REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, PRETORIA)

Case number 26123/11

In the matter between:

SCENEMATIC (PTY) LTD **PLAINTIFF**

and

FIRST NATIONAL BANK, a division of

FIRST RAND LTD **FIRST DEFENDANT**

THOMAS JOHANNES NAUDÉ **SECOND DEFENDANT**

JUDGMENT

HIEMSTRA AJ

[1] The plaintiff, Scenematic (Pty) Ltd, is a manufacturing company. The first defendant is First National Bank, a division of First Rand Ltd, The plaintiff held a bank account, No. 6[...], with the first defendant. The second defendant is Mr Thomas Johannes Naudé, a former director and employee of the plaintiff.

THE ISSUE

[2] The second defendant who was at the time an employee and director of the plaintiff, personally entered into an instalment sale agreement with Wesbank, also a division of First Rand Ltd, for the purchase of a Mitsubishi Pajero motor vehicle. He furnished to Wesbank the bank account number of the plaintiff, 6[...], for the purposes of payment of the monthly instalments by debit order. The agreement was entered into on 22 May 2007. The debit order was honoured by the first defendant and monthly instalments of R4 362.23 were debited to the plaintiff's bank account from 2 July 2007 to 1 February 2011, in a total amount of R195

661.94.

[3] The plaintiff alleges that the second defendant had no authority to cause the debit order to be implemented against its bank account. The second defendant, on the other hand, alleges that the Managing Director of the plaintiff, Mr W.C. Annandale, had agreed, as part of the second defendant's remuneration package, that he could finance the purchase of a motor vehicle and debit the instalments to the plaintiff's account.

Claim against the first defendant

[4] The plaintiff alleges that the first defendant, as its banker, had undertaken tacitly or impliedly that it would perform its duties scrupulously and without negligence. This undertaking included that the bank shall not debit the bank account of the plaintiff without proper authority.

[5] The plaintiff claims that the first defendant had failed to comply with this undertaking in that it had failed to take the necessary steps to ensure that the second defendant had the required authority to cause the plaintiffs bank account to be debited with the instalments in terms of the second defendant's instalment sale agreement with Wesbank. It further failed to exercise the necessary care in carrying out its duties in respect of the plaintiff's bank account.

Claim against the second defendant

[6] According to the plaintiff, it had given the second defendant no authority to debit its account and it had no knowledge of the instalment sale agreement between the second defendant and Wesbank. The plaintiff alleges that the second defendant had acted fraudulently by misrepresenting to Wesbank that bank account number 6[...] was his personal bank account number, or that the second defendant had authority to furnish the plaintiffs bank account number as the account against which the monthly instalments were to be debited. It claims that as a result of the second defendant's fraud, it had suffered damages in the amount of the instalments debited to its account.

[7] The plaintiff accordingly claims against the first and second defendants jointly and severally, the one paying, the other to be absolved, payment of the sum of R195 661.94.

PRESCRIPTION

[8] Both defendants raised special pleas of prescription and argued that I should decide the special pleas at the outset because, if they were upheld, it would be the end of the matter It is, however, clear from the plaintiffs replication, filed belatedly with the consent of the defendants, that evidence was required to decide

the special pleas, and furthermore that the evidence regarding prescription would be so interwoven with the evidence on the merits, that all the evidence should be presented. I accordingly made such a ruling.

[9] The instalment sale agreement was entered into on 22 May 2007 and the first instalment was debited to the plaintiffs account on 2 July 2007. Summons was issued on 9 May 2011, nearly four years later. The debt in question, if it exists, is one contemplated by section 11(d) of the Prescription Act 68 of 1969 (the Act). The subsection further provides that such a claim is extinguished by prescription after three years.

[10] Section 12(1) - (3) of the Act provides:

> "(1) Subject to the provisions of subsections (2), (3) and (4), prescription shall commence to run as soon as the debt is due."
>
> (2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.
>
> (3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such
>
> knowledge if he could have acquired it by exercising reasonable care."

[11] The plaintiff never became indebted to Wesbank in terms of the instalment sale agreement. The agreement was entered into between the second defendant and Wesbank. The plaintiff's claim against the first defendant is for for damages arising from negligence or breach of contract. The claim against the second defendant is for damages arising from fraud. The plaintiff, on its version, suffered damages each time its bank account was unlawfully debited. Prescription can therefore at the earliest run from the date of each debit.

[12] In terms of s 12(3), a debt is deemed to be due once the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises. In terms of the proviso to the subsection a creditor shall be deemed to have such knowledge when he could have acquired it by exercising reasonable care. When that moment arrives is a factual question to be determined in the context of the circumstances.

[13] The plaintiffs account was debited for the first time on 2 June 2007and the debit was reflected on its bank statement for the relevant period and in subsequent bank statements. Had the plaintiff thoroughly investigated the debit each time it was reflected in its bank statement, it would have established the identity of the person who unlawfully caused its bank account to be debited and all the facts that were necessary to institute action. In that event the plaintiff would have been able to prevent any further instalments to be

debited.

[14] In terms of the proviso to section 12(3) the question is whether plaintiff had exercised reasonable care each time its bank account reflected the alleged unlawful debits.

[15] Mr Annandale, the Managing Director of the plaintiff, testified that he does not personally scrutinise the bank statements. That is the duty of the bookkeeper. He said that the company had been in a growth phase at the time and that he had entered into many instalment sale agreements with Wesbank and other credit providers during that time for the purchase of machinery. He said that debit orders to the tune of approximately R150 000 per month were debited to the plaintiff's account. A debit order for R4 362.23 would not necessarily have raised the interest or alarm of the accounting staff. They would have assumed that it was for the purchase of machinery. The first time it was brought to his attention was during or about August or September 2008 when the auditors requested the source documents for all debit orders. He said that the source documents in respect of this debit order could not be found. He said that the auditor, Mr van Dyk, suggested that Mr Annandale or his staff enquire from Wesbank about the debit order. He said that his daughter, Ms Candice Annandale, who was employed by the plaintiff, had requested the information from Wesbank, but that Wesbank had failed to respond. Ms Annandale testified and confirmed this. Mr Annandale said that Mr van Dyk had told him that it was not crucial since it was a relatively small amount and that he was prepared to sign off the annual financial statements without having had sight of the documents. Mr van Dyk testified and confirmed this evidence. This was the situation each year until March 2011 when Wesbank eventually furnished the lease agreement.

[16] Should I find that the plaintiff had failed to exercise reasonable care each time its bank account had been debited, then prescription would run from the date of each debit. Should I, on the other hand, find that the plaintiff had exercised reasonable care in the circumstances, prescription would only run from such later date upon which the plaintiff’s continued failure to investigate the matter had become unreasonable.

[17] I find Mr Allandale’s explanation for the failure of his staff to establish the origin of the debits as soon as they were reflected on the bank statements plausible, in the context of the huge amounts debited to the account monthly, these debits were relatively insignificant. Although the plaintiff’s staff may not be entirely blameless, ! cannot find that their failure to investigate the debits was so unreasonable that it can be said that the plaintiff had not exercised reasonable care.

[18] I am, however, not impressed with the explanations of Mr Annandale and Ms Annandale for the plaintiffs failure to find the cause of the debits when the auditor requested them to find the source documents. The efforts of Ms Annandale to establish from Wesbank the origin of the debits were half-hearted to say the least. However, that is irrelevant. The auditor requested the documents during August or September 2008.

That is the date from which prescription ran. That is less than three years before summons was issued,

[19] I therefore find that the plaintiffs claims have not prescribed.

THE PLEADINGS

[20] I have already set out the nature of plaintiffs claim against the two defendants. The first defendant's defence as set out in its plea amounts thereto that the plaintiff had "caused and authorised" the second defendant, in his capacity as a director of the plaintiff, to enter into the instalment sale agreement, and had undertaken to pay the monthly instalments.

[21] The first defendant pleaded in the alternative that the plaintiff had supplied to the first defendant various documents in order for the first defendant to be appraised of the plaintiffs financial position. It also furnished a list of all the plaintiffs directors and notified the first defendant that the second defendant was one of its authorised directors. It thereby represented to the first defendant that the second defendant had been authorised to act on its behalf. The first defendant relied upon the plaintiffs representation and accordingly agreed to grant financial assistance to the plaintiff and to the second defendant for the purchase of the motor vehicle. As a result of the plaintiffs failure to notify the first defendant that the second defendant had no authority to bind the plaintiff to such an agreement, the first defendant acted to its detriment by entering into the instalment sale agreement. The plaintiff is accordingly estopped from relying on the true state of affairs.

[22] The second defendant pleaded that he, as a director of the plaintiff, had full signing powers relating to the plaintiff's bank account, and that he and Mr Annandale had colcuded a "Director's remuneration agreement" in terms whereof the plaintiff agreed to finance the purchase of the particular Mitshibushe Pajero.

THE EVIDENCE

[23] It is common cause that the second defendant had entered into an instalment sale agreement with Wesbank on 22 May 2007 in his own name for the purchase of a Mitsubishi Pajero motor vehicle. The instalment sale agreement initially reflected, in typescript the second defendant's bank account number with the plaintiff, but that number was deleted and the bank account number of the plaintiff was inserted in manuscript. The amendment was initialled by only the second defendant. The second defendant declared in the agreement, under the heading "ERKENNINGS" the following:

> "DEBIETORER ek magtig hiermee onherroepelik dat **my** bankrekening gedebiteer mag wordmet alle bedrae wat verskuidig is of te eniger tyd in die toekoms verskuldig mag word ten opsigte van my verpiigttng kragtes hierdie ooreenkoms."(my emphasis)

He thereby clearly represented to Wesbank that the number indicated was his own bank account number

[24] On 24 May 2007, the second defendant, presumably at the instance of the Wesbank , requested Ms Annandale to prepare a document confirming his employment status and his salary. She said that she had confirmed with her father the second defendant's correct income, whereafter she prepared such a document.

[25] The second defendant testified that at some stage Mr Annandale had offered him on two occasions motor vehicles, both Mercedes Benzes. He declined the offers because the vehicles did not suit his needs. Mr Annandale then told him to "source" a vehicle that suited him. He said that Mr Annandale had insisted that the vehicle be registered in his own name. He then purchased the Mitshubishi Pajero in his own n ame, and caused the instalments to be debited to the account of the plaintiff.

[26] Mr Annandale emphatically disputed the second defendant's evidence. He testified that the second defendant had been dismissed on unrelated disciplinary charges during November 2008. It is common cause that the instalments continued to be debited to the plaintiffs account long after the second defendant's dismissal. This, according to Mr Annandale, shows conclusively that the motor vehicle could not have been part of the second defendant's director's remuneration.

THE LEGAL ISSUES

In respect of the first defendant

[27] The plaintiff claims for pure economic loss, namefy damages not arisng directly from damage to its property, but rather in consequence of a negligent act on the part of the first defendant. Conduct causing pure economic loss would only be regarded as wrongful if public or legal policy considerations require that such conduct, if negligent, should attract legal liability for the resulting damages.[1]

[28] It was held repeatedly that a bank generally owes their cousomers a duty of care in respect of their bank accounts. It must exercise its duties scrupulously and without negligence.[2] In deciding whether the bank has adheared to its duty of care, is a value judgment embracing all the relevant facts and considerations of public policy.[3]

[29] In concluding the instalment sale agreement, Wesbank was represented by an employee, Ms Vanessa Downing. She was not available to testify. Council for the plaintiff accepted that she could not be traced and did not submit that a negative inference should be drawn from the failure to call her. It is however, common cause that the second defendant contracted in his own name and furnished his own financial information for the purposes of approval of the credit. Ms Downing completed a "Corporate Spif Transmissions Checklist"

in which she ticked a block indicating "Agreement signed by authorised signatory and resolution attached". There is no resolution attached and it is common cause that none existed. It is also common cause that she had done nothing to verify the second defendant's bank details, or whether he had authority to cause the plaintiffs bank account to be debited.

[30] As I have s*aid supra*, whether the bank has failed in its duty of care is a value judgment, in my view, Ms Downing's omission was negligent. Her negligence is compounded by the fact that the second defendant had changed the account number that he had first given to that of the first defendant. This should have caused her to enquire as to whose bank account number the second defendant had supplied. If she knew from previous dealings with the plaintiff or the second defendant, or had been told that it was that of the plaintiffs account number, she should have established whether he had the necessary authority. The fact that the second defendant had signing powers in respect of the plaintiffs bank account does not mean that he had authority to burden the plaintiffs bank account with his personal liabilities.

In respect of the second defendant

[31] I have no hesitation in rejecting the evidence of the second defendant where it is in conflict with that of Mr Annandale. He was an evasive witness who continuously adapted his version under cross-examination. Apart from the fact that I find him to be a dishonest witness, his evidence that the alleged motor vehicle benefit had been part of his remuneration is completely discredited by the fact that the instalments continued to be debited to the plaintiffs account long after the termination of his services. His explanation that he had had a loan account to his credit and that he thought that the instalments would be debited to his loan account was another invention conjured up during cross-examination.

[32] *I* find that the second defendant had acted fraudulently and had caused the plaintiff to suffer damages in the amount of the Instalments debited to its bank account.

In the result 1 make the following order:

1. Both defendants' special pleas are dismissed with costs;

2. The first and second defendants are ordered to pay to the plaintiff the amount of R195 661.94 jointly and severally, the one paying, the other to be absolved.

3. The first and second defendants are to pay the plaintiffs costs, the one paying, the other to be absolved.

J. HIEMSTRA

ACTING JUDGE OF THE HIGH COURT

Date heard: 7 March 2014

Date of judgment: 30 April 2014

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MV MSC Spain; Mediterranean Shipping Co (Pty) Ltd v Tehe Trading (Pty) Ltd 2005 (5) SA 514

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(SCA at 520G - 522F; *Peterson & Another v Absa Sank Ltd* 2011 (5} SA 489 (GNP) at para [3] z *Indac Electronics (Pty)Ltd v Voikskas Bank Ltd* 1992 (1) SA 733 (A)

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" *Indac Electronics* supra 3t797 E-F