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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

- (1) REPORTABLE: YES/~~NO~~
- (2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
- (3) REVISED

CASE NO: 4052/2017

14/6/2019

In the matter between:

GALACTIC AUTO (PTY) LTD

PLAINTIFF

and

ANDRE VENTER

DEFENDANT

JUDGMENT

MAKGOBA JP

- [1] The Plaintiff, a motor dealer carrying on business as such in Polokwane, instituted an action against the Defendant claiming payment of the sum of R 379 341.16 being in respect of the purchase price of a motor vehicle sold and delivered by the Plaintiff to the Defendant. This action started as an urgent application in terms whereby the Plaintiff as the Applicant prayed for an order against the Defendant as the Respondent for the

return of the motor vehicle delivered to the Defendant on the 13 May 2017 on the basis that the Defendant had failed to pay the purchase price but continued to possess and use the motor vehicle concerned.

- [2] The urgent application was opposed and at the hearing of the application a dispute of fact arose resulting in the matter being referred for trial in terms of Rule 6(9) of the Uniform Rules of Court.
- [3] The Defendant has raised a defence of estoppel and in the alternative instituted a counterclaim for payment of an amount of R 365 720.48 based on alleged misrepresentation by the Plaintiff in that the Plaintiff, through its representatives, Pulane Zwane and Jaques Swart, made a misrepresentation to the Defendant which was false and caused the Defendant to believe that the purchase price was paid to their bank account and received by them when this was not the case. The Plaintiffs contention on this aspect is that the risk of the interception and paying the purchase price money into the wrong bank account is on the client (the Defendant in this instance) who has the obligation to ensure that his/ her emails and computer are not corrupted and that he/ she is paying the money into the correct bank account. Plaintiff avers that it is not part of its policy and procedure that after sending the correct banking details to the client from secure computers and e-mails to thereafter check whether all the clients have paid into the correct bank account. That is the clients' own responsibility.

Plaintiff's case

- [4] Ms Pulane Zwane, a sales executive of the Plaintiff Ford dealership in Polokwane received a phone call from the Defendant on the 10 May 2017. The Defendant enquired from her whether they had a Ford Ranger XL single cab 4 x 4 pickup in stock as he wanted to purchase one cash. He also wanted certain extras to be done in respect of the vehicle. Pulane confirmed the availability of the vehicle and that she would prepare a quotation for him and obtained the Defendant's e-mail address. Shortly

thereafter Pulane sent the quotation to the Defendant using her e-mail address to wit, **Sales1@galacticauto.co.za**. She also phoned the Defendant to enquire whether he had received the quotation which he confirmed to her. Shortly thereafter the Defendant phoned her and asked her whether she could also include rubberising in the quotation which she confirmed she would do. She then sent the Defendant another quotation which included the rubberising. She again made use of the e-mail address, **Sales1@galacticauto.co.za** to send the second quotation. She then phoned the Defendant to enquire whether he had received the said quotation which he confirmed to her.

- [5] The next day, on 11 May 2017 the Defendant phoned Pulane to obtain Plaintiff's banking details to enable him to effect payment of the purchase price by way of an electronic transfer (EFT). She then sent the Plaintiff's **proforma** banking details to the Defendant per e-mail address **Sales1@galacticauto.co.za** .
- [6] Pulane testified further that after she had sent the **pro forma** document with the Plaintiff's correct banking details to the Defendant the latter phoned her and asked whether she had received proof of payment which he had sent her. She said no, but she would check again while the Defendant was holding on. She then confirmed that she had not received any proof of payment and asked him: **Are you sure you sent it to the correct E-mail address which is Sales1@galacticauto.co.za?** He said yes he did but he would resent it.
- [7] Shortly thereafter she received the proof of payment from the Defendant. She phoned him and informed him as such and that she would start preparing the vehicle. The Defendant told her that he needed the vehicle to be delivered to him and registered on his name the next day as he had to start with a project at a mine near Thabazimbi on Monday 15 May 2017 and that he would not be allowed access to the mine without number plates on the vehicle. She assured him that she would do her best to ensure that the vehicle is registered and delivered to him.
- [8] On Saturday 13 May 2017 Pulane and the Defendant inspected the

vehicle together whereafter they sat down. She handed the Offer to Purchase (OTP) to him and explained the warranty and service plan to him. She then asked him to go through it whereafter he signed it and she delivered the vehicle to him.

- [9] Pulane testified that at the time she delivered the vehicle to the Defendant she knew that the money would not yet show in their bank account as the Defendant had only made payment on Thursday the 11 May 2017. She further testified that on the strength of the proof of payment sent to her and the fact that the Defendant wanted the vehicle urgently for a project which would start on Monday 15 May 2017 at a mine near Thabazimbi her sales manager gave her the necessary authority to start preparing the vehicle for delivery.
- [10] Pulane testified further that on 24 May 2017 she was informed by her employer that the money (purchase price) was not paid into the Plaintiff's bank account. She was suspended from her duties pending investigation. Her cellphone and computer were confiscated by the employer. After 2 to 3 days she returned to work and was informed that they have established that she did send the correct banking details to the Defendant and that her e-mails were not compromised. She concluded her testimony by stating that since she started to work as a sales executive at Galactic Auto on 16 September 2016 she has used the same e-mail address, to wit **sales1@galacticauto.co.za**.
- [11] Pulane Zwane gave evidence openly and without any hesitation or confusion. She answered questions under cross-examination perfectly and without any contradictions. It was put to her that she informed the Defendant upon receipt of the proof of payment that she was satisfied that he had paid them and that she would therefore proceed to prepare the vehicle for delivery. She denied that and said that there was a difference between receiving the proof of payment and the money showing in their bank account and that according to her a client has only paid once the money is in the account.
- [12] Under cross-examination she openly and honestly made the following

concessions:

- 12.1 She did not verify the account number on the proof of payment which was sent to her by the Defendant, nor the branch code.
- 12.2 She only looked on the proof of payment for the beneficiary's name, being GalacticAuto, the bank's name i.e Standard Bank, and that the amount correlates the purchase price.
- 12.3 It would have been very easy for her to verify the bank account number reflected on the proof of payment as she was in possession of the proof of payment sent to her by the Defendant. However, she explained that it was the sales manager's responsibility to verify the bank account details on the proof of payment and the bank particulars which she had sent to the Defendant.
- 11.4. She is aware that one must be wary of fraud transactions and fraudsters especially with regards to cash transactions over Fridays and weekends.

[13] Pulane's honesty makes her a reliable witness. She impressed me as such and I accordingly accept her version of her dealings with the Defendant as the truth of what happened.

[14] The second witness for the Plaintiff is Mr Jaques Swart, the sales manager at Plaintiffs motor dealership as at May 2017. Swart confirmed that he authorised the preparation and delivery of the vehicle to the Defendant after he was shown the proof of payment by Pulane Zwane on 11 May 2017. He expected that the payment of the purchase price would reflect on the Plaintiff's bank account after 3 to 5 days.

[15] On 24 May 2017 Swart noticed that the amount in respect of the purchase price was not taken off his debtors' list. He then discovered that the amount was not reflected in the Plaintiff's bank account. Upon checking the proof of payment he noticed that the purchase price was deposited in a wrong bank account number. He phoned the Defendant seeking clarification and the latter responded that that was the information he

obtained from Pulane. He informed the Defendant that the money was paid into a wrong account.

- [16] According to Swart internal investigations were conducted and nothing wrong was found on the Plaintiff's computer system. Pulane's correct e-mail address was found to have been used when sending all documents to the Defendant. After further investigations it was found that Pulane had sent the correct banking details to the Defendant.
- [17] Swart testified further that on the strength of the proof of payment he believed that the Defendant had paid the Plaintiff but because it was a transfer between two banks (First National Bank and Standard Bank) he knew that it would take 3 to 5 days to process and that payment would not show in Plaintiff's bank account by Saturday the 13 May 2017. He went further to state that on the strength of the proof of payment, his belief was that the Defendant has paid the Plaintiff, the fact that the Defendant needed the vehicle before Monday the 15 May 2017 otherwise he could have lost the contract, the fact that the Plaintiff had previous dealing with the Defendant and that he knew about the Defendant and his business, Venter Drilling, they decided to deliver the vehicle to the Defendant "out of goodwill".
- [18] Swart confirmed the evidence of Pulane that it was not expected of Pulane to check the bank account number on the proof of payment. He has also never before checked their bank account number on the proof of payment because it is the required procedure that all employees of the Plaintiff were only allowed to send the Plaintiff's banking details to a client by way of a **pro forma** document in the computer containing the correct banking details to ensure from their side that they provide the client with the correct banking details.
- [19] Both Swart and Pulane testified that no one in the employ of the Plaintiff used **sales@galaticauto.co.za** as an e-mail address. They corroborate each other that Pulane's e-mail address is **sales1@galacticauto.co.za**.

Swart conceded under cross-examination that upon receipt of the proof of payment they proceeded to register the vehicle into the name of the Defendant. He conceded further that over weekends one must be wary of fraudsters and hackers, especially with cash transaction. As a witness Swart impressed me as an honest and reliable witness. I have no reason to reject his version.

[20] The third and last witness for the Plaintiff was Mr Willem Pieter Taljard.

He is the IT Manager of the BB Group of which the Plaintiff forms part. On the 24 May 2017 he was called upon and informed about what had transpired regarding the purported payment of the purchase price in this transaction. He suggested that they contact the Defendant and ask him to send to them the e-mail from which the Defendant had received fraudulent bank details to enable him to try and trace it. In response the Defendant indicated to them that he had already sought legal advice and that they should speak to his advocate.

[21] During the course of his investigation Taljaard took Pulane's computer and checked all her e-mails from May 2017 and retrieved all the e-mails sent by her to the Defendant. He established that Pulane had in fact sent their correct **pro forma** banking details to the Defendant. He further established that she was using **sales1@galacticauto.co.za** as her e-mail address. Taljaard testified further that the Plaintiff did not have an e-mail address as **sales@galaticauto.co.za**. He could not find any malware or viruses on the computers and everything was in order. He stated further that the Plaintiff is using the number one antivirus system in the world.

[22] Taljaard concluded by stating that the e-mail on page 5 of the trial bundle with the attachment on page 6 of the same bundle (which I shall for the sake of convenience refer to them as fraudulent documents) which the Defendant received from e-mail address **sales@galaticauto.co.za** on 11 May 2017 was not sent from Pulane's computer or the Plaintiff's network.

- [23] Cross-examination of this witness did not bring out anything new or contradictory. The evidence of Taljaard remains unchallenged and therefore wholly acceptable.
- [24] Before setting out the evidence of the Defendant and his witness, I find it appropriate to put on record certain facts that are common cause in this matter. The following facts are common cause or not seriously disputed:
- 24.1. On 11 May 2017 the Defendant phoned Pulane to obtain the Plaintiff's banking details to enable him to effect payment of the purchase price by way of EFT. Pulane sent their pro forma banking details to him.
 - 24.2. Unbeknown to both of them their e-mails had been changed by the hacker to **sales@galaticauto.co.za**. The bank account number and branch code had been changed.
 - 24.3. The Defendant upon receipt of the banking details made payment into the fraudulent account being Standard Bank Account Number [...] Branch Code 051001 instead of the Plaintiff's Standard Bank Account Number [...] Branch Code 052548.
 - 24.4. The Defendant had thereafter sent the proof of payment to the "wrong" e-mail address (created by the hackers) to wit **sales@galaticauto.co.za**. The e-mail address of Pulane since she started her employment with the Plaintiff on 16 September 2016 until today is **sales1@galacticauto.co.za**.
 - 24.5. The Defendant shortly thereafter phoned Pulane to enquire from her whether she had received proof of payment which he had sent her. She informed him that she had not received the proof of payment which he had sent her. She gave him her e-mail address to wit **sales1@galacticauto.co.za**. He then sent the proof of payment to her at this email address.
 - 24.6. Upon receipt of proof of payment she phoned him and informed him as such. After she had received the proof of payment on 11 May 2017 she started the process to have the vehicle registered on his

name and to have the extras done.

24.7. On 13 May 2017 the Defendant signed off the offer to purchase (OTP) whereafter the vehicle was delivered to him.

24.8. On 22 May 2017 the Defendant acquired the services of an IT and internet specialist, a certain Mr Pierre Smith who compiled a technical report and according to the Defendant a full assessment of his email addresses was conducted and there was nothing out of order.

[25] Based on the above common cause facts it is clear that Plaintiff has delivered the vehicle to the Defendant but did not receive payment of the purchase price. On the other hand the Defendant has benefited in as much as he has received delivery of the vehicle and continues to be in possession of same. The question arises: who bears the risk of any possible hacking of the parties' computers and e-mails?

Defendant's Case

[26] The Defendant testified at the trial and called one witness, one Mr Louis Koekemoer. I shall not repeat the evidence of the Defendant in so far as it relates to the facts which are common cause as outlined in paragraph [24] above. What follows is the version of the Defendant.

[27] The Defendant testified that after he received the e-mail from Pulane containing the Plaintiff's banking details, he made the necessary EFT payment into the bank account with particulars as provided to him by Pulane. He believed that it was the bank account of the Plaintiff as he had emailed the proof of payment to Pulane, who ultimately confirmed that she had received the proof of payment which he had sent. That Pulane confirmed that she was satisfied with the proof of payment after being asked by the Defendant whether she was satisfied. She answered "everything is fine". According to the Defendant this meant that Pulane was satisfied that the Plaintiff had received the payment made by the

Defendant. Pulane then said that they will proceed to fit the extras and register the vehicle into his name and that he might collect the vehicle on Saturday the 13 May 2017.

- [28] The Defendant stated that Pulane represented to him that the money was paid into the correct account by stating that everything is fine after perusing the proof of payment. He stated further that Pulane failed to notify him on the 13 May 2017 when the vehicle was delivered to him that the money has not been reflected in the bank account of the Plaintiff. Furthermore that the money was paid into the wrong bank account and that the account number does not correspond with the account number of the Plaintiff.
- [29] The Defendant testified further that as a result of the representation made to him that the money was paid to the Plaintiff and received, he *bona fide* believed that the money was paid to the Plaintiff and received in their account. He avers that on the strength of this belief he failed to reverse the transaction before it reflected in the account of an unknown third party, alternatively, failed to reverse the transaction before the unknown third party was able to withdraw the funds. He avers further that had he known that it was the wrong account number, he could have stopped the payment immediately or could have reversed the payment immediately.
- [30] The Defendant stated that due to the representation made by the Plaintiff as referred to above, he committed an omission to his detriment as the money that was paid into the wrong bank account was withdrawn and was stolen. Consequently, the Defendant prays that the Plaintiff is estopped from now claiming that payment was not received, as their actions constituted a misrepresentation that has caused the Defendant to act to his detriment.

The Defendant went further to say that it was in the exclusive knowledge of the Plaintiff that payment was made into the wrong account and that they had a duty to inform him that the money was paid into the wrong account. Accordingly , it is the Defendant's view that the Plaintiff failed to

act with reasonable care when this representation was made, and the representation was therefore negligent, alternatively willful.

- [31] Upon being informed by the Plaintiff on the 24 May 2017 that the purchase price had been paid into a wrong bank account, the Defendant approached his bank in an effort to reverse the transaction. He discovered that a large portion of the money was withdrawn from the account and only an amount of R 13 620.68 remained in credit. This amount was paid out to him.

He approached the Police to open a fraud charge but to date hereof he does not know of the outcome of the Police investigations.

- [32] The Defendant avers that due to the negligent/ willful misrepresentation by the Plaintiff, he was only able to recover the amount of R 13 620.18 from the wrong account. He states that he has suffered damages in an amount of R 365 720.48 being the amount of R 379 341.16 (purchase price) less R 13 620.68 (the amount recovered). Accordingly , the Defendant has filed a counterclaim for payment of the alleged damages suffered by him in the sum of R 365 720.48 plus costs.

- [33] The Defendant did not give a good impression as a witness. I shall later in this judgment deal with his credibility as a witness when I analyse and evaluate the evidence as a whole. Suffice to say that the Defendant could not answer questions directly under cross-examination but went on to give very longwinded answers and explanations that were not called for. More often than not he was unable to answer questions briefly as requested. On several occasions the Court had to intervene and request him to listen to questions carefully and avoid giving unnecessary explanations.

- [34] The Defendant's witness, Mr Louis Koekmoer testified that he had worked for the Plaintiff from 2004 until 2014 and again in 2018 for three months. His evidence was largely undisputed and same is accepted as such.

[35] He testified that the written sales executive procedures of the company (Plaintiff) specifically state that:

35.1. The sales person must at all times confirm with the branch accountant that EFT payments have been cleared before a vehicle can be delivered to a prospective client.

35.2. That no vehicle may be delivered if all monies have not been paid over to the Plaintiff and it does not reflect in the bank account of the Plaintiff.

35.3. If this procedure is not followed the Plaintiff sees it in a serious light and the sales executive can be fired.

[36] He testified further that there are no exceptions to the above rules and that the vehicle may under no circumstances be delivered to any client should full payment not have been made and be reflected in the bank account of the Plaintiff. He further testified that the sales executive as well as the sales manager must verify the account number on any proof of payment which was received into the Plaintiff's bank account which also includes the branch code of the bank. This, according to him, has been the Plaintiff's practice throughout since 2004 when he started work at the Plaintiff and was also the procedure in 2018 when he worked at the Plaintiff.

[37] As I have already indicated above, the evidence of Koekmoer is undisputed. However, in my view this evidence does not take the Defendant's case any further as will appear in my evaluation of the totality of the evidence in this case, in particular the evidence of the Defendant.

Estoppel as a defence

[38] It is trite that the defence of estoppel can be raised under the following circumstances:

38.1. Where the representer by his words or conduct makes a representation to another person (the representee) and the latter, believing the truth of the representation, acts thereon and would

suffer prejudice if the representer were permitted to deny the truth of the representation made by him, the representer may be estopped (precluded) from denying the truth of his representation¹.

38.2. The estoppel assertor must, therefore, establish a misrepresentation causing him to act thereon and the prejudice suffered as a result of such an act if the misrepresentation is not maintained.

38.3. The principle of estoppel by representation is based on considerations of fairness and justice as it is aimed at preventing prejudice and injustices. See **MEC for Economic Affairs, Environment and Tourism, Eastern Cape v Kruizenga and Another**².

[39] The question that arises in this matter is whether the Plaintiff made any misrepresentation to the Defendant which led to the Defendant suffering any prejudice. Is the Defendant entitled to raise a defence of estoppel in these circumstances where the Plaintiff claims payment of the purchase price of a motor vehicle sold and delivered to the Defendant?

The Plaintiff has not received payment but the vehicle has been delivered to the Defendant who is presently in possession thereof and continues to use same.

Evaluation of the Evidence

[40] In the present case the versions of the Plaintiff and that of the Defendant are incompatible, in particular on the issue whether the Plaintiff provided the Defendant with correct banking details and whether the Defendant utilised the said banking details to pay the purchase price through EFT. The onus is on the Plaintiff to prove that they provided the Defendant with correct banking details. On the other hand the onus is on the Defendant to

¹ *Johaadien v Stanley Porter (Paarl) (Pty) Ltd* 1970 (1) SA 394 (A), *Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd* 1976 (1) SA 441 (a) AT 452 A- H.

show that he paid the purchase price into the correct bank account provided by the Plaintiff. Furthermore the onus is on the Defendant to prove the defence of estoppel.

- [41] In order to resolve this impasse, I have to consider and weigh the probabilities to determine which version is more probable than the other. I also have to consider the credibility and reliability of the various witnesses who testified for the Plaintiff and those for the Defendant. The test to be applied in such a case was enunciated lucidly as follows in

National Employers' General Insurance v Jagers :

"It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in criminal cases, but nevertheless where the onus rests on the Plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the Defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the Plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the Plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the Plaintiff's case any more than they do the Defendant's, the Plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the Defendant's version is false.

This view seems to me to be in general accordance with the views

² 2010 (4) SA 122 (SCA) at p 132

expressed by Coetzee J in Koster KO-operatiewe Landboumaatskappy Bpk v Suid- Afrikaanse Spoorwee en Hawens (supra) and African Eagle Assurance Co Ltd v Gainer (Supra). I would merely stress however that when in such circumstances one talks about a Plaintiff having discharged the onus which rested upon him on a balance of probabilities that means that he was telling the truth and that his version was therefore acceptable. It does not seem to me to be desirable for a Court first to consider the question of the credibility of the witnesses as the trial Judge did in the present case, and then having concluded that enquiry, to consider the probabilities of the case, as though the two aspects constitutes separate fields of enquiry. In fact, as I have pointed out, it is only where a consideration of the probabilities fails to indicate where the truth probably lies, that recourse is had to an estimate of relative credibility apart from the probabilities".³.

- [42] It is trite that when faced with two mutually exclusive versions, the Court has to resolve the factual disputes by making findings on the credibility of the various factual witnesses, their reliability and the probabilities. The test in such circumstances is that the Defendant in this case can only succeed if he satisfies the Court on a preponderances of probabilities that his version is true and accurate and therefore acceptable.

In **Stellenbosch Farmers; Winery Group Ltd and Another v Martell ET CIE and Others**⁴ it was stated that:

"On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So too on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the

³ 1984 (4) SA 437 (ECO) at 4400 - 441A

⁴ 1984 (4) SA 437 (ECO) at 440 D - 441 A

various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

- [43] The Defendant herein bears the onus of proof with regard to the defence of estoppel and must further prove that he made payment into the correct banking account of the Plaintiff. The Defendant must further prove that the version advanced by the Plaintiff is therefore false or mistaken and falls to be rejected.

I shall now proceed to weigh up and test the Defendant's version against the general probabilities.

- [44] There are contradictions and improbabilities in the version of the Defendant. When it was put to the Defendant in cross-examination that he should have verified the account number before doing the electronic payment which he failed to do, his response was that there is no law compelling him to do so. He said this against his own evidence that he is a computer specialist. On the other hand it is the Plaintiff's contention that the risk of interception and / or paying the money into the wrong bank account is on the client who similarly has the obligation to ensure that his or her e-mails and computer are not corrupted and that he or she is paying the money into the correct account.
- [45] When the Defendant was asked why he obtained the services of an IT and internet specialist on 22 May 2017 if he only became aware that he had been defrauded by hackers when Swart informed him as such on 24 May 2017, he replied that the reason was because the lady who is doing his administrations computer was slow and he then asked Mr Pierre Smith to have a look at his computer system. Here he contradicted himself because he gave a different version under oath in his answering affidavit in the previous motion proceedings where he said the following: *"I did after learning of the scam acquire the services of an IT and internet specialist, Pierre Smith from Zero One Online, who conducted a full assessment of my e-mail address and concluded that there was nothing out of order⁵".*
- [46] The acquisition of the IT specialist by the Defendant on 22 May 2017 before he could discover the payment into a wrong account on 24 May 2017 can only be described as suspicious. In any event part of the report of Pierre Smith reads as follows:
- "One of the computers was completely clean of any ma/ware software. The other computer did detect some ma/ware and unwanted programs and did delete the files. From what I could see there weren't any running*

⁵ See paragraph 20.3 of Answering Affidavit

malware that could cause a hacker to access the system although some files were found on the pc that could make this happen but they were not running...⁶."

It is the Defendant's undisputed evidence that he himself is an IT specialist and as such he was obliged to keep his computers safe from any possible hackers.

- [47] The Defendant conceded during cross-examination that the payment he had made into the fraudulent bank account can in no way be attributed to any act or omission on Pulane's part. Consequently he conceded that the risk lay on himself. In my view the Defendant realized that he had paid the money into a wrong account as a result of hacking before he was made aware of it by Swart on 24 May 2017 . That is why upon realizing that his computer and e-mail could have been compromised he obtained the services of an IT specialist on the 22 May 2017 to do an investigation and to secure his computer system.
- [48] During his evidence in chief as well as under cross-examination the Defendant denied that he needed the vehicle urgently and that same was delivered to him even when his payment had not yet reflected in the Plaintiff's bank account. He denied that the vehicle was delivered to him "out of goodwill" according to Swart because he needed the vehicle for a mining project in Thabazimbi. He contradicts himself on this aspect because in his answering affidavit in the motion proceedings he stated:
- "At the end of April it became necessary to send on additional pick-up down to the Western Cape, which I did. Shortly after this I successfully quoted on a project in Thabazimbi, Limpopo. I urgently required a vehicle to enable me to perform in accordance with that agreement. The project was to commence on 15 May 2017"⁷.*

⁶ See Annexure AVG to Answering Affidavit

⁷ See paragraph 11.6 of Answering Affidavit

Findings

[49] I come to a conclusion that the Defendant is not a credible witness and that his version in so far as same differs with that of the Plaintiff is rejected.

I accordingly make the following adverse findings against the Defendant:

- 49.1. Pulane has sent the correct banking details to the Defendant from her work e-mail to wit **sales1@galacticauto.co.za** . Pulane's computer and e-mail were not compromised.
- 49.2. The Defendant failed to verify the banking details with Pulane before he made payment of the purchase price by way of EFT. The Defendant merely assumed that the e-mail with banking details attached to it came from Pulane.
- 49.3. The Defendant had in fact paid the money into a wrong and fraudulent account. He had been defrauded by hackers who stole his money after they have changed the banking details on the said e-mail.
- 49.4. If the Defendant had only verified the banking details with Pulane he would have prevented his loss. His failure to do so was at his own peril.
- 49.5. I accept the Plaintiff's undisputed evidence that they on their part have policies and procedures in place to ensure that they send the correct banking details to clients. That it is not their policy to check whether each and every client has made payment into the correct account. That is the client's responsibility.

Conclusion

- [50] The Defendant bears the onus of proof in respect of the defence raised by him as well as in respect of his counterclaim. The Defendant is keeping the vehicle to himself and continues using it in his business. However he has filed a counterclaim for the amount representing the purchase price of the vehicle without tendering the return of the vehicle. This is untenable.
- [51] The Plaintiff has sold and delivered the motor vehicle to the Defendant. It is common cause that the Plaintiff has not received payment of the

purchase price from the Defendant. The Defendant attempted to make payment but such payment did not reach the Plaintiff.

The principles to be applied in cases where payment has been intercepted and misappropriated by a thief have been concisely summarized by Nienaber J (as he then was) in **Mannesmann Demag (Pty) Ltd v Romatex**⁸ thus:

"When a debtor tenders payment by cheque, and the creditor accepts it, the payment remains conditional and is only finalised once the cheque is honoured. (Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton, and Another 1973 (3) SA 685 (A) at 693; Christie The Law of Contract in South Africa at 413.) Until that happens a real danger exists that the cheque may be misappropriated or mislaid and that someone other than the payee may, by fraudulent means, convert it into cash or credit, for instance, by forging an endorsement or by impersonating the true payee. That risk is the debtor's since it is the debtor's duty to seek out his creditor".

See also **Stabilpave (Pty) Limited v South African Revenue Services 2014 (10 SA 350 (SCA))**.

Order

[52] I grant the following order:

- 51.1. Judgment in favour of the Plaintiff against the Defendant for payment of the sum of R 379 341.16;
- 51.2. Interest on the above amount tempore morae;
- 51.3. Costs of suit.
- 51.4. The Defendant's counterclaim is dismissed with costs.

EM MAKGOBA

⁸ Mannesmann Demag (Pty) Ltd v Romatex 1988 (40 SA 383 (D) at 389 F - 390 D

**JUDGE PRESIDENT OF THE
HIGH COURT, LIMPOPO
DIVISION, POLOKWANE**

APPEARANCES

| | | |
|------------------------------|----------|--|
| Heard on | : | 27, 28 & 30 May 2019 |
| Judgment delivered on | : | 14 June 2019 |
| For the Plaintiff | : | Ms M C De Klerk DDKK Attorneys |
| For the Defendant | : | Mr J J Grabler Thomas Grobler Attorneys |