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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

CASE NO: 3159/2021

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: **YES/NO**

(2) OF INTEREST TO OTHER JUDGES: **YES/NO**

(3) REVISED: **YES/NO**

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DATE

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SIGNATURE

In the matter between:

ENKULISWENI PRE-SCHOOL

Plaintiff

and

NEDBANK LIMITED

Defendant

JUDGMENT

Introduction

[1] This matter, shorn of much distracting detail, turns on the simple question whether or not Mr Michael Kolonsi was authorised by the plaintiff to withdraw an amount of R486 000.00 from the plaintiff's transaction bank account held with the defendant at its Maponya Mall, Soweto branch. The plaintiff claims this amount from the defendant on the basis that it did not nominate Mr Kolonsi a signatory to the bank account and he was therefore not authorised to transact on the account and to withdrawal the money claimed by the plaintiff. The plaintiff pleads in the particulars of claim that Mr Kolonsi was fraudulently or negligently added as co-signatory to the account.

[2] It is common cause that the money was electronically withdrawn from the account by Mr Kolonsi, at the time the Chairperson of African Self Help Association ("ASHA") to which the plaintiff was affiliated, and that he acted alone in making the withdrawal. If I find that Mr Kolonsi was not authorised by the plaintiff to make the withdrawal from the bank account, the plaintiff must succeed in the claim and if he was, the plaintiff fails.

[3] The plaintiff is a pre-school in Klipspruit, Soweto. On 12 October 2017, it opened transaction bank account number 1[...] with the defendant's Maponya Mall, Soweto, branch. It is common cause that the account opening documents were signed at ASHA's Elizabeth Resource Centre, Klipspruit and not Maponya Mall as recorded in the documents. It is further common cause that Mr Kolonsi made the arrangements with the defendant's Mr Manny Mabapa to meet with the plaintiff's authorised signatories to sign the documents to open the bank account.

[4] The defendant's form with heading "Application for Transactional Bank Account", and other ancillary documents to open the bank account, bear the names and signatures of Ms Musa Edith Sikhosana, Mr Edward Mlangeni, Ms Smangele Marvellous Mosimane and Mr Kolonsi as the plaintiff's authorised representatives and signatories to open the bank account. Mr Manny Mabapa represented and signed the same documents on behalf of the defendant. There is a dispute between the parties whether or not Mr Kolonsi was an authorised signatory to the bank account and whether he was present and signed the documents on the same day, at the same time and place as the other signatories.

The evidence

[5] The plaintiff presented the evidence of Ms Sikhosana, Mr Mlangeni and Ms Mosimane and Messrs Mabapa and Kolonsi testified for the defendant. The parties each submitted bundles of documents to which they referred in evidence - the plaintiff bundle “F” and the defendant bundle “G”.

[6] The evidence of the plaintiff’s witnesses is overwhelmingly consistent and any variances are not material to the issues for decisions, as is the case with the evidence of Mr Mabapa and Mr Kolonsi. Importantly, the evidence of the witnesses is largely common cause save for the dispute about the authority of Mr Kolonsi and whether or not he was present with the other signatories when the application to open the bank account was completed.

[7] The following is a summary of the relevant evidence.

[8] The evidence of Ms Sikhosana may be summarised as follows. She is the plaintiff’s Centre Manager and held that position at the time of the decision to open the bank account and on 12 October 2017. The plaintiff was one of ASHA affiliated pre-schools until February 2018 when it disaffiliated from ASHA (the circumstances of the disaffiliation are irrelevant for present purposes and I do not discuss them). The plaintiff authorised her, Mr Mlangeni and Ms Mosimane, the Chairman and Treasurer of the plaintiff’s board respectively, to open the bank account. ASHA made the arrangements for them to meet with Mr Mabapa at the Elizabeth Resource Centre to open the bank account. Mr Kolonsi was not present when they met with Mr Mabapa and signed the account opening documents. ASHA provided the Constitution and other documents of the plaintiff to Mr Mabapa and she, Ms Mosimane and Mr Mlangeni each brought only their identity documents. Mr Mabapa completed the account opening forms in their presence and handed each completed page to them to sign and they each signed in the order they were seated in the room, her, Mr Mlangeni and Ms Mosimane in that order. Mr Mabapa also signed the documents. Mr Mabapa did not explain or read the documents to them and did not offer them the opportunity to read the documents before or after they signed. She,

Mr Mlangeni and Ms Mosimane signed the account opening documents in bundle F and the signatures of Mr Kolonsi were placed on the documents in their absence. She was referred to the form with heading '*Application for Transaction Current Account*' (bundle F) and testified that she does not know Mr Andrew Girdlestone whose name and mobile number appears on the form as the "contact person" for the account. (Mr Kolonsi would later testify that Andrew Girdlestone was ASHA's Chief Executive Officer at the time). Ms Sikhosana was referred to a form with heading 'Extract of Minutes – Clubs/Societies/Non-Profit Organisations' which reads, *inter alia*:

"We, the undersigned, duly authorised to act for and on behalf of the above club/society/non-profit organisation ... warrant that at a duly constituted meeting of the member/committee/directors held at Maponya on 12/10/2017 It was resolved that the organisation establish a banking relationship with Nedbank and ... to open and operate a, when required, various banking facilities, accounts or services, including Electronic banking services ...".

[9] Ms Sikhosana testified that there was no meeting of the plaintiff at Maponya Mall on 12 October 2017 but admitted her signature on the document. She was also referred to a further document with the heading '*RESOLUTION OF CLUBS/SOCIETIES/NON-PROFIT ORGANISATIONS TO ADD BUSINESS ACCOUNTS TO AND MAINTAIN ELECTRONIC PROFILE*' which records that she, Mosimane, Mlangeni and Kolonsi warrant that on 12 October 2017, a meeting of the plaintiff attended by all trustees of the plaintiff at Maponya resolved that the plaintiff is, *inter alia*, authorised to nominate beneficiary account payments and to require once-off payments and that Mr Kolonsi is authorised '*to sign all documents and to do all things necessary to give effect to the resolution*' and again denied that there was a meeting of trustees of the plaintiff on 12 October 2017 and testified that Mr Mabapa did not inform them of the electronic profile of the account and what that meant.

[10] Ms Sikhosana further testified that the plaintiff's Constitution prescribes that three people shall be signatories to the account and the plaintiff authorised her, Ms Mosimane and Mr Mlangeni to be signatories to the account and that they all sign

together on all transactions and referred to clause 9.2 which reads *“9.2 Signing: Cheques and other documents requiring signature on behalf of the preschool shall be signed by at least three persons authorised by the PSC. Whenever funds are taken out of the bank account, the chairperson and at least two other members of the preschool must sign the withdrawal or cheque.”*

[11] She first became aware on 19 January 2018 at a meeting of ASHA and its affiliates that the Gauteng Department of Social Development had deposited money into the bank account when ASHA asked that the money be transferred to its account. She reported this deposit to the plaintiff following which she, Mr Mlangeni and Ms Mosimane went to the defendant's Jabulani Mall, Soweto branch to enquire about the deposit. At Jabulani Mall, Sthembiso, an employee of the defendant, confirmed that there was money in the account but refused them a copy of a bank account statement in the absence of the fourth signatory present. This was the first time they learnt that there was a fourth signatory to the account. Sithembiso did not give them the name of the fourth signatory and said they should go to Maponya Mall branch to enquire. She, Ms Mosimane, Mr Mlangeni and the plaintiff's Deputy Secretary, Mr Victor Nsele, went to the Maponya Mall branch where they met with Mr Thabang Sithole from whom they learnt that Mr Kolonsi was the fourth signatory to the account. Mr Sithole also refused to give them a copy of the bank statement without Mr Kolonsi present. They told Mr Sithole that they did not know Mr Kolonsi because he was not with them when they opened the account. They sought legal advice following which they wrote to Mr Kolonsi to remove himself as a signatory to the account but he did not respond to their letter. The plaintiff resolved that Mr Kolonsi must be removed as a signatory to the account and they sent a letter to the defendant not to permit transactions on the account. A letter was also sent to Mr Mabapa but he did not respond either and to Glynnis van Wyk of the defendant's Fraud Department, and she too did not respond. Ms Sikhosana, Mr Nsele and Ms Mosimane later returned to Mr Sithole and informed him that they were unable to find Mr Kolonsi and Mr Sithole agreed to give them the bank account statement if Mr Nsele became chairperson of the plaintiff's board, Mr Mlangeni having vacated the position. Mr Nsele became Chairperson of the board after which Mr Sithole provided them with a bank statement. It is then that they found out from the bank statement that the money that was deposited by the Gauteng Department of Social

Development was withdrawn from the account. This is the money from which Mr Kolonsi made the withdrawals which are the subject of the claim.

[12] The cross-examination of Ms Sikhosana primarily sought to establish that Mr Kolonsi was present with the other signatories when they signed the account opening documents and that she knew who the fourth signatory was when she reported to meetings of the plaintiff and it was put to her that the allegation that Mr Kolonsi was fraudulently added to the account was a recent fabrication because, so it was put to her, in her reports after the visit to the defendant's Jabulani Mall branch, she did not state that the fourth signatory was fraudulently added to the account. She was referred to - minutes of the plaintiff's Parent Service Committee (referred to as PSC) dated 21 January 2018 (the minute and resolution of the meeting refer to a "ASHA Board member" who must be removed); (I do not consider that Ms Sikhosana's testimony in chief that they did not know who the fourth signatory was when they met on 21 January 2018 is material. – she fairly conceded that she may have made a mistake and I have no reason to find that she intended to mislead with this evidence); minutes of plaintiff's board of 4 February 2018; minutes of the PSC meeting of 6 March 2018 which reports that an ASHA Board member is signatory to the account; a letter dated 1 March 2018 from Mr Mlangeni to the defendant, and a minute of a meeting of the plaintiff on 22 April 2018, all of which do not state that the fourth signatory was fraudulently added to the account. Ms Sikhosana explained that at the time of the meetings and letter to the defendant, they did not know how My Kolonsi became a signatory to the account and so could not allege that he was fraudulently added to the account. It was further put to her and she accepted that paragraph 9.2 of the plaintiff's Constitution does not limit bank account signatories to 3 but rather that there must be at least 3 signatories. Ms Sikhosana was also referred to a resolution dated 9 September 2017 which lists her, Mr Mlangeni, Ms Mosimane and Mr Kolonsi as authorised signatories to open and operate the bank account – the resolution bears the signatures of Mr Mlangeni and Ms Mosimane but not Ms Sikhosana. She explained that as Centre Manager she attended all meetings of the plaintiff and did not know of a meeting of the plaintiff on 9 September 2017 and of the resolution. She has asked Mr Mlangeni and Ms Mosimane about the meeting and both say they have no recollection of signing the resolution and of the meeting. The resolution bears the signatures of Sizakele Ndlou indicated as "PSC

Sub Member”, Mr Mosimane, Mr Mlangeni, Nokuphila Nyoka indicated as “Deputy Secretary”, Nancy Mashao indicated as Deputy Chairperson, Victor Nsele as Secretary and Kgomotso Mogara as PSC Sub Member. The resolution bears the stamp of defendant, with Mr Mabapa’s name and date 12/10/2017 and accordingly suggesting that the resolution was part of the documents that Mr Mabapa had when the bank account was opened - there is no direct evidence of this or of who provided the document to Mr Mabapa.

[13] The re-examination of Ms Sikhosana sought primarily to reinforce her evidence in chief and nothing material turns on it.

[14] The next witness was Mr Mlangeni. He testified that he was the Chairman of the plaintiff’s board at the time of opening of the bank account. Mr Kolonsi arranged with defendant to open the bank account and for him (Mr Mlangeni), Ms Sikhosana and Ms Mosimane to meet with Mr Mabapa. They brought their identity documents and other documents of the plaintiff to the meeting with Mr Mabapa and Mr Mabapa already had other documents provided to him by ASHA. Mr Mlangeni’s evidence that Mr Kolonsi was not authorised by the plaintiff to be a signatory to the bank account and was not present when they signed the account opening documents, his evidence that Mr Mabapa did not explain the documents or give them the opportunity to read the documents and his evidence about the visits to the defendant’s Jabulani Mall and Maponya Mall branches is consistent with the evidence of Ms Sikhosana and does not bear repeating. He further testified that he has no recollection of a meeting of the plaintiff in which a resolution of 9 September 2017 which authorises him, Ms Sikhosana, Ms Mosimane and Mr Kolonsi to open a bank account was passed but admits that it is his signature that appears in the resolution. His explanation for his signature on the document is that “*many times I was required to sign*” documents (suffice to say that while this is not a satisfactory explanation, it is not material for the reasons that will become apparent in the judgment).

[15] Mr Mlangeni further testified that he does not know the implications of the defendant’s form with the heading ‘RESOLUTION OF CLUBS/SOCIETIES/NON-PROFIT ORGANISATIONS TO ADD BUSINESS ACCOUNTS TO AND MAINTAIN ELECTRONIC PROFILE’ which authorises the linking of the 10 digit electronic profile

number with the account and lists Mr Kolonsi as the ‘Person responsible for profile number and PIN’ and Mr Mabapa did not explain this to them whilst he admitted his signature on the document. After Ms Sikhosana reported to plaintiff’s PSC about her meeting with ASHA on 19 January 2018, the PSC meeting of 21 January 2018 declined ASHA’s request to transfer monies from its bank account to ASHA. At the time of this meeting, the plaintiff did not know that the person added as the fourth signatory to the account could transact alone on the account. On 13 March 2018 they sent a letter to the defendant’s Maponya Mall branch that they did not know how the fourth signatory was added to the account. He signed the letter dated 23 May 2018 to the defendant’s Glynnis van Wyk of the Fraud Division which lists the names of the signatories including Mr Kolonsi with a note next to Mr Kolonsi’s name that his “*appointment is currently contested*” and requests that the defendant “*halts all transactions in the account and investigate this matter*”. The defendant did not halt transactions on the account after he sent the letter. After they established that Mr Kolonsi was the fourth signatory to the account, the plaintiff took a decision that he should be removed and they wrote a letter to him to withdraw as signatory to the account and he did not respond. ASHA also refused to attend a meeting with the plaintiff and the defendant to address the matter. The plaintiff also obtained *pro bono* legal advice and advice from the Department of Social Development how to deal with the matter and they advised that Mr Kolonsi must remove his name from the account. The defendant did not heed their complaint that Mr Kolonsi is not supposed to be a signatory to the account.

[16] As with Ms Sikhosana, the cross-examination of Mr Mlangeni focused on establishing whether or not Mr Kolonsi was present when the account opening forms were signed by the other signatories, that the resolution of 9 September 2017 which includes his name as an authorised signatory was passed by the plaintiff in his presence and that the plaintiff knew that he was a signatory to the account and its claim that he is not is a recent fabrication. Suffice to say that the cross-examination did not elicit any concessions helpful to the determination of the question whether Mr Kolonsi was authorised to conduct the disputed transactions which are the basis of the claim.

[17] The third and last witness of the plaintiff is Ms Mosimane. She is the Treasurer and board member of the plaintiff. She testified that she does not know and has never met Mr Kolonsi and does not know when he signed the account opening documents but he was not present when they met with Mr Mabapa to open the account. She, Mr Mlangeni and Ms Sikhosana went to the defendant's Jabulani Mall branch on 20 January 2018 after Ms Sikhosana reported on her meeting with ASHA on 19 January 2019 after which they convened and reported to a meeting of the plaintiff's PSC on 21 January. She has no recollection of a PSC meeting of 9 September 2017 and of the resolution authorising Mr Kolonsi a fourth signatory to the bank account but admits that a signature appearing on the resolution next to her name is hers. She saw the document for the first time in Court. The rest of Ms Mosimane's relevant testimony accords with that of Ms Sikhosana and Mr Mlangeni in all material respects and for that reason I do not repeat it.

[18] Mr Mabapa testified that he is employed by the defendant as acquisition manager to acquire new clients, "*write them up*" and link them to dedicated bankers. He completed the forms to open the bank account and gave to each signatory to sign. Mr Kolonsi was present and signed the bank account opening documents on the same day, place and time as all the other signatories. He explained the contents of the documents to all four signatories because they had to know which account they are opening and the charges and explained what they were signing. He explained that all four would have to be present if they needed anything to do with the account and they then chose online banking. They chose to transact daily, to receive and make electronic transactions and were interested in online banking. He explained the Resolution for opening online banking to create a profile and to activate it and that a one-time password (commonly referred to as OTP) would be sent to a particular person to access the account. The signatories gave Mr Kolonsi authorisation to transact electronically on the account.

[19] Mr Mabapa further testified that the defendant required a registration certificate or Constitution of the plaintiff before opening a bank account and he was provided with the Constitution. He also had resolutions of the plaintiff which authorised the opening of the account and the signatories to the account. This included a resolution of 9 September 2017 which lists Ms Sikhosana, Ms Mosimane, Mr Mlangeni and Mr

Kolonsi as authorised signatories to the account. In cross-examination, it was pointed to Mr Mabapa that clause 9.2 of the plaintiff's Constitution states the persons authorised to make withdrawals from the bank account and that must act together and they do not include the Chairperson of ASHA. He responded that he considered the resolution of 9 September 2017 which authorises Mr Kolonsi as co-signatory to the account to supersede the provisions of clause 9.2 of the Constitution. It was pointed out to Mr Mabapa that the signatures on the resolution are dated 23 September 2017 and another two are dated 23 September 2019, two years after the date of the resolution and the dates of the other signatories, that the resolution is not accompanied by minutes of the meeting at which the resolution was taken and the list of persons who attended and unlike the other resolutions of the plaintiff presented in evidence, it is on the letterhead of ASHA (Mr Mlangeni had testified that none of the plaintiff's minutes and resolutions were recorded on ASHA's letterhead – this is indeed the case with all the minutes of the plaintiff presented in evidence). In response, Mr Mabapa said that the dates of 2019 must be a mistake.

[20] The second witness for the defendant was Mr Kolonsi. He testified that he was the chairperson of the board of ASHA, the umbrella body under which the plaintiff and other pre-schools belonged at the time of opening the bank account in issue. He testified that “earlier in 2017”, ASHA and all creches affiliated to it resolved that bank accounts to be open by creches in response to the requirement of the Department of Social Development would have the chairperson of ASHA, Mr Kolonsi, as signatory to the bank accounts of the affiliate creches but does not have a copy of the resolution. He was guided by this resolution when he took control to operate the plaintiff's bank account. ASHA's constitution superseded the plaintiff's resolutions. He arranged for all the affiliate pre-schools to meet with the defendant on 12 October 2017 to open bank accounts. Because they were many, some pre-schools were assisted at the defendant's Maponya Mall branch and others, including the plaintiff, at Elizabeth Resource Centre and he, Mr Mabapa and Mr Sithole moved between Maponya Mall and the Elizabeth Resource Centre assisting the different centres with the bank account opening processes. He provided some of the plaintiff's documents to Mr Mabapa. He was authorised by the plaintiff to be signatory to the opening and operating of the account and the resolutions which include his name as authorised to open the account were taken at meetings of the plaintiff. He was present when the

account opening forms were signed by all the other signatories and were explained by Mr Mabapa.

[21] The cross-examination of Mr Kolonsi sought to show that he was not present when the other signatories when they signed the documents to open the bank account and that the resolutions and Constitution of the plaintiff did not authorise him to be a signatory to the bank account and to withdraw moneys from the account. Suffice to say that this did not extract any helpful concessions.

Discussion

[22] The plaintiff's claim is founded on fraudulent alternatively negligent inclusion of Mr Kolonsi as a signatory to the account as a result of which he withdrew the disputed moneys from the plaintiff's bank account. It accordingly bears the onus to prove the alleged fraud, alternatively negligence.

[23] The defendant counsel has formulated the question for decision as follows "*To determine whether the defendant breached the terms of the agreement or any duty of care owed to Asha- Enkulisweni Pre-School*", with certain ancillary questions. As I see it, the question for determination is no more complicated than, on the evidence before me, did the plaintiff authorise Mr Kolonsi to be a signatory to the account and to make the disputed electronic transactions, and if it did not, was this a result of fraud on the plaintiff or the result of negligence of the defendant.

[24] An affirmative answer to the questions - (i) whether Mr Kolonsi was authorised by the plaintiff to be a co-signatory to the account, (ii) whether he was present and signed with the other signatories when they opened the account, and (iii) whether Mr Mabapa read or explained the documents and their contents to the signatories when they signed, is not, in my view, dispositive of whether the plaintiff authorised Mr Kolonsi to conduct the disputed electronic withdrawals and whether fraud or negligence of the defendant enabled him to make the withdrawals. Simply put, the correct question in my view is, did the plaintiff and the defendant contract or agree that Mr Kolonsi had authority to transact alone on the account and to make the disputed electronic withdrawals?

[25] The evidence of the witnesses whether Mr Kolonsi was present when the other signatories signed the documents and did so with them stands at polar opposites and is irreconcilable. The documents are signed by all four and the order in which the signatures appear is not any more enlightening than the testimony of the witnesses.

[26] *Stellenbosch Farmer's Winery Group Limited & another v Martell et cie & others* 2003 (1) SA 11 (SCA) provides helpful guidance for the evaluation of evidence to resolve mutually destructive versions, as follows,

“[5] To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra curial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.”

[27] Needless to say, the witnesses were each biased in favour of their account, all have a direct interest in the outcome – the plaintiff’s witnesses to recover the claimed amount, Mr Mabapa to avoid liability arising from his conduct when the account was opened and Mr Kolonsi, to avoid liability for the amount claimed.

[28] I make no credibility findings on any of the witnesses as I do not consider it necessary to decide the controversy about Mr Kolonsi’s presence when the other signatories signed the documents to open the bank account because this is not determinative of the question whether he was authorised by the plaintiff to make the disputed transactions which are the subject of the claim and whether the defendant was negligent or acted fraudulently when it gave him the ability to make the transactions. Whilst much time was spent in evidence-in-chief and cross-examination of witnesses of both parties, to either to show or disprove that Mr Kolonsi was present and signed the bank account opening forms in the presence of the other signatories and whether he was authorised by the plaintiff to conduct electronic transactions on the account, it is, in my view, the latter question which is determinative of the question and accordingly I do not dwell on the dispute whether or not Mr Kolonsi was present when the bank account opening forms were signed by all the other signatories. I assume, without deciding the question, that as the person who admittedly made arrangements with Mr Mabapa to meet and complete the documents on 12 October 2017, he was likely present when the other signatories attended at Elizabeth Resource Centre in the day.

[29] The defendant relies on the resolution of 9 September 2017 as authorising Mr Kolonsi to be a co-signatory to the account with the other three signatories and on the “resolution” of trustees/directors/members purportedly taken on 12 October 2017 to authorise Mr Kolonsi to make electronic transactions on the account. For his part, Mr Kolonsi refers to a resolution of “earlier in 2017” which authorised him and which he said he did not have in his possession. The defendant faces the following difficulty in respect of its reliance on either of these resolutions,

29.1 There is no explanation from Mr Mabapa who provided him with the resolution of 9 September 2017, important information in the face of the plaintiff’s witnesses disavowing knowledge of the resolution. The evidence of

Mr Mlangeni that the plaintiff did not use ASHA's letterhead and of Ms Sikhosana that she attended all meetings of the PSC and did not know of a meeting of 9 September 2017 that passed the resolution was not challenged in any way by the defendant.

29.2 For his part, Mr Kolonsi did not place reliance on the resolution of 9 September 2017 as authority for him to be a signatory to the account and to make the disputed electronic withdrawals from the account. He did not say that he was at the meeting or who else was present and did not offer any explanation why the resolution has a different date from the dates of the signatories to the resolution. I put no stock on Mr Mabapa's attempt to explain the dates of 23 September 2019 as a mistake for the simple that he did not testify that he was at the meeting or present when the 2019 signatures were appended and in any event, he did not testify that this is the explanation he was given by whoever provided him with the resolution. Mr Kolonsi did not provide any explanation for these discrepancies either. All these unanswered issues assume particular significance in the light of the denial of the plaintiff's witnesses of knowledge of the meeting and resolution of 9 September 2017, and firm denial that the plaintiff authorised that Mr Kolonsi would be a co-signatory to the bank account. And yet, the defendant had the opportunity to enquire about all these issues, (including the signature dates which are all different from the date of the resolution 9 September 2017), when, according to Mr Mabapa, it vetted the application after it was submitted and before the account became active on 21 October 2017. At best for the defendant, it was negligent to place any reliance on this resolution as authority to include Mr Kolonsi as signatory to the account – it was after all the very important document on which the defendant, according to Mr Mabapa, relied as authority to include Mr Kolonsi as signatory to the account and ultimately the person authorised to make withdrawals on the account contrary to clause 9.2 of the Constitution. For all these reasons, I am unable to place any reliance on this resolution as authority for Mr Kolonsi to be a co-signatory to the account and to transact on the account as he did.

29.3 The resolution of 9 September 2017, even if I were to accept it as not seriously put in dispute by the plaintiff's witnesses, does not authorise Mr Kolonsi to transact alone on the account and to do so electronically. This is

apart from the fact that clause 9.2 of the plaintiff's Constitution plainly states who is authorised to transact on the account and this does not include the Chairperson of ASHA and in particular, Mr Kolonsi. Mr Mabapa's opinion that the resolution, such as it is, supersedes clause 9.2 of the Constitution is irrelevant and is in any event obviously wrong, especially when there is no evidence that this was the intention of the plaintiff. Mr Mabapa did not claim this to be the case.

29.4 Different from Mr Mabapa, Mr Kolonsi relied on a resolution of the plaintiff of "earlier in 2017" as appointing him co-signatory to the bank accounts of all the affiliates, including the plaintiff. Mr Kolonsi said he does not have the resolution and accordingly, the resolution is not evidence before me. No explanation was offered why the resolution could not be presented in evidence and importantly, it was not suggested by Mr Mabapa that he had a copy of this resolution when the account was open. This is especially significant in the face of a denial by the plaintiff's witnesses that Mr Kolonsi was authorised by the plaintiff as signatory to the account. In any event, the defendant did not rely on any such resolution to include Mr Kolonsi as co-signatory and for authority to transact electronically alone on the bank account.

29.5 The defendant's pro forma resolution of 12 October 2017 which purports to authorise Mr Kolonsi to transact electronically on the account is obviously not a resolution of the plaintiff. Mr Mabapa could not have been in any doubt about this fact. Ms Sikhosana, Ms Mosimane and Mr Mlangeni deny that they authorised Mr Kolonsi to transact electronically on the account. It is especially telling, and perhaps destructive of the defendant's reliance on this resolution as a resolution of the plaintiff authorising the disputed electronic transactions by Mr Kolonsi, that in his evidence, Mr Kolonsi did not invoke this resolution as authority from the plaintiff to make the electronic withdrawals as he did.

29.6 The resolutions of the plaintiff presented to Mr Mabapa, including the controversial resolution of 9 September 2017, do not authorise any one person to transact alone on the account. In the absence of any such authority, and in the face of clause 9.2 of the Constitution which Mr Mabapa was provided with, there can be no reasonable explanation why Mr Mabapa

gave Mr Kolonsi the authority to transact electronically and alone on the account. A diligent banker would have realised there is no authority from the plaintiff for this and would have declined to grant Mr Kolonsi electronic access to the account. At best for the defendant, Mr Mabapa in particular, he was negligent to do so, if not worse.

[30] It is common cause, or at least evident from the evidence, that the resolution authorising Mr Kolonsi to operate the account electronically and alone was not taken by a meeting of the plaintiff on 12 October 2017. At best, it was taken by a meeting of the persons only authorised by the plaintiff to open the account and importantly, to always conduct transactions on the account together. The defendant has not suggested they were authorised or that it relied on their representation that they were authorised by the plaintiff to give authority to Mr Kolonsi to transact alone and electronically. Even if they had purported to do so, it would be negligent of the defendant to accept that they were so authorised when it was in possession of the plaintiff's Constitution and well aware that they are neither of the persons contemplated in clause 9.2 and that no meeting of the plaintiff on 12 October 2017 convened and passed the resolution. Absent authority from the plaintiff, it follows that the defendant was not authorised or did not agree with the plaintiff that Mr Kolonsi would have the authority to transact electronically and alone on the bank account.

[31] Thus, whether or not Mr Kolonsi was included by the plaintiff in the authority to open the bank account and transact on the account, and whether or not he was present when the bank account documents were completed and signed, the resolution(s) of the plaintiff authorising the opening of the account and paragraph 9.2 of its Constitution stipulated the persons authorised to transact and make withdrawals from the account. None of them, including Mr Kolonsi whose authority is disputed, had the authority to act alone. Mr Mabapa was aware of the resolutions of the plaintiff and of the Constitution that the signatories were mandated to act jointly. He was aware that there was no meeting of the plaintiff on 12 October 2017 at Maponya authorising Mr Kolonsi to make electronic transactions on the account and do so alone and would have known that the representation in the form 'Application for Transaction Account' of a purported resolution of a meeting of the plaintiff held on that day authorising Mr Kolonsi to transact electronically on the account is plainly

false. By including Mr Kolonsi as a signatory to the account with authority to transact alone, Mr Mabapa failed to give effect to the instruction of the plaintiff as recorded in the resolutions and in Constitution provided to him. At best for the defendant, Mr Mabapa was negligent in accepting or treating the "resolution" as that of the plaintiff when he knew otherwise. To borrow from counsel for the defendant, the defendant had and breached a duty of care owed to the plaintiff.

[32] The defendant has not disavowed the authority of Mr Mabapa. Its defence is that Mr Kolonsi was authorised to make the disputed withdrawals is predicated on the document '*RESOLUTION OF CLUBS/SOCIETIES/NON-PROFIT ORGANISATIONS TO ADD BUSINESS ACCOUNTS TO AND MAINTAIN ELECTRONIC PROFILE*' and being a resolution of the plaintiff. This is in fact not so and any reliance on that resolution is misplaced.

[33] This in my view is the end of the question. Absent a resolution of the plaintiff authorising Mr Kolonsi to transact alone and electronically on the bank account, it follows that defendant failed to give effect to the agreement between the parties that withdrawals from the account would be made by at least three people, one of whom would be the chairperson and the other, members of the PSC. It follows that the withdrawals from the bank account were not authorised by the plaintiff.

[34] The plaintiff having established that that it did not authorise Mr Kolonsi to electronically withdraw the claimed amount from its account, it must succeed in the claim and must be reimbursed the amount of R486 000.00 withdrawn from its bank account number 1[...] without its authorisation.

Conclusion

[35] I find that the plaintiff has proven that it did not authorise Mr Kolonsi to operate the account and to make the disputed withdrawals from the account.

[36] Having succeeded in the claim, there is no reason that the plaintiff should not be awarded costs. The defendant did not argue otherwise.

[37] Lastly, I must offer my sincere apology to the parties for the delay in delivering this judgment, the delay resulting mainly from unexpected personal family circumstances immediately after I reserved judgment. I do not mean to make an excuse for the delay, well appreciating that justice delayed is justice denied and the inconvenience to the parties caused by the delay.

[38] I accordingly make the following order.

ORDER

[39] It is ordered that the defendant pay to the plaintiff:

39.1 The sum of R486 000.00.

39.2 Interest on the amount of R486 000.00 to be calculated at the prevailing rate of interest from date of this order until date of payment.

39.3 Costs on the party and party scale.

MS BALOYI AJ

Acting Judge of the High Court
Gauteng Division, Johannesburg

APPEARANCES:

For the Plaintiffs:	Adv. K Kabinde
Instructed by:	Letlhage Attorneys

For the Defendant:	Adv M Matsiela
Instructed by:	CDH Attorneys Incorporated

Judgment heard:	07 February 2024
Judgment delivered:	18 November 2024