

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 42547/2015

DATE: 2017-11-09

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

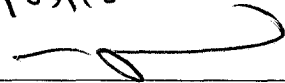
(2) OF INTEREST TO OTHER JUDGES: NO.

(3) REVISED.

DATE

SIGNATURE

26/03/18



10 In the matter between

NOMALIZO BERYL LANGA-ROYDS

Plaintiff

and

NEDBANK LTD

Respondent

Date of hearing: 06-07 September 2017

Date of Judgment: 09 September 2017

20

---

**JUDGMENT**

---

**WEPENER (J):** The plaintiff seeks payment from the defendant bank of an amount, which is the difference between a loss sustained and the amount recovered by the bank.

The plaintiff intended purchasing a property and utilised the services of a conveyancing attorney (Ramdas) to assist with the

transfer. Ramdas furnished the plaintiff with an invoice for transfer costs and fees, in the amount of R180 000. The cash purchase price for the property was R2.8 million.

After Ramdas sent the invoice for R180 000 to the plaintiff, which invoice contained the correct banking particulars of Ramdas, the plaintiff received a message, purportedly from Ramdas, in which new banking particulars were set out and the plaintiff was requested to rather pay the amount in to the new account as it would yield a higher interest rate.

10           It is common cause that this email was not sent by Ramdas and that it was fraudulent. The change in banking particulars was accepted by the plaintiff, who then instructed the defendant to make payment into the fraudulent account.

The plaintiff, when receiving the fraudulent information, said that she was surprised. She also received it after normal working hours. She saw that it came from a Yahoo email address, which would not normally be an attorney's official email address.

20           She noticed that the font of the email was much larger than the document received from Ramdas previously and that the wording was awkward. She said that the language was not "too legal".

Despite this unease, the plaintiff copied the fraudulent particulars from the email which she received and forwarded an instruction to the defendant to pay the R180 000 to the fraudulent account. She asked that the payment be made that very day.

It is noteworthy that the instruction was given shortly before

14:00, being the cut off time for payments to be effected by the defendant on any particular day. The defendant duly performed its security check and found the instruction to properly emanate from the plaintiff and transferred the R180 000 to the account specified by the plaintiff.

Shortly thereafter, the plaintiff forwarded a message to the defendant and attached an invoice for R180 000. This invoice, she received from Ramdas and it contained the correct Ramdas banking particulars but the horse had bolted and counsel for the plaintiff was  
10 constrained to concede that the bank officials acted properly and that no fault could be attributed to them for having executed the instruction given by the plaintiff.

The only issue then is whether the defendant should be held liable to the plaintiff due to its following her instructions to pay over the R2.8 million. The plaintiff's instructions, in short, while given later on the same day, was to pay the R2.8 million to the same fraudulent account. This time, the instruction was not followed by an invoice.

Again, the bank followed their security procedures, which included contacting the plaintiff to confirm the instruction and the bank  
20 paid over the amount, albeit sometime later, to the fraudulent account.

At a first blush, the defendant's actions are blameless, as they were when it paid over the R180 000. However, counsel for the plaintiff submitted that the invoice which followed the first instruction should have alerted the defendant that there were different banking particulars contained in the instruction to pay the R2.8 million and the

invoice for the R180 000. I do not agree.

There was no evidence that the attorney's fees and costs on the one side, and the purchase price on the other side, were necessarily to be paid into the same account held at Ramdas. In addition, the invoice related to the R180 000 and not to the R2.8 million, which amount had no invoice at all.

The case of *Columbus Joint Venture v Absa Bank Limited* 2002 (1) SA 9 (SCA) is distinguishable from this matter. There, the fraud was perpetrated by the customer of the bank when he opened the  
10 account with the bank. The bank's duty of care in such circumstances was discussed but cannot find application in this matter.

In *Absa Bank v Hanley* 2014 (2) SA 448 (SCA), the fraud was perpetrated on both the bank and the customer and that matter is consequently different to the matter before me where the fraud was perpetrated on the customer or client only.

It was the plaintiff / client who relied on the incorrect and fraudulent communication and instructed the bank to pay. The defendant, before effecting payment, executed the usual security checks and paid according to the plaintiff's instruction. It is difficult to  
20 conceive a basis for concluding that the bank failed in its duty that it owed to the plaintiff.

Finally, counsel for the plaintiff narrowed the case by relying solely on paragraph 11.7 of the particulars of claim, which reads:

"In the premises, the defendant was grossly negligent, alternatively negligent, in that it ought

not to have transferred the amount into the second account without first obtaining a further instruction from the plaintiff concerning which of the two respective accounts now required to be credited with the amounts".

This allegation is as a result of the fact that the defendant, after discovering the fraud and securing the fraudulent account, paid over R180 000 and R2.8 million to the correct Ramdas account. This came about when the plaintiff's personal banker saw that there was indeed  
10 R2.9 million in the account which was used to perpetrate the fraud but the personal banker was unaware that there were some preauthorised amounts, which had to be met from the R2.9 million and which would cause the R2.9 million to reduce substantially.

The defendant consequently re-transferred the R180 000 and the R2.8 million from the Ramdas account and waited until such time when all the pre-authorisations on the fraudulent account were met. The defendant took further positive successful steps to recover more of the funds, which were transferred to the fraudulent account and compensated the plaintiff with a total of the recovery of approximately  
20 R2.2 million.

It is the difference between this amount and the R2.8 plus R180 000, which the plaintiff is seeking from the defendant. In my view, however, the actions of the bank officials by later incorrectly paying the sums to Ramdas and reversing it cannot form a ground of negligence vis-à-vis the plaintiff. That conduct needed no instruction

from the plaintiff and indeed had little to do with the plaintiff at all. It does not constitute a ground for a conclusion that the defendant failed to exercise reasonable care vis-à-vis the plaintiff. It is wholly irrelevant conduct on behalf of the bank as far as the loss suffered by the plaintiff is concerned.

In addition, the plaintiff and the defendant entered into a written agreement prior to the transfer of funds. In terms thereof, the parties agreed:

10                    "I/we agree and confirm that the bank, its  
affiliates and/or employees are not liable for any  
loss or damage caused as a direct or indirect  
result of instructions given via telephone, MMS,  
SMS, fax and/or email including but not limited to  
loss or damage (of whatever nature) brought  
about by or in relation to:

(1) ...

(2) ...

(3) ...

(4) Reliance placed on incorrect, illegible,  
20                    inaudible, incomplete or inaccurate  
information or dates contained in any  
instruction received from the bank via  
telephone, MMS, SMS, fax and/or email..."

The plaintiff consequently indemnified the defendant against claims of this nature where the plaintiff was indeed the source of the incorrect

information.

It was not argued, nor indeed was it pleaded, nor can I find that the conduct of the bank was so grossly negligent that the indemnity clause does not cover it.

I am of the view that the plaintiff failed to establish any fault, grossly or otherwise, on the part of the defendant and the plaintiff's claim is consequently dismissed with costs.

-----