movables in the amount of R58 250.00 and further stated as follows:

"Please find attached a copy of the estate banking details for purposes of payment of the purchase price.

Kindly provide us a copy of the proof of payment once payment has been made".

- [14] This e-mail is attached to the particulars of claim as Annexure "C1". According to Mr Fortein a document was attached to the said e-mail containing the banking details of the insolvent estate at Standard Bank of South Africa, attached to the particulars of claim as annexure "C2". The e-mail was sent by Mr Fortein to Ms Engelbrecht and once again it was also marked for the attention of the appellant.

- [15] It is common cause between the parties that the appellant did not receive the payment and when the respondent provided the appellant with the email proof of payment, Annexure "13" to the respondent's amended plea ("plea"), it was evident that the payment was made into a different banking account at a different bank (First National Bank) than the details which were (meant to have been) attached to the e-mail of Mr Fortein to Ms Engelbrecht (Annexures "C1" and "C2").

- [16] Mr Fortein was referred to annexures "11" and "12" attached to the respondent's plea and it was indicated on behalf of the appellant that those were the two e-mails with the banking details which Ms Engelbrecht received for Mr Fortein and not Annexures "C1" and "C2" to the particulars of claim. According to Mr Fortein that was not the e-mail and banking account details which he sent to Ms Engelbrecht.

- [17] According to Mr Fortein it was a term of the agreement that the respondent would pay the money into the account elected by the appellant, being the Standard Bank account.

- [18] Mr Fortein was never contacted by anyone on behalf of the respondent to confirm the banking details of the insolvent estate.
- [19] The respondent, according to Mr Fortein, did not comply with its obligations in terms of the agreement, since it did not make payment into the elected Standard Bank account.
- [20] In cross-examination Mr Fortein testified that he cannot deny if it is the respondent's version that it did not receive annexures "C1" and "C2" attached to the particulars of claim but instead thereof received annexures "11" and "12" attached to the respondent's plea. He, however, persisted with his version that he did not send the e - mails, annexures "11" and "12" attached to the plea, to Ms Engelbrecht.
- [21] When the email received by Ms Engelbrecht, Annexure "11" and the e-mail which Mr Fortein sent, Annexure "C1", were compared to each other, it was evident that they were similar and both were incorrectly addressed to "Marjolie", whilst Ms Engelbrecht's name is spelled "Marjoli" Both e-mails also reflected the same e-mail "signature" of Mr Fortein. The only difference was that the appellant was included in the email Annexure "C1", but not so with Annexure "11". Questions were also asked about the spacing of the e-mail, "11", as opposed to the spacing of the e-mail "C1", which differ from one another. However, this line of questioning was not really taken any further.
- [22] Mr Fortein conceded that it was not stated in the e-mail he sent nor in the e-mail which the respondent received that the respondent should call the appellant to confirm the banking details.
- [23] Mr Fortein testified that he believes that the duty to have confirmed the banking details was the responsibility of the respondent. Mr Fortein further testified that he was aware of cyber-crime, but that it was not his duty to have advised the respondent to confirm the banking details telephonically. As representative of the insolvent estate he fulfilled his duty to make sure that he receives the money by having sent the correct banking details to the respondent.
- [24] Mr Fortein denied that there was a duty on the appellant to have reported this

matter to the police, because the appellant was not the one who made the payment, so he would not have been able to give the necessary information to the bank.

Jason Jordaan:

[25] Mr Jordaan testified as an expert in the field of digital forensics and referred in his evidence to his forensic affidavit.

[26] He testified that he investigated the computer system of the appellant and that he could not find any evidence of e-mail filtering or forwarding rules associated with these types of business e-mail compromise frauds. He, however, confirmed that it is not to say that such evidence was not present at the time when the e-mail was sent in October 2020, since cyber criminals are able to remove any evidence within minutes after the crime.

[27] There was no evidence that the e-mail and banking details which were received by the respondent, annexures "11" and "12", was sent by the appellant or the appellant's representative. There was also no evidence that the appellant's e-mail account had been compromised in any way.

[28] He could not testify as to whether the falsified e-mails, annexures "11" and "12", had been received by the respondent. He did not have access to the respondent's server and computer system.

[29] In his opinion it appears that the hacking did not take place on Mr Fortein's side and in the absence of any evidence to the contrary, he would draw the inference that the hacking may have taken place on the respondent's side.

However, he cannot infer that without having examined respondent's computer systems too.

[30] He further testified that he was not aware that the respondent, by notice, allowed the appellant or her expert access to inspect the respondent's computer and e-mail servers during October 2021. The appellant never made him aware of such a notice.

[31] When it was put to Mr Jordaan that Ms Engelbrecht of the respondent is

going to testify that when she received the e-mail, she specifically checked whether it was indeed received from Mr Fortein's e-mail. She picked up that her name was spelled wrongly, similarly to previous emails she received from Mr Fortein. The e-mail "signature" and address of Mr Fortein were also the same as previously. That is why she was satisfied that she can act upon those banking details and make the payment. Mr Jordaan confirmed that he accepts that version, because usually the fraudulent e-mail would look legitimate.

- [32] Mr Jordaan further testified that the level of this type of fraud is extremely high in South Africa. He has personal knowledge thereof that the Law Society of South Africa has been highlighting this problem and has actually issued a number of warning notices or directives as to this risk.

Karen Fortein:

- [33] Ms Fortein testified that she was aware of the risk of cyber-crime, but that she does not agree that it is necessary to request anybody to confirm banking details which she provides, before they make a payment. According to her it was the respondent's duty to have ensured the correctness of the banking details.

- [34] Ms Fortein testified and confirmed that the money which should have been paid by the respondent to the appellant was never received by the appellant.

Evidence on behalf of the respondent:

Marjoli Engelbrecht:

- [35] Ms Engelbrecht is the Financial Department Manager of the respondent.
- [36] She testified that when she received the e-mail dated 9 October 2020, annexures "11" and "12" to the plea, she had no reason to doubt that the e-mail was indeed from Mr Fortein, since the e-mail address and ¹¹signature were the same as previous communications and what further satisfied her in this regard is that Mr Fortein spelled her name incorrectly by adding an "e" on the end, like he did in previous e-mails which he sent to her.

- [37] The account details which was reflected on the e-mail, annexure "11" and "12" to the plea, was that of a First National Bank account. The respondent made the payment into that First National Bank account and afterwards she provided the proof of payment thereof, annexure "13" to the plea, to Mr Fortein upon his request thereto.
- [38] She confirms that there was a request on behalf of the appellant to have access to the respondent's computer system. It, however, never materialized.
- [39] She further testified that the respondent offered to assist the appellant by going to the bank, but that did not materialize either.
- [40] Ms Engelbrecht agreed that the appellant had not received the payment which the respondent made into the First National Bank account.
- [41] She testified that she was not responsible for making the actual payments. *One Nelis van Tonder "usually confirmed and made the payment, so I did not make the payment".* In her further evidence she explained it differently by stating that when she has to make a payment, when she receives an invoice, she hands it over to Mr van Tonder, who confirms the payment and *"that is when I will make the payment".*
- [42] With reference to the strange spacing of annexure "11" to the plea, Ms Engelbrecht testified that she did not notice it when she received the e-mail. This issue was, however, never cleared up during further cross-examination or re-examination.
- [43] Ms Engelbrecht agreed that it was the duty of the respondent to have opened a case at the South African Police Service regarding the incident.
- [44] Ms Engelbrecht had no knowledge of cyber-crime and this incident was the first time she became aware of risks caused by cyber- crime and since then she has been confirming banking details before she makes a payment.
- [45] The respondent never appointed an expert to conduct a forensic investigation of its computer systems after the incident.
- [46] It was put to Ms Engelbrecht during cross-examination that according to the appellant, since the respondent was the one to make the payment, she should

have acted like a reasonable person and have confirmed the banking details telephonically before she made the payment. Ms Engelbrecht agreed and again testified that since the incident and since she has become aware of cyber-crime, she has been doing it like that.

[47] Ms Engelbrecht admitted that it would have been impossible for the appellant to ensure that payment is correctly made.

[48] Ms Engelbrecht also confirmed that the payment the respondent made was not received by the appellant since it was made into a fraudulent/incorrect bank account.

Findings by the court a quo:

[49] The court *a quo* stated as follows at paragraph 6 of the judgment

"6. In this matter there are a few issues which are common cause as gleaned from the evidence, namely: That payment was made by the Defendant, that the payment was into the incorrect account, that the e- mail received was different to the e-mail sent. Neither party approached the police or the banks to open a case for investigation."

[50] With regard to the evidence presented, the court stated as follows at paragraph 8 of the judgment:

"8. It should also be mentioned that all the witnesses herein were clear in their evidence and the facts of the matter regarding claim 1 is clear. The court did not see any witness as being confused regarding the facts and no real dispute can be drawn regarding the facts presented before court "

[51] In respect of the first claim, the contractual claim, the court *a quo* found as follows at paragraph 9 of the judgment:

"9. The Plaintiffs claim regarding claim 1 ('the monies') is shrouded in a claim that the monies was never paid but there was not sufficient evidence brought to sustain this claim. The alternative in claim 1 is that the Defendant was negligent in that they did not take reasonable care to ensure that the amount

of R58 250.00 was paid. Most of the evidence led by the Plaintiff and testimony of the parties rely on this alternate claim and this deserves further scrutiny".

[52] With regard to the alternative claim, the court *a quo* stated as follows at paragraph 20 of the judgment:

"20. In the matter at hand, bearing in mind the aforementioned precedent case, I did not regard the versions of the witnesses of the two respective parties, regarding the facts of the matter, to be particularly in dispute. All are in agreement that the accounts were hacked, that payment was made but it was made into a fraudulent account provided by those who had hacked the e-mails".

[53] The court *a quo* dealt, *inter alia*, with the following authority in its judgment:

"10. The plaintiff relied on the case of **Galactic Auto (Pty) Ltd v Venter (4052/2017) [2019] ZALMPPC 27** wherein the Court decided in favour of the Plaintiff and said: the duty to make sure payment is made into the correct account rests on the person making payment (Debtor). There is also a great deal of further precedent dealing with similar facts and the Court also had to ensure a thorough reading of all cases.

11. The matters of **Fourie v Van der Spuy and De Jongh Inc and Others 65609/2019 ZAGPPH 449** as well as the matter of **Lochner v Schaefer Incorporated and Others (3518/2016) ZAECPH** dealt in depth with cyber-crime issues. In both these matters the defendants were Attorneys and the Court in both matters intimated that there is a duty on attorneys as professionals to be extra vigilant regarding payments out of trust accounts". (My emphasis)

[54] The court *a quo* continued and stated the following at paragraphs 16 and 17 of its judgment:

"16. The courts herein referred to the skill and diligence ^{applied} required of an average attorney. The question herein is thus, can the same diligence, in view of the aforementioned case law be to the Defendant who on the evidence provided

is not legally qualified, has not been exposed before to alleged Cyber-Crime of this nature, be it directly or through alerts that is received by attorneys. In my view the average person or reasonable man simply does not check each and every payment prior to making it. On the other hand, it should be mentioned that the Plaintiffs consultant, Mr Luke Fortein, who is the husband of the Plaintiff, and the one who had sent the e-mail containing the bank details, is an admitted attorney and thus own a duty of care.

17. The evidence of the Defendant is that she had checked the e-mail address and wording which was similar to previous e-mails received. In her evidence she mentions that she checked the e-mail address which was the same and she checked the signature of the first witness which was the same as well as the way in which he had wrongly spelled her name. She had no reason to doubt the e-mail".

[55] The court *a quo* then concluded as follows with regard to the alternative claim at paragraphs 23 and 24 of its judgment:

"23. The Plaintiff owes a responsibility of diligence to ensure the protection of third party's monies and in addition should do whatever it can to mitigate any possible loss. At the very least, the police would have given direction as to the correct party to open a case. They may have also, as happened in the precedent cases such as this, have recovered some of the lost funds. It is staggering that to date no such case has been opened.

24. I am therefore not convinced that the Plaintiff has proven on a balance of probabilities that the Defendant was negligent herein regarding claim 1".

Submissions. case law and conclusions:

The first claim:

[56] Mr van Rensburg, on behalf of the appellant, submitted that the court *a quo* erred and that the appellant should have been successful with the first claim, since the agreement is not in dispute and the respondent simply did not perform in terms of the agreement between the parties.

[57] For purposes of his aforesaid argument, Mr van Rensburg relied on the judgment of this Division in **Andre Kock en Seun Vrystaat (Pty) Ltd v Willem Stephanus Snyman N.O. and Another** (5180/2021) [2022] ZAFSHC 161 (27 June 2022). The facts in that matter are in fact the same as the facts *in casu*, except for one aspect. In that matter the terms of the agreement were hundred percent common cause between the parties. After the e-mail which was sent from the plaintiff to the defendant, containing the banking details, was intercepted and replaced with a fraudulent e-mail containing fraudulent banking details, the defendant paid the money which it owed to the plaintiff into the fraudulent account. The court made the following findings, which findings are also applicable to the alternative claim in the present matter:

"[5] Relying on *Mannesmann Demag (Pty) Ltd v Romatex Ltd and Another* and *Galactic Auto (Pty) Ltd v Venter* counsel for the applicant, Mr. Van Aswegen argued that the fact that the Trust had made the outstanding payment into a fraudulent account does not absolve it from paying the applicant. The responsibility to seek the applicant as a creditor was on the Trust as the debtor including to ensure that the payment was paid into the correct account. Furthermore, the facts which gave rise to the applicant's contractual right to payment were uncontroverted, the Trust had failed to raise a valid defence to the applicant's claim, a referral of the application to hearing of oral evidence as proposed by the Trust was not necessary as the order is merely sought to provide the Trust with an opportunity to gather evidence to prove that its email was not hacked whereas even if the Trust succeeds in doing so that would not constitute a defence to the applicant's claim

[9] I disagreed with the Trust's contention on this aspect as the Trust's liability to pay the applicant would have only been discharged by payment to the applicant. Where a payment is effected by way of an Electronic Funds Transfer (EFT) as in this case, the responsibility of verifying the creditor's banking details before making the payment lies squarely on the debtor. In this matter, the Trust had merely assumed that the email it received was from the . applicant and then went on to make a payment into the banking account provided in the said email without having taken any steps to verify such information. The Trust could therefore not rely on that payment in defence of the applicant's claim. See paragraph 29 to 50 in *Galactic Auto (Pty) Ltd*.

[10] It was for these reasons above that I held that the applicant had succeeded in making out the case for the payment it sought from the Trust." (My emphasis)

[58] However, the difference between the facts of that matter and the facts of the present matter is that the term pertaining to payment in terms of the agreement is in dispute in the present matter. In this regard the appellant specifically averred as follows at paragraph 6 of the particulars of claim:

"6. It was a specific term of the acceptance of the offer that payment of the purchase amount of R58 250.00 was to be made into the estate bank account with account details: Standard Bank, Account No. Account holder: P[...] B[...], [...] and Branch code:[...], as more specifically appears from Annexure "C2"."

[59] The said annexure "C2" is the e-mail containing the correct banking details which was attached to the original e-mail which Mr Fortein sent, but which was intercepted. In its plea to the said paragraph 6, the respondent pleaded as follows at paragraph 2 of the respondent's plea:

"2. Safe to deny that Annexure "C1" and "C2" were received by the Defendants it is further denied that it was a specific term of the agreement to pay the amount in the estate bank account as specifically appears on Annexure "C2". Defendant annexed hereto a copy of the e-mail received on 9 October 2020 as Annexure "11" and a copy of the estate bank details that was attached thereto as Annexure "12". It was therefore a specific term of the agreement to make the payment into the estate bank account with account details: Account Holder: P[...] B[...], First National Bank, Account No. [...], as more specifically appears on Annexure "12"."

[60] The term regarding the payment and the account details into which the payment was to be made, were therefore not common cause between the parties. From the evidence it is clear that it is now no longer in dispute that the respondent did not receive annexures "C1" and "C2", but did receive annexures "11" and "12" containing the fraudulent banking details. The parties could therefore not have agreed on payment into the Standard Bank account if the respondent did not even

have knowledge of the Standard Bank account and its details.

- [61] The term pertaining to payment as pleaded by the appellant, has consequently not been proven on a balance of probabilities by the appellant.
- [62] In my view the court a *quo* was consequently correct by having dismissed the first claim and the appeal cannot be upheld in this regard.

The alternative claim:

- [63] It is evident that the aforesaid Andre Kock-judgment supports the appellant's case with regard to the alternative claim.
- [64] Mr van Rensburg submitted that the principles regarding payment by cheque are comparable to the present circumstances. In this regard he, *inter alia*, relied on the judgment of Erickson Motors (Welkom) v Protea Motors. Warrenton and Another 1973(3) SA 685 (A) at 693 to the effect that in general, payment by cheque is *prima facie* regarded as immediate payment but subject to the condition that the cheque is honoured. If the cheque is dishonoured, there has been no payment.
- [65] He also relied on the judgment in Mannesmann Demag (Pty) Ltd v Romatex Ltd and Another 1988 (4) SA 383 at 389 F where the following was stated:
- "Until that happens (the cheque is honoured), a real danger exists that the cheque may be misappropriated or mislaid and that someone other than the payee may, by fraudulent means, convert it into cash or credit, for instance, by forging an endorsement or by impersonating the true payee. That risk is the debtor's since it is the debtor's duty to seek out his creditor." (My emphasis)
- [66] Mr van Rensburg also relied on the judgment of Galactic Auto (Pty) Ltd v Venter (4052/2017) [2019] ZALMPPHC 27 (14 June 2019). I will return to this judgment.
- [67] With regard to the two judgments which the court a *quo* referred to, being Fourie v Van der Spuy and De Jongh and Others 65609/2019 ZAGPPH 449 (30 August 2019); 2020 (1) SA 560 (GP) and Lochner v Schaefer Incorporated

and Others (3518/2016) ZAECPHC 4 (24 January 2017) for its finding that a higher duty of care rested on the appellant and her representative, are, in my view, distinguishable from the present matter. In the quoted cases the attorneys were the defendants and they made payments into incorrect accounts, which is the opposite to the facts in the present matter.

[68] Mr Roux, on behalf of the respondent, *inter alia*, relied on the judgment of **Hawarden v Edward Nathan Sonnenbergs Inc** 2023 (4) SA 152 (GJ). The plaintiff was the buyer in a property sale transaction and the defendant the conveyancer appointed by the seller. The defendant emailed the plaintiff its banking details for the plaintiff to pay the purchase price to the defendant. The plaintiff's email account was hacked by a third party and the third party intercepted the defendant's email and altered the banking details. The plaintiff paid the purchase price into the account detailed and the moneys were misappropriated. The Plaintiff then instituted proceedings against the defendant, claiming damages in the extent of the purchase price on the basis of what plaintiff asserted was the defendant's negligent omission to warn it of the danger of "business email compromise", such as occurred. One of the issues was whether the defendant's omission had been negligent, with the court holding that the defendant was aware of the danger and indeed created the risk by the means it employed to convey its banking details, where inexpensive and easy steps could have been taken by it to mitigate the danger. The Court held as follows at para [131] (where "ENS" is a reference to the defendant "BEC" is a reference to business e-mail compromise):

"[131] The interests of the defendant, as well as the society, demand that a legal duty is recognised in this case. ENS is best placed to understand and prevent BEC. Individuals in society are generally not as well placed to respond to the ever evolving threat of cyber crime, which is sophisticated and technical in nature. As stated in *Estate Van der Byl v Swanepoel*, 'where one of two innocent parties has to suffer a loss arising from the misconduct of a third party it is for the public advantage that the loss should fall ... on that one of the two who could most easily have prevented the happening or the recurrence of the mischief. All facts considered, accordingly, I am persuaded that considerations of legal and public policy require liability in this case. Accordingly, the plaintiff's claim is upheld'.

[69] Mr Roux consequently submitted that the court *a quo* correctly dismissed the

appellant's alternative claim.

[70] During the hearing of the appeal both parties referred us to the judgment of Mosselbaai Boeredienste (Pty) Ltd v 0KB Motors CC 2023 JDR 2033 SCA which was an application to the Supreme Court of Appeal for special leave to appeal, which was granted and the matter was referred to the full court of this Division to decide the merits of the appeal. The judgment, at paragraphs [14] to [17] thereof, contains a very useful exposition of the currently conflicting judgments applicable to the present appeal. Counsel also referred us to some of those judgments during their arguments. However, the matter has since been on appeal and the full court of the Free State Bench has delivered judgment on 7 March 2024 in which judgment the respective conflicting judgments were comprehensively dealt with. The factual background was very similar to the present matters. Although estoppel was raised in that matter and counter-claim was also instituted, the principles the full court dealt with, are in my view applicable to the present appeal. I consequently deem it apposite to refer to certain extracts from the full court decision in Mosselbaai Boeredienste (Pty) Ltd t/a Mosselbaai Toyota v 0KB Motors CC t/a Bultfontein Toyota (A43/2021) [2024] ZAFSHC 95 (7 March 2024)

"[15.3] During cross-examination, Mrs Steyn, conceded that in hindsight, she first should have contacted Mr Maritz telephonically to confirm the bank account details on the invoice received by her. In her own words she testified 'As ek terugdink dan sou ek hulle eers gebel het om te bevestig die bankbesonderhede.' However, at the time of the transaction, she did not do so as she did not have any reason to doubt the correctness of the bank account details on the invoice. She further testified that she could have verified the bank account details telephonically, which she did not, because it was not the procedure at the time, and therefore she accepted that it was a mistake on her side not to verify the bank account details telephonically.

[18.6] It was established that the invoice which was received by Mrs Steyn was changed and payment had been made into an incorrect account. Neither Mrs Steyn nor any employee of the respondent telephonically requested him to confirm the bank account details in the invoice which was received by the respondent on 7 February 2018. Had they telephonically requested him to verify the bank account details, he would have realised that the invoice received by Mrs Steyn contains the incorrect account number and that the

invoice has been changed. This would have prevented the respondent from making the payment into the incorrect bank account.

[22] However, in his heads of argument, Mr Pienaar, on behalf of the appellant, submitted that the appeal in essence turns on the following main issues (I am in agreement with this submission):

[22.1] ...

[22.2] Whether the respondent had to ensure that payment is made into the appellant's correct bank account and had to, before making payment to the appellant, confirm the correctness of the bank account details depicted on the invoice which the respondent received by electronic mail.

[28.1] It is common cause that the respondent did not take any steps to verify or confirm the bank account details as contained in the incorrect invoice before making payment to the appellant.

[39] The uncontested evidence on behalf of the respondent, namely that the respondent failed to verify the appellants bank account details before the payment was made, resulted in the incorrect payment being made. This finding is supported by the evidence of Mr Olivier, namely, that he was not only aware of the circular issued by Toyota South Africa referred to *supra*, he also acted with the necessary caution, and only approved the invoice for payment after he received confirmation from Mrs Steyn, that the appellant's bank account details were verified as correct.

[44] The court held in *Galactic Auto* that "if the defendant had only verified the banking details he would have prevented the loss. His failure to do so was at his own peril". The court found in favour of the plaintiff (the creditor) and relied on the principles summarised in *Mannesmann Demag (Pty) Ltd v Romatex* where payment has been intercepted and misappropriated by a thief, namely: ...

[46] In *Awarden v Edward Nathan Sonnenbergs ("Hawarden"?)* ...

[48] I agree with Mr Pienaar's submission that *Hawarden* is distinguishable

from the facts in in this matter....

[49] In *Andre Kock en Seun Vrystaat (Pty) Ltd v Snyman N.O. ("Andre Kock")* ...

[50] In conclusion, and in finding in favour of the applicant, the court held in *Andre Kock* that the respondent's liability to pay the applicant would have only been discharged by payment to the applicant; that where a payment is effected by way of an electronic funds transfer, the responsibility of verifying the creditor's banking details before making the payment lies squarely on the debtor; and that the respondent had merely assumed that the electronic mail received was from the applicant and then went on to make a payment into the banking account provided in the said electronic mail without having taken any steps to verify such information.

[57] I agree with Mr Pienaar's submission that the principles and findings referred to *supra* in *Galactic Auto, Fourie, Andre Kock, Gerber and Hartog* are correct and applicable to the facts in this matter....

Conclusion

[58] Central to the appellant's case is that a person who sends an electronic mail is generally unaware of any fraudulent access to his or her electronic mail account and is unaware that the electronic mail which is received by the recipient has been intercepted, hacked and changed. The golden threat in the judgments referred to *supra* places an obligation on the purchaser to ensure that the bank account details contained in the invoice is in fact correct/verified and that payment is made to the seller and not to an unknown third party. Failure to do so, and where payment is made into an incorrect bank account, such incorrect payment does not extinguish the purchaser's obligation and liability to pay the debt. (My emphasis)

[61] The evidence established clearly that the interception of the electronic mail at the appellant's electronic mail domain was not the proximate cause of the payment into the incorrect account. The proximate cause of the payment into the incorrect bank account was in fact the approval of the payment by Mr Olivier after having been satisfied that the bank account details have been verified. The bank account details were in fact never verified, and consequently the respondent acted

at its own peril when the payment was made into the incorrect bank account. (My emphasis)

[62] I am in agreement with the appellant's submissions that the court *a quo* erred in not dismissing the respondent's plea of estoppel and its conditional counter claim and not granting judgment in favour of the appellant."

[71] I respectfully agree with the aforesaid judgment of the full court.

[72] In the circumstances the appellant's alternative claim should have succeeded in the court *a quo*.

[73] The appeal against the order by the court *a quo* in respect of the alternative claim is consequently to be upheld.

Costs:

[74] In ordering that each party is to bear its own costs, the court *a quo* held as follows:

"Costs is in the discretion of the court and in this matter there was a distinct lack of communication between the parties which could have avoided the need for a lengthy litigation or at least the trial. Parties owe a duty of diligence to avoid unnecessary costs. I am therefore not inclined to grant either parties costs herein also bearing in mind the limited success of each party. My order is therefore that each party will bear their own costs."

[75] Considering the substantive success of the appellant as the plaintiff in the court *a quo* as a result of this appeal, I'm of the view that we can, and should, interfere with the order as to costs issued by the court *a quo*.

[75] In my view there is now no reason why costs should not follow the success of the appellant as the plaintiff in the court *a quo*.

[76] In view of the substantive success of the appellant in the appeal, there is no reason why the respondent should not be ordered to pay the costs of the appeal.

[77] The appeal against the order of costs is therefor to be upheld.

[78] In his heads of argument Mr Van Rensburg requested that the costs order should include *"elevated costs of counsel, to include day fees, preparation time by counsel, time spend [sic] drafting heads of argument - as provided for in Magistrate Court Rule 34(8) [sic]"*. I presume Mr Van Rensburg intended to refer to Rule 33(8), which reads as follows:

"33(8) The court may on request made at or immediately after the giving of judgment in any contested action or application in which -

- (a) is involved any difficult question of law or of fact; or
- (b) the plaintiff makes two or more claims which are not alternative claims; or
- (c) the claim or defence is frivolous or vexatious; or
- (d) costs have been reasonably incurred and in respect of which costs there is no specific provision in these rules,

award costs on any scale higher than that on which the costs of the action would otherwise be taxable: Provided that the court may give direction as to the manner of taxation of such costs as may be necessary.

[79] Such an order can be granted on appeal. See **Maggabi v Mafundityala and Another** 1979 (4) SA 106 (E)

[80] In **Jones and Buckle: Civil Practice of the Magistrates' Courts in South Africa**, D.E. van Loggerenberg, Jutastat, at RS 26, 2020 Rule-p33-10 the following principles are stated when considering an order in terms of Rule 33(8)(a):

"The question as to whether the point of law or fact is a difficult one is for the court to decide in its discretion, to be exercised judicially upon a consideration of the facts of each case, it being in essence a matter of fairness to both sides. On appeal the court will consider whether there were any special grounds arising out of the nature and importance of the case or the difficulty or urgency of the case; if these grounds are present, the court will not entertain an appeal as to the manner in which the court *a quo* exercised its discretion."

[81] In the present matter the case involved, in my view, a difficult question of law in respect of the alternative claim. This is also evident from the number of different conflicting decisions, which the Supreme Court also took into

consideration when it granted special leave to appeal in the **Mosselbaai Boeredienste-matter**.

[82] In addition the circumstances provided for in Rule 33(8)(b) and (d) are also present in this matter

[83] Consequently and in the exercise of my discretion I consider the elevated costs order as requested on behalf of the appellant, to be fair.

[84] This appeal initially served before us on 9 October 2023. On the said date the appeal record was incomplete in that Annexures "11", "12" and "13" did not form part of the record. The hearing of the appeal therefore had to be postponed and the wasted costs stood over for later adjudication.

[85] Although Mr van Rensburg conceded that the appellant is *dominus litis*, he submitted that the said documents are documents which the respondent relied on as part of its plea and therefore both parties had a duty to have seen to it that the said Annexures form part of the record. He consequently submitted that each party should pay its own costs in respect of the said wasted costs. Mr Roux submitted that the appellant should be held responsible for the wasted costs.

[86] I agree with the submission of Mr Roux. Since the appellant is *dominus litis*, the responsibility to have seen to it that a complete record serves before court, fell squarely within its obligations.

[87] The appellant is therefore to pay the wasted costs occasioned by the postponement of the appeal on 9 October 2023.

Order:

[88] The following order is consequently made:

1. The appeal against the dismissal of the first claim by the court a *quo*, is dismissed.
2. The appeal against the dismissal of the alternative claim by the court a *quo*, is upheld and substituted with the following order:

'The defendant is ordered to pay the amount of R58 250.00 to the plaintiff, together with interest a *tempore morae*'.

3. The appeal against the costs order made by the court a *quo* is upheld and substituted with the following:

"The defendant is ordered to pay the costs of the action, such costs to be elevated in terms of Magistrate's Court Rule 33(8) to include costs of counsel, including day fees, preparation time by counsel, time spent drafting heads of argument."

4. The respondent is ordered to pay the costs of the appeal.
5. The appellant is ordered to pay the wasted costs occasioned by the postponement of the appeal on 9 October 2023.

C.VAN ZYL, J

I concur:

N.M. MBEHELE, DJP

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