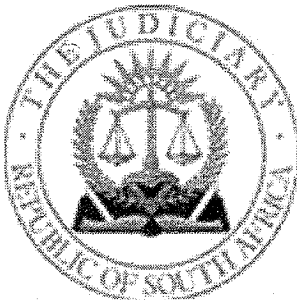


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 22594/2018

(1)	REPORTABLE: <u>YES</u> / NO
(2)	OF INTEREST TO OTHER JUDGES: <u>YES</u> / NO
(3)	REVISED. <u>✓</u>
<u>1.8.2019</u> DATE	
<u>[Signature]</u> SIGNATURE	

In the matter between:

NSOVO HOLDINGS (PTY) LTD

Applicant

and

STANDARD BANK OF SOUTH AFRICA

Respondent

J U D G M E N T

LAMONT, J:

[1] The applicant and respondent concluded a suite of contracts pursuant to which the applicant conducted a banking account with the respondent and made use of a credit card. As part of the contract relating to the credit card the applicant received from the respondent both the credit card and a Personal

Identification Number (PIN). It was a term of the contract that the card and PIN be kept separate and that the PIN not be disclosed to anyone.

[2] The terms of the contracts provided that only the authorized cardholder was entitled to use the card, that when the card was used the cardholder would be required to enter the PIN, that the applicant was responsible for the safekeeping and proper use of the card, that the applicant was obliged to notify the respondent immediately it realized the card had been lost or stolen or if any other person was aware of the PIN, that the applicant would be responsible for all card transactions until it notified the respondent that the card had been lost or stolen.

[3] The authorized cardholder to whom the applicant specified the PIN number should be disclosed to, was Mrs. Mabunda. The only authorized signatory for the card was Mrs. Mabunda.

[4] The manner in which transactions would take place was that the cardholder would present the card to pay for the transaction in question. If the card was acceptable to the merchant the merchant would require the cardholder to enter the PIN number, the respondent would authorize the transaction if the PIN number was correct, the merchant might or might not require the cardholder to sign the documentation and would deliver the merchandise to the cardholder, the payment which was at that time already due and payable to the merchant would in due course be debited to the

applicant's bank account by the respondent and paid by the respondent to the merchant on the applicant's behalf.

[5] The terms of the contract provide that the applicant is responsible for the safekeeping and proper use of its card (clause 6.5), the applicant was to memorize the PIN number or keep it in a safe place separate from the card (clause 6.5), the applicant was to notify the respondent immediately it realized the card had been lost or stolen or if any other person was aware of the PIN number (clause 6.5), the applicant was liable for all card transactions (business check card terms clause 4.3) only the applicant could use the card and the applicant and cardholder were to take all reasonable steps to prevent unauthorized use of the card, card number and PIN number (business check card terms clause 5.1 and 5.2).

[6] The Code of Banking Practice in South Africa provides in paragraph 20.15 as follows:-

"20.15 The risk of loss: The relevant provisions of the Code of Banking Practice In terms of the Code of Banking Practice the bank accepts the risk of loss in the following circumstances only:

- (a) when a card is used by someone else before the client receives it;*
- (b) when transactions not authorized by the client have been entered into after the bank has been informed of the loss of a card or checkbook, or that a PIN has been compromised;*
- (c) when money is transferred from the client's account to his "electronic purse" after the bank has been informed of the loss or theft, or that a*

PIN, password or unique means of identification have been compromised; or

- (d) when system malfunctions occur at ATM's or associate systems, provided these are not obvious and are not subject to a warning notice at the time.*

The bank declines liability however, when the client acts fraudulently, and may do so when the client acts without reasonable care – that is, negligently.

The failure to inform the bank of the loss of a card or the disclosure of a PIN may be indicative of negligence.

When a credit card transaction is disputed the onus of proving fraud or negligence or that a client has received the card lies with the bank.

The code reflects a number of common sense provisions which could relate to whether a client acted negligently. Clients are advised:

- (a) not to keep the card together with a PIN, or with a checkbook;*
- (b) not to disclose a PIN, password or other unique means of identification;*
- (c) to keep this information safe always;*
- (d) not to record this information in writing unless it is adequately disguised;..."*

[7] Mrs. Mabunda, the applicant received the card on 8 July 2014. The applicant kept the card in a storage safe at a guesthouse owned and operated by the applicant Mrs. Mabunda. She stated on oath that the only person authorized and having access to the card was herself and an employee of the applicant and further that the employee and she used the card to purchase utilities for the guesthouse. Neither she nor the employee had used the card on 11 August 2017. Mrs. Mabunda did not say so in the affidavits but she did

say to the respondent that the employee had free use of the card and PIN and that the PIN was kept in an old notebook in the safe together with the card. She was unable to say how or when the card and PIN had been removed. The applicant's employee when asked denied that she had done anything in relation to the card or PIN.

[8] The applicant has failed to give any explanation of how the thief gained access to both the card and the PIN within the safe. There is no evidence of any damage to the guesthouse where the safe is contained or the safe itself. Mrs. Mabunda's attention was not drawn to anything untoward in the environment where the card was kept and did not know the card and PIN had been stolen until well after 11 August 2017. There is no evidence of any continued use of the card after 11 August 2017. If the card was in the possession of a thief it is probable the thief would have continued to use it. The whole explanation of the applicant as to the loss of the card is improbable and factually unfounded.

[9] On 11 August 2017 the card and the PIN were used to complete a number of transactions. The evidence of the applicant was that the applicant had not performed the transactions which accordingly must have been performed by the thief. The respondent has a computer program which is able to detect transactions which might not have been authorized by the card user. That program during the course of the 11 August 2017 drew the attention of the respondent to the fact that the transactions on the applicant's account constituted an unusual activity.

[10] On 11 August 2017 the respondent telephoned Mrs. Mabunda on the phone number given for her. The respondent was unable to contact her as the call was unanswered. On the same day at 12h26 the respondent sent an email requesting its employee to take further steps in the matter. At 13h00 on the same day the respondent phoned Mrs. Mabunda on her cell phone. The call was not answered. At 13h26 on Friday, 11 August 2017 the respondent sent an email to Mrs. Mabunda asking her to confirm whether the transactions processed on the business card were valid. From the respondent's perspective as such transaction involved the use of the card and the PIN each transaction on the face of it appeared authorized.

[11] The respondent's attempts to contact the applicant were unsuccessful as there was no response from the applicant. On 15 August 2017 the respondent's fraud investigator commenced inspecting a transaction concluded at POC Majestic Autos. On 18 August 2017 the respondent again contacted Mrs. Mabunda on her cell phone and managed to speak to her. She said that she had no knowledge of the transaction concerned. She sent a sms to cancelled the transactions conducted on the account on 11 August 2017 and stated that she did not think she had ever received the card in question. The card was cancelled on 18 August 2017.

[12] All the transactions were conducted on 11 August 2017 and all the amounts due to the merchants were due on that date. The card was only cancelled after that date (18 August 2017) pursuant to the applicant's notice

concerning the transactions and receipt of the card. The applicant's bank account with the respondent was debited with the value of the transactions over the period 11 August 2017 to 22 August 2017.

[13] The applicant launched an application against the respondent claiming an order directing the respondent to reverse certain "fraudulent transactions" as well as an order requiring the respondent to reimburse the applicant the amount of R612 815.84 (the total value of the transactions) and costs. I inquired of the applicant whether the claim was brought in contract or delict. The applicant stated that the claim being made was a delictual claim. The applicant abandoned the claim it had made for reversal of the transactions between itself and the merchants. The transactions which were concluded using the card and PIN number of the applicant remain in force. The obligations of the parties pursuant to those transactions remain in force. That being so the applicant remains obliged to pay the merchants the monies due to them (the total amount of the applicant's claim). The mechanism by which payment was to be made was for the respondent to make payment of the applicant's debt in accordance with the contract made between them. If the applicant is obliged to pay the merchant by reason of the existence of the contracts then and the respondent has paid the merchant as it was contractually obliged to do, that seems to me to be the end of the matter. There is no patrimonial loss suffered by the applicant.

[14] The applicant in the affidavits does not directly allege negligence on the part of the respondent it was however argued that the respondent was

negligent. The respondent was contractually obliged to perform the acts which it did by way of seeking to contact the cardholder on the dates and at the times that the respondent did, which are set out above. So far from there being any negligence it appears to me that the respondent had the rights of the applicant in full view when it took steps to diminish any possible loss to the applicant by way of making contact with the applicant. The fact that it failed to reach the applicant until later is not due to negligent conduct by the respondent.

[15] The cause of the loss is not the result of conduct on the part of the respondent but conduct on the part of the applicant who in some unexplained way lost control of the card and PIN number to a person who concluded a number of transactions for which the applicant is liable. The applicant breached the obligations of the contract to keep the card under its control and to keep the PIN number secret and separate from the card. It was those breaches which enabled the conduct which resulted in the loss to occur.

[16] The applicant submitted that there was a duty on the respondent to make greater effort to protect the applicant. There is no indication of what greater steps should have been taken other than to attempt to contact the cardholder which the respondent did. The respondent was entitled to assume that an authorized cardholder had used the card and the PIN number lawfully and in accordance with the contract. There was no indication from the respondent that there was any difficulty with the transactions.

[17] The question arises whether assuming there was an obligation which the respondent breached by failing to contact the applicant that there would have been any effect in the loss which had been incurred. The loss was incurred on 11 August 2017 when the card was used - steps were taken and could only be taken by the respondent after the loss had been incurred and its computer program drew the fact of the existence of the transactions to its notice. By that time, as the loss had been incurred any steps to prevent loss could only be in respect of future loss and there were no future losses. As to the debt due to the merchants there was no loss suffered by the applicant as on any basis the applicant owed the merchants the sum it seeks to recover from the respondent.

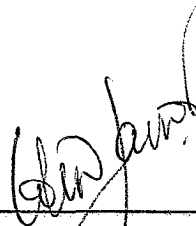
[18] There is no evidence that after the transactions were concluded on 11 August 2017 they could be undone. Indeed the applicant when it abandon its attempts to obtain and order setting the transactions aside accepted this.

[19] In considering this matter I have ignored the issue of whether or not a delictual claim is competent. I need not decide whether the negligence relied upon consisted of a breach of a contractual term or not. See: *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Limited* [2007] 1 All SA 240 (SCA) at paragraph 18; *Lillicrap, Wassenaar and partners v Pilkington Brothers (SA) (Pty) Limited* 1985 (1) SA 475 (A); *Holtzhausen v ABSA Bank Limited* 2008 (5) SA 60 oh (SCA) at paragraphs 8 to 9.

[20] I'm accordingly of the view that the applicant's claim must fail and would dismiss the application with costs.

[21] I make the following order

Application dismissed with costs.



C G LAMONT
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

COUNSEL FOR THE APPLICANT:

Adv. Ntshangase

APPLICANT'S ATTORNEYS:

TF Mathebula Attorneys

COUNSEL FOR THE RESPONDENT:

Adv. Groenewald

RESPONDENT'S ATTORNEYS:

Van Hulsteyns Attorneys

DATE/S OF HEARING:

29 July 2019

DATE OF JUDGMENT:

1 August 2019