REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA

CASE NO: 798/2020
DOH: 22 February 2022

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED.
DATE: 2022/03/30

In the matter of:

IRENE DALE	**APPLICANT**

And

RIAN DU PLESSIS ATTORNEY & CONVEYANCER	**FIRST RESPONDENT**
JOHANNES CHRISTIAN DU PLESSIS	**SECOND RESPONENT**
P J KLEYHANS INCORPORATED ATTORNEYS	**THIRD RESPONDENT**
LEGAL PRACTICE COUNCIL	**FOURTH RESPONDENT**

JUDGEMENT

THIS JUDGEMENT HAS BEEN HANDED DOWN REMOTELY AND SHALL BE CIRCULATED TO THE PARTIES BY WAY OF EMAIL/ UPLOADING ON

CASELINES. THE DATE OF HAND DOWN SHALL BE DEEMED TO BE 30 MARCH 2022

BamJ

A. INTRODUCTION

1. This case is concerned with a claim for the recovery of money, an amount of R843 945, that was retained in the respondents' trust account for the benefit of the applicant. The money was paid out to two recipients both of whom the applicant claims not to know, without her authorisation. She blames the respondent for making the payments and she states that it is unlikely that anyone else would have known that there were funds in the respondent's trust account and much less that anyone else would have intercepted and redirected emails, all of which led to the payment of the alleged unknown third parties. She seeks an order from this court for the payment of the full amount with interests and costs on a punitive scale. On 28 February, following argument on 22 February 2022, I issued an order dismissing the application based on the applicant's failure to comply with Rule 63 of the Uniform Rules. Based on the state of the applicant's papers, I concluded that it cannot be said that there is an application before this court. The applicant has since requested reasons for this decision. Since the merits of the case were fully argued, in addition to the reasons, I include my findings on the merits of the case.

B. THE PARTIES

2. The applicant identifies herself as a housewife and holder of a British passport, number [....]. She states in her papers that she resides at Mentzhauser Strasze, Ovelgoenne, in the Republic of Germany. The second respondent practices for his own account under the name and style of the first respondent. As such, the first and second respondents are one person;

hence, I refer to them collectively as the respondent. The third and fourth respondents are not participants in this litigation. Thus, nothing further need be said about them.

C.BACKGROUND

3. The common cause facts are: On 4 July 2018, whilst resident in Norfolk in the State of Virginia, USA, the applicant accepted an offer to purchase her home situated in Pretoria North, Gauteng, from one Ms Fourie, in the amount of R 900 000. The property was transferred on 3 September 2018. A little over two months after accepting the offer, on 6 September 2018 to be precise, the applicant announced to the respondent that she had moved to Germany to the address already mentioned[1].

4. The applicant and respondent have never met in person and never spoken to each other over the telephone. They became connected to one another through an introduction by the estate agents, KW Edge Infinity Reality, Pretoria North, mandated to market the applicant's property. As a result of the recommendation of the estate agents, the respondent was appointed to attend to the registration of transfer of the property. The applicant, according to the respondent, chose e-mail as her preferred mode of communication. Thus, all communication, both before and after the transfer was only by means of e-mail. There came a time when the parties began communicating via WhatsApp. Niether the WhatsApp communication, the nor the reasons for switching from e-mail to WhatsApp are covered anywhere in the applicant's affidavit. Nonetheless, it appears that through a third party, apparently from the estate agents, information was relayed by the applicant that the respondent contact her via WhatsApp. I elaborate on the circumstances and the reasons proffered by the applicant for the change.

5. Just over two weeks since registration of transfer, money was paid out

[1] see paragraph 2

of the respondent's trust account, via his correspondent, on the strength of what the respondent says were e-mail instructions from the applicant. The first payment in the amount of R 450 000 was made to a Siphiwe Qhama on 13 September 2018. The second and last payment of R 393 940 was to Enkanyezi Funerals, on 21 September. The respondent stands by a series of e-mails which bear the email address of the applicant, through which he says his instructions were communicated. The respondent denies being negligent or that he committed theft or fraud. He asserts that there are too many material disputes of fact in the matter and that this court cannot overcome those by a mere reading of the affidavits before court. On that basis, the applicant ought to have sued out a summons, which would have seen the testimony of each witness being tested under cross examination to get to the bottom of the truth, says the respondent. He asked that the court dismiss the applicant's case with costs.

D. MERITS

6. In making her case for the liability of the respondent, and after canvassing the background detail, the applicant sets out what was due to her, with reference to Annexure A, a Statement of Account issued by the respondent on 3 September 2018. She then states:

> 'Following the last authorised payment on 19 September 2018, the second [respondent] indicated that he would open a bank account on his name for me because opening a bank account in my name would be a long process. I attach hereto as Annexure C an extract of communication I received from the second respondent to that effect.'[2]
> 'To my utter surprise I then received an sms/email from the Second Respondent on 28th of September 2018, wherein he told me that he was concerned that there was still a problem with payments of my money. '[3]

[2] paragraph 4.11 FA

7. The applicant further adds that on 29 September, for the first time, the respondent revealed that he had made payments to Simphiwe Qhama in the amount of R 450 000 on 13 September and the remainder of R 393 940.65 to Enkanyezini Funerals on 20 September. She says she told the respondent that she had never made the instruction to pay and had no idea who the two recipients were to whom the respondent had allegedly paid her money. In his reply, the respondent stated, 'we have a huge problem.' He further went on to say that he had been hacked by criminals and that he would report the incident to the police. These exchanges, took place via WhatsApp. I shall return to the WhatsApp exchanges.

8. The applicant says she believes the respondent has not been candid with the court about what he did with her funds. She lists the reasons for her belief as: (i) The delay on the part of the respondent in reporting to her the two payments made on 13 and 21September and his failure to confirm with the applicant whether she had received the funds. (ii) The respondent's failure to provide her with progress reports on the police investigation into the alleged criminal hacking. (iii) The unlikelihood that, firstly, anyone other than the respondent would have known of the funds in the respondent's trust account, and that anyone else would have intercepted e-mails and redirected them, resulting in the payments as alleged by the respondent.

9. The respondent denies committing fraud or theft. He further denies the he had been negligent and specifically points out that the applicant has failed to present any factual basis on which this court can conclude that he had been negligent. He adds that the applicant has failed to present expert evidence to this court to establish the authenticity of the emails she relies on as evidenced in Annexure C. He denies authoring the e- mail in Annexure C. He states that all the emails conveying the instructions to pay to the two recipients came from the very same email address that the applicant supplied him. That e-mail address was confirmed by the applicant when completing

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[3] paragraph 4.12 FA

the mandatory Financial Intelligence Centre Act (FICA) form. He stands by the e-mail instructions he received to pay out to the two recipients and states that without expert evidence, there is no proof that the applicant had not sent the emails. He refers this court to the letter issued by his attorneys on 1 November 2018, wherein the applicant was informed in no uncertain terms that the funds held in trust on her behalf were paid out on the basis of the applicant's instructions.

E. ANALYSIS

10. Building on the foundation laid out in the applicant's affidavit, and with reference to the *Plascon Evans* rule[4], counsel for the applicant urged this court to find in favour of the applicant. The reasoning as stated by counsel went along these lines: There were funds in the respondent's trust account. Upon receipt of an e-mail instruction and without verifying, the respondent paid the wrong parties. Counsel placed reliance on the reasoning of this court in *Fourie* v *Van der Spuy and De Jongh Inc. and Others*[5], pointing that the law on the duties of an attorney when dealing with trust money and whether or not the applicant, as a trust creditor, has any control over the respondent's trust account have long been established. In this case, so the argument ran, money was paid into the respondent's trust account, and upon receipt of instructions, without verification, the respondent paid the wrong party. The respondent must, according to the reasoning of the court in *Fourie,* take the knock. Indeed, this was the conclusion of the court in *Fourie* and the facts justified it. The facts in Fourie briefly were as follows: the applicant, a long standing client of the respondents and to whom the respondents had rendered professional services, had money standing to his credit in their trust account. This is what the court found of the respondents' conduct:

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[4] The Plascon Evans rule from *Plascon-Evans Paints (TVL) Ltd.* v *Van Riebeck Paints (Pty) Ltd.* (53 of 1984) (1984) ZASCA 51 (21 May 1984) informs that".....where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order…..Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted".

'The Respondents say that the dispute between the parties lies therein that "a dispute exists regarding payment instructions (real or perceived)'. Yet, the payment instructions are clear: those that were legally done and those that were done due to hacking, are clearly distinguishable.'[6]

'It cannot be disputed by the Respondents that had the 2nd Respondent confirmed or verified the new bank details with the Applicant the fraud simply would not have occurred. It is abundantly clear from the facts that no verification process was followed and that the firm would have to carry the loss, not the Applicant.'[7]

11. Similar sentiments were expressed by the court in *Jurgens and Another* v *Volschenk*[8]*.* The court in *Fourie* made reference to *Jurgens.* In *Jurgens,* the facts briefly, point to the applicants and the respondent having had prior dealings in that the respondent firm of attorneys had sometime in 2017 transferred a property belonging to the applicant to a third party. That transfer was concluded without problems. For the second transfer, the applicants provided the mandate and thereafter emigrated to the USA. On 13 December 2017, the applicants received an email from the respondent's secretary, Natasha, advising that the transfer had been lodged. On the same day, the applicants responded that the proceeds are to be paid into the first applicant's Standard Bank account, which the respondents had all along had. The following day, the first applicant received an email purporting to be from Natasha and asking for proof of bank details. Since the email address was different from that often used by Natasha, the respondent copied the old Natasha address in his reply. He also copied the conveyancer. This is what the court said of the facts in reaching its conclusions on negligence:

'The furnishing of different banking institution within such short space

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[5] (65609/2019) (2019] ZAGPPHC **449;** 2020 (1) SA 560 (GP) (30 August 2019)
[6] paragraph 10
[7] note 4 supra, paragraph 24
[8] (4067/18) [2019) ZAECPEHC 41 (27 June 2019)

of time should have raised eyebrows to the respondent. First, the statement which purported to be from Absa Bank did not have names and addresses of the account holder. Second, most of the transactions in the statement were made in Gauteng in places such as Cresta, Centurion, Randburg and Fourways and cash deposits made in respect of Sotho speaking people. Third, the sudden change of banking institution was made a day after the Standard Bank account was given. A diligent, reasonable attorney would have taken steps to verify the information from Jurgens. The respondent failed to do so.'[9]

12. In *Flionis* v *Bartlett and Another*[10], an out and out fraud had been perpetrated on the appellant, an attorney. In short, in pursuance of what was initially described as a Gold Bullion scheme that made little or no sense to the court when carefully analysed, the respondent, also an attorney, had caused money to be transferred into the appellant's trust account, without informing the appellant that he had done so. The respondent had been introduced into the scheme by a woman named Hardarker, who apparently knew some people overseas who were said to be instrumental and experienced in brokering the deal. To cut the long and complex story, the respondent was specifically told by Hardarker not to communicate with the appellant. Shortly after the respondent had confirmed to Hardarker that the funds had been paid into the appellant's bank account, they were distributed, based on two successive letters sent by email to the appellant by a certain Gambino, without any proof or explanation of who he was, how he was connected to the funds, and what authority he had to issue instructions as he did. The letters conveying the instructions were handwritten, in broken English with numerous grammatical errors. Gambino included his contact numbers. Those numbers in the court's view would in all probability have led anyone astray. After hearing expert evidence from a person who had years of experience in dealing with attorneys' trust accounts, the court of appeal had

[9] note 7 supra, paragraph 36

the following to say:

> 'Faris testified that, in the present instance, the clearance voucher and the deposit slip would not have revealed the identity of the depositor, but the learned Judge found on the evidence that reasonably directed enquiry by Flionis would have established that the money came from the trust account of Bartlett's [the respondent's] company. In turn, any ensuing enquiry made of Bartlett would have elicited the latter's instructions to retain the money in the trust account. Appellant's counsel submitted that Bartlett, faced with such enquiry, would have adhered to his alleged undertaking not to communicate with Flionis. However, in all likelihood, in my view, Flionis would have had to say that he had instructions from Gambino. It is most unlikely that Bartlett would then have kept silent. He would have realised Hardaker's duplicity and spoken out.[11]

13. Each of the cases referred to in the previous paragraphs turned on its own facts. Certainly, there does not appear to have been an instance, in any of the cases discussed, where the courts registered a concern about whether or not the victims of the fraud had placed either half a story before the court or a carefully directed narrative to achieve a particular purpose. This, regrettably is what is at play in the present case. As enticing as counsel's argument was on the law, the reasoning of the courts in the cases referred to cannot and does not apply in the circumstances of this case. I now turn to the reasons for this statement.

(i) ***Internal contradictions in the applicant's version***

14. I start with the applicant's claim concerning the last authorised payment on 19 September 2018[12], for which she provides no proof, and the alleged undertaking from the respondent to open a bank account on her

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[10] [2006] SCA 24 (RSA)
[11] paragraph 22
[12] Refer to paragraph 6 of this judgement

behalf. This latter point alone, must the raise some questions. The first is, on what basis does a seller of property, in the ordinary course of events, expect a conveyancer to open a bank account for the seller in the conveyancer's name? The next question is: what became of the seller's own bank account? I demonstrate shortly that the applicant's avowals, that she was waiting to hear from the respondent about a bank account he had agreed to open for her, in his name, cannot be true, and this is based on the applicant's own version. Thereafter, I deal with the alleged 'utter surprise' in the applicant's statement where she says, 'to *my utter surprise, the respondent sent me an smslemaif* and informed her that he was concerned about the problem with her payments. The applicant herself had engineered the change to move away from e-mail communication to WhatsApp, under the excuse of having no email connection in her home; this, notwithstanding the numerous emails she had sent to the respondent whilst awaiting internet connection to her home. Simply, the applicant's story does not add up.

15. Annexure C contains two e-mail exchanges, one owned by the applicant with the date of 14 September 2018 at 4h36 pm and a second email dated 19 September 2018 at 09h51 am, which she says emanated from the respondent. There is a further extract in Annexure C with no clear reference as to its origins, with the time of 07h26. The extract has no date or email address. It is not possible to work out whether this is an extract from an email or from a short message system (sms). The applicant owns this extract as her own communication to the respondent. The respondent denies receiving both the email and the extract. He further denies sending the email of 19 September.

16. The e-mail allegedly from the respondent on 19 September reads:

> *'I have (sic) rectify the banking details you requested me to pay R5,000 into and they will get it on their side tomorrow. Also I have asked if I would be able to open an account and the requirement. I*

can be able to open an account (sic) on my name for you otherwise It will have to be a very long process opening an account on your name. Kindly let me know if I should open on my name or following the procedure opening of your name. Looking forward to your response. Regards'.

17. On 29 September 2018 at 09h25 pm, the respondent sent a WhatsApp to the applicant. The events as to how the applicant and respondent came to communicate via WhatsApp are fully canvassed in the respondent's affidavit. They are not mentioned at all in the applicant's affidavit. I deal with them in the next heading. In the course of their communication the applicant wrote:

> '... Stephanie and G.. said you are good at your job. So how can you transfer money into people while my last email to you I was asking you (sic) wether to (sic) ipen an account for me and you told me it was not easy to do that. The other option would have been you depositing the money into your own account. ..'
>
> The applicant continues, at 09h29 pm: *' ..but I told you that I would like to know what has to be done to open a bank account.'*
>
> The respondent responds: *'The last email I received from you were the ones dated 21 September when you confirmed that you had seen the last payment to Enkanyezini Funerals. I did not communicate to you regarding possible opening of bank accounts. We were hacked by criminals.'*

18. In all the papers provided by the applicant to this court, her bank account, into which the proceeds of the sale were to be paid, is not recorded anywhere. Now, if the applicant had indeed received the e-mail, set out in Annexure C of 19 September, from the respondent, and placed reliance on it, as she claims in her affidavit, there would have been no basis whatsoever for the persistent enquiries about the opening of a bank account for her,

in the name of the respondent, as revealed in her WhatsApp exchanges of 29 September. These exchanges on WhatsApp, demonstrate that:

(i) The applicant, at the time of deposing to the affidavit in 2020, well knew that the respondent had not agreed to open a bank account for her, in his name. Thus, the statement she makes in her affidavit must be taken as a false.

(ii) Her careful avoidance of referencing her WhatsApp exchanges in her affidavit, and her choice of referring to those exchanges as sms/email, is telling. The WhatsApp exchanges are not even labelled as an Annexure to her affidavit. They are merely dumped as part of her papers placed before this court.

(iii) The demand as can be seen in this statement during the WhatsApp exchanges, *'but I told you that I would like to know what has to be done to open a bank account'* reveals that the applicant had no intention of having the funds deposited into her own bank account at all, whatever the explanation was for such a stance.

(iv) The applicant's statement that: 'The other option would have been you depositing the money into your own account...' exposes the true nature of her game. First, it must be understood that the funds were always in the respondent's trust account. The reference therefore to, 'your own account', is a reference to the respondent's personal funds.

20. These facts reveal that the respondent, whether knowingly or unknowingly, was caught in a dangerous web of lies and deciet. Why the applicant was so desperate to have the funds paid from the respondent's trust account into other people's accounts and not her own accont, is a mystery. It is doubtful whether litigation would have ensued had the respondent relented to the applicant's demands, much earlier in the transaction, either by opening the bank account for the applicant, in his name, or depositing the funds into his personal account, both of which, would be unlawful. In addition to all that has been said, after a lengthy period of communicating with the respondent by e-mail only, the grammatical and

language mistakes exhibited in the e-mail in Annexure C, make it plain that the respondent did not author the e-mail. Where the e-mail came from, and why the applicant has not seen it fit to attach her e-mail of 19 September, in which the applicant claims to have authorised the last payment, simply echo the respondent's assertions in questioning the authenticity of the e-mails in Annexure C and his claim that there is a genuine dispute of fact in the matter. The deliberate avoidance of making any reference to the WhatsApp exchanges in the applicant's affidavit make it plain that the applicant knew that the whole story would be exposed and would upset the carefully directed narrative she has provided of an innocent victim who was awaiting an attorney to transfer funds into her bank account. These facts cannot be overlooked in favour of the carefully carved out narrative to suit the *Fourie* and *Jurgens* cases.

(ii) Glaring omission in the applicant's narrative

21. The applicant engineered the move away from e-mail to WhatsApp. The respondent says, on 25 September 2018, about twelve days after the first payment to Qhama, and four days after the payment to the Funeral home, he received a call from a lady by the name of Rose, enquiring about payment of R 5000 the respondent was supposed to make to her. He informed the lady that he had no such instruction. He further informed the lady that the applicant had been paid already. On 28 September, the respondent received a follow up call from the estate agent, Stefanie, conveying a complaint from the applicant about an unpaid amount of R 5000 to a Rose. Stefanie further informed the respondent that the applicant had been struggling to get hold of the respondent. Stefanie advised the respondent to rather contact the applicant via WhatsApp, as the applicant was having trouble with her emails. Indeed, on 28 September 2018, at 8h19, the respondent wrote to the applicant via WhatsApp:

'Hi Irene,

I understand that you are experiencing problems with your emails,

since when is this the case since we have been in email-touch since last Friday, if I am not mistaken? I'm concerned that there is still problems with the payments of your money! Can you please confirm the successful payments to your nominees and the amounts received? Regards Riaan

On 29 September 2018 at 06h13 pm, the applicant responds: Notably, with no immediate reaction to the payments made to her nominees referred to by respondent. Nor does she react to the respondent's reference to 'e-mail-touch since last Friday':

'I am *not able to access my email right now because I am still waiting for internet to be connected at my house. The Five Thousand Rands has not been deposited yet?* So *what is the problem? When did you do the transaction?'*

At 6h59 the respondent writes: *'When and how did you ask me to pay R 5000?'*

22. Why the applicant preferred to furnish the respondent's number to Rose and register her dissatisfaction and struggles in getting hold of the respondent to Stefanie, instead of calling the respondent directly via his landline or on his mobile phone, is a mystery. Why she chose to direct that the respondent pay third parties, such as Rose, who have no connection in any way to the conveyancing transaction, is not explained.

23. The applicant's explanation of why she was not able to access emails makes no sense at all. She had been communicating by e-mail with the respondent since the day she announced her arrival at her address in Germany, with or without house connection. For example, on 6 September 2018 at 10h31, the applicant wrote to the respondent:

'Hi Riaan

'I/We have moved to Germany… . Looking at the exchange rate for the ZAR I wonder whether it makes more sense to leave the money in South Africa and invest it through a bank. What are your thoughts on that? Could you arrange it?' The attachment only shows council fees, is this (sic) sell tax free.
Thanks again
Kind regards Irene Dale'

24. What is important to stress for now is that it could not have come as a surprise that the respondent sent an sms or WhatsApp to the applicant. The applicant engineered the entire shift from e-mail as a mode of communication to the WhatsApp platform. She has no explanation for it.

25. During argument, counsel for the applicant emphasised that the respondent was negligent in failing to verify the e-mail instructions that saw him pay the two recipients, stating that the respondent had flouted a basic rule of risk management. I do not accept that the respondent's failure to call the applicant in the circumstances of this case points to negligence. For one, there is nothing distinguishing the e-mails with instructions to pay from any of the applicant's e-mails. There is no way of telling that the e-mails were not from the applicant. It is only the applicant's say so. Any reasonable attorney in the position of the respondent would have acted on those e- mail instructions without any hesitation and made the payments.

26. In any event, I need not state that the applicant in her affidavit makes no case for the respondent's negligence. She has not placed any information before this court to demonstrate just how the respondent's conduct, in the circumstances of this case, deviated from that of a reasonable conveyancer. Other than making unsubstantiated statements suggesting the unlikelihood that anyone, other than the respondent, would have known of the funds standing to her credit in the respondent's trust account, and the unlikelihood that anyone other than the respondent, could have redirecting emails, leading

to the payments, the applicant makes no case for the respondent's negligence. None at all. If anything, the applicant in her affidavit blames the respondent of not being candid and adumbrates theft and fraud, neither of which are properly established as a foundation for the respondent's liability. In any event, motion proceedings can hardly be an appropriate means to pursue a claim based on fraud. In *Steyn* v *Ronald Bobroff* & *Partners*[13], the court remarked:

> 'To encapsulate: (a) The appellant set out to prove that the respondent had failed to execute its mandate with the skill, diligence and care required from a reasonable attorney.
>
> (b) The only evidence proffered was, however, that of the appellant herself who did not practice nor was she qualified as an attorney.
>
> (c) Shorn of unnecessary detail, her evidence established two things. First, that her claim against the Road Accident Fund could notionally have been brought before the court much earlier and, secondly, she wanted her claim to be finalized as a matter of urgency.
>
> (d) In argument, counsel for the appellant contended that in the circumstances the delays were so unreasonable that it justified the inference of negligence on the part of the respondent. Or, in legal parlance, *[res ipsa loquitur,]* which literally means that the facts spoke for themselves....As I see it, the mere fact that the respondent did not bring the matter before court in the shortest possible time-frame does not necessarily justify the inference of negligence. Even on the assumption that the appellant took a long time which could, on the face of it, conceivably be described as unreasonable, the enquiry whether this constituted lack of skill, diligence and care on the part of the respondent would, in my view, still raise the question: what were the circumstances?'

(iii) ***Revealing information in the applicant's replying affidavit***

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[13] 025/12) [2012] ZASCA 184 (29 November 2012) at paragraph 29

27. In her 22 pages' of replying affidavit, the applicant shifts gears, makes direct accusations that the respondent has been complicit in fraud and has lied to this court. She further indirectly accuses the respondent of making a false report to the police. She also reveals details that can only be interpreted to mean that the applicant knows a little more than she has revealed about the payment to at least one of the individuals. In this regard, the applicant deals with the payment to Simphiwe Qhama of 13 September 2018 in minute detail[14]. She makes the startling statement that the reason the second payment of 17 September, which the respondent had attempted to make, failed (based on the follow-on instruction to pay the balance to Qhama), was because the account 'was no longer active / no longer able to receive payment'. She then remembers that the reason the payment was rejected was noted as unknown. As to the provenance of the statement made by the applicant that the account was no longer active/ no longer able to receive payment, the applicant provides no explanation. One thing is clear, the respondent, the person who was asked to make payment, never made mention of the account's inactivity as the reason the payment was unsuccessful. He simply recorded in his answering affidavit that he was informed by his correspondent firm that the payment did not go through, for unknown reasons. The applicant's replying affidavit is replete with statements as to why the respondent was easily hacked, without providing any expert evidence.

28. As to the applicant's direct accusations that the respondent was complicit in fraud and the statements implying that the respondent had made false reports to the police, a litigant is not entitled to make a new case in a reply in motion proceedings. In *Global Environmental Trust and Others* v *Tendele Coal Mining (Pty) Ltd and Others,* it was said:

> 'It is impermissible for an applicant in motion proceedings to make out a new case in reply. As Cloete JA pointed out in *Minister of Land Affairs and Agriculture v D & F Wevell Trust,* '[t]he reason is

[14] paragraph 6.4.11 RA : Caselines 006-20

manifest - the other party may well be prejudiced because evidence may have been available to it to refute the new case on the facts. The position is worse where the arguments are advanced for the first time on appeal'[15].

29. It is time to address one more contention made by the applicant's counsel during argument in his comparison of this case with the facts in *Fourie*[16] and in *Jurgens*[17]. Counsel, ignoring the circumstances of this case, including the disputes of fact, made reference to a comment made by the court in *Fourie.* This was in response to an averment made by the respondent that there was a dispute as to whether the applicant was not involved in the alleged cybercrime. The court, rejecting the alleged dispute, noted that the respondent had deposed to an affidavit to the police, alleging that fraud had been committed, as a result of which money belonging to the applicant was paid out to incorrect parties. Bringing the same reasoning to the present case, counsel raised the fact that the respondent too had reported the matter to the police, alleging criminal hacking. He further referred to an instance where the respondent exclaimed that he had been hacked by criminals. This was, of course, during the exchanges on WhatsApp. The respondent has explained his reaction at the time. He says that at the time, he was made to believe that he had sent e-mails he does not know to the applicant, and that the applicant had sent e-mails to him, as set out in Annexure C, demonstrating the alleged hacking,. However, says the respondent, after having threaded his way carefully over his e-mail communications with the applicant, and made contact with his service provider, he is satisfied that there is no evidence that he was hacked. He concludes by stating that the emails carrying the applicant's instructions to pay are from her and, without expert evidence, that dispute cannot be overcome. Looking at the circumstances of this case, I must agree with the respondent's assertions that there simply is no way of telling that the emails did not come from the

[15] (1105/2019) [2021] ZASCA 13 (09 February 2021)
[16] note 4
[17] note 7 supra

applicant.

F. CONCLUSION

30. For all the reasons set out in this judgement, I am satisifed that the applicant has failed to prove her case against the respondent. Her reliance on the decided cases discussed in this judgment was misplaced, given the unique facts of her case. Motion proceedings are about resolving legal issues on common cause facts. See in this regard the comments of the court in *National Director of Public Prosecutions* v *Zuma* that[18]. The principle was repeated in *Fakie NO v CCII* Systems *(Pty) Ltd* in the passage below:

> That conflicting affidavits are not a suitable means for determining disputes of fact has been doctrine in this court for more than 80 years. Yet motion proceedings are quicker and cheaper than trial proceedings, and in the interests of justice, courts have been at pains not to permit unvirtuous respondents to shelter behind patently implausible affidavit versions or bald denials. More than sixty years ago, this court determined that a judge should not allow a respondent to raise 'fictitious' disputes of fact to delay the hearing of the matter or to deny the applicant its order. There had to be 'a bona fide dispute of fact on a material matter'. This means that an uncreditworthy denial, or a palpably implausible version, can be rejected out of hand, without recourse to oral evidence. In *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd,* this court extended the ambit of uncreditworthy denials. They now encompassed not merely those that fail to raise a real, genuine or bona fide dispute of fact, but also allegations or denials that are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers.'[19]

31. The question that must now be answered is, is the respondent's citation of material disputes of fact in this case so far-fetched, untenable and

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[18] (573/08) (2009] ZASCA 1 (12 Jan 2009) at paragraph 26

palpably impossible such that the court would be justified in rejecting his version on paper? The answer most definitely must be a no. On the circumstances of this case, the applicant has not proved any negligence against the respondent. That means, the applicant's application fails. As to the costs, the applicant was informed in the respondent's letter of 1 November 2018 that her version was disputed by the respondent. The half version produced by the applicant of the parties' extensive e-mail communication, coupled with the WhatsApp trail, ought to have been sufficient basis to conclude that there were bound to be material disputes of fact. These were sufficient reasons to dissuade the applicant from proceeding by way of motion proceedings to pursue relief. Yet the applicant proceeded. The applicant must pay the respondent's costs.

G. Rule 63

32. It is time to refer to the state of the applicant's papers. Rule 63 deals with authentication of documents outside the Republic for use within the Republic. Authentication in the context of the Rule means the verification of any signature thereon when applied to a document. A document includes any deed contract or affidavit or other writing. The relevant part is found in subsection 2 and it states:

> '(2) Any document executed in any place outside the Republic shall be deemed to be sufficiently authenticated for the purpose of use in the Republic if it be duly authenticated at such foreign place by the signature and seal of office-
>
> (a) of the head of a South African diplomatic or consular mission or a person in the administrative or professional division of the public service serving at a South African diplomatic, consular or trade office abroad; or

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[19] (653/04) [2006] ZASCA 52; 2006 (4) SA 326 (SCA) (31 March 2006) at paragraph 56

(b) of a consul-general, consul, vice-consul or consular agent of the United Kingdom or any other person acting in any of the aforementioned capacities or a pro-consul of the United Kingdom;

(c) of any Government authority of such foreign place charged with the authentication of documents under the law of that foreign country; or

(d) of any person in such foreign place who shall be shown by a certificate of any person referred to in paragraph *(a), (b)* or *(c)* or of any diplomatic or consular officer of such foreign country in the Republic to be duly authorised to authenticate such document under the law of that foreign country; or (e)... (f)...

(3) If any person authenticating a document in terms of subrule (2) has no seal of office, ...'

(4) Notwithstanding anything in this rule contained, any court of law or public office may accept as sufficiently authenticated any document which is shown to the satisfaction of such court or the officer in charge of such public office, to have been actually signed by the person purporting to have signed such document. '

32. I start with the document serving as applicant's founding affidavit and note the following: (i) Neither the applicant's initials nor that of the person authenticating appear on the pages of the affidavit. The last two pages carry the seal of a person who identifies himself as a notary public, by the name of Christian Freericks. Below the first seal on the penultimate page, the words, 'Seal of a Notary Public' are underlined and above the seal the following appears: Address of Notary Public: Hindernburgstrasse 29, 26122, Oldenburg, Germany. The last page carries what appears to be a certificate in

the German language, the seal, the place Oldenburg, the word notary, a signature, file number 798/2020 and a brief translation into English. Below the file number is the following:

> 'I hereby certify that this document was signed in my presence by Mrs Irene Dale, born Rusape, on 04 October 1960, of Mentzhauser Strasse 26939, Ovelgonne, identified by her official passport of the United Kingdom. Oldenburg and date 19.08.2020. '

33. Save for the applicant's initials that appear on every page, without those of the person authenticating, the applicant's replying affidavit appears to have been authenticated by the same Freericks on 19 October 2020. Both the founding and the replying affidavits appear to have been authenticated by a person who falls outside the categories set out in sub rule 63 (2) (a), (b), and (c). In the event, as sub rule (2) (d) provides, that such person, *'shall be shown by* a *certificate of any person referred to in paragraph (a), (b) or (c) or of any diplomatic or consular officer of such foreign country in the Republic to be duly authorised to authenticate such document under the law of that foreign country'.* Ex facie the applicant's papers, Rule 63 (2) (d), couched in peremptory terms, was not complied with. I shall return to this aspect. I now turn to the Annexure:

> 33.1 Annexure A is a statement of account bearing the respondent's letterhead, his address and telephone numbers. This document appears to have been authenticated in Bremerhaven on 17 August 2020, two days before the applicant's signature in the founding affidavit was authenticated. There is a seal, which is clearly different from that placed by the person who identified himself as the notary with the name Freericks. Before I deal with all the Annexures, those that were 'authenticated' carry reference to the same person, by way of seal and office address. The person is not Freericks. Whether the annexures were at all placed before Freericks, and what he made of them, is not clear.

33.2 Annexure B, the Offer to Purchase that was prepared by the estate agents, appears not to have received the attention of the person who signed the affidavit as notary at all.

33.3 There are two copies of the applicant's British passport, issued on 13 January 2018, a mere six months before the sale took place. These copies, like the WhatsApp trail, which carry neither the initials of the person who authenticated the affidavit nor that of the applicant, are simply placed on Caselines with no clear indication of what they represent. They further carry no label.

33.4. Annexure C is a record with two pages carrying two emails that appear to have been exchanged during the month of September 2018. The two pages carry neither the applicant's initials nor that of the person authenticating. A third page with no writing at all carries the seal and stamp.

33.5 A further document, not identified as an annexure, carrying WhatsApp exchanges between the applicant and the respondent, shows neither the initials of the applicant nor that of the person authenticating. The last page, a blank, carries a seal.

30.6 Annexure D: A single page letter dated 1 November 2018, on the letterhead of the third respondent, carries what appears to be a stamp. Neither the applicant's initials nor that of the person authenticating appear in the document.

33.7 Annexure E is a letter of demand on the letterhead of the applicant's attorneys dated 25 June 2020. Neither the applicant's initials nor that of the person authenticating appear on the document. The last page, a blank, carries a seal.

34. I now return to Rule 63 (2) and the apparent purpose and context in which the meaning is to be understood[20]. The wording of the sub rule is

[20] *Natal Joint Municipal Pension Fund v Endumeni Municipality* (920/2010) [2012] ZAS A 13 (15 March 2012) at paragraph 18: '... Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever

plain. It requires, in the event the person authenticating, does not fall within the category of persons set out in subrule (2) (a) (b) or (c) a certificate to confirm that such person has been duly authorised, under the laws of that particular country. That would be confirmation that the alleged notary, and the second person whose seal and stamp appears in the Annexures, are both duly authorised to authenticate documents in the Republic of Gemany. Clearly, the object of the provision must be, *inter alia,* to minimise instances of unauthorised individuals pretending to be so authorised, authenticating documents to the prejudice or disadvantage of lay persons who may be none the wiser.

35. This brings me to the more compelling point in this case. It is one thing that the applicant may be oblivious of the demands of Rule 63, but the same cannot be said of her legal team. The duty to place properly authenticated papers rests with the applicant, the party that is *dominus litis.* To sum up, based on the applicant's founding papers, the annexures and the replying affidavit, and for the reasons aforementioned, there is, in fact, no application before the court to accept the applicant's papers as they are, simply because no objection was raised by the respondents, would undermine the orderly functioning and effectiveness of the justice system. Rule 63 (2) was not complied with, which is fatal to the applicant's case. It was for the applicant, assisted by her legal team, to ensure that the papers presenting her case are properly before court It Is on this basis that I issued the order dismissing the applicant's case.

F. Order

36. The applicant is dismissed. The applicant is ordered to pay the costs of the respondent.

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the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax: the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production.'

NN BAM

JUDGE OF THE HIGH COURT, PRETORIA

DATE OF HEARING **21 February 2022**

APPEARANCES

APPLICANT'S COUNSEL:	**Adv Mureriwa**
Instructed by·	Makota Attorneys Pretoria
FIRST AND SECOND RESPONDENTS' COUNSEL:	**Adv Grobler SC**
Instructed by:	Rian du Plessis Attorneys Pretoria