



NOT REPORTABLE

CASE NO: SA 47/2018

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

NEDBANK NAMIBIA LIMITED

Appellant

and

FAIDA TRADING AND CLEARING ENTERPRISES CC

Respondent

Coram: DAMASEB DCJ, HOFF JA and MOKGORO AJA

Heard: 11 March 2020

Delivered: 18 November 2021

Summary: In a claim for alleged damages based on negligent conduct, the trial court made certain credibility findings. Credibility findings revisited on appeal. The approach by a court of appeal on credibility findings of the trial court is that it will not readily disturb such findings. The reluctance of a court of appeal to interfere with credibility findings is not an immutable rule and an appellate court is duty bound to interfere where the trial court's conclusions are clearly wrong.

The dispute whether or not the appellant had the required mandate to transfer money from respondent's account into an alleged erroneous international account must be considered on the facts of the case. The credibility findings is a factor to be considered in respect of the issue of the necessary mandate.

The test for negligence restated.

In respect of indemnity contracts, a court must have regard to the language used in order to determine whether or not the conduct of a litigant is covered by the terms of such contract.

The purpose of pleadings is to define the issues in a civil matter and it is for courts to adjudicate upon the disputes and those disputes alone. The trial court made findings in respect of issues not based on the respondent's (plaintiff's) claim. Such an approach is not allowed. The trial court is confined to the issues in dispute as determined by the litigants.

Held – in respect of the credibility findings that such findings are not supported by the evidence presented and court on appeal is justified to make its own credibility findings.

Held – in respect of the issue of the mandate, taking into account the credibility findings by the appeal court, it is found that the respondent did not prove on a preponderance of probabilities that the appellant did not have the required mandate to effect the transfer of the said monies.

Held – in respect of the indemnity contracts, the contention by the respondent that those indemnity contracts are not applicable since they only related to instances where electronic instructions had been given – not supported by the evidence.

Held – that the indemnity contracts are applicable and indemnifies the appellant against a claim of damages based on its negligent conduct.

Appeal is upheld with costs.

APPEAL JUDGMENT

HOFF JA (DAMASEB DCJ and MOKGORO AJA concurring):

[1] This is an appeal against the entire judgment in the High Court (court *a quo*) granting the respondent's claim against the appellant in the sum of US\$39 300 with interest *a tempore morae*. The appellant was ordered to pay respondent's costs.

Factual background

[2] The respondent (plaintiff in the court *a quo*), a close corporation, instituted an action against the appellant, a banking institution, for payment of the amount of US\$39 300. The respondent has been a client of the appellant and has held a current account with the appellant's branch at Oshikango. The claim arises from money which was paid by the appellant into a wrong account which was denied by appellant.

[3] In the particulars of claim it was alleged that on 18 March 2013 a member of the respondent visited the appellant's Windhoek main branch with the intention of effecting an electronic payment from its account in favour of the account of one Amazing Grace Exports, a United States of America (USA) based recipient with an account number held at the Bank of America.

[4] The respondent represented by Mr Emmery Bizimana (Bizimana), a member of the respondent, was assisted by Ms Ravioli Kooper (Kooper), an employee of the appellant.

[5] There appears to have been a misunderstanding in respect of the correct account number in the USA into which the money had to be transferred. The allegation by the respondent was that Ms Kooper did not transfer the amount of US\$39 300 in terms of its instructions into the correct account of Amazing Grace Exports, but into a different account in the name of one Alicia J Guiles.

[6] It was alleged that the money was transferred into the wrong account number unilaterally, negligently and without any mandate from the respondent to do so. It was alleged that the appellant wrongfully and unlawfully and in breach of its duty to the respondent as its client made the deductions from the respondent's account without any lawful basis to do so.

The condonation applications

[7] This court was required at the inception of these proceedings to consider two condonation applications brought by the appellant as well as the reinstatement of the appeal. The first application relates to appellant's non-compliance with the provisions of rules 14(3) and/or 14(4) of the Rules of this Court in that the appellant failed to inform the registrar in writing whether it has entered into security in terms of the said

rules and that the time periods for the said notifications be extended to 19 and 20 November 2018 respectively.

[8] The second application relates to the non-compliance with the provisions of rule 11(4)(b) in that the appellant omitted from the appeal record: (a) the re-examination of the witness Mr Bizimana, (b) Exhibit 5(9) being an email dated 22 March 2013 11h17, (c) the attachment to Exhibit 5(14)(B), being an email dated 25 March 2013 07h56, the attachment being a letter dated 27 March 2013, (d) the second page of Exhibit 9 being a letter dated 7 August 2013, and (e) that an unclear copy of Exhibit 13 being the indemnity to be included in the record.

[9] In respect of the first application, the deponent (a legal practitioner) of the founding affidavit explained the background to this application for condonation.

[10] The application was triggered when the deputy-registrar of this court raised a query with the appellant's legal practitioner of record by virtue of a letter dated 19 November 2018 in the following manner:

'With reference to the above appeal and specifically to your notice filed at our offices on 18 October 2018 we kindly wish to enquire;

"Whether same extends to the notification in respect of the security provided for in rule 14 (3) and (4)."

Kindly let us have your response latest by 30th November 2018.'

[11] The deponent to the founding affidavit stated that it appears that the deputy-registrar's view was that the appellant failed to comply with rules 14(3) and 14(4) in

that the notification to the registrar about the setting of security was filed at the registrar after the period provided for in rule 8(2)(b), being the three month period from the date of the judgment appealed against, and as a result, that the appeal had lapsed.

[12] The deponent stated that in spite of her disagreement with the registrar's interpretation of the rules, she launched this application within a reasonable period of time and prepared a draft affidavit on 27 November 2018. The application was then filed on 4 December 2018 after having received input from instructed counsel.

[13] It was further stated that the prospects of success on appeal was good, motivating this submission in the founding affidavit.

[14] It is necessary in my view to briefly look at the relevant rules of court.

[15] Rule 8(2)(b) states that in a civil appeal an appellant must file the record of the proceedings within three months of the date of judgment or order appealed against or where leave to appeal is required, within three months after an order granting leave to appeal or as provided for in rule 8(2)(c), within such further period as may be agreed to in writing by the respondent.

[16] Rule 14 deals with the security in cases of appeals and provides in sub-rule (3) (a) that if the execution of a judgment is suspended pending appeal, the appellant must *when*¹ copies of the record are lodged, inform the registrar in writing whether he

¹ Emphasis provided.

or she has entered into good and sufficient security for the respondent's costs of the appeal.

[17] Rule 14(4) provides that failure to inform the registrar in accordance with sub-rule (3) within 21 days is deemed a failure to comply with the provisions of that sub-rule (ie sub-rule 3).

[18] The following sequence of events appear from the founding affidavit: The judgment which forms the subject of this appeal was delivered on 23 July 2018. The applicant filed its notice of appeal on 21 August 2018. In terms of rule 8(2)(b) the record of the proceedings was due to be filed on 27 October 2018.

[19] However as a result of the belated transcription of a portion of Ms Kooper's evidence, the appellant approached the respondent to agree on an extension of time for the filing of the record as provided for in terms of the provisions of rule 8(2)(c). The respondent agreed to the request and the date for the filing of the record was extended to 20 November 2018. This agreement was filed with the registrar on 18 October 2018.

[20] The appellant provided security on 26 September 2018 in an amount agreed between the parties. In terms of rule 14(3) the appellant must have, when the copies of the record are lodged, informed the registrar whether it has entered into security in terms of that rule. The record was filed on 20 November 2018 as agreed between the parties and in accordance with the provisions of rule 8(2)(c).

[21] On 19 November 2018, one day prior to the filing of the record, the registrar was informed in writing that the appellant has entered into security. A copy of the payment guarantee was included in the written notification to the registrar.

[22] The deponent stated that her interpretation of the registrar's view, with reference to the query dated 19 November 2018, was confirmed by the registrar verbally, to the effect that the extension to file the record did not include an extension of the notification of security in terms of rule 14(3). Thus, according to the registrar the security was filed out of time which resulted in the non-compliance with that rule as stipulated in rule 14(4).

[23] In my view, the language or terms used in the provisions of rule 14(3) are clear and unambiguous. It provides for the notification to the registrar at that time or at that stage when copies of the record are lodged. The provision is not subject to any qualification nor is it subject to rule 8(2)(b). From the fact referred to above, the appellant notified the registrar well within the time limit required by the rules. In any event, rule 14(4) provides an additional grace period of 21 days within which to notify the registrar before non-compliance with rule 14(3).

[24] I am therefore of the view that the appellant had complied with the provisions requiring notification to the registrar of security entered into for the respondent's costs in the appeal and thus it was not necessary at all to have launched this condonation application. This in my view obviates the necessity to deal with prayers 1, 2 and 3 in the notice of motion.

[25] In respect of the second application, the deponent stated that the fact of the incomplete record was brought to her attention on 8 February 2020 by appellant's instructed legal practitioner. The deponent stated that she herself prepared the appeal record and submitted it to Hibachi, the transcribers, for binding. According to her on 9 February 2020 she investigated how it came about that the appeal record was incomplete and started to prepare a draft affidavit and notice of motion in anticipation of this application. The said drafts were 'settled' by applicant's instructed legal practitioner on 11 February 2020 whereafter this application was 'delivered as soon as possible thereafter'.

[26] The deponent explained that on 6 June 2020, during the proceedings in the court *a quo*, an application was made for absolution of the instance. In her quest to comply with the provisions of rule 11(8),² she inadvertently omitted the re-examination of Mr Bizimana which portion of the record immediately preceded the application for absolution from the instance. This portion comprises about 12 pages. The deponent accepts that the omission was entirely her fault and takes full responsibility therefore. She submitted that the re-examination mainly constitutes a repetition of Mr Bizimana's evidence-in-chief which in any event should not have been allowed in re-examination. She further submitted that the omission does not render the appeal incapable of being decided as a result thereof.

² Rule 11(8) deals with that part of a record of the proceedings in the court appealed from which must not be included in the appeal record unless essential for the determination of the appeal.

[27] Regarding Exhibit 13, deponent states that when she prepared the appeal record, a copy of Exhibit 13 was legible but when the appeal record was copied and bound it became faint.

[28] Regarding Exhibits 5(9), 5(14)(B) and the incomplete Exhibit 9, deponent explained that when preparing and submitting the exhibits to the transcribers for copying and to be bound she included her own bundle of exhibits as she had collected them during the trial. She has also, so she avers, used her own bundle in preparation of appellant's heads of argument before judgment in the court *a quo* and had no reason to believe that it was incomplete. The deponent was of the view that the exhibits in question must have been removed from the bundle for a reason she cannot explain. She stated that the only explanation how it came about that the record was incomplete was that she must have overlooked those exhibits and proffered her sincere apologies. She further stated that the appellant has good prospects of success on the merits of the appeal with reference to appellant's notice of appeal and the grounds set forth therein.

[29] Deponent stated that the omitted portions were provided about one month before the hearing date of the appeal, leaving sufficient time for the respondent to consider it in preparation of its heads of argument. Deponent submitted, in the founding affidavit, that the respondent will not be prejudiced if the relief sought in the application is granted.

[30] It was submitted by counsel appearing on behalf of the respondent during oral argument that no proper case for condonation had been made out and the application should be refused.

[31] In addition to the requirement that a reasonable and acceptable explanation for the non-compliance of the rules of this court must be provided, an applicant must convince this court that there are good prospects of success on the merits of the appeal. I shall now turn to the question of prospects of success in respect of the merits of the appeal.

Pre-trial order

[32] On 22 January 2016 the parties signed a second amended pre-trial order which reads as follows:

'1. *Issues of fact to be resolved at trial*

- 1.1 Which party is responsible for the fact that the monies were paid into an allegedly erroneous account.
- 1.2 Whether the defendant had the necessary and requisite authority to make the transfer into the said account on 18 March 2013 from the plaintiff.
- 1.3 Whether or not the plaintiff provided the wrong account number to the Defendant.

2. *Issues of law to be resolved at trial*

- 2.1 Whether the plaintiff had indemnified the defendant against all loss in respect of the said transaction;
- 2.2 Whether the form used to make the said transfer was a legal or a falsified document and whether the defendant had authorization to transfer the said funds into the account of the person who received the said funds as opposed to the plaintiff's intended recipient.
- 2.3 The amount of damages suffered by the plaintiff and whether the Defendant is liable for such damages.'

Evidence led in support of the plaintiff in the court *a quo* (the respondent on appeal)

[33] Mr Bizimana testified on behalf of the respondent and related that on 18 March 2013 at 15h00 he wanted to transfer money to Amazing Grace Exports in the USA. Inside the bank in Windhoek he was assisted by Ms Kooper, an employee of the appellant. Since he had no office in Windhoek and could not print out an invoice which he had on his cellphone, he forwarded an email to Ms Kooper and asked her to print it for him which she did. Mr Bizimana explained that it was procedure that money could not be transferred without an invoice. Ms Kooper filled out form A (an application for overseas transfer of funds form) which Mr Bizimana signed. Ms Kooper made a copy of it and brought the original and the copy back to Mr Bizimana. Mr Bizimana then saw something was suspicious on the invoice because the account number cannot have two names as there is either a company name with an account number or a personal account with an account number. Mr Bizimana asked Ms Kooper whether she printed the invoice which he had forwarded to her, which she confirmed.

[34] Mr Bizimana testified that he told Ms Kooper that something was wrong with her email and the invoice 'cannot be'. Mr Bizimana then phoned the owner of Amazing Grace Exports, Vincent, and asked his account number which was different from the account number which appeared on the invoice. Mr Bizimana then asked Ms Kooper to phone appellant's Oshikango branch to confirm or verify the account number, since he had used the same form one or two weeks ago. The account number which was received from Oshikango branch was the same as the number received from Vincent – it was the correct account number.

[35] Mr Bizimana testified that he then asked Ms Kooper to fill in another application form containing the correct account number which she did, and he signed the form. It was countersigned by Ms Kooper who also stamped the form. Mr Bizimana then took the incorrect form and in the presence of Ms Kooper tore it and threw it in the dustbin. According to Mr Bizimana at that stage the bank was already closed, so he left Ms Kooper with the original new form A. Mr Bizimana testified that his personal email address which he always uses to communicate with the bank is emmery20@gmail.com and his business email address is: faidatc@yahoo.com. Mr Bizimana explained that he used his personal email address to communicate with the bank since other individuals may have access to his business email address and this address was not secure. He testified that the incorrect account number was 375000260328. Since an invoice was required to accompany the new application form, Mr Bizimana around 16h00 (the bank was already closed) sent the correct invoice to Ms Kooper for her to print out. Ms Kooper sent Mr Bizimana an email to confirm that she received the invoice. According to Mr Bizimana he gave Ms Kooper

the correct account number and instructed Ms Kooper to send the money to that account.

[36] Copies of the incorrect form A (two pages) were received as Exhibits 1A and 1B. The invoice was marked 1C. The correct form A and invoice were marked Exhibits 2A, 2B and 2C. On top of Exhibit 2A appears the word 'cancelled' and according to Mr Bizimana he did not cancel that document and did not know it was cancelled. The date of 18 March 2013 appears on Exhibit 2A. According to Mr Bizimana he forwarded the correct invoice (Exhibit 2C), which he had received from Amazing Grace Exports, by email to Ms Kooper on 18 March 2013.

[37] Mr Bizimana testified that when he received the first invoice (Exhibit 1C) from Amazing Grace Exports, he received it 'correctly' but when he forwarded the invoice to Ms Kooper and she printed it, it contained the wrong information. He later asked Amazing Grace Exports to resend the invoice (received by the court as Exhibit 2C). The information contained in this invoice was correct which he forwarded to Ms Kooper and she confirmed that it was the correct invoice, which she printed and attached to the new application form (Exhibit 2A).

[38] On 22 March 2013, Mr Bizimana telephoned Ms Kooper and told her that the money never arrived. According to Mr Bizimana, Ms Kooper informed him that she transferred the money. When he received proof of transfer from Ms Kooper he discovered that the money was sent to a different account. The next day he drove to Windhoek and asked Ms Kooper how she had managed to send the money to the

wrong account and she explained that a copy of the incorrect document remained in the memory of the copy machine which she retrieved and used to send the money. Mr Bizimana testified that he then asked Ms Kooper to stop the transfer of the money and she promised that the problem would be 'resolved'.

[39] During cross-examination Mr Bizimana confirmed twice that he did not inform Ms Kooper at the stage when she printed the email containing the invoice (Exhibit 1C), that the information which originally appeared on his cellphone differed from the information later printed out by Ms Kooper. When he was pressed on this point Mr Bizimana explained that he told Ms Kooper after they had read everything that the invoice which Ms Kooper printed was 'very wrong'.

Evidence in support of the defendant (appellant on appeal)

[40] Ms Kooper testified that she was employed by the appellant *inter alia* as a business banker. Ms Kooper testified that Mr Bizimana was known to her at that stage as a client of the appellant and confirmed that on 18 March 2013 Mr Bizimana wanted to transfer money to an overseas account. Ms Kooper further confirmed that after the completion of the application form and the scanning thereof Mr Bizimana expressed uncertainty regarding the account details on the invoice provided.

[41] She confirmed that the Oshikango branch was subsequently contacted and another application form was completed. The invoice was at that stage still awaited. According to Ms Kooper before Mr Bizimana left her office he promised her that he would forward the correct invoice by mail whereafter the awaited invoice was received

via the same email account (faidatc account) Mr Bizimana had communicated with her all along. She discovered that the new invoice was exactly the one previously cancelled on request by Mr Bizimana and Mr Bizimana was advised accordingly. The next day, Mr Bizimana via the same email account (faidatc account) he had always communicated with Ms Kooper confirmed that the transaction should proceed with the same invoice. Mr Bizimana was, via the same email he had always utilised, requested to confirm the accuracy of the account statement before processing, which he confirmed.

[42] Ms Kooper testified that the day after the processing of the transaction she received a message from Mr Bizimana's email that the money was sent to the wrong account. Subsequently and upon a follow up by her regarding the wrong account, Mr Bizimana conveyed to her that he also saw the email messages on his phone but that it was not him sending the emails.

[43] Ms Kooper further testified about the indemnity signed by Mr Bizimana in which he expressly and irrevocably indemnified and held the appellant harmless against any negligence on the part of the bank. She further testified that on 18 March 2013, a male person was present with Mr Bizimana in her office but that this person did not contribute anything in respect of the transaction.

[44] Ms Kooper confirmed that initially when she assisted Mr Bizimana on 18 March 2013 she received Exhibits 1A, 1B and 1C which were emailed from Mr Bizimana's cellphone. Exhibits 1A and 1B comprised of form A (two pages) and Exhibit 1C was

the invoice. On Exhibit 1A was the name of the beneficiary 'Amazing Grace Exports', and on Exhibit 1C it was stated that the invoice was issued on behalf of Amazing Grace Exports. The account name on the invoice was given as 'Alicia J Guiles' and the account number as 375008260328. This same account number also appears on Exhibit 1A.

[45] The second application form was also completed in the presence of Mr Bizimana. It was Exhibits 2A and 2B (form A). Ms Kooper testified that she received this form A by email from Oshikango branch and she just amended the amount and the date, printed it out and gave it to Mr Bizimana who signed it. Mr Bizimana then said that he would email the invoice to her. The account number which appears on this form is 2341922737. Ms Kooper testified that after Mr Bizimana had left the bank, she attended an internal meeting and when she returned to her office just before 16h00 she found two emails and two invoices both forwarded from the same email address. The first email was in respect of Amazing Grace Exports and the second email, shortly after the first email, was in respect of Alicia J Guiles.

[46] This second invoice contained the same particulars as the invoice initially forwarded by Mr Bizimana himself to her which contained the particulars of Alicia J Guiles – the one previously said had contained the incorrect account number and which was torn up.

[47] As she received two conflicting invoices, Ms Kooper on 19 March 2013 at 07h53 responded by pointing out via email to Mr Bizimana that he had indicated earlier that the second invoice (referred to *supra*) had to be cancelled, the one with

Alicia J Guiles as beneficiary. She testified that she got a reply from Mr Bizimana by way of an email on 19 March 2013 at 08h44 that it was the correct one and which email reads: 'no forward the invoice with account name: alicia j guiles and account number 375008260328'. She testified that this was the reason why she had written 'cancelled' on Exhibit 2A. Mr Bizimana during his testimony denied ever having sent this email to Ms Kooper.

[48] She testified that the instruction to proceed to process the invoice containing the particulars of Alicia J Guiles was confirmed on 19 March 2013 at 09h03 by means of a email received from Mr Bizimana which reads: 'yes, is ok, confirmed, go ahead and process it'. Mr Bizimana during his testimony denied having sent this email to Ms Kooper.

[49] Ms Kooper testified that on 19 March 2013 at 1h41 PM (13h41) she forwarded an email to Mr Bizimana which reads as follows:

'Hi Emery,
The funds are going to Alicia J Guiles? Please confirm, thanks.'

Mr Bizimana testified that he never received this email.

[50] She received a reply via email from Mr Bizimana's email address on 19 March 2013 3h36 PM (15h36) as follows:

'ok, confirmed waiting for the transfer slip.'

Thanks
BEST REGARDS
FAIDA TRADING cc'
.....'

Mr Bizimana testified that he never sent this email to Ms Kooper. This instruction was then sent through to 'Global Trade' to proceed with the transaction.

[51] Ms Kooper testified that the email address which Mr Bizimana instructed her to transfer the money to, the Alicia J Guiles account, was the same email address (faidatc address) from which she was informed that the money was transferred into the wrong account which she had received the next day.

[52] Ms Kooper testified that Mr Bizimana used both his 'faidatc email' as well as his 'Emmery' email when he communicated with her.

[53] Ms Kooper testified that Mr Bizimana was a party to an agreement, received as Exhibit 12, with the heading: GENERAL AGREEMENT APPLICABLE TO CUSTOMER FOREIGN CURRENCY ACCOUNTS. She testified that paragraph 5 of this agreement reads as follows:

'The Bank is hereby authorized to accept any instruction in respect of the operation of a CFC Account given of which purports to be given on behalf of the Client by an authorised person on behalf of the Client. It is agreed that all instructions in respect of the operation of a CFC Account purporting to originate from the Client's Office in writing and/or electronically and/or telex/cable and/or facsimile will be binding on the'

Ms Kooper admitted that this paragraph was incomplete.

[54] Ms Kooper read para 7.3 into the record as follows:

'7.3 The Bank and the Client agree that any application made or instruction given in terms of and pursuant to this agreement which reasonably appears to be a proper authorized application and/or instruction made or given on behalf of the Client shall be deemed to be a proper and authorized application and/or instruction made or given in terms of this agreement and that the Client shall be bound to such application and/or instruction.'

[55] Ms Kooper testified that Mr Bizimana signed an indemnity document (received as Exhibits 13 and 13A) with the following caption:

'INDEMINITY IN RESPECT OF INSTRUCTIONS CONVEYED AND/OR
PURPORTED TO HAVE BEEN CONVEYED TO THE BANK BY E-MAIL, FACSIMILE
AND/OR TELEPHONE

The definition of "instructions" in this context shall mean, but not be limited to, all e-mailed, faxed and/or telephone communications, mandates, orders, requests, consents, commitments, minutes of meetings, and any other documentation transmitted, sent or communicated to the Bank.

I/We issue instructions of a legally binding nature by e-mail, facsimile and/or telephone and hereby expressly request Nedbank Namibia Limited (hereinafter referred to as "the Bank") to transmit/accept email, facsimile and/or telephone instructions from me/us or to act according to instructions conveyed or purported to have been conveyed to the Bank by means of an e-mail message, facsimile transmission and/or telephone communications; and

I/we realize that when this means of transmission or communication is used, the 'Bank is able to check the authenticity and completeness of these instructions only on the

basis of such received instructions; instructions received and/or transmitted in any of the aforesaid means may be tampered with prior to being transmitted and/or received; can be fraudulently abused by outsiders, delays may occur, the instructions may inadvertently be mislaid, illegible, disrupted and discrepancies may occur as a result thereof; and

I/we agree that any instruction purported to emanate from me/us in any of the aforesaid means, shall be deemed to have been issued by me/us in the form and manner actually received by the Bank ("purported e-mail, facsimile, or telephone instructions"), which may as a result of malfunction of equipment, the distortion of communication links and the like, be different to that intended or sent – and I/we shall be bound thereby;

In cognizance of these risks I/we hereby authorize you to execute instructions which you receive in any of the aforesaid means, provided that these are furnished to all outward appearances with signatures and/or other means of identification requested through the telephone which match the specimen signature(s) and/or other means of identification agreed with you and comparison of these signatures and/or the means of identification does not reveal any striking discrepancies.

The Bank desires to be indemnified in the event that instructions issued or received in any of the aforesaid means are not carried out according to my/our instructions; or an instruction containing personal/confidential information comes into the possession of, or is intercepted by a person who is not entitled to be in possession of, or to read or hear such instructions.

Wherefore I/We the undersigned: –

- Do hereby indemnify and hold the Bank harmless against all demands, actions and proceedings which may be made or instituted against the Bank, and all injury, loss or damage which may be suffered by the Bank, whether directly or indirectly arising out of my/our election to use the e-mail, facsimile and/or telephone system of communication in our dealings with the Bank.
- Irrevocably undertake and warrant that I/we will not make any demand or claim or institute any action against the Bank should I/We incur any damage, loss or injury, whether directly or indirectly, arising out of or in connection with my/our use of any of the aforesaid means to convey instructions to and to receive confidential transmission from the Bank.

- Expressly and irrevocably indemnify and hold the Bank harmless against any negligence on its part when handling instructions or when responding to instructions in any of the aforesaid means.

This authorization will remain valid until revoked by me/us or by Nedbank Namibia Limited in writing.'

[56] Ms Kooper testified that the indemnity signed by Mr Bizimana applied in respect of the foreign currency account of Mr Bizimana. Mr Bizimana's testimony on this point was that although he admitted that he signed an indemnity form in general, permitting payments or transfers telephonically, by fax or by email, he contended that this indemnity did not cover international transfers.

The findings of the court *a quo*

[57] During the trial in the court *a quo* Mr Bizimana testified on behalf of the respondent, and Ms Kooper on behalf of the appellant.

[58] The court *a quo* considered their respective testimonies and pointed out that Mr Bizimana advised Ms Kooper to contact the Oshikango branch for the correct details, which she did but subsequently proceeded to retrieve a scanned copy (of form A) which contained incorrect information, but continued to use it despite the fact that Mr Bizimana had advised her not to do so.

[59] The court *a quo* pointed out that after this 'mishap' the appellant engaged the services of a forensic investigator who compiled a report which the appellant refused

to discover. The appellant also commenced negotiations with the view of compensating the respondent.

[60] Considering the testimonies of the witnesses, the court *a quo* found that Mr Bizimana was clear, honest, not shaken during cross-examination, and above all was honest in his evidence that he advised Ms Kooper not to proceed with the initial form A application. Mr Bizimana's evidence was accepted in its entirety.

[61] In respect of Ms Kooper the court *a quo* found that her evidence was not convincing and that she was not prepared to tell the truth in the circumstances. Ms Kooper's evidence was rejected as untruthful and designed to cover-up her negligence and/or fraudulent activities.

[62] The court *a quo* noted that the transfer took place on 18 March 2013 and the purported contradictory information from Mr Bizimana, through emails, was received from 19 – 22 March 2013 well after the money transfer had been effected. The court *a quo* stated that upon receiving those contradictory emails Ms Kooper should have sought clarification to verify the new and contradictory instructions by phone and not by emails.³ The court *a quo* found that Mr Bizimana did not authorise Ms Kooper to transfer money to Alicia J Guiles and that the appellant was negligent in the circumstances.

³ The court *a quo* found that Ms Kooper's failure to act reasonably placed her actions and/or omissions below the standard of a reasonable person in the circumstances.

[63] The court *a quo* found that in view of credible evidence by Mr Bizimana the respondent has proved on a balance of probabilities that the appellant breached a contract between them, alternatively acted negligently as a result of which the respondent suffered financial prejudice as claimed in the summons.

[64] In respect of the indemnity clause, the court *a quo* referred to case law⁴ which hold that 'indemnity' should not be available to fraudulent actions or those against public policy. Also referred to by the court *a quo* was the matter of *Hotels, Inns and Resorts SA (Pty) Ltd v Underwriters at Lloyds & others*⁵ in which the court refused to enforce a sub-clause which exempted liability on the part of a security company for loss and damage from what was described as 'liability from whatsoever cause', by the company's employees.

[65] The court *a quo* stated that the courts look at the role the party seeking to rely on an indemnity clause played. Thus a party who acted fraudulently or negligently cannot benefit from its own unlawful conduct. The court *a quo* held that: 'the fact that the respondent had signed an indemnity contract should not be used as a shield where there is a flagrant and brazen derelict (*sic*) of duty or negligence. In as much as it cannot be used to cover fraudulent activities, negligence, is in my view also included. In addition thereto, public policy does not allow that genuine innocent parties should be held victim to such nefarious conduct'.

⁴ *Wells v SA Alumenite Co* 1927 AD 69 at 72 (*Wells*), and *Hall – Thermotank Natal (Pty) Ltd v Hardman* 1968 (4) SA 818 (D) at 835.

⁵ 1998 (4) SA 466 (C).

Submissions on appeal

On behalf of the appellant

[66] The legal representative acting on behalf of the appellant submitted that the evidence led by the respondent (as plaintiff in the court *a quo*) did not in all respects support the allegations in the particulars of claim and referred to a few examples.

[67] Firstly, it was alleged in the particulars of claim that the respondent could not give instructions to the bank as the respondent was not in possession of the necessary banking details and the invoice of Amazing Grace Exports. It was submitted that there is evidence at the time when Mr Bizimana was in Ms Kooper's office filling out forms, that he in fact had the correct bank details and invoice on his phone.

[68] Secondly, it was alleged in the particulars of claim that subsequent to obtaining the correct bank account number from Oshikango branch by email, Ms Kooper telephonically confirmed receipt of the email to the respondent, whereas there was no evidence that Ms Kooper telephonically confirmed receipt of an email.

[69] Thirdly, it was alleged in the particulars of claim that Ms Kooper received the incorrect invoice from a different email address as that of the respondent, and that this allegation is not in line with the evidence presented as the evidence is that Ms Kooper received this email from the *faidatc* email address.

[70] Fourthly, contained in the particulars of claim is the allegation that the bank unilaterally and negligently proceeded to effect a transfer to an account unknown to the respondent which was not the account of Amazing Grace Exports, whilst the evidence shows that this account number came from Mr Bizimana himself whilst he was seated in the office of Ms Kooper. Furthermore, it was submitted that at that stage Mr Bizimana did not alert Ms Kooper to the fact that what was printed by her was different from what he had received (from Amazing Grace Exports).

[71] It was submitted that whilst the respondent's case was that the appellant was liable for damages based on the alleged negligent conduct by the appellant, it was never the respondent's case that any fraud had been perpetrated by the appellant. Fraud was never pleaded, it was submitted.

[72] It was submitted that the respondent had never proved that it suffered damages in the amount of U\$39 300 since the evidence presented by the respondent in support of this allegation amounts to hearsay evidence.

[73] In respect of the findings of the court *a quo* it was submitted that the court *a quo* upheld the respondent's claim on the basis that:

- (a) Firstly, the respondent instructed the appellant to do the transfer to Amazing Grace Exports but instead it was transferred to an (alleged) wrong account number. It was submitted that the court *a quo* erred in this regard in that there was an instruction to transfer the funds to the

account number to which it was in fact transferred, *albeit* a deemed instruction.

- (b) Secondly, the appellant's employee should have verified by phone as she had the respondent's telephone number and this was a breach of contract and also negligence. It was submitted that the court *a quo* erred in this regard as there was no such contractual obligation on the appellant and the failure did furthermore not amount to negligence, and the appellant was, in any event protected by the indemnity.

[74] Regarding the issue of the mandate, it was submitted that the court *a quo* seemed to have ignored the ultimate, or deemed instruction to the appellant, and incorrectly simply held that the appellant acted contrary to the respondent's instructions and did not act on proper instructions. It was submitted that the appellant succeeded to prove that it did have a mandate to transfer the money to account number 375008260328. It was submitted that Mr Bizimana before he left the bank on 18 March 2013, expressly told Ms Kooper that he would email her the invoice to be attached.

[75] On negligence, it was submitted with reference to the matter of *Minister of Health and Social Services NO v Kasingo*⁶ where this court incorporated an authoritative test of negligence as formulated in *Kruger v Coetzee*,⁷ that the respondent failed to prove that the appellant acted negligently when it effected the

⁶ 2018 (3) NR 714 (SC).

⁷ 1966 (2) SA 428 (A).

transfer. It was submitted that the court *a quo* failed to determine whether the particular harm was reasonably foreseeable and if so, whether the said harm was reasonably preventable. It was submitted that there is no evidence on record that the harm concerned was reasonably foreseeable in the circumstances of the case.

On behalf of the respondent

[76] The legal representative on behalf of the respondent referred to paragraph 6 of Exhibit 12, the general agreement applicable to CFC accounts, which requires that a client who intends to transfer money internationally must furnish the bank with 'suitable documentary evidence including Bank of Namibia Form A', duly completed and signed. The completion of this form is a prerequisite and without such form there is no application to transfer funds. It was submitted that the transfer of money may therefore not be effected by means of an email or a sms or an invoice.

[77] It was submitted that after form A and the invoice were destroyed, there was no original form A (Exhibit 1A) left and a new application form A was completed (Exhibit 2A and B). It was submitted that Mr Bizimana was unaware of the fact that Ms Kooper had retained a copy of the destroyed document. It was submitted that the instructions received by the bank were contained in Exhibit 2A and B and that the invoice (Exhibit 2C) was just supporting information.

[78] It was submitted that contrary to appellant's own protocol, the transfer was effected, on 18 March 2013, without a signed original form A since the original form A (Exhibit 1A) had been destroyed.

[79] It was submitted that in view of the testimony that the transfer of funds took place on 18 March 2013 the flurry of purported emails received during the period 19 – 22 March 2013 is unhelpful to the appellant.

[80] It was submitted that the indemnity agreement sought to be relied upon leaves no doubt that the bank was aware of the prevalent fraud perpetrated through electronic communications such as emails. It was submitted that the indemnity agreement obviates liability for the bank, provided that the electronic instructions furnished to the bank in all outward appearances have signatures or other means of identification requested through the telephone which match the samples or other means of identification agreed with the client and a comparison thereto does not reveal any striking discrepancies.

[81] Thus, it was submitted that where the bank had clearly been instructed not to proceed with the transfer it was not asking too much to expect a bank official to pick up a phone and call Mr Bizimana. The bank, it was submitted, failed to do so and therefore the conclusions of the court *a quo* in this regard cannot be faulted.

[82] It was submitted that regarding the question of negligence the court *a quo* considered the legal obligations of the bank, namely to treat the accounts of their clients with meticulous care considering the nature of the bank and client relationship. The respondent supported the conclusion reached by the court *a quo* that the bank

was negligent in the circumstances. It was submitted that the conduct of Ms Kooper exceeded the 'threshold' of negligence since she acted contrary to direct instructions.

[83] In so far as the indemnity clause was concerned, the conclusion by the court *a quo* that it was inapplicable because it was against public policy to do so was supported by the respondent. It was submitted that a party cannot act fraudulently or negligently and still benefit from its unlawful conduct.

[84] It was submitted with reference to the matter of *Wells* that a clause exempting a contracting party from liability for the fraud of a representative (employee) is against public policy. *A fortiori* that would be the case where the clause seeks to exempt the contracting party from its own fraud.

[85] It was also contended on behalf of the respondent that the appellant's reliance on the exemption clause is untenable, since the wording of the exemption clause do not fall within the exclusionary circumstances set out in the contract eg the actual instructions to the bank were not given electronically or by email.

[86] Although the legal representative on behalf of the respondent initially contended that this court should ignore the indemnity contract, he subsequently conceded that the parties had indeed signed an indemnity contract and that the question was whether or not the indemnity contract indemnified the appellant from any liability. It was submitted that the indemnity contract relates to electronic instructions whereas in the present matter the instructions had been given by

attending physically at the bank. Thus, it was submitted that the indemnity contract was inapplicable.

[87] It was pointed out that a forensic investigation had been done by the bank but the report was not disclosed. This failure to disclose, it was submitted, was not in line with our 'constitutional ethics' and this court was urged to draw a negative inference from such non-disclosure.

Evaluation of the evidence and the judgment of the court *a quo*

The credibility findings

[88] Where the court *a quo* found that the evidence led on behalf of the respondent could not be faulted and was accepted as credible 'in its entirety', based on consistency and the demeanour of Mr Bizimana, it found that Ms Kooper's evidence was not convincing since she was not prepared to tell the truth and her evidence was rejected as untruthful, 'designed to cover-up her negligence and/or fraudulent activities'. The legal practitioner on behalf of the appellant criticised the credibility findings of the court *a quo* by pointing out that on a proper consideration of the testimony of Mr Bizimana, his evidence was not clear and credible and should have been rejected when tested against the general probabilities.⁸ It was submitted that Ms Kooper's testimony should not have been rejected as untruthful.⁹

⁸ This was a ground of appeal (ground 7 in the notice of appeal).

⁹ This was a ground of appeal (ground 8 in the notice of appeal).

[89] The approach of a court of appeal on credibility findings by a trial court is well established. It has been stated as follows:

‘An appeal court will not readily disturb the findings of a trial court on credibility and on questions of fact. The rationale of this rule is that the trial court has the advantage of seeing and hearing the witnesses and being steeped in the atmosphere of the trial. The appeal court does not have that advantage. The reluctance of an appellate court to interfere with findings of facts is not an immutable rule, especially because on appeal an aggrieved appellant is entitled to a rehearing as of right. That right should not be rendered illusory by an inflexible rule that the appeal court will under no circumstances interfere with the first instance court’s findings of fact. If, based on the probabilities of the case, the trial court’s conclusion is clearly wrong, the appellate court is duty bound to interfere.’¹⁰

It is also trite law that:

‘The truthfulness or untruthfulness of a witness can rarely be determined by demeanour alone without regard to other factors including, especially, the probabilities’¹¹

[90] From what I have been able to identify from the record of proceedings in the court *a quo*, Mr Bizimana’s testimony was not as consistent as found by the court *a quo*.

¹⁰ Unreported judgment of this court in *BV Investment Six Hundred and Nine CC v Kamati & another* (SA 48/2016) [2017] NASC (19 July 2017) para 16.

¹¹ *President of the Republic of South Africa & others v South African Rugby Football Union & others* 2000 (1) SA 1 (CC) para 79.

[91] Mr Bizimana's testimony was that he always used his personal email address when he communicated with the bank. It is common cause that all emails received by Ms Kooper during the period 19 – 22 March 2013 came from the same email address ie the 'faidatc' address, the business email address of Mr Bizimana. Emails sent by Ms Kooper during aforementioned period were also sent to the same email address. The only explanation for this state of affairs is a bare denial by Mr Bizimana that he never sent nor received the said emails.

[92] A curiosity which appears from Mr Bizimana's testimony, and for which no rational explanation appears from the record, in particular not from Mr Bizimana himself, is that when Mr Bizimana on 18 March 2013 sat in Ms Kooper's office and he forwarded an invoice which he claimed to have received 'correctly' from Amazing Grace Exports, to Ms Kooper's email address, when the invoice was printed out by Ms Kooper contained wrong information, according to Mr Bizimana. This in my view is highly improbable.

[93] In a letter dated 12 July 2013 (received as Exhibit 6) the erstwhile legal practitioner of Mr Bizimana wrote to the bank informing it that their client, Mr Bizimana's instruction was that he did not sign any indemnity permitting the bank to make payments or transfer telephonically, via fax or via email, and that the only indemnity signed by their client relates to 'general communication'. The evidence was that Mr Bizimana in fact signed two indemnities.¹² Mr Bizimana's evidence was that

¹² Received as Exhibits 12 and 13/13A.

the indemnity he had signed was not in respect of international transfers, only later to admit that the general agreement did apply to international transfers.

[94] The court *a quo* criticised the testimony of Ms Kooper for the fact that she had not used a telephone to communicate with Mr Bizimana when she discovered the contradicting emails (invoices) as it would have made sense to use a telephone. Ms Kooper's evidence why she instead used emails as a way of communication, which in the circumstances seems to be a reasonable explanation to me – was for the purpose of record keeping. She also testified that it was common practice or procedure to use emails. The court *a quo* failed to consider whether or not this method of communication was reasonable, since there was no finding that Ms Kooper was contractually prohibited from using emails.

[95] It does not appear from the judgment of the court *a quo* on what basis Ms Kooper's evidence was designed to cover up fraudulent and/or negligent activities, and neither did the court *a quo* refer to the demeanour of Ms Kooper, as it did in respect of the testimony of Mr Bizimana.¹³

[96] From a careful reading of the record it appears to me that Ms Kooper had not been shaken at all under cross-examination, nowhere was it pointed out by counsel appearing on behalf of respondent that she contradicted herself, or that she was untruthful or that she covered up fraudulent activities, or that she deviated from her

¹³ The court *a quo* just referred to the demeanour of Mr Bizimana without describing how his demeanour was. It is left to the reader to conclude that the demeanour of Mr Bizimana made a favourable impression on the court.

witness statement. Ms Kooper was able to explain satisfactorily the emails received and sent by her on 18 March 2013 as well as the period 19 – 22 March 2013. In my view, there was no justification for her evidence to have been rejected by the court *a quo* as untruthful. The court *a quo* erred by so finding.

[97] In my view, Mr Bizimana's evidence could not have been accepted by the court *a quo* 'in its entirety' and it erred in doing so. The credibility findings by the court *a quo* are not supported by the evidence and are patently wrong. Credibility findings are important considerations when a court is to determine whether or not a litigant has discharged his or her onus in civil trials.

The mandate

[98] In respect of the question whether the appellant had the mandate to transfer funds to the incorrect account, the court *a quo* found that Ms Kooper did not act on proper instructions in view of the fact that the initial application form A was torn up in the presence of Ms Kooper – a clear indication that Mr Bizimana did not want her to proceed on the basis of incorrect information and that when Ms Kooper received the correct information from the Oshikango branch she subsequently chose to disregard it, preferring information which came through emails.

[99] The onus was on the respondent to prove on a preponderance of probabilities that the appellant did not have a mandate to transfer the money to account number 375008260328 and that the appellant had no lawful basis to do so.

[100] There is evidence on record that the respondent mandated the appellant to effect the transfer or that respondent was deemed to have mandated the appellant to transfer the money. In this regard, the emails received by Ms Kooper between 19 – 22 March 2013 is of cardinal importance. A reading of these emails clearly reveal that the respondent had reinstated its original instruction or is deemed to have reinstated the initial instruction. The initial instruction was contained in the invoice (Exhibit 1C) which Mr Bizimana forwarded to Ms Kooper inside her office and which he later claimed to have contained incorrect information.

[101] One of the emails received from the business email address of Mr Bizimana¹⁴ confirmed that the money should be transferred into the account name of Amazing Grace Exports containing the ‘wrong’ account number, since (so it appears from the email) Alicia J Guiles is the owner of the company. This confirmation was conveyed to Ms Kooper after she had requested Mr Bizimana to confirm whether or not the money should be transferred to Alicia J Guiles.¹⁵

[102] The contention by counsel on behalf of respondent that the indemnity contract was inapplicable since it relates to electronic instructions and that Mr Bizimana personally gave instructions to the bank, is flawed. In the first instance, paragraph 5 of the general agreement (applicable to CFC accounts) describes an instruction as *any instruction*¹⁶ given to the bank ‘which purports to be given on behalf of the client by an authorised person on behalf of the client’. This specifically included instructions conveyed or purported to have been conveyed to the bank by email, facsimile and/or

¹⁴ On 22 March 2013 at 12h02 PM.

¹⁵ By email on 19 March 2013 at 1h41 PM.

¹⁶ Emphasis provided.

telephone. It is common cause that an application to transfer money internationally (form A) must be accompanied by an invoice – this was an internal requirement of the bank and Mr Bizimana was well aware of it. Thus, by informing Ms Kooper on 18 March 2013 before he left the bank, that he would email the invoice to her (which he did), he chose an electronic form of communication and the indemnity contract is on this basis also applicable.

[103] A strange phenomenon appears from the testimony of Ms Kooper, (which was uncontested on this point), namely, that when she investigated the allegation that the money had been paid into the wrong account, Mr Bizimana informed her that he had also seen the email messages¹⁷ on his phone but that it was not him sending those email messages. There is no apparent answer from the record who else could have sent those emails to the appellant. It was not the respondent's case that Ms Kooper did not receive from or did not send emails to the faidatc email address. It was merely denied that Mr Bizimana received or sent those emails.

[104] In view of the undisputed evidence by Ms Kooper (referred to in the previous paragraph) and the credibility findings on appeal, I am of the view that the respondent did not prove on a preponderance of probabilities that it did not give the appellant the mandate to effect the transfer of monies into the Alica J Guiles account number. The issues of fact to be resolved during the trial in my view should have been answered as follows:

¹⁷ Received and sent by Ms Kooper during the period 19 – 22 March 2013.

In respect of the first question the answer is that Ms Kooper was the official who informed Global Trade to effect the transfer but this was done on account of incorrect information provided or purported to have been provided by the respondent. In respect of the second question the answer is in the affirmative ie appellant had the necessary authority to effect the transfer of money into the alleged erroneous account.

[105] This court needs, in my view, to consider the finding by the court *a quo* that the transfer of money into the erroneous account took place on 18 March 2013 and that the clarification sought by Ms Kooper after she had received contradictory emails from Mr Bizimana after the fact (ie between 19 – 22 March 2013) was a futile exercise.

[106] It is common cause that Mr Bizimana visited the bank in the afternoon on 18 March 2013 with the intention to transfer money from his account into an international account number. Ms Kooper during her testimony explained that a branch of the bank where she was employed could not effect money into an overseas account but could only facilitate such transfer by processing the required documents. The department in the bank which eventually effects the transfer was referred to as Global Trade, which does so on the basis of an email received from a branch.

[107] Ms Kooper testified during cross-examination that on 18 March 2013 she received the application, the scanning was done and she sent the transaction the same day to Global Trade. It appears from further questioning that she was not sure whether she had sent it the same afternoon or early the next morning on 19 March

2013, but Global Trade could not have done the transfer on 18 March 2013 because the 'cut-off time' was 15h00. It was explained that the office of Global Trade close at 16h00 or 16h30, so even if she had sent the transaction on 18 March 2013, Global Trade would have 'picked it up' only the next morning, and that is why Global Trade by way of an email asked her the next morning whether the account number was correct. She testified that on 19 March 2013 at 08h45 the transfer had not yet been done.

[108] Her testimony further was that when she realised that the money went to a wrong account she contacted the forensic department and sent an email to Global Trade to stop the transfer. After about two days (she was not sure of the time lapse) she received an email from Global Trade informing her that the money was already transferred out of the account of the respondent.

[109] The court *a quo* thus erred by not considering the testimony in context, viz that the transfer of the money could not have happened on 18 March 2013 and also not by 08h45 on 19 March 2013. The court *a quo* in my view misdirected itself by finding the exchange of emails was done after the fact. The submission by counsel on behalf of the respondent in support of the court *a quo*'s finding where counsel submitted that the flurry of emails could be of no assistance to the appellant, since the money was gone by 18 March 2013, is not supported by the evidence on record.

Negligence

[110] The court *a quo* found that the appellant was negligent based on the finding that Ms Kooper did not verify with respondent's representative whether or not he had changed his mind. This finding was based on the evidence that Ms Kooper did not do so telephonically. The record however is clear that Ms Kooper did verify Mr Bizimana's change of mind by means of emails. Ms Kooper testified that this method of communication was procedural in the bank and more reliable.

[111] Another justification for a finding of negligence was that her failure to act reasonably in the circumstances placed her 'actions and/or omissions below the standard of a reasonable person in the circumstances'. This omission was again based on the fact that Ms Kooper did not telephonically contact Mr Bizimana regarding the changed instructions.

[112] The evidence by Ms Kooper that it was common practice or procedure to use emails as a means of communication (for the reasons provided) was never gainsaid during the testimony of Mr Bizimana, and as stated *supra*, the court *a quo* itself did not point out any prohibition in using emails when communicating with clients. In my view, these 'omissions' could hardly have formed a basis for negligence.

[113] The court *a quo* also found that because Mr Bizimana did not authorise Ms Kooper to transfer money to Alicia J Guiles, the appellant was negligent in the circumstances. As pointed out *supra*, the evidence does not support a finding that Ms Kooper acted contrary to the instructions of Mr Bizimana. This was also in my view no ground to found negligence.

[114] Another ground, as found by the court *a quo*, which was indicative of negligence on the part of the appellant was that Ms Kooper failed to stop Global Trade from proceeding with the application when she discovered that the information on the application form was incorrect. The undisputed testimony of Ms Kooper simply does not support such a finding. The court *a quo* misdirected itself on this point.

[115] In *Kasingo (supra)* this court stated in respect of negligence that a plaintiff must prove firstly, that a *diligens pater familias* in the position of the defendant would foresee the reasonable possibility of his or her conduct causing patrimonial loss and would have taken reasonable steps to guard against such occurrence, and secondly, that the defendant failed to take such steps. The court *a quo* failed to determine whether the harm was reasonably foreseeable in the circumstances.

[116] It should be apparent, in my view, that there is no evidence on record that the harm concerned was reasonably foreseeable in the circumstances. The respondent did not prove that the conduct of Ms Kooper was contrary to what would have been expected of a *diligens pater familias* in the position of Ms Kooper and did not prove that no reasonable steps were taken by the appellant to guard against the patrimonial loss suffered by the respondent. Ms Kooper had no reason to suspect that the emails containing the instructions concerned had not been sent by Mr Bizimana. Negligence was not proved.

[117] The court *a quo* in its judgment¹⁸ stated that ‘. . . the fact that plaintiff had, signed an indemnity contract should not be used as a shield where there is a flagrant and brazen derelict of duty or negligence. In as much as it cannot be used to cover fraudulent activities, negligence, is in my view also included. In addition thereto, public policy does not allow that genuine innocent parties should be held victim to such nefarious conduct’. The court *a quo* also found that Ms Kooper’s evidence ‘was designed to cover-up her negligence and/or fraudulent activities’.¹⁹ The court *a quo* referred to case law in support of the findings.

[118] It must be emphasised that the respondent’s case in the court *a quo* was never that the appellant acted fraudulently or that its conduct was a flagrant and brazen dereliction of duty or that appellant’s reliance on the indemnity contract was against public policy.

[119] This court in the matter of *Namibia Airports Co Ltd v Fire Tech Systems CC & another*²⁰ referred with approval to the matter of *Molusi & others v Voges NO & others*²¹ where it was confirmed that the purpose of pleadings is to define the issues and that it is for the court to adjudicate upon the disputes and those disputes alone.

[120] It is therefore in my view not necessary for this court to consider the findings by the court *a quo* that there was a flagrant and brazen dereliction of duty, or that appellant covered up fraudulent activities, or that an indemnity contract cannot be used to cover fraudulent activities.

¹⁸ Para 37.

¹⁹ Para 23.

²⁰ 2019 (2) NR 541 (SC).

²¹ 2016 (3) SA 370 (CC) para 28.

Damages

[121] The testimony of Mr Bizimana was that one Victor, from Amazing Grace Exports had informed him that the money was not received. This person was never called as a witness during the trial in support of respondent's case. This evidence by Mr Bizimana amounts to inadmissible hearsay evidence and could not have been relied upon by the court *a quo* to find that as a result of appellant's action the respondent suffered financial prejudice in the amount claimed by the respondent. The damages allegedly suffered had not been proved by the respondent.

The indemnity contracts

[122] It is common cause that the respondent signed a general agreement as well as an indemnity contract and as pointed out (*supra*) the submission that the indemnity contract is not applicable in the circumstances of this case, is not supported by the clear and unambiguous terms of the contracts. It is in my view quite artificial to argue that the indemnity contract relates only to electronic instructions. As pointed out, the definition of instruction includes instructions orally given, and in any event in this instance the representative of the respondent elected or chose an electronic instruction as a means of communication.

[123] From a reading of the indemnity contract it is clear that the respondent realised that electronic means of communication may be tampered with prior to being transmitted and/or received; can be fraudulently abused by outsiders, delays may

occur, the instructions may inadvertently be mislaid, may be illegible, may be disrupted and discrepancies may occur as a result thereof.

[124] The indemnity contract further stipulates that the respondent agreed that any instruction purporting to emanate from respondent shall be deemed to have been issued by the respondent in the form and manner actually received by the bank which may be different to that intended or sent and that the respondent shall be bound thereby.

[125] Respondent indemnified the appellant 'harmless against all demands, actions and proceedings which may be made or instituted against the Bank . . . '.

[126] Respondent irrevocably undertook not to make any demand or claim or institute any action against the bank for any loss, injury or damage incurred.

[127] Respondent stated that it: 'Expressly and irrevocably indemnify and hold the Bank harmless against any negligence on its part when handling instructions or when responding to instructions in any of the aforesaid means'.

[128] The first legal question to be resolved during the trial as required by the pre-trial order namely whether the plaintiff had indemnified the defendant against all loss in respect of the said transaction should be answered in the affirmative. The other two legal questions had already been dealt with in this judgment.

[129] Thus, even if negligence had been proved by the respondent and respondent had proved that it had suffered damages as a result of the conduct or omission of the appellant, the indemnity contract is applicable.

[130] The court *a quo* was wrong in law to find that in as much an indemnity contract cannot be used to cover fraudulent activities, it can also not be used to cover negligent conduct. There is an abundance of authorities that state that negligence may be covered in an indemnity contract. In the matter of *Wells* referred to by the court *a quo*, Innes CJ stated the following on p 73 in considering an allegation that a contract was induced by certain misrepresentations:

‘No doubt the condition is hard and onerous; but if people sign such conditions they must, in the absence of fraud, be held to them. Public policy so demands.’

[131] The Chief Justice then referred with approval to the following excerpt from *Printing Registering Co v Sampson*, L.R. 19 Eq at 466 per Jessel, M.R.:

‘If there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by courts of justice.’

Conclusion

[132] In conclusion, it is found that the respondent had failed to prove its claim as embodied in its particulars of claim against the appellant on a preponderance of

probability, and thus, the appellant has showed reasonable prospects of success on appeal.

[133] In the result, the following orders are made:

- (a) The appellant's non-compliance with the provisions of rule 14(3) and/or 14(4), in that, appellant failed to inform the registrar in writing whether it has entered into security in terms of rule 14(3) and/or 14(4), is condoned.
- (b) The appeal is reinstated.
- (c) The appeal is upheld with costs, such costs to include the costs of one instructing and one instructed legal practitioner.
- (d) The whole judgment (including the costs order) handed down in the High Court Northern Local Division on 23 July 2018 under case number I 143/2014 is set aside and substituted with the following:

The plaintiff's claim is dismissed with costs.

HOFF JA

DAMASEB DCJ

MOKGORO AJA

APPEARANCES

APPELLANT:

B de Jager

Instructed by Shikongo Law Chambers

RESPONDENT:

T C Phatela

Instructed by FB Law Chambers