HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

(1) REPORTABLE: Electronic reporting only.
(2) OF INTEREST TO OTHER JUDGES: No.
(3) REVISED.

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DATE SIGNATURE

Case No. 18171/2018

In the matter between:

SHARON BEVERLY NEL Applicant

and

DALITA RAMWELL T/A RAMWELL ATTORNEYS Respondent

***Case Summary*: Practice – Motion proceedings – Disputed issues of fact - An application for the hearing of oral evidence must, as a general rule, be made *in limine*, and, unless the circumstances are exceptional, a court will not permit an applicant to apply in the alternative for the matter to be referred to evidence should the main argument fail – Application dismissed.**

JUDGMENT

MEYER J

[1] The applicant, Sharon Beverly Nel, sought payment from the respondent, Ms Dalita Ramwell trading as Ramwell Attorneys, of an amount of R711 063, plus

interest and costs. Material disputes of fact arose, which could not be resolved on the papers alone. I, therefore, dismissed the application with costs. These are my reasons.

[2] Ms Ramwell is an experienced attorney and conveyancer by profession. She has acted as Ms Nel's attorney on a number of occasions in the past. During January 2017, Ms Nel sold a residential immovable property, Unit 4, Riverlair, Douglasdale, Extension 97 (the property). On 20 February 2017, she mandated Ms Ramwell to attend to the transfer and registration of the property into the name of the purchaser.

[3] On 3 April 2017, when Ms Nel attended at Ms Ramwell's offices to sign the transfer documents, she advised Ms Ramwell that she might be using the proceeds of the sale of the property to buy a holiday house jointly with her adult children and would probably be sending Ms Ramwell a change of banking details closer to the date of registration. By email dated 15 May 2017, Ms Ramwell notified Ms Nel, that the transfer, cancellation of the existing mortgage bond and registration of a new mortgage bond have 'come up on prep in the Pretoria Deeds Registry on 12 May 2017.' Ms Nel responded by way of an email dated 18 May 2017, advising Ms Ramwell that she had changed bank accounts and that Ms Ramwell should confirm the details of her new bank account before paying over the proceeds of the sale.

[4] Ms Ramwell responded by way of an email dated 19 May 2017, which reads:

'Hi Sharon,

Thank you for your email.

Please send me your new bank account details.

We hoping the registration is effected today, delay was that the bond attorneys were waiting for their process to register.

Keep you informed shortly.'

In response (and forming part of the same email chain), Ms Ramwell received an email that appeared to her to be from Ms Nel, which reads:

'Thank you for advising that Riverlair was transferred.

Please see new FNB account that the proceeds needs to be paid into:

Shandre Group (Pty) Ltd

FNB – Acc No. […]73

Branch Code: 250655

Thank you
Sharon Nel.'

Attached to this email was a copy of an officially stamped FNB confirmation letter that reflected the same account details.

[5] On 22 May 2017, Ms Nel sent a WhatsApp message to Ms Ramwell, saying 'Did you receive the message? Re Bank account'. On the same day, Ms Ramwell's secretary, Ms Desai, contacted Ms Nel telephonically to confirm that Ms Ramwell had received Ms Nel's new banking details as transmitted by her on 20 May 2017 and to notify her that an electronic payment transfer of the proceeds of the sale would be made that evening. Ms Nel confirmed that she indeed had sent new banking details and that Ramwell Attorneys should proceed to transfer the funds. Ms Ramwell also replied to Ms Nel's WhatsApp message and confirmed that she had received her new banking details.

[6] On 22 May 2017, Ms Ramwell electronically transferred the net proceeds of the sale in the sum of R711 063 from her Standard Bank trust account to the First National Bank account with number […]73, as set out in the email dated 20 May 2017, that she had ostensibly received from Ms Nel. It subsequently transpired that there had been a fraudulent interception and alteration of the email communications between Ms Nel and Ms Ramwell. Ms Nel sent an email on 19 May 2017 (and not on 20 May 2017) from the email address 'Sharonbnel@gmail.com' (and not Sharonnbnel@gmail.com) furnishing First National Bank account details (account number […]25 and not […]73) with an attached stamped letter from the bank confirming the bank account details. That email seems to have been intercepted and the bank account details changed, both in the body of the email and the attached letter from the bank. The fraudulent email was delivered to Ms Ramwell's email inbox on 20 May 2017 from the email address Sharonnbnel@gmail.com.

[7] Ms Ramwell adopted the stance that she had discharged her obligations in terms of the contract of mandate and that she was no longer indebted to Ms Nel, who, on the other hand, adopted the stance that whether or not the payment was innocently or negligently made to a third party fraudster, it was not made to her and that Ms Ramwell remained legally obliged to pay the net sale proceeds of her immovable property to her. Hence the present application.

[8] Serious disputes of fact arose on the papers, *inter alia* as to the terms of the contract of mandate concluded between Ms Nel and Ms Ramwell, whether Ms Ramwell breached the agreement, whether she acted reasonably with the required diligence and skill of the average conveyancing attorney and without negligence, or whether it was Ms Nel who acted in breach of the contract of mandate. One of the major disputed issues of fact concerned a tacit term of the contract of mandate on which Ms Ramwell relied, which essentially was to the effect that Ms Nel had an obligation to ensure that her electronic devices used in communicating with Ms Ramwell were safe, secure and not susceptible to interception, manipulation and cybercrime and that she would take all reasonable steps and precautions to ensure the integrity and safety of the electronic devices under her control. Circumstances upon which reliance was placed for the imputation of such a tacit term included 'the epidemic nature of exactly this kind of fraud involving attorneys' trust accounts and specifically occurring when attorneys transfer sale proceeds from their trust accounts to their clients', which was common cause.

[9] Ms Ramwell put forward evidence to the effect that the electronic device used by her in communicating with Ms Nel and in effecting electronic transfers of funds had not been corrupted and she accordingly contended that the risk of interception and ultimate misappropriation of the funds had been that of Ms Nel. (Compare the legal principles applicable where cheques have been intercepted in the post and misappropriated by a thief: *Stabilpave v SARS* 2014 (1) SA 350 (SCA) paras 9-10.) Ms Nel, on the other hand, denied the existence of such a tacit term and argued that Ms Ramwell's version was far-fetched and untenable. I held a different view. The disputed issues are incapable of resolution on the papers and require full ventilation at a trial.

[10] At the outset of the hearing before me I reminded Ms Nel's counsel that an application for the hearing of oral evidence or referral to trial must, as a rule, be made *in limine* and he expressly elected to argue the matter on the papers. But, instead of addressing me in reply, he applied for the hearing of oral evidence or referral to trial. In initially arguing for a final order, counsel submitted that Ms Ramwell's version of the tacit term of the contract of mandate was not credible and probable, and should thus be rejected. But, as was said by Harms DP in *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at 290D-E:

‘Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities.’

[11] And even if I were to accept that Ms Ramwell’s version was improbable in certain respects, I was called upon to decide the matter without the benefit of oral evidence and had to accept the facts alleged by Ms Ramwell ‘unless they constituted bald or uncreditworthy denials or were palpably implausible, far-fetched or so clearly untenable that they could safely be rejected on the papers’. (*Per* Wallis JA in *Media 24 Books (Pty) Ltd v Oxford University Press Southern Africa (Pty) Ltd* 2017 (2) SA 1 (SCA) at 18A-B.) That test was not satisfied. Furthermore, ‘[a] finding to that effect occurs infrequently because courts are always alive to the potential for evidence and cross-examination to alter its view of the facts and the plausibility of the evidence’. (*Media 24* at 18B.)

[12] In *National Scrap Metal (Cape Town) (Pty) Ltd and another v Murray & Roberts Ltd and others* 2012 (5) SA 300 (SCA) para 22, Leach JA said the following:
‘As was recently remarked in this court, the test in that regard is ‘a stringent one not easily satisfied’. In considering whether it has been satisfied in this case, it is necessary to bear in mind that, all too often, after evidence has been led and tested by cross-examination, things turn out differently from the way they might have appeared at first blush. As Megarry J observed in a well-known dictum in *John v Rees and Others; Martin and Another v Davis and Others; Rees and Another v John* [1970] 1 Ch 345 ([1969] 2 All ER 274 (Ch)) at 402 (Ch) and 309F (All ER):
‘As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.’

[13] I have dismissed the application with costs despite the belated request on Ms Nel’s behalf for the matter to be referred for the hearing of oral evidence. An application for the hearing of oral evidence must, as a general rule, be made *in limine*, and, unless the circumstances are exceptional, a court will not permit an applicant to apply in the alternative for the matter to be referred to evidence should the main argument fail. In *De Reszke v Maras and others* 2006 (1) SA 401 (C) at 413G-H, Comrie J said the following:

'Some younger counsel, in particular, seem to take it half for granted that a court will hear argument notwithstanding disputes of fact and, failing success on such argument, will refer such disputes, or some of them, for oral evidence. That is not the procedure sanctioned by the Supreme Court of Appeal. On the contrary, the general rule of practice remains that an application to refer for oral evidence should be made prior to argument on the merits. The Supreme Court of Appeal has widened the exceptions to this general rule, but they remain exceptions'.

And in *Law Society, Northern Provinces v Mogami* 2010 (1) SA 186 (SCA) at 195C-D, the Supreme Court of Appeal re-affirmed that general rule of practice. There, Harms DP said this:

'An application for the hearing of oral evidence must, as a rule, be made *in limine* and not once it becomes clear that the applicant is failing to convince the court on the papers or on appeal. The circumstances must be exceptional before a court will permit an applicant to apply in the alternative for the matter to be referred to evidence should the main argument fail (*De Reszke v Maras and Others* 2006 (1) SA 401 (C) ([2005] 4 All SA 440) at paras 32-33).

[14] No special circumstances that justified a deviation from the general rule of practice were shown to exist. The factual disputes are wide-ranging and not within a narrow compass. A referral to oral evidence on specified issues, therefore, would not have been a suitable method of employing *viva voce* evidence for the determination of the disputed issues of fact. The exchange of pleadings and a trial are required to define and resolve the disputes between the parties. Ms Nel, through her counsel, made a deliberate election at the outset of the hearing to argue the matter on its merits, well-knowing that a referral to evidence might well be refused should it be found that there are material disputes of fact that are incapable of resolution on the papers alone. Furthermore, prior to the filing of Ms Ramwell's answering affidavit her attorneys had written a letter to Ms Nel's attorneys wherein they had been alerted to the existence of some of the disputed issues of fact and the inappropriateness of motion proceedings in this instance, but they, on behalf of Ms Nel, nevertheless insisted to proceed by way of motion proceedings.

P.A. MEYER
JUDGE OF THE HIGH COURT

Dates of hearing:	4 December 2018
Date of Judgment:	1 March 2019
Counsel for Applicant:	Adv C Acker
Instructed by:	Pagel Schulenburg Inc, Bryanston, Johannesburg
Counsel for Respondent:	Adv CT Vetter
Instructed by:	Frese, Moll & Partners, Roosevelt Park, Johannesburg