HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

(1)	REPORTABLE: Yes.
(2)	OF INTEREST TO OTHER JUDGES: Yes.
(3)	REVISED.

.....	.....
DATE	SIGNATURE

Case No. 38883/2011

In the matter between:

STANDARD BANK OF SOUTH AFRICA LIMITED Plaintiff

and

NKULUMO HOPEWELL SIBANDA Defendant

***Case Summary*: Practice – judge who presided at the trial became indisposed and unable to deliver judgment – parties not wanting trial *de novo* – procedure, by agreement between the parties, that a transcript of the evidence, together with the documentary exhibits, be placed before another judge for the hearing of argument and the delivery of judgment followed - value of demeanour as a factor in evaluating a witness' credibility considered - *Mondi Shanduka Newsprint (Pty) Ltd v Murphy* 2018 (6) SA 230 (KZD) not followed.**
Banking – Money drawn against uncleared effects honoured by bank – effects not met – loss to be borne by customer.
National Credit Act, 34 of 2005 – Reckless Credit – a defence of reckless credit constitutes a defence on the merits and must be properly raised by way of plea - question whether a financial institution permitting an account holder to draw against uncleared effects of a cheque deposit into the account may in a given situation amount to a credit agreement that is reckless as contemplated in s 80(1) of the National Credit Act in circumstances where the provisional credit to the account is reversed when effects giving rise to such credit are not cleared, left open.

JUDGMENT

MEYER J

[1] The defendant, Mr Nkulumo Hopewell Sibanda (Mr Sibanda), conducted a current account at the plaintiff bank, Standard Bank of South Africa Limited (Standard Bank). Mr Sibanda drew the amount of R448 179.71 by means of a cheque card purchase before certain effects deposited to the account were cleared. Standard Bank honoured the withdrawal. Subsequently the effects were not paid. Standard Bank is suing Mr Sibanda, in contract or based on enrichment, for payment of the sum of R472 996.66, being the debit balance on the account that includes the said sum of R448 179.71.

[2] The hearing of evidence has been completed, but the presiding judge became indisposed and unable to deliver judgment. The parties agreed that a transcript of the proceedings, which include the evidence and Standard Bank's closing argument, together with the documentary exhibits and the parties' written heads of argument that were furnished to the trial judge, be placed before me for the delivery of judgment. In his letter of consent to this procedure being followed, Mr Sibanda stated:

'. . . I have no financial muscle to restart these proceedings afresh.'

I agreed to the procedure for the reasons that follow and invited the parties to address further oral argument to me, if they wished.

[3] Standard Bank instituted this action against Mr Sibanda on 12 October 2011. The trial commenced on 14 October and was concluded on 16 October 2015. Standard Bank called Mr Mark John van der Walt, a senior manager in its legal collections department, as its only witness. In defence, only Mr Sibanda testified. After the leading of evidence only Standard Bank's counsel presented an oral closing argument. Mr Sibanda elected only to furnish the trial judge with written heads of argument by an agreed date. It was further agreed that Standard Bank, in addition to its oral closing argument, would also furnish the trial judge with written heads of argument by an agreed date. Due to the trial judge having become indisposed, the Judge President of this division allocated the matter to continue before me.

[4] *Mondi Shanduka Newsprint (Pty) Ltd v Murphy* 2018 (6) SA 230 (KZD) is a matter that went to trial, all the evidence was led, argument was heard and judgment reserved. Before giving judgment the trial judge died. When the matter went back to court to continue before another judge (Lopes J), the parties agreed and requested the court to finalise the matter by the presiding judge reading all of the documents that would have been available to the deceased judge, hearing argument from the parties and then deciding the matter, rather than the trial beginning *de novo*. In refusing the proposal and directing that the trial begin *de novo* if the parties wished to continue with the matter, Lopes J said the following:

'[21] In my view none of the arguments advanced before me, nor the cases cited in favour of the matter being heard as sought by the parties, have provided a solution to the problem that matters of credibility cannot be dealt with in the manner suggested by the parties. There are numerous disputes of fact and expert opinion in the record of the proceedings, and a determination of those would be crucial to any decision.

[23] Whilst the parties may well place whatever evidence they wish before a civil court, the court still has to decide the matter on the applicable principles of law. Parties may, for example, agree that a certain fact can be accepted by the court as being true, when there is no documentary or viva voce evidence to support the finding of fact. In this way parties to civil actions may agree to limit, to some extent, the role of a judicial officer in determining matters. That is a very different thing, however, to parties being able to dictate to a judge how to exercise his oath of office by restricting the judge's adherence to legal principles, statutes, and precedent. Given the number of conflicts of fact and expert opinion in this case, I am of the view that a judge would not be able properly to determine the matter upon a mere reading of the record.

[24] It is also no answer to the above to suggest that one can simply apply the tests set out in *Stellenbosch Farmers' Winery* [*Stellenbosch Farmers' Winery Group Ltd and another v Martell et Cie and others* 2013 (1) SA 11 (SCA)] for the resolution of disputes. That is because the first two aspects referred to by the learned judge of appeal are the credibility of the factual witnesses and their reliability. The very fact that they cannot be decided merely on paper is recognised in *Plascon-Evans* and provides a limitation on the ability of judges to make such decisions, except in special circumstances. This matter is distinguishable from the situation where a case is part heard, and the judge may recall one or more witnesses (who have recently testified) in order to clarify any particular uncertainty.

[25] Were I merely to override those considerations, albeit with the consent of the parties, I have serious doubts as to whether I would be fulfilling my oath of office by allowing the parties to a civil action to restrict the ordinary performance of my duties.'

[5] The premise of the finding in *Mondi* appears to be that the opportunity of a judge presiding at a trial to observe the demeanour of a witness is of great value in deciding whether or not to believe the witness's testimony. But that premise does not seem to be supported by relevant social science. On the contrary, as WH Gravett *Spotting the liar in the witness box – How valuable is demeanour evidence really?(1)* 2018 (81) THRHR 437, convincingly argues, that premise is contradicted by extensive empirical social science data.

[6] Dr WH Gravett, who is a senior lecturer, Department of Procedural Law at the University of Pretoria, examined the value of a witness' demeanour as a guide to the truth of testimony in the light of a well-developed body of behavioural science research spanning some seven decades. The extensive empirical evidence, as demonstrated by him, 'shows that demeanour – as a means of accurate reliable credibility assessment and decision-making in litigation – essentially is worthless.' Human lie detection, according to the learned author, 'is fraught with difficulty. It is predicated upon a multitude of misconceptions about how liars behave, including specific verbal and nonverbal cues commonly believed to indicate dishonesty.' The empirical research, according to the learned author, 'overwhelmingly demonstrates that ordinary people, including fact-finders, have no particular talent for spotting lies' and that this 'inability of most ordinary people to detect deception accurately has even greater implications in a heterogeneous society, such as ours, in which fact-finders often have to overcome racial and cultural differences in determining witness credibility'.

[7] The empirical research, according to the learned author, demonstrates that '[t]he traditional legal perspective on the evaluation of demeanour evidence is premised on four fallacies regarding how liars and lie-detectors behave: (i) that detecting deception in another is a matter of "common sense"; (ii) that liars betray themselves through certain telltale signs in their physical demeanour; (iii) that observers know which behavioural cues to look for in evaluating speakers' truthfulness; and (iv) that observers thus have a substantially better-than-average chance of catching liars' (at 443 *et seq*). In conclusion he states (at 450):

'In short, there exists cogent evidence from social science studies that demonstrates that the concept of demeanour evidence as accepted by the law is invalid as it stands. In attempting to use a witness's conduct, manner, bearing ("demeanour") to assess that witness's

credibility, most fact-finders will in fact rely on highly manipulative cues that mislead them, and will conclude that a witness is perjurious more often than they should.'

[8] The learned author also considered *inter alia* the reasons for the poor lie detecting ability of people and why lie detecting in court is even more difficult than in the laboratory in his second instructive article on the topic: WH Gravett *Spotting the liar in the witness box – How valuable is demeanour evidence really?(2)* 2018 (81) THRHR 563. According to the research referred to by him (at 563-4)-

'[c]ertain signs of perceived deception, especially those involving the face, are also simply signs of nervousness and distress. It is almost impossible to distinguish between a person who experiences stress because she is guilty and on the verge of being exposed, and someone who experiences stress because she is innocent and stands falsely accused. . . . Yet, researchers have consistently found that observers attach meaning and significance to these behavioural cues of nervousness or anxiety even when the message is truthful. The mistaken interpretation of interrogation stress as deceit is so prevalent in the psychological literature that the phenomenon has come to be called "Othello's error" because it is excellently illustrated by Othello's mistaken interpretation of Desdemona's distress and despair in response to his accusation of infidelity.'

[9] I respectfully agree entirely with the learned author that 'by far the best determinant of the truth of testimony is not a witness's demeanour (visual or auditory behavioural cues) at all, but the actual content of the testimony' and that factors 'such as self-contradiction, inherent plausibility or the lack thereof, omissions and imprecisions, verification of facts testified to by other witnesses and exhibits, bias or motive on the part of the witness, and limitations of recall are among the most important indications of witness credibility', all of which would be readily discernible by a reading of a transcript of the evidence (at 566).

[10] Our highest courts have displayed more than a modicum of discomfort when assessing the value of demeanour evidence. In *S v Kelly* 1980 (3) SA 301 (A) at 308B-D, this was said:

'[D]emeanour is, at best, a tricky horse to ride. There is no doubt that demeanour - 'that vague and indefinable factor in estimating a witness's credibility' (*per* HORWITZ AJ in *R v Lekaota* 1947 (4) SA 258 (O) at 263) - can be most misleading. The hallmark of a truthful witness is not always a confident and courteous manner or an appearance of frankness and candour. As was stated by WESSELS JA in *Estate Kaluza v Braeuer* 1926 AD 243 at 266 more than half a century ago in this Court:

"A crafty witness may simulate an honest demeanour and the Judge had often but little before him to enable him to penetrate the armour of a witness who tells a plausible story."
On the other hand an honest witness may be shy or nervous by nature, and in the witness-box show such hesitation and discomfort as to lead the court into concluding, wrongly, that he is not a truthful person.'

[11] In *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) para 79, the Constitutional Court said that-
'[t]he advantages which the trial court enjoys should not, therefore, be over-emphasised 'lest the appellant's right of appeal becomes illusory'. The truthfulness or untruthfulness of a witness can rarely be determined by demeanour alone without regard to other factors including, especially, the probabilities. As indicated above, a finding based on demeanour involves interpreting the behaviour or conduct of the witness while testifying. The passage from *S v Kelly* above correctly highlights the dangers attendant on such interpretation. A further and closely related danger is the implicit assumption, in deferring to the trier of fact's findings on demeanour, that all triers of fact have the ability to interpret correctly the behaviour of a witness, notwithstanding that the witness may be of a different culture, class, race or gender and someone whose life experience differs fundamentally from that of the trier of fact.'

[12] In upholding a full bench's reversal of adverse credibility findings by a trial magistrate in *Allie v Foodworld Stores Distribution Centre (Pty) Ltd* 2004 (2) SA 433 (SCA) para 38, Navsa JA referred with approval to the following passage in the judgment of the court *a quo*:
'In dealing with demeanour and credibility in relation to the magistrate's findings Van Zyl J said the following:
"Of course, the judicial officer, who has sight of the witnesses and is able to assess their evidence from nearby, is the best person to gauge their demeanour. The record of such evidence, however, speaks for itself. If a witness is mendacious, contradictory or evasive, this will appear from the record. And if a judicial officer has justified criticism of a witness or of his or her evidence, the justification for such criticism will normally also appear from the record. Even more so will this be the case when a credibility finding is made against a particular witness. Although a Court of appeal is reluctant to interfere with credibility findings made by the court of first instance, it is not obliged to accept such findings if they should not appear to be justified."'

[13] In *St Paul Insurance Co SA Ltd v Eagle Insurance Ink System (Cape) (Pty) Ltd* 2010 (3) SA 647 (SCA), the Supreme Court of Appeal held that where, in a civil

matter in which the hearing of evidence has been completed, the presiding judge dies before the delivery of judgment, the parties are entitled to agree that a transcript of the evidence, together with the documentary exhibits, be placed before another judge for the hearing of argument and the delivery of judgment. Cloete JA, who wrote the unanimous judgment of the Supreme Court of Appeal, said this:

'[1] The appellant, St Paul Insurance Co SA Ltd, is, as its name suggests, an insurance company and I shall refer to it as such. The respondent, Eagle Ink System (Cape) (Pty) Ltd, to which I shall refer as Eagle Ink, is a manufacturer, importer and distributor of printing inks and related products. The insurance company issued a policy of insurance to Eagle Ink which, as the plaintiff, sued the insurance company in the Cape High Court for indemnity under the policy. Knoll J presided at the trial, but died before she could deliver judgment. By agreement between the parties a transcript of the evidence, together with the documentary exhibits, was placed before Griesel J who heard further argument. There is precedent for such a procedure, and it is eminently sensible: *Mhlanga v Mtenengari and Another* 1993 (4) SA 119 (ZS). Griesel J found in favour of Eagle Ink, but subsequently granted leave to appeal to this court.'

[14] In *Mondi* para 12, Lopes J distinguished *St Paul Insurance Co* on the basis that it concerned the interpretation of clauses in an insurance policy, but such a distinction, in my view, is not justified in the light of the modern contextual approach followed by our courts when interpreting written instruments. The process of interpretation is not stopped at the literal meaning but considered in the light of all relevant context without any distinction being made between background and surrounding circumstances. (See *Natal Joint Municipal Pension Fund v Enduneni Municipality* 2012 (4) SA 593 (SCA) paras 17-26; *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) paras 10-12.) Furthermore, the Supreme Court of Appeal did not limit the procedure which it considered 'eminently suitable' to trial matters where no assessment of the evidence of witnesses is required to be made. *Mondi,* with due respect, over-emphasised the advantages which the trial court enjoys in observing the demeanour of witnesses in deciding on their credibility and the reliability of their evidence.

[15] Turning to the merits, it is common cause that Mr Sibanda conducted a current account at Standard Bank since 2005; initially an entry level one called a *Classic Plus* account, which was during October 2008 upgraded to a more prestigious one called a *Prestige Plus* account. The account remained the same, but

its upgrade afforded Mr Sibanda additional benefits, such as, according to Mr van der Walt, access to a personal banker, an overdraft facility with a limit of R24 400 (which was repayable on demand), a debit card and the automatic 'upliftment of the U-status', which means that a *Prestige Plus* current account holder such as Mr Sibanda was permitted to draw against uncleared effects of cheque deposits.

[16] The cheque in issue is a trust cheque dated 8 May 2011, ostensibly drawn by attorneys Morebodi-Paul Inc. on Absa Bank Limited, Rustenburg for the amount of R462 000 in favour of 'N.H. Sibanda'. It was deposited at Standard Bank, Eastgate Branch on 11 May 2011, and credited to Mr Sibanda's account. Morebodi-Paul Inc. placed a 'stop payment' of the cheque with their bankers, Absa Bank, Rustenburg. The credit of R462 000 on Mr Sibanda's account was reversed after Mr Sibanda had already drawn the amounts of R5 421 and R448 179.71 against the uncleared effects of the cheque deposit by means of cheque card purchases of a flight ticket at South African Airways (SAA) and foreign currency at American Express Foreign Exchange (American Express) at OR Tambo International Airport, Johannesburg (the airport). The credit to Mr Sibanda's account when the cheque of R462 000 was deposited to his account was merely a 'provisional credit' and effects giving rise to such credit had first to be cleared before the credit became a final credit: *ABSA Bank Ltd v IW Blumberg and Wilkinson* 1997 (3) SA 669 (SCA) at 681F-G.

[17] Mr van der Walt testified to the effect that the cheque card purchases of the flight ticket and of the foreign currency were 'pin based' transactions. By Mr Sibanda entering his personal identification number (pin) into the card machine, he expressly instructed Standard Bank to debit his account with the amount of the transaction, in other words that was his instruction to Standard Bank to pay. According to Mr van der Walt, at the time of the two debit card point-of-sale electronic transactions, Mr Sibanda was in good standing with Standard Bank; R462 000 stood to the credit of his account by virtue of the cheque deposit, his account was in credit with a further amount of R3 500 and he had an overdraft facility of R24 400. The funds were available to him to transact with and the system, therefore, authorised the debit card point-of-sale electronic transaction for the purchase of the foreign currency.

[18] Mr Sibanda denies that a term permitting him to draw against uncleared effects of cheque deposits, was ever agreed upon or that he was even aware that

such privilege was afforded to him. I need not resolve this issue. As was said by Zulman JA in *IW Blumberg and Wilkinson* at 675H-676C:

'The fact that the appellant might have permitted the respondent to draw cheques against uncleared effects, despite there being no agreement in this regard, would not excuse the respondent in law from liability to make payment to the appellant. The appellant was perfectly entitled to choose to honour such cheques, notwithstanding the fact that the effects earlier deposited had not been cleared, and to waive any benefit afforded to it in this regard by its agreement with the respondent. It would be strange indeed if it were permissible for a customer of a bank to draw a cheque on the bank, requesting the bank to honour the cheque, and thereafter, when the bank honoured the cheque despite the absence of an overdraft facility, to plead that this would have resulted in an overdraft facility which had not been agreed upon. In essence this is precisely what the respondent is contending for. It hardly lies in the mouth of the respondent, who drew the two cheques in question against uncleared effects, albeit contrary to the agreement between the parties, to be heard to complain that the bank should not have honoured the cheques and debited its account. Put differently, it is the appellant, so it is suggested, who must bear the loss if the uncleared effects were not met. This can not be so. (Compare *Bloems Timber Kilns (Pty) Ltd v Volkskas Bpk* 1976 (4) SA 677 (A) at 687E-688C; *Trust Bank of Africa Ltd v Wassenaar* 1972 (3) SA 139 (D) at 142G-143A and 143E-F.'

[19] And in *Standard Bank of SA Ltd v Sarwan* [2002] 3 All SA 49 (W) at 55g-i, Van der Walt AJ said this:

'Even where the parties agreed, as in this matter in respect of the prestige account, that the account-holder may draw immediately upon "uncleared effects", the principle remains the same. Such a privilege does not detract in the least from the fundamental principle that the risk of non-payment, for whatever reason, of a cheque deposited for collection, falls on the customer and not on the bank. It would, if otherwise, not be in accordance with sound financial and commercial common sense. There may be exceptional circumstances – perhaps in the case of a special clearance of a cheque. I express, however, no view in this regard.

Apart from being a term *ex lege* of the contract between the plaintiff and the defendant, the right of reversal in the case of non-payment of a cheque deposited for collection in a current account, is, at the same time, an independent and substantial principle of the body of banking law as developed over a long period by commercial practice, custom and usage. Its existence and applicability is not dependent upon consensus, intention or knowledge on the part of the parties. It is an integral part of the objective law pertaining to banking practice and the relationship between banks and their account-customers.'

[20] Mr Sibanda further contends that a bank official who was on duty at the reception desk of the Standard Bank branch at the airport, negligently misrepresented to him that there was a credit balance on his account available for him to draw, as a result of which misrepresentation he paid for the foreign exchange purchased for a third party at American Express. Standard Bank, he contends, had a legal duty not to have misstated the true facts to him and its negligent misrepresentation caused him loss in the amount that is now being claimed from him. It is necessary to set out the evidence of Mr Sibanda in some detail.

[21] Mr Sibanda, who was about 40 years of age at the time and the holder of an MBA degree, was employed in the capacity of a key accounts manager in the sales and marketing department of Robor (Pty) Ltd, a company conducting business in the steel industry (Robor). He looked after major clients (accounts) for Robor, including major construction companies, such as Murray & Roberts and Group 5. On Wednesday, 11 May 2011, he attended a meeting at Robor's offices in Isando concerning a project in Mauritius for which Murray & Roberts and Group 5 were bidding. Robor, in turn, wished to supply steel for the project to either company if awarded the construction contract. The meeting was about Mr Sibanda and three of his colleagues who were to go to Mauritius to assess the project. At the meeting only Mr Sibanda, as the person who was looking after the engineering sector for Robor, and one other colleague were mandated to go. During a short adjournment of the meeting, Mr Sibanda received a call from a stranger on his cell phone, introducing himself as Tony Lionel and saying that he had mistakenly deposited R462 000 into Mr Sibanda's bank account. Mr Sibanda told him that he needed to go back into a meeting he was attending and asked him for his cell number so that he could call him back after the meeting in about an hour, to which Mr Lionel responded that he did not have a cell number but was calling from a public telephone and would rather call Mr Sibanda more or less after that time.

[22] After the meeting Mr Sibanda immediately drove to the airport in order to see whether he could get a ticket for a flight to Mauritius. *On route* he received another call from Mr Lionel who enquired from him where he was, and he told him that he was driving to the airport to see whether he can get a flight ticket in connection with a work related project. He asked Mr Sibanda whether he had received an SMS on his cell phone from his bank to which Mr Sibanda responded that he had seen one, but

because he was speaking on his phone at that moment was not able to read it. Mr Lionel told Mr Sibanda that he would call him again within the next 20 minutes.

[23] Upon his arrival at the airport, Mr Sibanda saw an SMS from Standard Bank confirming 'the amount of money the gentleman had deposited into [his] account which was R462 000'. He first went to the banking section at the airport, withdrew R2 500 with his card 'to see if there was any difference from the SMS [he] got and the money that was in [his] account', and he kept the ATM slip. He then went to the Emirates Airlines counter, but was unable to get a flight to Mauritius for the days he needed to be there, and then to the SAA counter, where he bought a return ticket, leaving for Mauritius on Thursday morning, 12 May 2011 at 09:40, and returning on Saturday afternoon, 14 May 2011 at 15.35. Thereafter he bought himself a cool drink while he was waiting for Mr Lionel. He again went to the banking section and into the Standard Bank branch. He showed the lady in attendance at the enquiries desk the ATM slip that he received when he drew the R2 500 cash as well as the SMS from Standard Bank on his cell phone, whereupon she said to him 'the funds are available' and 'what more do you need as confirmation, you have the slip and you have the SMS'.

[24] Mr Sibanda saw a man fitting the description of Mr Lionel. He had earlier given his description to Mr Sibanda, who also told him what he, Mr Sibanda, was wearing. The man then approached him, saying-

'. . . are you Hope? I said yes I am Hope because that is the name I gave him on the phone when we spoke and I also asked him are you Tony Lionel and he said, yes, I am.'

They greeted each other and Mr Sibanda said to him-

'. . . I think it is only fair for us to go back to Standard Bank, which is the bank that I bank with, so that we can make a transaction, this is a huge amount, I do not think I will be able to make any withdrawal without the bank being involved so that I can give you back your money. And he was with another gentleman which I did not ask his name because I did not speak to him from the start of the conversation. Mr Lionel insisted, that no, this is a huge amount, I understand but I am also here at the airport because I want to travel so I would like to purchase some foreign currency using the money. . . . I said to Mr Lionel I am not too sure if my card would actually swipe that kind of money, depending on the machine. That is why I offered still to go to Standard Bank to say this is my banker and they are only upstairs, it is not like we travelling anywhere very far, so I wanted to take him into the bank so that we can make a transaction inside the bank. . . . And his response was no, we cannot go to the

bank, because I want to purchase foreign currency and foreign currency is here at American Express which was actually next to SAA at the time and as we were talking, we were all standing close to SAA. I would say between SAA and American Express. So we just talking generally in the public area and I still insisted that, you know what, I never had this kind of money in my account, I doubt very much if I would be able to put my card into a swiping machine and be able to swipe it off for you, whatever you want to buy in foreign currency. And he still said to me at the time, do not worry sir, if it bounces, it bounces, we are going to go to the bank, but I can tell you now, I want foreign currency and I do not need to go to your bank. I said, I had just been to my bank but I think it is also safe if we can do that transaction at the top. . . . After a little conversation I also agreed to say, okay, if you want foreign currency then let us try and use American Express of which he led me to the American Express counter.'

[25] At the American Express counter, Mr Lionel requested US$20 000 and €30 000, and he told the gentleman who was attending to him that he was going to use Mr Sibanda's card to pay 'because he had erroneously put money into [his] account'. Mr Sibanda inserted his card into the card machine, entered his pin number, and the transaction was successfully processed. Mr Lionel received his requested foreign currency. The withdrawal from Mr Sibanda's account in payment for the foreign currency was the sum of R448 179.71. According to Mr Sibanda he still owed Mr Lionel R12 000. While the gentleman who attended to them at the American Express counter was still counting the foreign currency before handing it over to Mr Lionel, Mr Sibanda accordingly offered to go to Standard Bank to withdraw the balance that he was still owing Mr Lionel, and he left. But, before entering the Standard Bank branch, he received another SMS from Standard Bank, in his words, 'confirming that the money has bounced or it has been reversed, whatever the case might be, or it has not been honoured'. He immediately ran back to the American Express counter in search of Mr Lionel, but he was no longer there and the gentleman at the American Express counter who attended to them told him that he had given the foreign exchange to Mr Lionel who then left.

[26] Mr Sibanda then looked around the airport for Mr Lionel, probably for about five minutes, and then went back to the Standard Bank branch. He spoke to the same lady who attended to him earlier, saying to her-

'. . . I showed you my slip and you said if your slip and your SMS confirm that the money is in your account it is in your account. What more proof do you need from us? Now I just did a

transaction for a gentleman that said he put money wrongly into my account and now this is another SMS that I have got and the lady at the enquiries at the time told me that, oh, probably this is a scam. . . .

I said to the lady that I came here earlier on so we had a little bit of an argument obviously being frustrated, panicking that what had happened to my account and that I had approached the bank first and they say the money is in your account which is in your account. I got another SMS that confirmed that the money was not showing into my account, they have reversed the whole deal, so that gave me a bit of aggravation, I must say. I was aggravated at the time [indistinct] to say why did you initially say to me this is the story, that is why I walked into the bank in the first place because I wanted help for you to confirm that this money was genuinely in my account or not. . . .

So would you say sir that you acted in a manner as the representative of the bank that lady had told you? That you acted upon the representation that she made to you right at the beginning? - - - Right at the beginning and it is also to my knowledge that is why I also went back to the same lady to say I gave you my slip out of the ATM, I showed you my cell phone, the SMS and you say to me if the money is in your account what more do you want us to confirm? So now there is another SMS that has come through and that SMS is saying the deal that I made, or the cash that I had bought using my card is now been reversed. So, I am now sitting in a minus and I was going to go into the bank at the time to withdraw the balance of the money, so I argued with the lady, that is why I said my lady, forgive me because obviously I argued a bit because I was aggravated at the time to say I came to you first, now this. What is happening here?'

[27] Mr Sibanda then went to the SAPS airport satellite station but was told that they do not investigate such cases and that he must sort it out with his bank or go to the nearest police station where he stays or works. Mr Sibanda then went to the Sebenza police station, which, according to him, is down the road from his house. There a Captain Makula suggested to him that he goes to his office, type his statement and bring it back to him, which Mr Sibanda did. He took his typed statement to Captain Makula the same afternoon or the next day. Mr Sibanda did not go to Mauritius. In this regard he testified:

'I could not leave whilst there was a big problem on my personal account. It would have been viewed as I was running away, even if it was for two days, but I know logically it was not supposed to be like that.'

[28] Mr Sibanda's evidence raises more questions than plausible answers. He, an educated man with a prestigious MBA degree, used his own flight ticket that he had

purchased to fly to Mauritius, the presentment of which flight ticket and his own passport enabled him to buy foreign currency at American Express to the value of R448 179.71 for a complete stranger, whose identity document, flight ticket, or deposit slip of the R462 000, it is not suggested, he even had required to see or indeed had seen. Mr Sibanda then did not use his flight ticket to fly to Mauritius for the two-day business trip for which it was allegedly acquired, and his explanation for not doing so is implausible. Furthermore, he never enquired from the stranger, who only phoned him from public telephones, how the erroneous deposit into his account came about, how the stranger got his name, bank name and account number to effect the deposit or how he got Mr Sibanda's cell number to require the repayment of the alleged erroneous deposit. It is, in my view, safe to accept that if Mr Sibanda had made any such enquiries it would have been mentioned in his evidence in chief, and in his police statement and affidavit in support of his rescission application.

[29] The record of the evidence speaks for itself: Mr Sibanda's evidence in several material respects lacks inherent plausibility and is contradictory. I need only refer to a few external contradictions in his evidence. In his founding affidavit in support of his rescission application in these proceedings, Mr Sibanda did not state that his intended travel to Mauritius was a business trip. On the contrary, he stated this:

'At the time I was set to go to Mauritius on holiday. On the same day (11 May 2011) I was contacted by one Mr Tony whom informed me that the aforesaid amount was mistakenly paid into my bank account. I accepted this to be true by virtue of the fact that I did not expect such a large payment. We subsequently agreed to get together in order to arrange a refund of the said monies to Mr Tony.'

When Mr Sibanda was confronted under cross-examination with this material external contradiction in his evidence, he proffered the following implausible explanation:

'Can you read the first sentence into the record perhaps? - - - It says "At the time I was said to go to Mauritius on holiday."

Remarkable. Absolutely remarkable. So when did this business trip develop into a holiday? - - - Because, when I gave my statement to my attorney which was Pistorius and Osborne at the time, he said, "You have got a lekker job", in a joking way and I said, "Why do you say that?" He said, "You have got to get a paid holiday to go to Mauritius." I said, "But I am working." He says "But at least, you are afforded your ability to travel on company expense."

Is that your answer? - - - That is my answer,'

[30] Mr Sibanda could give no plausible explanation for why he drove to the airport to buy his flight ticket as opposed to booking it online or even telephonically - he said he did so because the airport was 10 to 15 minutes away from his office. Furthermore, one would expect the flight tickets of Mr Sibanda and the colleague who was supposed to accompany him to Mauritius to be booked together in order for them to investigate the business opportunity at the same time, particularly in the light of Mr Sibanda's evidence that they needed to be in Mauritius on the Saturday, 14 November 2011.

[31] Mr Sibanda's evidence that he had gone to the Standard Bank branch at the airport where the alleged representation had been made to him prior to meeting Mr Lionel and effecting the transaction at American Express, is improbable and not credible. In his police statement, which, according to him, he prepared and submitted to Captain Makula the same afternoon or the next day, no mention was made by him that he had gone to the Standard Bank branch at the airport while he had been waiting for Mr Lionel and before he had met him and that he had shown the lady in attendance at the enquiries desk of that branch the ATM slip that he earlier had received when he had withdrawn R2 500 cash at an ATM as well as Standard Bank's SMS on his cell phone, and that she had said to him that the slip 'says there is money in your account' and that 'you have got an SMS and you have got a slip, so what more confirmation would you need from the bank?'

[32] On the contrary, according to Mr Sibanda's police statement, he had only gone to the Standard Bank branch at the airport after he had paid for the purchase of the foreign currency at American Express in order to draw the balance that he had still owed Mr Lionel. In this regard his police statement reads as follows:

'One guy walked with me to American Express to do the transaction while the other stood a few metres away in the public. To my surprise my card managed to go through for the purchase of 20 000.00 US dollars as well as 30 000.00 Euros and all this came to + - R448 000.00. I took all the money and gave it to the guy who was constantly with me to make sure I do the transaction. The balance of +- R12 000.00 I then told them that we should walk to the upper floor to my bank where I could withdraw it for them in cash. The two guys then offered to remain downstairs counting their money as they needed to purchase a few items while I run to my Standard Bank upstairs. As I was almost a few steps

away from entering the bank another sms came through to say the money deposited into my account earlier on was stopped or bounced whatever the case might be. I quickly made a u-turn and ran downstairs to check on the two guys before they left but to my surprise I could not find them. I again ran upstairs to Standard Bank and asked by the enquiries what had happened with the money wrongfully deposited into my account. The lady by the enquiries told me that the owner had stopped it and I explained to her what had just happened and she said she thought at the time it was a scam. She advised me to go to the police downstairs of which I did and an officer there advised me that I should speak to my Bank as they are the one who had allowed such an amount to go through. I again went to Standard Bank upstairs where I was advised to phone the 0800222050 number so that I can report the crime. I tried this number several times but could not get through.'

[33] The explanation proffered by Mr Sibanda under cross-examination as to why a significant component of his version - that he attended at the Standard Bank branch prior to meeting Mr Lionel where a Standard Bank official made the representation to him regarding the monies being in his bank account – had not been included in his police statement that he had prepared shortly after the event, is that Captain Makula had told him 'to be precise and to the point' when he drafts his statement and that it should not be more than two pages. Yet, Mr Sibanda was unable to explain why insignificant detail, such as him buying a cold drink at the airport while he had been waiting for Mr Lionel, was then included in his police statement.

[34] What further demonstrates the mendaciousness of Mr Sibanda's evidence in this regard is the fact that in his police statement no mention was made that when he had gone to the Standard Bank branch at the airport after the fact, he had confronted the same bank official who earlier attended to him at the enquiries desk of that branch about the representation which she had earlier made to him, that he had an argument with her and that he had been aggravated and angry as a result thereof. On the contrary, his evidence and his police statement are also contradictory regarding his attendance at the Standard Bank branch at the airport after the event. In his police statement he merely stated that the lady at the enquiries desk had told him that the owner had stopped payment, that he had explained to her what had just happened and that she had said she thought it was a scam.

[35] But even if it is accepted that Mr Sibanda had gone to the Standard Bank Branch at the airport prior to meeting Mr Lionel and paying for the foreign currency, I cannot find any factual basis for holding that Standard Bank made any misrepresentation to Mr Sibanda, and most importantly for finding that there was any special arrangement with Standard Bank that if he draws against uncleared effects and such effects were subsequently dishonoured, Standard Bank would not be entitled to debit his account with the amount of such dishonoured cheque. It emerged during the course of the cross-examination of Mr Sibanda that his version is that the Standard Bank official represented to him that the deposit of R462 000, according to the Standard Bank SMS on his phone and the ATM receipt, was available to him for withdrawal purposes and he expressly conceded that it was not represented to him that the effects were cleared or that if the cheque deposited to his bank account was not paid that the bank would not be entitled to debit his account with the amount of that cheque. This, at the time was exactly the correct factual position. There was no misrepresentation on the part of the bank official. Mr Sibanda, therefore, has failed to prove any facts or circumstances disentitling Standard Bank from debiting his account with the value of the uncleared effects when those effects were subsequently not paid. (See *IW Blumberg and Wilkinson* at 681D-I; *Sarwan* at 56c-e.)

[36] In his plea Mr Sibanda also averred that Standard Bank 'through its authorized representatives acted fraudulently alternatively negligently in that', *inter alia*, 'it granted credit to [him] recklessly when it extended a sum of money in excess of R24 400.00' and it 'should have known and/or foreseen that . . . [t]he extension of credit beyond the amount of R24 400.00, as agreed, would amount to reckless credit as envisaged in terms of the National Credit Act, No. 34 of 2005'. This is the sum of Mr Sibanda's plea of reckless credit. A defence of reckless credit constitutes a defence on the merits (see JW Scholtz et al *Guide to the National Credit Act* Commentary at 11-126) and must be properly raised by way of plea (see *Absa Bank Limited v Vorster* 2018 JDR 1715 (GP) para 72; Harms *Amler's Precedents of Pleadings* Eighth Ed at 140 and 143).

[37] Reckless credit agreements are defined in s 80(1) of the National Credit Act, which reads:

'A credit agreement is reckless if, at the time that the agreement was made, or at the time when the amount approved in terms of the agreement is increased, other than an increase in terms of section 119(4) -

(a) the credit provider failed to conduct an assessment as required by section 81(2), irrespective of what the outcome of such an assessment might have concluded at the time; or

(b) the credit provider, having conducted an assessment as required by section 81(2), entered into the credit agreement with the consumer despite the fact that the preponderance of information available to the credit provider indicated that-

(i) the consumer did not generally understand or appreciate the consumer's risks, costs or obligations under the proposed credit agreement; or

(ii) entering into that credit agreement would make the consumer over-indebted.'

[38] A court that declares a credit agreement reckless in terms of s 80(1)*(a)* or 80(1)*(b)*(i) may, in terms of s 83(2), make an order setting aside all or part of the consumer's rights and obligations under that agreement, as the court determines just and reasonable in the circumstances, or suspending the force and effect of that credit agreement in accordance with subsection (3)*(b)*(i). If the court declares a credit agreement reckless in terms of s 80(1)*(b)*(ii), the court, in terms of s 83(3)-

'*(a)* must further consider whether the consumer is over-indebted at the time of those proceedings; and

(b) if the court or Tribunal, as the case may be, concludes that the consumer is over-indebted, the said court or Tribunal may make an order-

(i) suspending the force and effect of that credit agreement until a date determined by the Court when making the order of suspension;

(ii) restructuring the consumer's obligations under any other credit agreements, in accordance with section 87.'

[39] Mr Sibanda did not plead on what basis the conclusion is drawn that in permitting him to draw against the uncleared effects of the cheque deposit in question, Standard Bank concluded a credit agreement with him, on which ground or grounds he relies for averring that the credit agreement is reckless in terms of s 80, nor did he claim the setting aside of all or part of his rights and obligations under the agreement (if permitting him to draw against the uncleared effects of the cheque deposit can be said to be a credit agreement as contemplated in the National Credit

Act, and I am not making any finding in this regard), or for the suspension of the force and effect of such alleged agreement.

[40] Furthermore, the question of reckless credit was hardly touched upon in the evidence, let alone fully canvassed. The sum of Mr van der Walt's evidence on the question is that in permitting Mr Sibanda to draw against the uncleared effects of the cheque deposit in question, Standard Bank did not approve or grant an overdraft facility to Mr Sibanda in the amount of R260 000, nor did Mr Sibanda apply to Standard Bank for such a facility. In his view, permitting a client to draw against uncleared effects amounts to 'incidental' credit, but not to an 'incidental credit agreement' as defined and contemplated in the National Credit Act. In this regard he testified:

'I term it incidental credit because, a.) The client did not apply for an actual facility, so he did not come to me and say, listen, I want to draw against this cheque; however, if it bounces, please give me an overdraft facility up to and including R490 000, or whatever it is. It is incidental in nature in that nobody anticipated, I do not think Mr Sibanda anticipated it, neither did Standard Bank anticipate it. So that is why I say, hum . . .

Anticipate what? --- The extent of the overdraft or what actually happened. That is why I say it is incidental. It was not granted in terms of the normal rules of the National Credit Act, which require me as a banker to ensure that the client has a source of repayment, has a means of payment, can afford the debt. None of that featured in this thing.'

(Sections 81 to 84, and any other provisions of Part D of the National Credit Act to the extent that they relate to reckless credit, do not, in terms of s 78(2)*(e)*, relate to 'an incidental credit agreement' as defined in s 1.) Mr van der Walt further referred to the credit balance of Mr Sibanda's account in the amount of approximately R490 000 at the time when he made payment for the foreign currency in support of his contention that in permitting him to draw against the uncleared effects of the cheque deposit, reckless credit was not granted to him.

[41] The only aspects of Mr Sibanda's evidence that have any bearing on the question of reckless credit is that Standard Bank afforded him an overdraft facility of only R24 400 and that he owns a house to the value of R700 000, which property is burdened with a mortgage bond in favour of Standard Bank. The amount owing by him to Standard Bank in respect of that mortgage loan is R130 000.

[42] A special plea of reckless credit not having been properly raised on the pleadings nor fully canvassed in the evidence render it unnecessary and undesirable for me to consider the question whether a financial institution permitting an account holder to draw against uncleared effects of a cheque deposit into the account may in a given situation amount to a credit agreement that is reckless as contemplated in s 80(1) of the National Credit Act, in circumstances where the provisional credit to the account is reversed when effects giving rise to such credit are not cleared. It is an important question since payments by way of cheques in this country are still appreciable, in volume and value.

[43] Nevertheless, bearing in mind the application of the National Credit Act ('. . . to every credit agreement between parties dealing at arm's length and made within, or having an effect within, the Republic, except' those listed in s 4), the definition of a 'credit agreement' in s 1 ('. . . an agreement that meets all the criteria set out in section 8'), the criteria set out in s 8 that 'an agreement constitutes a credit agreement for the purposes of this Act if it is . . . a credit facility . . . a credit transaction . . . a credit guarantee . . . or . . . 'any combination of the above' (subsection (1)) and the description of each given in subsections (3), (4) and (5), I do not think (and this is not a definitive finding) that a financial institution, in permitting an account holder to draw against uncleared effects of a cheque deposit, and the account holder made a credit agreement to which sections 81 to 84 and any other provisions of Part D of the National Credit Act relating to reckless credit apply, if the uncleared effects were not met, the account debited as a result and the overdrawn balance repayable immediately. In *Vorster* para 130, Prinsloo J rejected the contention that the fact that the account holder 'was allowed, on a limited basis, to draw against uncleared effects, amounted to an overdraft or "a loan" resulting in a "credit agreement" in the spirit of the NCA'.

[44] In the result the following order is made:

(a) The defendant is to pay the plaintiff the amount of R472 996.66 plus interest thereon at the rate of 15.5% per annum from 25 August 2011 to date of payment.

(b) The defendant is to pay the plaintiff's costs of suit.

P.A. MEYER
JUDGE OF THE HIGH COURT

Date of hearing:	25 April 2019
Date of judgment:	28 November 2019
Plaintiff's counsel:	Adv JC Viljoen
Instructed by:	Stupel & Berman Inc., Germiston
Defendant's counsel:	Adv I Oschman
Instructed by:	Lingenfelder & Baloyi Attorneys, Kempton Park