IN THE NORTH WEST HIGH COURT, MAFIKENG

Reportable: YES
Circulate to Judges: YES
Circulate to Magistrates: YES
Circulate to Regional Magistrates: YES

CASE NO: M370/2018

In the matter between:

FIRSTRAND BANK LIMITED **APPLICANT**

and

GODFREY M KGETHILE **RESPONDENT**

DATE OF HEARING	: 20 MAY 2021
DATE OF JUDGMENT	: 31 AUGUST 2021
FOR THE PLAINTIFF	: ADV. B VAN DER MERWE
FOR THE RESPONDENT	: MR. S MOSES

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by way of e-mail. The date and time of the handing down of judgment is deemed to be 10H00 on 31 August 2021.

JUDGMENT

PETERSEN J

Introduction

[1] In this opposed application, the applicant ("the Bank) seeks an order against the respondent in the following terms:

> "1. The respondent is ordered to pay to the applicant the amount of R2 926 291.59.
>
> 2. Together with *mora* interest on the above-mentioned amount calculated at the rate of 10% per annum as from the date of demand, a*lternatively* the date of service of the notion of motion.
>
> 3. The respondent is ordered to pay the applicant's cost of suit on an attorney and client scale.
>
> 4. Further and/or alternative relief."

The parties

[2] The applicant is FIRSTRAND BANK LIMITED, a public company incorporated in terms of the Companies Act, Act 61 of 1973, trading as, *inter alia*, bankers and financiers in terms of the provisions of the Banks Act, Act 94 of 1990 (as amended) and registered as a credit provider in terms of the National Credit Act, Act 34 of 2005 ('the NCA") with its principal place of business situate at 1 Enterprise Road, Fairland, Johannesburg.

[3] The respondent, GODFREY M KGETHILE, is a major male, who resides at [....] L[....] Street, Huhudi Location, Vryburg, which address is the respondent's chosen *domicilium citandi et executandi* address.

Background

[4] On 30 August 2010, the Bank represented by a duly authorised employee and the respondent in his personal capacity, entered into a written agreement in terms of which the Bank would open a banking account termed a Smart Account for the respondent.

[5] The express, alternatively tacit, and implied material terms of the agreement were as follows:

5.1 The account would be a debit card account and no credit facility would be afforded to the respondent on the account;

5.2 The account would be funded by the respondent by way of deposits and transfer of funds either by the respondent or third parties;

5.3 The applicant would on instruction of the respondent make payment of the respondent's funds held in the account to a nominated party ("the third party") as instructed by the respondent;

5.4 In order to facilitate the payment instructions from the respondent the applicant would furnish the respondent with a debit card linked to the account.

5.5 The debit card could be used to transact as follows:

5.5.1 Withdraw cash from an ATM and selected point of sale devices.
5.5.2 Perform any standard ATM function at an ATM;
5.5.3 Obtain a balance on the account at an ATM and selected point of sale devices, and purchase goods and services from suppliers who display the VISA or MASTERCARD logo;

5.5.4 Purchase fuel;

5.5.5 Register for online banking.

5.6 The debit card could not be used for credit transactions, as only funds belonging to the respondent could be used in the account due to no credit being granted to the respondent in terms of the account.

5.7 The respondent chose [....] L[....] Street, Huhudi Location, Vryburg as his *domicilium citandi et executandi* address for the service of any legal notices and summonses.

5.8 The respondent has a duty to check each entry on the account statement and in the event of noticing any mistakes, to report the mistakes to the applicant.

5.9 In the event of any unauthorised transactions being noticed by the respondent on the account, the respondent has 30 days from the date of the statement to report same, where after the entries and transactions on the account would be deemed to be correct and done with the respondent's permission.

5.10 In the event that the applicant needs to take legal action against the respondent, a manager of the applicant may produce a certificate showing the amount that the respondent owes the applicant, which certificate will be *prima facie* proof of the respondent's indebtedness to the applicant.

[6] The Bank performed in terms of its obligations in terms of the agreement and provided the respondent with a debit card linked to the account and made payments from time to time from the account as instructed by the respondent. The account at some stage became dormant.

The alleged breach of the terms of the agreement by the respondent

[7] The Bank contends that the respondent breached the terms of the agreement by using funds which did not belong to him, through the use of the account and linked debit card, contrary to the terms of the agreement. By doing so, the Bank alleges, the respondent was grossly negligent, alternatively acted fraudulently by using the account as an overdraft facility when his own funds were depleted during the month of October 2015.

[8] The Bank further contends that the respondent failed to report any unauthorised transactions or entries on the account within 30 days of the issuing of the respondent's account statements and further failed to report the debit card, as either being lost or stolen.

[9] As a result of the alleged breach of the terms of the agreement, the Bank contends that the respondent became indebted to it in an amount of R2 926 291.59 (two million nine hundred and twenty six thousand two hundred and ninety one rand and fifty nine cents). A certificate of balance signed by a duly authorised representative of the Bank, confirms the said amount.

[10] The amount of R2 926 291.59 is premised on the respondent's statement of account for the period October 2015 to the end of December 2015. These amounts contend the Bank was paid out by the Bank to third parties on the unlawful request or instruction of the respondent.

[11] The Bank conducted a forensic fraud investigation. The investigation it contends revealed a number of unlawful payments which did not reflect on the respondent's statement immediately at the end of October 2015, but only at the end of November 2015 and during December 2015. The forensic report, was however, not adduced as evidence before this Court and neither was any confirmatory affidavit as proof of this allegation.

The respondent's alleged liability to the bank (the bank's cause of action)

[12] The Bank formulates its main cause of action against the respondent as follows:

12.1 The respondent was the account holder of account number [....];

12.2 The respondent gave the unlawful payment instruction to the applicant, who followed such instruction in making the said payments to the third parties;

12.3 The respondent knew or reasonably should have known that the terms of the agreement were being breached by his unlawful instructions to the applicant to make certain payments to third parties;

12.4 The respondent was enriched by the unlawful payments being made by the applicant to third parties and for the benefit of the respondent;

12.5 In order to facilitate the payment instructions from the respondent the applicant would furnish the respondent with a debit card linked to the account.

[13] The Bank contends that the respondent's enrichment was at its expense, having made the unlawful payments with funds available to the Bank and not funds held by the respondent in the respondent's bank account. In this regard the Bank's cause of action bears the hallmarks of a delictual claim premised on the *condictio indebiti*, a cause of action the Bank conflates with its alternative cause of action based on fraud.

[14] The Bank explains that its computer software which normally blocks unlawful payments being processed, experienced a failure when it was not functioning from 18 to 21 October 2015. This, the Bank downplays as simply being an error. The respondent's bank account was dormant during this period and only re-activated on payment of a sum of R50.00 (fifty rand) on 22 October 2015 on the respondent's version, which is not

gainsaid by the Bank. On his own version, however, the respondent had, prior to 22 October 2015 been informed that monies were deposited into the account.

[15] The alleged error contends the Bank is excusable in that it was instructed by the respondent to make the unlawful payments, purported to be lawful when in fact it was not, during the period occasioned by the error in computer software, which was utilised by the Bank to regulate the conduct of customers on their banking accounts.

[16] The Bank formulates its alternative claim of fraud in the following terms. The respondent represented to the Bank that there were sufficient funds in the account to allow for the unlawful payments. The respondent by making the representation intended the Bank to act thereon and pay the funds to third parties, for the respondent's benefit, to which he was not entitled.

[17] The respondent when making the representation to the Bank knew it to be false and further knew it to be contrary to the terms of the agreement. The Bank contends that it was therefore induced into making the unlawful payments and acted on the respondent's false representation, whilst if the Bank was aware of the falseness of the representation, it would not have made the unlawful payments.

[18] The Bank accordingly contends that it *bona fide* and reasonably believed the unlawful payments to be due, when in fact they were not and suffered damages in the amount claimed.

[19] *Adv. Van Der Merwe* for the Bank emphasizes in his heads of argument that the Bank's claim is premised in the main on the contractual relationship with the respondent, with the fraud claim being alternative thereto.

The respondent's defence to the banks claim

[20] In the answering affidavit, the respondent provides the following background to the events leading to the Bank's claim. During 2015 he was unemployed with no monthly income and performed odd jobs to survive. Towards the end of 2015, he visited a friend who owned an Internet Café in Vryburg Town in the North West Province. On checking his emails on one of the public computers, a *"pop up* screen" appeared with a message reflecting that he had won a certain sum of money in foreign currency. The message required of the respondent to click on a link to provide his personal details, to receive the money. As he was unemployed with no income and motivated by temptation at the prospect of receiving money, he duly provided his personal details.

[21] On providing his personal details, he immediately received a telephone call originating from an international (overseas) number. The respondent's evidence in fact is that he was readily able to identify the number as being of international origin. The respondent answered the call and spoke to a lady who introduced herself as a certain "Elana". Elana informed him that she was his account manager and went on to explain that he had won a certain sum of money in foreign currency, which was a substantial amount he cannot recall. By now the respondent's curiosity was triggered even more and he did not want to dismiss the possibility of receiving the money and accordingly entertained the said Elana further. The respondent requested that the money to be deposited into his bank account. He was requested to provide a copy of his identification document and proof of residence with his banking details and claims that in good faith, he provided all the requested documents to Elana.

[22] The respondent's evidence is that he was further informed to check his bank account, as his winnings were deposited into the account. On proceeding to the Bank to establish if the money was deposited, no such deposit reflected on the account. A period of time elapsed until the respondent received a further call from "Elana" informing him that the money was in fact deposited in his bank account and he was requested to check again. At this stage still tempted by the prospect of receiving money the respondent went to the Bank, once again. On this occasion, being the 22nd October 2015, when he approached the Bank, he was informed that the bank account was

dormant. A teller requested him to deposit R50.00 (fifty rand) into his account to activate the account which he duly did. No money, had, however been deposited into the account. The respondent maintains that he *bona fide* believed that he would receive the money.

[23] A long period elapsed until he received a call from a representative of the Bank informing him that he owed the bank R2 926 291.59. The respondent disputed the allegation that he owed the said sum of money. The representative of the Bank, at this stage, attempted to influence him to sign an acknowledgment of debt and intimated that the Bank would proceed with litigation against him.

[24] The respondent approached the First National Bank branch in Vryburg where he alleges he spoke to the bank manager, whose name he cannot recall. The manager was informed about the telephone call he received and the circumstances attendant thereto. The respondent re-asserted that he disputed owing the bank the amount claimed. In an attempt to secure support for his dispute with the Bank he lodged complaints on certain online platforms, which platforms are not identified.

[25] The respondent next heard of the matter when the present application was served on him by the Bank. The respondent contends that he never acted fraudulently nor did he try to deceive the Bank and that he did not receive money from the Bank. The respondent further maintains that he was a victim of cybercrime or internet fraud or a phishing scheme where he was drawn into disclosing his personal details and his identity, which was then stolen.

Procedural issues

[26] Before proceeding to the submissions, a number of procedural issues must be addressed. The Bank maintains that it filed a replying affidavit. The indexed and paginated bundle, however, contains no replying affidavit. When this application was initially enrolled for hearing on 11 September 2020, it was removed from the roll, *inter*

alia, as result of the replying affidavit not having been filed. In addition, the answering affidavit was not paginated and the indexed bundle contained only forty nine (49) pages.

[27] The Bank was responsible for indexing and pagination of the papers, and the application on each occasion was enrolled at the instance of the Bank. The indexed and paginated bundle before this Court is eighty seven pages, and I re-iterate with no replying affidavit. As the application has been moved at the instance of the Bank, this Court will adjudicate the application solely on the founding affidavit and the answering affidavit, as the only evidence before Court.

[28] The heads of argument and supplementary heads of argument filed by the Bank once the answering affidavit was filed are particularly brief and akin to short heads of argument. The respondent's heads of argument are similarly very brief.

Submissions

The Bank

[29] *Adv Van der Merwe* for the Bank in his initial heads of argument, drafted before the filing of the respondent's answering affidavit, submits that the respondent not only breached the terms of the written agreement with the Bank, which entitles the Bank to claim damages, but further, that the respondent in the alternative, defrauded the Bank. After setting out the elements of fraud and applying same to the facts, *Adv Van der Merwe* submits that the respondent represented to the Bank that the respondent had sufficient funds in his bank account held with the Bank to make certain payments to third parties, which representation was false. The submission further goes that the respondent made the alleged false representation deliberately, to be understood as intentionally, which alleged false misrepresentation induced the Bank to make the unlawful payments to the third parties. The actual prejudice suffered as a result of the alleged false misrepresentation which was to the detriment of the Bank amounts to R2 926 291.59.

[30] In the supplementary heads of argument of *Adv Van der Merwe*, he expounds on the contractual relationship of the Bank and the respondent and relies heavily on Clause 8 of the Smart Account agreement and in particular the following part (parties inserted in parenthesis by Adv Van der Merwe):

> "*You [the customer/respondent] will be liable for any unauthorised transaction that has been charged to the account through any person other than the cardholder [respondent] using the card for purchases/transactions made by mail order, telephone or electronically unless the cardholder [respondent] can prove that such person did not get the card or card number because of the cardholder's negligence."*

[31] *Adv Van der Merwe* premised on the aforementioned submits that the respondent on his own admission provided the details of the account, including his personal details to an unknown person, on two occasions, first, through a "*pop up* screen" and second, telephonically. The submission is amplified to the effect that the respondent recklessly divulged to an unknown person not only his personal details but also copies of his debit card with the CVV number, a copy of his municipal account for proof of residence and a copy of his South African identity document. The respondent it is alleged failed to bring the security breach of his bank account to the attention of the Bank within thirty (30) days of the breach and failed to monitor his statements/transactions on the Smart Account as contractually obligated to do. It is further highlighted that the transactions were not *"credit agreements"* and that the account was not a *"credit facility"*, which does not render the transactions subject to the National Credit Act.

<u>The respondent</u>

[32] *Mr Moses* for the respondent submits in his heads of argument in respect of the alleged breach of contract, that the Bank concedes in its founding affidavit that the

"unlawful payments" did not reflect on the respondent's account statement immediately, that is in October 2015, but only at the end of November 2015 and December 2015. He submits that the Bank has accordingly failed to adequately show the period when the said transactions actually took place. On the allegation by the Bank that the respondent utilised funds not belonging to him, *Mr Moses* submits that the banking service the respondent applied for did not allow for a credit facility or an overdraft facility. The only funds that could be utilised would be funds which either the respondent or a third party would deposit into the account.

[33] *Mr Moses* further submits that the Bank could therefore not have authorised payments on the *"instruction"* of the respondent as he was obligated not to make payments that exceed his account limit. The respondent's bank account was further dormant with no funds and as such the respondent could not authorise payments with money that was not in the account.

[34] *Mr Moses,* on the question of the alleged negligence of the respondent, submits that the Bank's cause of action is founded on an alleged breach of contract and not in delict. The cause of action not founded in delict, which is a valid submission, is however, not expounded on. *Mr Moses* submits that the respondent providing his banking details to a third party aligns with the normal manner of transferring funds from one person to another. A further contention, is that, *e-commerce* transactions on the whole require the disclosure of banking details. In this regard therefore he submits that it is incomprehensible how the mere production of such banking details to a third party would make the respondent grossly negligent.

[35] *Mr Moses,* in respect of the alleged negligence of the respondent, contends that, the negligence is in fact that of the Bank as the Bank allowed funds to be paid out in excess of the daily and monthly limits of the agreement. The agreement provides for a daily limit of R5000.00 (five thousand rand) and a monthly limit of R999 999.00 (nine hundred and ninety thousand nine hundred and ninety nine rand). The Bank, so goes the submission, contrary to the agreement allowed an amount of R2 926 291.59 to be

paid out in two (2) days, from funds the respondent did not have in his account and which the respondent could not authorise. The nub of the respondent's case submits *Mr Moses* is that he was a victim of cybercrime.

The bank-customer relationship

[36] This Court has not been referred to any authority by the parties for the submissions made and had to embark on extensive research on what appears at first glance to be a novel issue, on which there are no clear pronouncements, in the context of the peculiar facts of this application.

[37] Dr. Samuel Johnson, an English writer (1709 -1784) once said "*He that thinks he can afford to be negligent is not far from being poor.*" The saying is very apt in the context of the issues in the present application and speaks squarely to the consequences of negligent conduct. The saying as will be shown is equally apt in the symbiotic contractual relationship between the Bank and the respondent. This symbiotic relationship embraces a reciprocal duty of care. In terms of the common law, a duty of care is owed to any persons whom one can reasonably anticipate may suffer harm as result of ones actions or inaction for that matter. John Stuart Mills, an English philosopher (1851–1858) once said:

> "*A person may cause harm to others, not only by his actions but by his inaction, and in either case he is justly accountable to them for the injury.*"

The harm with due regard to the duty of care must, however, be harm of a foreseeable nature.

The duty of care of a bank to its customer

[38] In the present application, the Bank relies heavily on its contractual relationship with the respondent. In formulating the duty of care of a bank in this contractual

relationship, it would be fair to state that a bank has a contractual duty to its customers to exercise reasonable care and skill. In considering comparative law, the Court in *Karak Brothers Co. Ltd v Burden*[1], Brightman J, had the following to say about the contractual duty of a bank to its customer:-

> "*…. a bank has a duty under its contract with its customer to exercise "reasonable care and skill" in carrying out its part with regard to operations within its contract with its customer. The standard of that reasonable care and skill is an objective standard applicable to bankers. Whether or not it has been attained in any particular case has to be decided in the light of all the relevant facts, which can vary almost infinitely.*"

[39] In *Mccarthy Ltd v Absa Bank Ltd*[2], Nugent JA stated as follows in respect of the duty of care of a bank:

> "[22] The fact alone that McCarthy had a cheque account justifies the inference that an express agreement (not necessarily reduced to writing) was concluded between McCarthy and Absa (or their predecessors) at some time in the past that such an account should be operated (it is difficult to see how a bank account might otherwise come into existence). Where such an agreement exists, as pointed out by the authors of *Malan on Bills of Exchange etc*:
> '**It is the duty of the bank to pay cheques drawn by the customer that are in all respects genuine and complete, on demand, provided sufficient funds or credit for their payment are available in the customer's account. . . . In paying cheques, the bank must adhere strictly to the customer's instructions, and must perform its duties with the required degree of care, generally, in good faith and without negligence**.'

[1] [1972] 1 W.L.R. 602, (1972) All ER 1210
[2] 2010 (2) SA 321 (SCA)

[24] Counsel for Absa conceded for purposes of this appeal that Absa's employees the tellers and supervisors I have referred to ought to have suspected that Fourie was not entitled to the cheques, and thus that they were negligent in having accepted them for collection. But it argues that such negligence was in its 'collecting capacity' on behalf of Fourie and not in its 'paying capacity' on behalf of McCarthy (hence the misdirected enquiry as to whether the bank was contractually bound to exercise reasonable care when performing that collecting function). But the true enquiry is not whether the bank is liable for negligence in collecting the cheques, but instead whether, in view of the knowledge of its employees (albeit that it was acquired in the course of accepting the cheques for collection), the bank was negligent in paying them (at least without further enquiry)."

[40] In *Absa Bank Ltd v Hanley*[3], Malan JA, in dealing with the reciprocal duties of a bank and its client, stated as follows:

"[25] The relationship between a bank and its customer is unique and involves a debtor and creditor relationship. The relationship is contractual and may involve several agreements establishing different accounts. These agreements, generally, require the bank to perform certain services for the customer. Whether it relates to one or more of these services, the agreement giving rise to them is an agreement of mandate. The agreement between Hanley and the appellant involved the rendering of payment services to him. A bank undertaking to transfer funds on the instructions of its customer acts as a mandatary. The principal duty of the bank effecting a credit transfer is to perform its mandate timeously, in good faith and without negligence."

[41] In the present application, the Bank in the ordinary course of its business concluded a written agreement with the respondent, to render banking services through a Smart banking account. The relationship is regulated by various regulatory

[3] 2014 (2) SA 448 (SCA)

instruments, including international banking standards and domestic law. Banks are under a duty to both ethically and legally, to prevent, *inter alia*, financial crimes, inclusive of fraud, theft, money laundering and corruption.[4] These instruments make it plain that banks are under an obligation not to engage itself in or permit unlawful transactions, under its watch. The banker-customer contract is according very important is this regard, insofar as it delineates the relationship.

[42] In terms of the written agreement between the Bank and the respondent, the Bank has, *inter alia*, the following core duties relevant to the adjudication of this application, in its relationship with the respondent:

(i) to accept deposits and transfer of funds from the respondent and third parties into the bank account for the respondent;
(ii) to allow the respondent to transact with a debit card to make withdrawal of funds at an ATM an selected Points of Sale (POS);
(iii) to give effect to the respondent's instructions in accordance with his mandate subject to the availability of sufficient funds in the respondent's account;
(iv) to act only on valid instructions of the respondent and not on fraudulent instructions; and
(iv) to monthly provide the respondent with bank statements and *"in contact"* notifications by short message service (sms).

<u>The customer's duty of care to the bank</u>

[43] The corollary of the Bank's duty of care is the respondent's duty of care to the Bank, in the symbiotic relationship. Again, having regard to comparative law, the duty of care owed by a customer to the bank was set out very succinctly in *London Joint Stock*

[4] *See* The Code of Banking Practice, 2012; Articles 5, 6 7 and 8 of the United Nations Convention against Transnational Organised Crime; sections 20A, 21, 21A-E of the Financial Intelligent Centre Act 38 of 2001 (FICA); the Prevention of Organised Crime Act 121 of 1998 (POCA)

Ltd v Macmillan and Greenwood v Martins Bank Ltd[5]. In *London Joint Stock Ltd v Macmillan*, Lord Chancellor Finlay held:

> "that the customer owes his bank a duty to refrain from drawing cheques or other payment orders in such a manner as to facilitate fraud or forgery…"
>
> While in *Greenwood v Martins Bank Ltd*, the court held that:
>
> "that the customer owes a duty to inform his bank of any forged payment order as soon as he becomes aware of it."

[44] In the Kenyan High Court judgment of *Barclays Bank of Kenya v Jandy*[6], the Court stated that:

> "the customer's duty of care to the bank includes acting in good faith, exercising reasonable care in executing written orders so as not to facilitate fraud or forgery and the duty to inform the bank of any forged payment orders, which includes the duty to notify the bank of unexpected deposits into one's bank account."

[45] In *Absa Bank Ltd v Hanley supra*, Malan JA, stated as follows in respect of the duty of care of the client of a bank:

> "[24] The appellant *inter alia* pleaded that it was a term of the agreement between the parties that Hanley would execute all documents that contained written instructions to withdraw funds with due diligence and in a manner that did not facilitate fraud or forgery, and that he had failed to do so.
>
> …

[5] (1906) AC 439; (1918) AC 777
[6] (2004) 1EA 8

[26] The duty of the customer to draw his payment instructions with reasonable care in order to prevent forgery or alteration and to warn of known or suspected fraud or forgery arises from this relationship. **It has been accepted that in the case of a telegraphic transfer the same principles as those governing the drawing and payment of cheques apply. No doubt this is also the case where the payment instruction is given by way of an application for an overseas credit transfer, such as in this case. It was stated that 'a customer owes a duty to his banker to draw his cheques with reasonable care in order to prevent forgery'**.

The customer's duty is a restricted one:

'**Save in respect of drawing documents to be presented to the bank and in warning of known or suspected forgeries he has no duty to the bank to supervise his employees, to run his business carefully, or to detect frauds**.'

The negligence or carelessness of the customer must be the real, direct or immediate cause of the bank having been misled, and must be evident in the transaction itself, in the manner in which the cheque or payment instruction was drawn.

…

If the circumstances warrant it, a bank, before making payment, must make inquiries. It was said: (*AL Underwood Ltd v Bank of Liverpool* [1924] 1 KB 775 (CA) at 793, quoted with approval in *Columbus Joint Venture v Absa Bank Ltd* 2002 (1) SA 90 (SCA) paragraph 24.)

'If banks for fear of offending their customers will not make inquiries into unusual circumstances, they must take with the benefit of not annoying their customers the risk of liability because they do not inquire.'"

[46] In terms of the written agreement between the Bank and the respondent, the respondent has, *inter alia*, the following core duties, in his relationship with the Bank:

(i) to not disclose sensitive details of his bank account with third parties;

(ii) to disclose any suspicious conduct related to the bank account, inclusive of any clandestine dealings or fraudulent attempts on the account.

[47] It is against this background that the application is to be considered.

The alleged negligence of the respondent

[48] The Bank relies in the main on its contractual relationship with the respondent to sustain its cause of action and places much reliance on the respondent's alleged negligence in breaching the terms of the agreement. As stated *supra*, *Mr Moses* made the point that the relief sought is not premised in delict. The effect of this submission and its relevance will become clear *infra*. It is apposite to deal with the question of negligence and causation insofar as it is relevant both to a claim predicated on breach of contract and in delict.

Negligence and factual causation

[49] The test for negligence in South Africa was formulated in the *locus classicus*, *Kruger v Coetzee*[7], where Holmes JA stated as follows:

"For the purposes of liability *culpa* arises if –

(a) a *diligens paterfamilias* in the position of the defendant –

(i) would foresee the reasonable possibility of his conduct injuring another is person or property and causing him patrimonial loss; and

(ii) would take reasonable steps to guard against such occurrence; and

(b) the defendant failed to take such steps."

[50] In *Van der Spuy v The Minister of Correctional Services of the Government of the Republic of South Africa*[8], Leach J (as he then was) stated the following regarding the classic formulation of the test for negligence in *Kruger v Coetzee*:

[7] 1966 (2) SA 428 (A) at 430E - F

"Although this is the classic formulation which has consistently been applied, the Supreme Court of Appeal restated the test in *Mukheiber v Raath and Another* 1999 (3) SA 1065 (SCA) at 1077E – F, by adopting the following test as proposed by Prof. *Boberg* in the *Law of Delict* at 390:

"For the purposes of liability *culpa* arises if –

(a) a reasonable person in the position of the defendant –

(i) would have foreseen harm of the general kind that actually occurred;

(ii) would have foreseen the general kind of causal sequence by which that harm occurred;

(iii) would have taken steps to guard against it, and

(b) the defendant failed to take those steps."

This latter formulation involves a narrower test for foreseeability than that propounded in *Kruger v Coetzee*, *supra* by relating it to the consequences produced by the conduct in question and effectively conflating negligence and so-called "legal causation" in order to eliminate the problems associated with remoteness – see the judgment of Scott JA in *Sea Harvest Corporation v Duncan Dock Cold Storage* 2000 (1) SA 827 (SCA) at 839.

Essentially, the test in the *Mukheiber* case, *supra* involves a consideration both of factual causation and of remoteness in order for *culpa* to be established. But Scott JA stated in the *Sea Harvest* case, *supra* at 839 E – F that he had not understood the judgment in the *Mukheiber* case to have unequivocally embraced the relative theory of negligence and went on to observe that there probably can be no universal applicable formula appropriate to every case."

Legal causation

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[8] (186/01) [2003] ZAECHC 21 (17 April 2003)

[51] Of particular importance is the question of the remoteness of the harm of the kind suffered by the bank. In this regard, the question of legal causation must be considered. In *International Shipping Co. (Pty) Ltd v Bentley*[9], Corbett JA, referred with approval to the summary by Flemming in *The Law of Torts* 7th ed at 173:

> "The … problem involves the question whether, or to what extent, the defendant should have to answer for the consequences which his conduct has actually helped to produce. As a matter of practical politics, some limitation must be placed upon legal responsibility, because the consequences of an act theoretically stretch into infinity. There must be a reasonable connection between the harm threatened and the harm done. This inquiry, unlike the first, presents a much larger area of choice in which legal policy and accepted value judgments must be the final arbiter of what balance to strike between the claim to full reparation for the loss suffered by an innocent victim of another's culpable conduct and the excessive burden that would be imposed on human activity if a wrongdoer were held to answer for all the consequences of his default."

[52] In *Sea Harvest Corporation v Duncan Dock Cold Storage*[10], Scott JA stated that:

> "…Just where the inquiry as to culpability ends and the inquiry as to remoteness (or legal causation) begins – both of which may involve the question of foreseeability – must therefore to some extent depend on the circumstances . . . . . In many case the facts will be such as to render the distinction clear, but not always. Too rigid an approach in borderline cases could result in attributing culpability to conduct which has sometimes been called negligence 'in the air'".
>
> (emphasis added)

Application of the principles of negligence and causation in respect of the respondent to the facts

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[9] 1990 (1) SA 680 (A) at 700 - 701
[10] 2000 (1) SA 827 (SCA) at 840 D – E

[53] Having regard to the principles as aforesaid relative to the peculiar facts of the present application, it is clear that the respondent cannot shy away from the fact that his conduct in providing his personal details and banking details to an unknown woman was negligent, if not careless. When the respondent's conduct is placed in context, the following emerges. The respondent acted on a "*pop up* screen" on a computer at a public Internet Café, requesting his personal details under the guise that he had won money in foreign currency. The respondent on his own version is aware of phishing scams and identity theft. Notwithstanding, he readily provided his personal details, inclusive of his residential address and identity document, which was immediately followed by a telephone call from a woman portraying herself as the case manager for his winnings. The telephone call prompted the respondent to provide his banking details including the so-called security 3 digit CVC number. The submission by *Mr Moses* that there is essentially nothing amiss with the respondent having done so, *inter alia*, as there are a plethora of *e-commerce* transactions conducted on this basis on a daily basis, loses sight of the fact transactions of that nature are more often than not at the behest of the cardholder and not elicited by way of "*pop up* screens" at public venues. The respondent in his papers states emphatically that he was a victim of cybercrime and a reading of his papers makes it plain that he is acutely aware of scams of this nature. It must therefore be accepted that the respondent, contrary to his contractual obligations to the Bank in this regard, was in fact negligent.

[54] The finding that the respondent was in fact negligent in the peculiar circumstances of this matter, by providing his banking details including his sensitive personal information, cannot on its own justify a finding that this negligence summarily entitles the bank to damages for any consequences flowing from this specific negligent act. Otherwise stated, the finding of negligence in respect of the respondent's disclosure of his banking details and personal details to an unknown person on an international telephone call, does not necessarily imply that a reasonable person in his position would have foreseen harm of the general kind that subsequently occurred, when

transactions contrary to the agreement took place on the account, more than a month later.

The law applicable to a claim based on breach of contract

[55] The *locus classicus* for a claim for damages based on breach of contract is *Thoroughbred Breeders' Association of South Africa v Price Waterhouse*[11]. In this case a client sued its auditor for damages for breach of contract. The Supreme Court of Appeal dealt extensively with, *inter alia*, the issue of remoteness and the test applicable thereto.

[56] It is imperative to quote extensively from the judgment of *Thoroughbred Breeders' Association of South Africa v Price Waterhouse*, to fairly and justly adjudicate this application. Negligence of the respondent and essentially factual causation having been found, the following question in *Thoroughbred Breeders' Association of South Africa v Price Waterhouse* at paragraphs [46] – [53] is apposite (emphasis added is mine):

> "[46] Does the loss flow from the breach?
>
> Factual causation being a given, was the loss not too remote? The traditional approach for determining remoteness in a contractual context was restated in 1977 by Corbett JA in *Holmdene Brickworks v Roberts Construction Company* 1977 (3) SA 670 (A) 687D-F in the following terms:
>
> "**To ensure that undue hardship is not imposed on the defaulting party … the defaulting party's liability is limited in terms of broad principles of causation and remoteness, to (*a*) those damages that flow naturally and generally from the kind of breach of contract in question and which the law presumes the parties contemplated as a**

[11] (416/99) [2001] ZASCA 82; [2001] 4 All SA 161 (A) (1 June 2001)

probable result of the breach, and (*b*) those damages that, although caused by the breach of contract, are ordinarily regarded in law as being too remote to be recoverable unless, in the special circumstances attending the conclusion of the contract, the parties actually or presumptively contemplated that they would probably result from its breach (*Shatz Investments (Pty.) Ltd.* v. *Kalovyrnas,* 1976 (2) S.A. 545 (A.D.) at p. 550). The two limbs, (*a*) and (*b*), of the above-stated limitation upon the defaulting party's liability for damages correspond closely to the well-known two rules in the English case of *Hadley v. Baxendale*, 156 E.R. 145, which read as follows (at p. 151):

'Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.'

As was pointed out in the *Victoria Falls* case, *supra*, the laws of Holland and England are in substantial agreement on this point. The damages described in limb (*a*) and the first rule in *Hadley v. Baxendale* are often labelled "general" or "intrinsic" damages, while those described in limb (*b*) and the second rule in *Hadley v. Baxendale* are called "special" or "extrinsic" damages…

[47] It is apparent from the above *dictum* that "contemplation" is the minimum *desideratum* common to both so-called limbs or sub-rules. The controversy referred to in the *dictum,* which was identified in *Shatz Investments (Pty) Ltd v Kalovyrnas,* 1976 (2) SA 545 (A) at 552 and which remains unresolved to this day, relates to limb (b) and not to limb (a): it is whether "the rationale of special damages is the parties' convention and not merely their contemplation" (*Shatz* at

552C), that is to say, whether the contemplation of the parties must be shown "virtually to be a term of the contract" (at 552D)…

…

[49] … In England the degree of likelihood required for purposes of the contemplation test has in recent years attracted close attention. These developments are discussed in some detail in the standard text books (such as McGregor on *Damages,* 16th ed, para 248-274; Chitty on Contracts, 28th ed, para 27-039-051; Cheshire, Fifoot & Furmston, *Law of Contract,* 13th ed, 611-617; Treitel, *The Law of Contract*, 8th ed, 855-859; Atiyah, *The Law of Contract*, 3rd ed, 318-323 and 15 Stair Memorial Encyclopaedia para 903-905), with particular reference to what was said in *Koufos v C Czarnikow Ltd (The Heron II)* [1969] 1 AC 350 (HL) and the cases following it, such as *Balfour Beatty Construction (Scotland) Ltd v Scottish Power plc* 1994 SC 20 (HL). (See, too, the helpful exposition in Kerr, *The Principles of the Law of Contract,* 5th ed 700-709). The formulae used ranged from 'real danger' or 'very substantial' to 'easily foreseeable', 'liable to result' or 'not unlikely' (Treitel, *op cit,* 857). *The Heron II, supra,* was referred to in both *Shatz's* case, *supra*, and *Holmdene Brickworks, supra,* but in neither case, unlike this one, was the exact shading or nuance of meaning of any consequence. Even so, it is not necessary to trace the minute developments in the English decisions in this case for I believe that McGregor in para 264 of the work cited has fairly captured the essence of current English thinking on the point when he stated:

"The important factor is therefore whether the particular type of loss which occurs is within the contemplation of the contracting parties as a serious possibility …"

Or, as it was put by Goff J in *The Pagase* [1981] 1 Ll R 175 182:

"…but the thread running through the speeches [in the *Heron II*] is that the damages must have been within the contemplation of the defendant, not in the sense that they were probable (which would be too strict a test) but rather in the

sense that there was a serious possibility of their occurrence or that they were not unlikely to occur."

That approach, postulating, as it does not a likelihood (at the upper end of the scale) of the harm complained of occurring but (at the lower end) a realistic possibility thereof, appears to me to be sensible and sound. **Parties cannot contemplate what they cannot foresee**. **In the end it will usually turn on the degree of foreseeability of the kind of harm incurred** (compare *McElroy Milne v Commercial Electronics Ltd* [1993] 1 NZLR 39(CA) 43 45). What matters to the law is of course not infinite but reasonable foreseeability. Leaving aside atypical situations (such as, for instance, a circumstance which was foreseeable by only one of the parties or only at the time of breach and not *also* at the time of contract), what is required to be reasonably foreseeable is not that the type of event or circumstance causing the loss will in all probability occur but minimally that its occurrence is not improbable and would tend to follow upon the breach as a matter of course.

[52] … With breach of contract, as in delict and estoppel but unlike insurance (which entails the interpretation of the terms of the policy – compare *Napier v Collett and Another* 1995 (3) SA 140 (A)), the exercise would involve measuring the consequences of wrongful conduct by a composite legal yardstick. Admittedly there is an important factor present in contract and absent in the other categories mentioned and that is the competence of the parties to regulate, limit or expand by arrangement amongst themselves the consequences of any prospective breach (compare Kerr, *op cit* 648). Such arrangements can and must of course be accommodated in any flexible test. A conjectured application of the flexible test will not mean that the collected wisdom of past cases is summarily to be discarded. Both limbs of the current conventional test can readily be blended into an integrated test as being relevant factors to be taken into account. The fact that both parties had particular consequences in mind when they concluded their agreement will still be conclusive. There may be

instances where the time of breach will be more appropriate than the time of contract. The circumstances of each case will determine where the emphasis belongs. **Reasonable foreseeability, one imagines, will govern most but not all cases** (compare *Holmdene Brickworks, supra,* 688G-H; Smit *v Abrahams, supra,* 17 D-F; Kerr, *op cit* 718). **Ultimately it may be practical common sense based on the judicial officer's years of experience – and not dogma – that has to cut the Gordian knot**. (Compare *Alexander v Cambridge Credit Corporation Ltd* (1987) 9 NSWLR 310, 315B-C; 358B-C.) As has recently been said by Lord Steyn in a slightly different context in *Smith New Court Securities v Scrimgeour Vickers (Asset Management)* [1996] 4 All ER 769 (HL) 794j-795b:

"The development of a single satisfactory theory of causation has taxed great academic minds … But, as yet, it seems to me that no satisfactory theory capable of solving the infinite variety of practical problems has been found. Our case law yields few secure footholds. But it is settled that at any rate in the law of obligations causation is to be categorised as an issue of fact. What has further been established is that the 'but for' test, although it often yields the right answer, does not always do so. That has led judges to apply the pragmatic test whether the condition in question was a substantial factor in producing the result. On other occasions, judges assert that the guiding criterion is whether in common sense terms there is a sufficient causal connection … There is no material difference between these two approaches. While acknowledging that this hardly amounts to an intellectually satisfying theory of causation that is how I must approach the question of causation."

The effect of a finding of negligence on the part of the Bank (in contractual claims)

[57] In the adjudication of the application, having regard to the duties of the Bank in the contractual relationship, the next question which arises is whether the Bank itself was negligent, and if so, what the consequences of a finding of negligence against the Bank, holds.

[58] In *Thoroughbred Breeders' Association of South Africa v Price Waterhouse*, the Supreme Court of Appeal dealt with this question in the context of the facts of that matter at paragraph [61], as follows:

> [61] Was TBA's carelessness the sole or dominant cause of its loss?
>
> Both parties were careless. Can it be said that TBA's carelessness was the exclusive cause of its loss? I do not think so. **This is not the sort of case where harm can be said to have been caused by either one or the other of two competing causes, one for which a plaintiff and the other for which the defendant was responsible. On a finding to that effect, a plaintiff, bearing the *onus* to prove causation, must lose if he fails to prove that it was the cause for which the defendant was responsible**…"

The effect of a finding of *culpa* on the part of the Bank and the respondent

[59] In *Thoroughbred Breeders' Association of South Africa v Price Waterhouse*, the Supreme Court of Appeal dealt with this question in the context of the facts of that matter at paragraph [64] to [67]. At paragraph [64], the legal position applicable to a claim in delict is stated and at paragraph [65], the SCA makes the point that the clear legal position in delict is absent in contract. At paragraphs [64] – [67] the following is stated (emphasis added is mine):

> "[64] **In the law of delict where there is *culpa* on both sides the so-called "all or nothing principle" has been applied since Roman times**. This is dealt with *in extenso* by Zimmermann, *op cit,* 1010-1013 1030 and 1047-1048. At 1030 it is stated:
>
> "The fault of the plaintiff/victim was, in a way, 'set off' against that of the defendant/wrongdoer, with the result that '*culpa culpam abolet*'. Hence the

expression of *compensatio culpae* or culpa compensation that came to be used to label the uncompromising approach to the problem of contributory negligence. Whether every contributory fault on the part of the victim – even *culpa levissima* – was originally taken to deprive him of his remedy is not quite clear. In the later *usus modernus*, at any rate, the issue appears to have been decided on the basis of a preponderance of fault: only if he had displayed the same or a greater degree of negligence than the wrongdoer did the victim lose his claim. Where, on the other hand, his negligence was less significant, when compared with that of the wrongdoer, his claim for damages remained completely unaffected."

In South Africa, under the influence of English law (compare Zimmermann and Visser, *Southern Cross* 575-6), the all or nothing approach prevailed and its application was, in the words of Boberg, *The Law of Delict*, vol 1 653, "uncompromising". He continued:

"A plaintiff who was part author of his own loss could recover nothing at all. No provision existed for comparing the negligence of the parties and awarding proportionate compensation. The plaintiff's fall from grace, no matter how venial, cost him his remedy, and the defendant – through possibly far more negligent than the plaintiff – went scot-free. The defence was a complete one."

[65] **A similar clear-cut statement is absent in the law of contract**. There is a conspicuous dearth of express authority in the Roman-Dutch law either admitting or denying the existence of a defence of preponderance of own fault to a claim for damages for breach of contract. None was quoted to us by counsel and we were unable to find any ourselves, as to the applicability or non-applicability of an all-embracing "all or nothing principle", or any variant thereof, in a contractual setting. **Nowhere is it expressly stated that a plaintiff who sued a defendant for negligently performing his contract but who was himself careless was thereby non-suited, except of course where his *culpa* was**

held to be the sole cause of his loss. On the other hand, there is also no direct authority to the effect that such a plaintiff was entitled to full payment notwithstanding his proven lack of care. Not surprisingly there is likewise no authority for the intermediate situation i.e. that a plaintiff's claim is to be reduced in those circumstances in proportion to his own lack of precaution in preventing or minimising his loss.

[66] The defence of a preponderance of fault on the part of the plaintiff, on which the Court *a quo* appears to rely, is incongruent within the field of contract. Where a plaintiff can prove that the breach of the defendant was *a* cause of the loss (as opposed to *the* cause thereof) he should succeed even if there was another contributing cause for the loss, be it an innocent one, the actions of a third party (compare *Nedcor Bank Ltd t/a Nedbank v Lloyd-Gray Lithographers (Pty) Ltd* 2000 (4) SA 915 (SCA) para 10-12), or, logically, the carelessness of the plaintiff himself in failing to take reasonable precautions to avoid it. A defendant who commits a breach of contract does so independently of any of the extraneous factors mentioned above. All the requirements for his liability will have been fulfilled. In the absence of a contrary term in the agreement itself or of legislative intervention excluding or reducing his claim, he should therefore be held fully liable, regardless of whether the plaintiff's *culpa* was the dominant or pre-eminent cause of the loss. What was said for Australia in *Alexander v Cambridge Credit Corporation Ltd and Another, supra,* 315B, applies, I believe, with equal force to South Africa:

"It is irrelevant to inquire whether the defendants' default was the dominant, effective or real cause of the plaintiff's loss. If the evidence is suggestive of multiple causation, the inquiry to be made is whether the defendants' default was *a* cause of the plaintiff's loss: *Fitzgerald v Penn* (1954) 91 CLR 268 at 273."

And again, at 357G-358A:

"In my opinion the above cases do not establish the proposition that a plaintiff in an action for breach of contract must prove that the breach of contract was the real and efficient or dominant cause of the loss which he suffered. In the law of tort, it is well-established that it is sufficient that the wrongful act or omission of the defendant is *a* material cause of the plaintiff's injury or damage. In principle, the same rule must apply in the law of contract unless the terms of the contract require the sole or dominant cause to be determined. In *Simonius Vischer & Co v Holt & Thompson* [1979] 2 NSWLR 322, Samuels JA, with whose judgment on this point Moffit P and Reynolds JA agreed, said (at 346) that in an action for breach of contract against an auditor it was 'sufficient for the plaintiffs to establish that the defendants' breaches were *a* cause of the loss notwithstanding that there may have been other concurrent causes'."

[67] **A plaintiff who sues for damages for breach of contract for a loss allegedly sustained through the negligence of the defendant but who was himself careless in relation to the non-avoidance of such loss may therefore be non-suited: (a) if there was a term in the contract to that effect; (b) if the plaintiff's own carelessness is held to be the sole cause of the loss, either in its totality or, to that extent, in relation to a particular segment thereof; or (c) if the defendant's negligence was, comparatively speaking, so negligible or minimal as to be discountable as a significant cause of the loss, which, strictly speaking, is simply an instance of (b)**."

Discussion

[60] When regard is had to the authorities *supra* and the findings in respect of negligence and causation are applied to the facts of the present application, it can safely be accepted that both the Bank and the respondent were negligent or careless in respect of their contractual obligations in terms of the agreement. The Bank has not adduced any evidence to gainsay the evidence of the respondent that the respondent

was motivated solely by the inducement of money being paid into the respondent's banking account.

[61] It is apposite to deal with the Bank's alternative claim premised on fraud, which can be disposed of with brevity, before turning to the Bank's main cause of action. The Bank has simply failed on the evidence, to make a case on the alternative claim of fraud which is conflated with a claim based on unjustified enrichment. The elements of fraud on which the Bank relies, solely on the negligence of the respondent who provided his personal details and details of his bank account to an unknown woman, is a far cry from proof that the respondent's act in this regard proves the remainder of the elements required to sustain the claim of fraud. The Bank's evidence ultimately falls gravely shy of proving that the carelessness of the respondent was the real, direct or immediate cause of the Bank having been misled, when regard is had to the transactions itself and the very manner in which all the transactions took place in the virtual realm of banking in the digital age.

[62] The Bank's main cause of action premised on breach of contract must be considered with due regard to the fact that its own statements reflect the transactions which gave rise to its claim on breach of contract, as having reflected only at the end of November 2015 and the beginning of December 2015. No confirmatory or supporting evidence was adduced of the forensic investigation undertaken by the Bank and the findings of the investigation. The allegations in the founding affidavit in respect of the forensic investigation is accordingly hearsay and inadmissible.

[63] The Bank failed to adduce evidence of its compliance with its obligation to provide the respondent with bank statements for October 2015 and/or the transmission of *"in contact"* notifications, before it discovered the fraudulent transactions.

[64] The Bank, in particular, failed to prove that it acted on the instructions of the respondent to effect the said payments when the transactions occurred over a two day period. It was never gainsaid that the respondent had no funds in his account until the

account was revived from a state of dormancy on 22 October 2015 when an amount of R50.00 (fifty) rand was deposited by the respondent. In fact, on the Bank's own version, the respondent had no funds in his account. The Bank in terms of the agreement could only act on valid instructions from the respondent and not on fraudulent transactions. The transactions on the respondent's account were limited to R5000.00 (five thousand rand) per day to a maximum of R999 999.00 (nine hundred and ninety nine thousand rand) per month. The transactions giving rise to the Bank's cause of action exceeded the daily limit and in a matter of two (2) days exceeded the monthly limit. The Bank in this regard acted contrary to the terms of the agreement by allowing transactions which exceeded these limits, when on its own version, the respondent had no funds in his account.

[65] It further has to follow logically that if the Bank's computer systems operated as it should have, it was imperative for the Bank to question and in fact contact the respondent in terms of its obligations in the agreement, to raise the red flag on the transactions, before making the payments. The Bank's failed computer system cannot on the evidence be attributed or linked to the respondent's single act of disclosing his banking details to the unknown woman. The Bank's computer systems being down during October 2015 and prior to the respondent bringing his account out of a dormant state, cannot be relegated as stated *supra* by the Bank, to being a mere error. It is clear that the so-called error points to a compromised computer system where all of the Bank's clients appear to have been at risk. There is further no evidence to suggest that the respondent had a hand in the compromised computer system. The statement by the SCA in *Columbus Joint Venture supra* is apposite and re-emphasized:

> **'If banks for fear of offending their customers will not make inquiries into unusual circumstances, they must take with the benefit of not annoying their customers the risk of liability because they do not inquire**.'

[66] In the final analysis, the finding of the SCA in *Thoroughbred Breeders' Association of South Africa v Price Waterhouse supra* at paragraph [67] succinctly

encapsulates the result that should follow in the present application. The Bank having sued for the breach of contract for its loss sustained through the single negligent act of the respondent, and having itself been *"careless in relation to the non-avoidance of such loss may be non-suited: (a) if there was a term in the contract to that effect; (b) if the plaintiff's own carelessness is held to be the … cause of the loss, …, in relation to a particular segment thereof…"* The Bank was clearly careless in relation to the non-avoidance of the loss it sustained and is accordingly non-suited both on its own failure to comply with the terms of the agreement and the Bank's carelessness was clearly the proximate cause of the loss it sustained.

[67] The application, on the main and the alternative claims, accordingly stands to be dismissed.

Costs

[68] Costs ordinarily follow suit. In the exercise of this Court's discretion on costs, having regard to the issues which this application raised and with due regard to the carelessness of the Bank and the respondent, it would be fair and just that no order be made as to costs.

Order

[69] Consequently, the following order is made:

(i) The application is dismissed.

(ii) No order as to costs.

AH PETERSEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG