IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 11609/2006

In the matter between:

UNILEVER SOUTH AFRICA HOME AND PERSONAL CARE (PTY) LTD	**Plaintiff**
and	
MEGANATHAN KUMARASEN NAIDOO	**First Defendant**
DEVPRAGASEN PATHER (aka SEAN PATHER)	**Second Defendant**

ORDER

---

1 Judgement is granted against the first defendant jointly and severally with the second defendant as prayed for in the particulars of claim for payment of:

1.1 the amount of R15 779 946, 78

1.2 interest according to law

2 The costs of the interlocutory application are to be paid by the plaintiff.

3 The costs occasioned by the adjournment of the trial on 17 and 18 February 2016, reserved on 19 February 2016 are to be paid by the plaintiff.

4 The remainder of the costs of the action including any reserved costs, are to be paid by the first defendant on a party/party scale.

JUDGEMENT

HENRIQUES J

Introduction

[1] This is an action for damages instituted by the plaintiff against the first and second defendants arising from alleged fraudulent representations made by the defendants as a consequence of which the plaintiff suffered damages in the amount of R16 281 221.77. It is common cause that on 14 November 2011 judgment was granted against the second defendant by default. The trial proceeded as against the first defendant only.

A summary of the pleadings

[2] The plaintiff alleges that for the period 2000 to 2005 one Zenzele Joel Mchunu (Mchunu) who was employed as a fixed assets clerk or financial accounts clerk and the first defendant, Naidoo, who was employed in various capacities including as supervisor of Mchunu, made various representations which were false.

[3] The plaintiff had an agreement with Wesbank who would issue individual auto cards for its fleet motor vehicles which bore a specific registration number. The plaintiff's employees could utilise the cards only for motor vehicle expenses including petrol, oil, servicing, tyres and certain repairs in respect of the vehicle allocated to them on production of the relevant card. The service providers would claim the amounts of such transactions from Wesbank who in turn would claim reimbursement of the amounts from the plaintiff.

[4] Mchunu was responsible for the issue and controlling of such cards. The plaintiff alleges that the first defendant and Mchunu represented to the plaintiff and /

or Wesbank that cards were used in respect of vehicles to which they related, the cards were used in *bona fide* transactions in respect of goods properly acquired or services rendered in respect of the vehicles and as such Wesbank and the plaintiff became liable to make payment to the service provider for such amounts in respect of *bona fide* transactions. The defendants acted in person or represented each other and such representations were made orally, alternatively in writing.

[5] The plaintiff alleges that the representations were false as the cards were not used in respect of the vehicles to which they related and were not used for *bona fide* transactions and goods properly acquired and services rendered in respect of vehicles in the plaintiff's fleet as a consequence of which Wesbank and the plaintiff were not liable to the merchants or service providers for the amounts claimed.

[6] It is on this basis that the defendants' representations are alleged to be wrongful and intentional and further that they acted in common purpose with each other and Mchunu. The plaintiff alleges that service providers required payment in respect of fictitious and/or unauthorised transactions and as a consequence the plaintiff was liable to make such payments and suffered damages.

[7] In his plea, the first defendant denied each of the allegations contained in the particulars of claim and submitted that he ceased being Mchunu's supervisor in the course of 2002 and was transferred to another department. He alleges that until such period of time, the scope of his employment included the administration of the Wesbank cards. He denied that the cards were used in *mala fide* transactions and all transactions which fell within the ambit of his knowledge were genuine and *bona fide* transactions.

[8] He acted in the execution of his duties and he denies making any representations that were false. He denied that transactions administered or processed by him were as a consequence of the unlawful use of Wesbank cards. To the best of his knowledge the goods were properly acquired and services rendered by the plaintiff as a consequence of the use of such cards. He denied acting in common purpose with anyone and that he in any way misrepresented the position to the plaintiff.

The evidence

[9] At the trial the plaintiff led the evidence of several witnesses being Janet Rous, a forensic auditor, Mike Irving a handwriting expert, policemen involved in the execution of the search warrant at the first defendant's home led by Leonard Sheriff, Aatish Maharaj and Nico Kriegler Wesbank officials and Mchunu a former fellow employee of the first defendant.

[10] As the evidence is already a matter of record only a summary of the evidence follows. Leonard Bradford Sheriff (Sheriff), a member of the South African Police Services (SAPS) testified that in June 2005 he was a senior special investigator attached to the Scorpions (The Directorate of Special Operations, DSO). On 7 June 2005 he executed a search warrant he had obtained in Salseeta Road, Merebank. The search warrants obtained authorised a search and seizure at a number of premises relating to the criminal charges proffered against the first defendant including the home of the first defendant's parents.

[11] The matter related to garage cards issued by Wesbank allegedly unlawfully used by the first defendant and others to the detriment of the Unilever, the plaintiff. He and a number of other members of SAPS were present, namely Sergeant Henry Ngema, special investigators Meera Ramdeen and Wellington Mbokazi as well as Janet Rous and Nico Kriegler a representative of Wesbank,.

[12] Sheriff testified that he was responsible for overseeing the search of the various premises and Mbokazi was responsible for preparing a receipt and inventory together with Ramdeen who was the scribe. Ramdeen's role would be to take notes of what transpired during the search and to note any questions put to the first defendant and the answers provided. Rous and Kriegler would have assisted in identifying the necessary documentation to be seized. He confirmed that the address on the search warrant was that of 31 Salseeta Road, Merebank which was the address of the first defendant's father.

[13] Upon their arrival at the premises at 31 Salseeta Road they were directed to 17 Salseeta Road the first defendant's home. He produced a copy of the search warrant and explained to the first defendant the ramifications thereof. The first defendant was

informed of his right to obtain legal representation and the first defendant exercised such right, as a consequence of which he had a telephonic discussion with the first defendant's his legal representative. He also explained to Naidoo's legal representative the difference in the address reflected on the search warrant and that of the first defendant and informed the legal representative that if he insisted on it, he could return after having the address on the search warrant altered. The first defendant's legal representative indicated that this was not necessary as the authorisation of the search was a *fait accompli.*

[14] As a consequence they then proceeded with the search in the presence of the first defendant and his wife. During the course of the search the first defendant's attorneys arrived, being Vicky Persadh and Leon Pillay who discussed the matter with the first defendant and were present for part of the search. He confirmed that they conducted a search of the entire premises and the inventory reflects what was seized and in which particular room items were seized from.

[15] A briefcase was retrieved from a cupboard in the first defendant's bedroom which contained garage cards relevant to the matter under investigation as well as speed-point slips.[1] He confirmed that these items seized were eventually inventoried and placed in exhibit bags and handed over to the investigating officer. Every item seized was inventoried in the presence of either the first defendant or his wife. He indicated that apart from the incorrect address referred to on the search warrant the authorisation of the search warrant was legal and so too was the search and seizure which occurred at the first defendant's premises.

[16] During cross-examination by the first defendant, Sherriff confirmed that a search of Naidoo's father's premises did take place and a cheque book was seized from his father's home. He further disagreed with the suggestion by the first defendant that they only searched one room and that the ramifications of the search warrant were not explained to him. Sherriff confirmed that although he prepared the affidavit to which the inventory was attached, he did not prepare the inventory and could not confirm the contents of such inventory. He confirmed that the search warrant authorised not only members of the DSO to conduct the search, but identified other

[1] These were the documents examined by the handwriting expert, Mike Irving.

persons who could also be on the premises at the time of the search being conducted and could assist in conducting the search, including members of Wesbank and the firm conducting the forensic audit.

[17] Even though he had no clear recollection of the morning's events, he did not dispute that he requested the first defendant to shower and meet him at his offices at the Unilever premises for purposes of searching the first defendant's office and his desk. In summary Sheriff confirmed that they did not have a search warrant for the specific address at 17 Salseeta Road, Merebank, that members other than the DSO officers assisted in the search, that the premises were searched together with the vehicles found on the premises at the time, and the first defendant's father's home at 31 Salseeta Road was also searched. He confirmed that he did not specifically recall that foreign currency was seized from the premises. He confirmed that as far as he was aware although attempts were made to challenge search warrant it was not set aside and declared invalid.

[18] Colonel Wellington Mbokazi (Mbokazi), testified that he was a special investigator at DSO and confirmed Sheriff's evidence that he was part of the team that attended at the first defendant's home to execute the search warrant. He prepared the inventory of the items seized at the first defendant's home and the first defendant was present throughout the time of the search and seizure. Many people were present at the time assisting-these were members of SAPS, DSO and the forensic firm who prepared the forensic report.

[19] Whilst conducting the search, when a person found a document which they thought pertained to the case they were investigating, they would shout out and he would record it in the inventory. Although he had no clear recollection thereof he testified that it was standard procedure that once he had completed the inventory he would provide the first defendant with a copy of it and ask him to check it before signing it.

[20] After he had completed the exhibit list he signed it and the first defendant also signed the exhibit list. The purpose of doing so was for the first defendant to check the inventory to ensure that what was recorded had been seized by them and recorded in

his presence. The signature to the inventory confirms that Mr Naidoo saw the documents when they were seized and packed and they were taken by SAPS on the day of the search confirming the exhibits were in SAPS custody.

[21] He also confirmed that the document at page 35 was prepared by special investigator Meera Ramdeen. Although he could not say for certain given the passage of time whether Ramdeen or investigator Ramkhelawan seized the briefcase during the search, he confirmed the briefcase was listed in the inventory as being discovered. In addition he confirmed having regard to page 4 of exhibit 'E' apart from handwritten documents, the balance of the exhibits consisted of bank notes. WSM 8 was a brown envelope which contained foreign currency which was found in the safe in the top room. Each dollar that was seized was recorded by means of the serial number reflected on it.

[22] During cross-examination, Mbokazi indicated there were a number of officers present at the time of the search, and the search was done in different parts of the house at the same time. It transpired from the cross-examination by the first defendant that the signatures on the inventory were not his but certain of the pages were signed for by his wife Ms K Naidoo. In addition documentation such as speed point slips, cheques, return paid cheques, deposit slips, statements and opening documentation for banks were also seized together with a brown envelope containing First Auto[2] cards and vouchers.

[23] The next witness Michael John Irving (Irving), a handwriting expert[3] confirmed that he prepared a report based on original documents provided to him by the investigating officer in February 2007. He was provided with the known handwriting and signatures of the first defendant and asked to determine whether the handwriting and signatures of the first defendant were present on the documents found during the execution of the search warrant.

[24] He confirmed that in order to prepare the report he was provided with

[2] The reference to First Auto is a reference to Wesbank cards.
[3] At the commencement of his evidence, the first defendant did not challenge Mr Irving's credentials, qualifications and expertise as a handwriting expert and it was thus not necessary to formally qualify him.

documents which were found in a briefcase recovered in the first defendant's bedroom and examined the handwriting on those documents and a sample taken from the first defendant to determine whether any of the documents recovered contained his handwriting. An envelope marked "A" which contained the word "Sean" in manuscript he found the handwriting of the first defendant as was the handwriting contained in the First Auto vouchers contained in the envelope. The handwriting in most instances comprised the date, registration number, order number, written value and numerical value. The piece of paper found in envelope "A" also contained calculations and values which were written in the first defendant's handwriting.

[25] The second brown envelope seized marked "B" which contained the word "Basil" was also written by the first defendant. A number of documents in this envelope bore the first defendant's handwriting for example, the First Auto sales vouchers, a handwritten list of numbers, several speed point slips, and approximately 40 (forty) First Auto sales vouchers. In a third brown envelope marked "C" the first defendant's handwriting was found on the upper flap and on the letters "QS", several calculations, and three vehicle registration numbers were also found which bore the first defendant's handwriting. Of the seven pages of calculations in such envelope which included dates, vehicle registration numbers, and the initials "BC", "SS", and "QS", and speedometer readings and rand figures all were written in the first defendant's handwriting.

[26] He confirmed that pursuant to his examination of the documents, the author of the documents was the first defendant. During the course of his evidence he confirmed that certain of the documents did not contain the first defendant's handwriting or signature on them. There were three exceptions to this being cheque 0470 on chart J9, cheque 0481 on chart J13 and cheque 0486 on chart J17.

[27] In respect of the items marked K1 to K13 these are cheques submitted in respect of work done on the first defendant's vehicles at Quality Street Motors. K1 (page 131) is associated with the cheque which appears on J13 (pages 1 to 5) although the plaintiff did not rely on the services provided to Mr Naidoo by Quality Street Motors in support of the quantum of its claim. The purpose of leading this evidence was merely to show the correlation between annexures J and K to the report.

[28] During cross-examination apart from pointing out documents annexed to the report in which the authors were not identified, the findings in the report of Irving that the documents found during the search bore the first defendant's signature was not seriously challenged by the first defendant.

[29] Zenzele Joel Mchunu (Mchunu) confirmed he was previously employed by the plaintiff between 2000 to April 2005 when a fraudulent scheme was uncovered by the plaintiff which resulted in him and the first defendant being dismissed from the plaintiff's employ. He confirmed that at the time the events were uncovered he made a full confession to the plaintiff and to the police and co-operated with them throughout the course of the year's investigations.

[30] He was prosecuted criminally and pleaded guilty and was sentenced to fifteen years' imprisonment, six years of which was suspended. He served a period of four and half years' imprisonment and on 28 December 2009 was released on parole. In addition the Asset Forfeiture Unit attached and confiscated his property pursuant to the provisions of the Prevention of Organised Crime Act 121 of 1998 and his pension fund was forfeited to the plaintiff.

[31] He confirmed that initially in February 1984 he was employed as suspense clerk and subsequently held the position of a fixed assets clerk (aka financial accounts clerk). The first defendant was his supervisor until 2002 when the first defendant was transferred to another department. His duties in relation to the first auto cards was to request such cards which covered petrol purchases, maintenance of vehicles and toll fees, and he would receive reports at the end of each month from Wesbank detailing the expenses in respect of a particular motor vehicle. He testified that he administered a minimum of 35 vehicles which were used by sales representatives of the plaintiff. Each card was linked to a particular vehicle via the registration numbers and letters of the vehicle.

[32] He confirmed that a card was renewed annually and it was his responsibility to inform Wesbank when a particular vehicle had been sold, disposed of or had been involved in an accident. In addition, if the card had been stolen the sales representative would liaise with the area manager who would then liaise with him for a replacement

card to be requested for the vehicle. A similar procedure applied when a card was damaged. He confirmed that the monthly reports contained all the transactions which occurred in respect of a particular vehicle and card relating to petrol, repairs, maintenance and toll fees. The reports would indicate anomalies and also misuse of the card and an annual report was generated being an exception report.[4]

[33] He confirmed the reports would be sent in duplicate, one would be for their records and the other one would be sent to the sales manager of a particular area who would scrutinise the transactions and liaise with the sales representatives. He confirmed that the exception reports which reflected the anomalies and irregularities would come to the office where he and the first defendant had access to them. He confirmed that at the end of every month payment would be made by the plaintiff to Wesbank via debit order. He was also responsible for maintaining the asset register of the plaintiff and once the transaction reports came in he would have to post the expenses to the budget of the particular sales area.

[34] The first defendant was in charge of the financial accounts department and was his supervisor. During 1997/1998 he was approached by the first defendant who indicated that he needed money and that they could service both their vehicles and use a Wesbank card to do so. He indicated that where a vehicle had been disposed of, a new card would be ordered and the old card would be returned to him, Mchunu, to be destroyed. They would not destroy the old card and even though the registration number would not correspond with the Wesbank cards, the scheme would operate with the co-operation of the merchants. Cards would also be available where vehicles were written off and a new card would be sourced for the new vehicle and a replacement card sourced for that vehicle that had been written off.

[35] Initially, the merchants involved were Quality Street Motors, and then Select Auto Fitment Centre, Tyre and Tube and Basil's Tyres and Exhaust. The witness testified and demonstrated how this would occur by reference to annexure "I". However, it became evident that he could not say for certain whether all the annexures in the exhibits were part of the fraudulent scheme or not. All he could testify to was how the scheme operated and that the fraudulent scheme was the first defendant's

[4] Page 485 is an example of such reports which were received on a monthly basis.

idea and was perpetrated with his full knowledge and under his supervision. He could also confirm that only two people were authorised to sign for the receipt of the cards, being himself and the first defendant. Even though the first defendant moved departments, only he and the first defendant would sign for the cards so they could protect the scheme.

[36] He confirmed that on receipt of the cards, they would be delivered by either himself or the first defendant to the merchants, who would keep them. In addition, he was aware that the first defendant had some cards which he kept with him. He confirmed that it was the first defendant who introduced him to Basil Chetty, Shaun Pather and other merchants. What would transpire was that he would, after delivering the cards, for example, attend at Hirsch and identify an appliance which the merchant would then pay for. He confirmed that in consideration for handing over Wesbank cards to the merchant, paragraph 17 of his statement indicates the consideration he would receive for an appliance. He often received cash and would attend at the premises and collect cash in person.

[37] He confirmed that Basil Chetty had been making payments to him and purchasing items in consideration for the use of the Wesbank cards. He could not testify in relation to Quality Street Motors and assumed that this involved the first defendant. He confirmed that at all stages the first defendant was aware of the benefits he was receiving from the merchants and on some occasions he would discuss this with the first defendant before approaching the merchants. Even though he was not aware precisely what benefits the first defendant derived, having regard to the monthly reports, the figures indicated that it was in excess of R500 000. The witness was referred annexure ‘A’ which contained an analysis of fraudulent transactions by value and merchants. The witness was only able to identify Basil Tyre and Exhaust, Select Fitment Centre, Tyre and Tube and TCS Auto Repairs.

[38] He confirmed that once the fraudulent scheme started, he received transaction reports for the vehicles that had been disposed of which contained fraudulent transactions. These were kept in the sales department and he would not send the fraudulent transaction reports to the sales section. In other words, there was no verification procedure involved whereby an individual driver of a vehicle verified the transaction reports and attached the speed point slips in confirmation thereof. He

testified that the first defendant knew this was taking place.

[39] From an accounting point of view, the fraudulent transactions would be posted in accounts that were not being monitored or even looked at and he would be responsible for posting the journal entry and disposing of the journals. He testified that even though the posting of journal entries was his responsibility, the first defendant knew about the journal entries and when they were going through. He indicated that he was the one who came up with idea to post certain entries to certain accounts and he had been working there a while and knew which accounts and cost centres were safe to use for the fraudulent scheme.

[40] Mchunu testified that even after the relationship with Wesbank ended and the plaintiff moved over to Nedbank, the scheme continued for approximately a year and cards were delivered to merchants in 2003 by both him and the first defendant. In August 2003, he interacted with Aatish Maharaj who was the client liaison officer from Wesbank. Maharaj approached him regarding a fraud alert and mentioned that a number of merchants were processing multi-transactions in high amounts for repairs and maintenance. The reason why a fraud alert had being issued was because by this stage the use of Wesbank cards had already been scaled down and certain merchants were still appearing with multi-transactions on the exception reports.

[41] He discussed this with the first defendant and informed him that Maharaj had telephoned him. Mchunu confirmed that Maharaj came to a meeting at his offices and he explained to Maharaj that there were a number of merchants whom they had selected who formed part of the Axe project who they would use more frequently than other merchants. He confirmed with Maharaj that these transactions were in order and were coming to a close once the Axe project had terminated. He testified that he was not aware of Maharaj having a conversation with the first defendant regarding this because Maharaj had concerns that they were speaking with him, being Mchunu a mere finance accounts clerk. He testified that he could not recall who came up with the Axe project but confirmed that he had discussed this with first defendant.

[42] He confirmed that in September 2004, the plaintiff ceased making payments to Wesbank by EFT and payments were effected by means of a cheque. He confirmed that the change in payment system resulted in him approaching the first defendant

who came up with the idea that they needed to pay by cheque. The cheques were in a safe in the cash office. He and the first defendant had access to same. He would remove whatever cheques they needed to effect payment and do so manually. He confirmed that the first defendant was not the one writing the cheques. He was the one writing the cheques because the first defendant had been transferred from the department and questions would be raised as to why the first defendant had signed cheques for another department.

[43] He confirmed that the cheques were issued manually and he would approach a manager to sign the cheque. This cheque would be presented with a purchase order and as long as a manager had a purchase order accompanied by the cheques, no questions would be asked and they would sign. In addition, he would not approach the same manager all the time. He confirmed that in relation to the journal entry, the first defendant was required to authorize every journal entry irrespective of the stage of the month such journal entries occurred.

[44] Mchunu confirmed that he would discuss the fraudulent transactions with the first defendant where there were concerns and numbers on the exception report seemed to be increasing immensely. When he expressed his concerns to the first defendant, he would not get a firm answer from him. He indicated that he spoke to the first defendant about withdrawing from the scheme but it would not have been possible for him to do so as had he done so, someone else would have had to step in and would know something was wrong and he would have been exposed.

[45] He confirmed that he would not have been be able to conduct the scheme during 1997-2005 without the first defendant knowing about it. They had discussions concerning the fraud alerts and Wesbank needed someone senior to him to confirm that everything was in order and he needed confirmation from the first defendant. In addition, the first defendant would have had to authorise the journal entries and would have had access to the accounts that needed to be debited. Furthermore, if the first defendant was innocent and did not know what was going on once the fraud alert reports had been received, the first defendant would have alerted the authorities to this.

[46] He confirmed that on the day the fraud was discovered, it related to a cheque

made out to Bay Cars, which Standard Bank returned. The first defendant knew nothing about it and when Gavin Ward spoke to him about it, he requested that they not draw attention to him but while working at the office, he signalled to the first defendant that there was problem. He indicated that he may have had a telephonic discussion with the first defendant thereafter but could not recall.

[47] He was made aware of the fact the first defendant informed the plaintiff that he, Mchunu was the mastermind behind the whole scheme. It was then that he cut all ties with first defendant and decided to come clean. The only persons Mchunu spoke to were Basil Chetty and Shaun Pather.

[48] During cross-examination, he confirmed that the first defendant was his supervisor until March 2002. It was suggested to him by the first defendant that the cars under their control had to be maintained by them and kept roadworthy. The witness confirmed that certain of these pool vehicles required maintenance like having the tyres replaced and confirmed that both he and the first defendant drove the pool cars to have them repaired. It was put the witness that the first defendant introduced him to Basil Chetty.

[49] The witness agreed with this but denied that the reasons for this was because Mchunu used to take approximately half a morning to service the vehicles and would be away from the offices for long periods of time. The purpose of introducing him to Basil Chetty was to ensure that he returned to the offices timeously.

[50] He confirmed that he would complete the paperwork to Wesbank when a replacement card needed to be ordered from Wesbank. In addition, where expenses were above R500 000, the merchant would phone him or the first defendant for authorisation. The witness confirmed during cross-exanimation that he did not generate a purchase order when payment to Wesbank was still on the debit order system. It was only after the system changed that he generated a purchase order in order for payment to be effected to Wesbank.

[51] During cross-examination, by reference to pages 644 onwards of the annexures, he confirmed that the signatures were not the first defendant’s. He further

confirmed during cross-examination that as far as opening and closing accounts were concerned, they acted in concert. The first defendant informed him of which accounts to use and which accounts to post the entries to. The accounts which Mchunu did not have access to, the first defendant had access to and he would access the computer and open the accounts and post the entries.

[52] He confirmed that he was in contact with Chetty and Pather after the fraudulent scheme was uncovered, even though they were the first defendant's contacts. He confirmed that the fraud was detected via a cheque made out to Bay Cars and further that the first defendant had nothing to do with the cheque that had been made out to Bay Cars.[5]

[53] Janet Elizabeth Rous (Rous) a manager at Deloitte and Touche in the forensic component[6] testified that there were allegations of possible fraudulent activities and misuse of Wesbank fleet cards allocated to the plaintiff which Deloitte & Touche was asked investigate to determine firstly, if the transactions were fraudulent and determine who was responsible for such fraudulent transactions, and what action, if any, could be taken against such identified persons.

[54] Certain documentation was received from the plaintiff and from the DSO and was also retrieved during the search of the first defendant's property which search she participated in.

[55] Although they initially attended at the incorrect address in Merebank on the day of the search and seizure, they subsequently arrived at the second address and encountered the first defendant. A suitcase was found on top of the built-in cupboard in the bedroom which was recovered by Sheriff. Sheriff opened the suitcase in the bedroom and she observed garage cards, sales vouchers, and envelopes containing speed point slips. These documents were seized by the DSO who compiled an inventory and a register. She subsequently confirmed that after the search their team attended at the DSO offices to examine the documents which had been seized and record information recovered. The documents received from DSO are referred to in

[5] Page 245 & 246 of the transcript.
[6] The expertise and qualifications of Mrs Rous was not challenged by the first defendant, who testified that she joined the forensic team involved in the investigation by the plaintiff on 2 May 2005.

the report as Exhibits T, U, V, W and X.

[56] In addition they received information from Nico Kriegler, of Wesbank who provided a statement.[7] They were also provided with a disc which contained all the transaction information and because they could not access it, the information was then provided on an excel spreadsheet which they then analysed. Such spreadsheet contained the transaction history relating to a vehicle and the petrol card allocated to that particular vehicle. The first transaction commenced in October 1999 until the end of March 2005. She confirmed that the plaintiff had undertaken a house keeping process and transactions for a period of five years were retained that is from 2000 until 2005.

[57] She confirmed that Exhibits K1 to K6 annexed to the forensic report are affidavits obtained from persons specifically those in relation to the bank statements from Wesbank and the four merchants who were the subject matter of the investigation. The plaintiff had advised them that there was a contract with Wesbank to provide garage cards for maintenance and repairs for vehicles together with petrol and toll slips. In March of 2004 the plaintiff had terminated the contract with Wesbank but transactions were still going through and this was suspicious as their fleet was no longer with Wesbank.

[58] They were also advised that the financial accounts clerk was responsible for controlling the asset register which included the vehicles and was responsible for controlling the request for an allocation of garage cards. Wesbank would keep control and a record of the garage card being used for a vehicle as the initial card would have a zero one sequence and thereafter the zero two, zero three and so on. When a card was renewed it would follow a similar sequence. If a vehicle was disposed of by the plaintiff, the card would be returned to the financial accounts clerk to destroy and notify the bank that the vehicle had been disposed of and that the card ought to be cancelled and would no longer be valid.

[59] During cross-examination Ms Rous conceded that certain transactions reflected in the first defendant's bank account were legitimate transactions and appear

[7] Exhibit H.

to have been inter-account transfers between his Standard Bank account and his ABSA account. Exhibit H was presented by the first defendant who indicated the legitimate transactions prepared by Mr Naidoo. Having regard to the cross-examination by the first defendant and the cross-referencing to the bank account and cheques and statements put up by the first defendant, it would appear that certain deposits were duplicated and an amount of R341 269.15 appears to be accounted for.

[60] Nicolaas Johannes Kriegler (Kriegler), a fraud manager at Wesbank confirmed he was involved in the investigation into the illegal use of garage cards at the plaintiff. He confirmed that he compiled a statement deposed to on 13 June 2005 after the documents were collated. He received a request from the plaintiff relating to the suspected fraudulent usage of certain fleet cards issued by Wesbank. Essentially Wesbank was requested to supply any documentation and information relating to the plaintiff's fleet cars and he was requested to analyse the transactions and to indicate anomalies or irregularities that he could find on the transaction reports of the vehicles.

[61] He indicated that a transaction report is sent to the first defendant on a monthly basis which would contain the vehicle's details, the card details and the various transactions which took place during a particular period. The purpose of sending the transaction reports to the plaintiff was specifically in relation to a general card which had no security features and which could be used to purchase anything in relation to a vehicle. It was not restricted to those cars which could only be used for toll fees, petrol and oil. Wesbank would not be in a position to identify when the card could have been used fraudulently or the circumstances under which the expenses were incurred and the card used to pay for such transactions. It was the plaintiff who would be able to identify any variances or suspicious transactions on the card.

[62] After receiving and analysing the transaction report the client could inform Wesbank of the anomaly on the card to place Wesbank in a position to cancel or stop the card or report the card or stop any further usage on the card. In addition, the client could then conduct the necessary investigations and take whatever legal steps were required. He confirmed that although there were sales people employed by the plaintiff all over the country the transaction reports were sent to the plaintiff's head office in Umhlanga. He confirmed that the contact person at the plaintiff was the first defendant.

He confirmed that a transaction report and an exception report were two different types of reports.

[63] He indicated that in trying to assist and identify the fraudulent transactions he used the plaintiff's client code and accessed all transaction reports of the plaintiff from the end of 1999 up to and including April 2005. He analysed the reports and looked for irregularities, abnormal activities being the difference between the transaction dates and also using the geographical areas in which the vehicles were to identify any anomalies. He then identified legitimate transactions as these vehicles would be taken to the same merchants appearing in a certain geographical area. There would be a lapse in the report and thereafter the same merchant would be paid for the same type of product.

[64] It would happen that there would be two or three cars being used at the same merchant on the same day. In addition he identified from certain of the transaction times that there were anomalies in relation to repairs and maintenance at a fitment centre. In addition, the odometer readings of the vehicles showed a pattern and that is how he was able to identify the fraudulent transactions. Once he had identified what he thought were fraudulent transactions, he extracted the information from the transaction reports and compiled a transaction list in an excel document. This related to transactions for the period December 1999 until April 2005.[8]

[65] For a period of time Wesbank would deliver the transaction reports to the plaintiff and it was up to the plaintiff to look at the usage and identify any anomalies or irregularities on the transaction reports.

[66] In addition, he confirmed that prior to the date of his involvement in the investigations, an issue was raised with the plaintiff in relation to certain anomalies and transactions which had already been identified, but the response from the plaintiff was that these transactions should be allowed as they related to a specific project being the Axe Project.

[67] Kriegler identified certain merchants who featured prominently in the then

[8] File 3 pages 701 to 706

suspected fraudulent transactions. These were Basil Tyre and Exhaust, Tyre and Tube Durban, Umbilo Tyre and Exhaust Durban, Royal Vulcanising Durban and Dormant Precision Performance Durban. Kriegler confirmed that he had prepared a summary in relation to the transaction reports and the documents which he accessed. He confirmed that having regard to the summary the total suspected fraudulent transactions amounted to R16 288 035-64. He confirmed that he did not have access to the forensic report prepared by Deloitte and Touche.

[68] During cross-examination he confirmed that he accessed the information on the system and also used the transaction reports.[9] He confirmed that at the time there were approximately 61 Wesbank cards involved in the alleged fraudulent transactions, the system extracted transactions from 15 December 1999 to April 2005. In April 2005, he visited approximately five to seven merchants some of whose names he could not recall but specifically remembered Basil Chetty of Basil Exhaust and Tyres, Royal Vulcanising, Umbilo Motors, Replace Fitment Centre and North Coast Motors.

[69] In going through the transactions reflected on the excel spreadsheet which he prepared, Kriegler was forced to concede that in some respects the figures reflected were over-stated as a transaction was recorded but the reversal of such transaction was not taken into account, and transactions identified as suspicious transactions which were subsequently corrected, and/or which were subsequently identified as not being suspicious, have been included in the total representing the fraud. He indicated that it was correct that these transactions would affect the total amount which represented the fraud. He confirmed that he did not go through any of the reports he prepared and analysed and confirmed the exact amounts that were duplicated or incorrect.

[70] Having regard to page 891 of Exhibit E, the sequence of the cards the zero two and zero three sequence are legitimate transactions. He confirmed that errors may have occurred in the capturing of invoices and same would have been captured against the highest active sequence being zero three and not zero two. This would mean that certain of the transactions captured against the zero two sequence cards may have been legitimate.

---

[9] Exhibit B, Page 485 and 486.

[71] Mr Kriegler confirmed that neither plaintiff nor Wesbank recovered any monies from the merchants involved in the fraudulent transactions. In addition the original delivery books were not made available and he could provide an explanation for it. Having regard to the documents in exhibit H the signature of Mchunu appears on the documents and in relation to the request for replacement cards,[10] he confirmed that annexure H was compiled from accessing the Wesbank system to download the transactions to excel format. The transaction reports would be part of the documents downloaded and although he prepared the excel spread sheet the amount reflected therein was not intended to be the amount of the fraud perpetrated on the plaintiff.

[72] Aatish Maharaj (Maharaj) employed by Wesbank Motor Division at Embassy Building Smith Street Durban confirmed that from 2000 to 2005 he was a Customer Liaison Officer for Wesbank Auto Fleet Division. His duties entailed servicing existing customers like the plaintiff who were allocated a general card. He would liaise with financial managers, financial directors or a contact person allocated by the company. The general card issued by Wesbank to the plaintiff was one where a customer would be liable for expenses which related to filling fuel, maintenance, toll fees. The general facility which the plaintiff used only involved Wesbank alerting the plaintiff to any abnormal usage on the cards arising from a transaction report.

[73] The card itself was managed by the plaintiff and not by Wesbank as this was not a fleet management service card. He confirmed that the cards issued were vehicle specific and were linked to a registration number of a vehicle. There would be no limits imposed on the card and no one needed to phone Wesbank to obtain authorisation. Whenever the card was used for petrol, maintenance or servicing all the card holder was required to produce was the card to the service provider. The recordal of the mileage was the responsibility of the customer and the merchant.

[74] He was introduced to Naidoo, the first defendant, at the plaintiff's office. The first defendant in turn introduced him to Mchunu who was the person whom he would have relevant exchanges with on a monthly basis. The exchange with Mchunu would

[10] Page 904 and 905 emanated from Mchunu and he was the who signed for them.

normally take place at the end of the month or whenever the plaintiff's cut-off date was, being when they closed their books. Maharaj confirmed that he would receive the monthly statements indicating the usage on each of the cards from the Wesbank head office which they referred to as transaction reports. He confirmed that there would be a transaction report for each card issued by Wesbank to the plaintiff. On receipt of these transaction reports he would hand deliver it to his contact person at the plaintiff, Mchunu.

[75] He confirmed that amongst the documents in the bundle which he handed to Mchunu would be various reports like for example an exception report, a usage report and a maintenance report. The exception reports highlighted excessive usage on a card. The usage report would contain a breakdown of the amounts spent on for example oil, fuel and maintenance. So at a glance someone at the plaintiff would be able to see what a particular vehicle was costing them per month in the fleet. An exception report would identify the number of cards on which for example a purchase limit was exceeded, so at a glance one would be able to see which cards exceeded the limit allocated to them. He confirmed that because it was a general card, high usages were automatically highlighted and an email would be sent highlighting aspects on the exception report which needed to be canvased with the client.

[76] The documents which were delivered every month to the plaintiff would have the contact person Naidoo's details on it but he would hand deliver it to Mchunu as the contact person. He testified that when he handled the bundles to Mchunu on a monthly basis, they would speak and he would inform him about the transactions and any abnormalities that came through and also discuss any problems or new products. In the event of Mchunu not being present he would leave the bundles there at reception for him. He confirmed that there were a number of fraud alerts which arose in relation to the plaintiff's fleet during the course of his relationship with him. In May 2005, he deposed to an affidavit before a commissioner of oaths which contained an exchange of emails written in August 2003. This emanated from a fraud alert at Wesbank. The fraud alert from their fraud department emanated from high usage of cards at certain merchants being Basil's Tyre and Exhaust, Select Replacement and Fitment Centre and TCS Auto Repairs.

[77] On receipt of the email from his immediate manager he then contacted the plaintiff and spoke to Mchunu. He asked to see him personally as there was extremely high usage on the general cards in relation to these particular merchants and it needed to be addressed as the exception reports emanated from the fraud department of Wesbank. He confirmed that at the time these merchants were drawing the attention of their fraud department and were highlighted for any transactions. These merchants had already been blocked by the time he spoke to Mchunu who informed him that there was a special promotion being done namely an axe promotion and they were aware of the high usage of these cards in relation to certain of the merchants as fitments were being done. At the time he did not speak to the first defendant.

[78] He reported back to supervisors based on his conversation with Mchunu however they were not happy about the explanation and he then contacted the first defendant telephonically. Although he had no independent recollection of the exact conversation, he indicated he would have raised Wesbank's concerns with the first defendant in relation to the high usage and the merchants who were involved in suspected fraudulent transactions. The response which he received from the first defendant was to support what he had been told by Mchunu that these were legitimate transactions, fitments were being done on vehicles in terms of an axe promotion.

[79] He confirmed that he completed a call report based on his conversations with the first defendant and Mchunu which call report indicated he had been in contact with them and the merchants identified or earmarked on the fraud alert had won the contracts for the axe project. The call report also further recorded that the first defendant in his capacity as financial accountant would send an email to him to confirm this and to confirm that the work done was legitimate and completed. When he did not receive the email from the first defendant he contacted him telephonically and was advised by the first defendant that Mchunu was now in charge and taking over as decision maker of the plaintiff's fleet of vehicles. He confirmed that the signature on the bottom left of the call report which he had done contemporaneously when speaking to Mchunu bore Mchunu's signature as a report is done face to face with him.

[80] He confirmed on 25 August 2003 he addressed an email to Farouk confirming his meeting with Mchunu who allayed his fears in relation to the high usage. The email

also confirmed his telephonic discussion with the first defendant and requested the first defendant to inform him when such projects are confirmed so that the high usage were legitimate transactions. The email also records that Mchunu confirmed that Dazzle Tyres was also another one of the merchants who had been blocked who was part of the axe project. That was the last of his discussions with Mchunu and the first defendant in relation to the plaintiff's fleet and general cards.

[81] During cross-examination he confirmed that initially when the fraud alert had come through from Wesbank he spoke to Mchunu and not the first defendant and it was Mchunu who informed him about the axe project. He only then initiated a telephone call to the first defendant as his supervisor was not happy with the explanation which Mchunu had provided. He also conceded that even though his call report reflected that he had asked the first defendant to send through the email the email had come through from Mchunu whom he had been informed was the decision maker. As Mchunu had sent the email he did not see the need to follow up with Naidoo concerning this.

[82] That then was the evidence of the plaintiff and it closed its case.

The interlocutory application

[83] At the conclusion of the evidence of all the witnesses and after closing its case, the plaintiff brought an application for the admission of a statement of Lesley Chetty deposed to on 5 July 2005. Such application was opposed by the first defendant. After hearing counsel for the plaintiff and the first defendant, Mr Naidoo who appeared in person, the application to have the document dated 5 July 2005 which appears at pages 1018 of file 4 to the forensic report admitted into evidence was dismissed with costs. I indicated that my detailed reasons for such ruling would follow in the judgment. These are my reasons.

[84] Ms *Nicholson* argued that the document was admissible either in terms of s3 of the Law of Evidence Amendment Act or s34 and s35 of the Civil Proceedings Act 25 of 1965. Mr *Naidoo* opposed the admission of such affidavit on the basis that it was highly prejudicial to him and that he would not have the opportunity to cross-examine

the deponent.

[85] Ms *Nicholson* submitted that the affidavit was taken during the course of the investigations by the forensic auditor and the deponent had personal knowledge of the contents. The deponent had no interest in the proceedings at the time the affidavit was deposed to and one must consider the circumstances under which it was submitted and the purpose of submitting it. There were portions of the affidavit which had a ring of truth to it and contained direct evidence witnessed by the deponent at the places mentioned.

[86] The facts are couched in particular terms and are specific about the events. The facts stated in the affidavit are highly material and relevant to the issues. It links the first defendant with one of the merchants linked to the fraudulent transactions and the bulk of the transactions. The document she submitted contained a fair amount of detail and must then mean that the deponent remembers the events and it is accurate and the truth.

[87] In relation to the manner in which the document has been drafted, she submitted that the deponent chose to swear to the affidavit and knew the consequence of making it. The deponent did not have to swear to the truth of the contents but it was made in circumstances where he considered it binding on his conscience. He was prepared to depose to it and must have given it considerable thought.

[88] I have been presented with a document purported to be signed by a deceased person Lesley Chetty. The court has not been informed of the circumstances under which such document was obtained by the plaintiff. The plaintiff has formally placed on record that it does not intend calling the Commissioner of Oaths and concedes that Mrs Rous was not questioned about this affidavit when she testified.

[89] The high watermark of the plaintiff's case in regard to the admission of this document is in page 28 of the report of Mrs Rous. This merely says that during the course of the investigations affidavits were taken from various persons. Ms *Nicholson* when asked, indicated that she could take the matter no further and did not intend

calling anyone regarding the circumstances under which such document was prepared. There is no evidence by the Commissioner of Oaths that on the day in question the person who appeared before him was in fact Lesley Chetty and Lesley Chetty in fact appended his signature to the document. In addition, the manner in which the Commissioner of Oaths administered the oath is not in the normal course and the wording is not the normal wording prescribed in the regulations.

[90] At present what the court has is a document purportedly signed by a "Lesley Chetty" tendered for the truth of the contents. The court is not even advised as to whether or not Lesley Chetty did appear and make such affidavit. It is not even advised if this is what he reported at the time of signing the affidavit to the Commissioner of Oaths. What is also further disconcerting is that the plaintiff only wishes to have admitted certain portions of the affidavit only as they pertain to the incidents in question and as it assists their case to prove the fraud on a balance of probabilities.

[91] The statements of a deceased person are by their very nature hearsay and consequently are inadmissible at common law unless it fell within certain exceptions. The fact that the deponent to such statement was deceased was a requirement for the exceptions to apply. The grounds of the exception are the following:

[a] that such statement is against the deponent's interest;

[b] there is a common law rule that statements of a deceased person which are against his / her interest are admissible and are restricted to statements against his or her pecuniary or proprietary interest.

[92] In determining the admissibility, the first port of call are the provisions of the Law of Evidence Amendment Act No. 45 of 1998. For purposes of the Act, s 3 extends the definition of hearsay evidence to include written evidence for purposes of the Act. Section 3(1)(*c*) deals with the factors which a court has to consider when admitting hearsay evidence. In *Giesecke & Devrient Southern Africa (Pty) Ltd v Minister of Safety and Security* 2012 (2) SA 137 (SCA), Brand JA held that a consideration of the provisions of s 3(1)(*c*) of the Act:

'…requires that the court should have regard to the collective and interrelated effect of all the

considerations in paras (i) – (iv) of the section and any other factor that should, in the opinion of the court, be taken into account. The section thus introduces a high degree of flexibility to the admission of hearsay evidence with the ultimate goal of doing what the interests of justice require.'[11]

[93] The Supreme Court of Appeal admitted two affidavits of two fugitives of justice notwithstanding that the contents of such affidavits conflicted with other affidavits which they had deposed to. These affidavits were admitted on account of their probative value.

[94] At paragraph 32 of the judgment, Brand JA, in deciding on the prejudice and the interests of justice remarked as follows:

'The only real consideration offending against the introduction of these statements, as I see it, is the prejudice that the respondent will suffer. By that I do not mean, of course, that the contents of the statements will advance the appellant's case and at the same time be detrimental to the respondent's case. Interests of justice require the right answer. It does not matter in whose favour the right answer might be. The respondent's prejudice lies in the fact that he will be deprived of the opportunity to test this evidence through cross-examination, which is undoubtedly a real disadvantage. On the other hand, that disadvantage can to some extent be reduced by calling Kgathi and the other two policemen involved to give evidence. Moreover, the respondent's disadvantage must be weighed against the prejudice that the appellant will suffer if the evidence is disallowed.'

[95] Amongst the other factors which the court considered in weighing up the prejudice in admitting the hearsay affidavits was whether the contents of such affidavits were likely to be true given the other evidence that had been advanced before the court[12]. Because the facts in the two statements accorded with the other evidence before the court, the court was persuaded to admit the two statements.

[96] In applying with provisions of s 3(1)(*c*) of the Evidence Amendment Act our courts have held that the section should not be applied sparingly or reluctantly but the court is bound to apply the provisions of such section where 'the interests of justice' require[13].

---

[11] *Giesecke* at paragraph 31
[12] *Giesecke* at paragraph 33
[13] *Hewan v Kourie NO and Another* 1993 (3) SA 233 (T) at 239 I, *Metedad v National Employers' General Insurance Co Ltd* 1992 (1) SA 494 (W) at 499 G

[97] It is common cause on the papers that the affidavit is a copy which was provided by the DSO to the auditors and forms part of the forensic report of Janet Rous. Such affidavit has been commissioned by Riaan Delport, a senior consultant at Deloitte, the same firm contracted to prepare the forensic report. Ms Rous testified that affidavits were received from the offices of the DSO and they did not prepare any of such affidavits. The affidavit is deposed to by the brother of the late Basil Chetty, one Leslie Chetty.

[98] It is further common cause that the affidavit has not been deposed to in strict compliance with the Commissioner of Oaths and Justice of the Peace Act and was being tendered for the truth of their contents. It is further common cause that during the course of the plaintiff's case, Ms Rous was not pertinently asked as to how the affidavit was taken and whether or not it was prepared by the forensic auditors, Deloitte or whether this formed part of the affidavits received from the DSO. The reference to the affidavit appears at page 13 of Ms Rous' forensic report where it is alluded to as follows 'we interviewed the following persons and where deemed necessary affidavits were taken'. If one has regard to the provisions of s 3(1)(*c*) of the Evidence Amendment Act, one needs to consider the provisions carefully to determine whether or not the affidavit falls within the hearsay exceptions and can be admitted in terms of the provisions of the Evidence Amendment Act.

[99] Turning now to the nature of the proceedings. These proceedings are a civil trial and consequently Ms *Nicholson* submitted that the caution to be adopted against the receipt of hearsay evidence as it would apply in criminal proceedings to convict an accused person is of no application given that these are civil proceedings in nature.

[100] Insofar as the nature of the evidence is concerned the statement she submitted, is in the form of an affidavit deposed to before a commissioner of oaths and is first hand or direct evidence given by the deponent of his own observations. It was deposed to at a point in time shortly after the events described therein occurred and such events and facts were fresh in the deponent's memory. The facts contained in the affidavit was against the interest of the deponent at it placed his own brother, Basil Chetty at the heart of the fraudulent activities. The deponent had no incentive to lie as his brother Basil Chetty had already passed away. In addition the deponent to the

affidavit, Leslie Chetty had no motive to lie as he had no relationship with the first defendant and the affidavit was deposed to during the course of the investigations undertaken by forensic auditors into the alleged fraudulent use of the plaintiff's fleet cards.

[101] The evidence was tendered to prove that the first defendant, delivered garage cards to the late Basil Chetty and received a payment of approximately R8 000.00 from him. The probative value of the statement lies in the fact that it indicated the first defendant received monies from one of the merchants involved in the fraudulent scheme of the plaintiff. The deponent Leslie Chetty is deceased and consequently such evidence cannot be given by him. The prejudice to the first defendant is that he will be denied the opportunity to test the reliability of the evidence by means of cross-examination as Leslie Chetty is deceased.

[102] In the event of the court not being disposed to admitting the affidavit in terms of the provisions of s 3(1)(*c*) of the Evidence Amendment Act then in the alternative Ms *Nicholson* submits that the affidavit is admissible in terms of s 34 of the Civil Proceedings Evidence Act 25 of 1965.

[103] Section 35 of the same Act provides that in deciding what weight to attach to the affidavit the court should have regard to the circumstances from which any inference can be reasonably drawn as to the accuracy or otherwise of the statement, whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated and lastly whether or not the person who made the statement had any incentive to conceal or misrepresent the facts. Ms *Nicholson* submits that the facts contained in the affidavit of Leslie Chetty are highly relevant to the proceedings and cannot be admitted any other way as both the deponent and his brother, Basil Chetty have passed away. There can be no prejudice to the first defendant as he can refute all the facts which are asserted against him therein.

[104] It is correct that the provisions of 31(1)(*c*) of the Evidence Amendment Act as well as s 34 and 35 of the Civil Proceedings Evidence Amendment Act allows for hearsay evidence to be admitted subject to compliance with certain aspects. Having regard to the provisions of both sections, in my view, Ms *Nicholson* has underscored the potential prejudice to the first defendant as a consequence of him not being

provided with an opportunity to cross-examine these witnesses. The crux of the evidence of these witnesses is damning and goes to prove the fraudulent scheme embarked on. To deny him the right to cross-examine such witnesses albeit in civil proceedings is a serious infringement of his fair trial rights.

[105] Of further concern is the fact that no evidence has been placed before this court to set out the circumstances under which the affidavit was taken, who took the affidavit and whether the deponent read it before signing it as it has not been properly commissioned. Ms *Nicholson* has elected not to lead the evidence of the commissioner of oaths or lead any evidence in relation to the circumstances around which such affidavit was deposed to and signed by the deponent. This is a highly unsatisfactory state of affairs given the fact that the first defendant is a lay litigant.

[106] Given the prejudice to the first defendant, I dismissed the application for the admission of the document. Then plaintiff then sought to have the matter adjourned for it to consider its position.

[107] At the commencement of the re-convened trial on 6 August 2018, Ms Nicholson who appeared for the plaintiff indicated that the plaintiff considered its position and was no longer desirous of calling any further witnesses and consequently closed its case.

[108] Mr Naidoo, who appeared in person, firstly indicated that he made arrangements for a witness to be available on Wednesday, being the 8 August 2018. The reason for this was that the plaintiff had initially communicated trial dates for 13 to 17 August 2018 and had not in advance indicated that it would be closing its case. A matter which he also brought to the court's attention concerned his witness, whose identity he had disclosed to the plaintiff on the last occasion when the trial served before the court in February 2016. He indicated that the consequence of him disclosing the identity of his witness was that members of the Hawks/Scorpions had attended the witnesses' home and the witness would no longer testify on his behalf as they felt intimidated.

[109] It is for this reason that Naidoo indicated that he would not disclose the identity of his further witnesses.

[110] Mr Naidoo also placed on record that he was provided with two notices of set down by the sheriff for this matter and had consequently arranged for his witness to be available on those days. The witnesses would only be available on Wednesday. He had only two witnesses that he intended calling and would then decide whether he would testify. He apologised for the delay but indicated that he was asking the court for an indulgence and giving the time period that this matter proceeded, this is the first time he had asked for an indulgence from court.

[111] He also anticipated that the witnesses' evidence and cross-exanimation would not take too long and the evidence could be finalised in the four days allocated for trial.

[112] Ms *Nicholson* indicated that as a consequence of the wasted court time the plaintiff would be seeking an appropriate cost order. After hearing the submissions of the parties in relation to the wasted costs, as a consequence of the matter not proceeding for the remainder of the court time on Monday 6 August, and resuming on Wednesday 8 August 2018, I indicated to the parties that I would reserve costs and hear further submissions during closing argument.

Application for absolution from the instance

[113] The first defendant then applied for absolution from the instance. The submissions made by Naidoo in this regard as well as Ms *Nicholson* for the plaintiff are apparent from the record of proceedings. In addition, Ms *Nicholson* prepared written submissions which were also considered by the court and it formed part of the record. After affording Naidoo an opportunity to consider the written submissions of Ms *Nicholson*, I refused the application for absolution from the instance with costs. My reasons for doing so were placed on record.

The first defendant's case

[114] The first defendant then led the evidence of Vinesh Baruth who confirmed that he was in the employ of the plaintiff from 1979 until September 2007. When he left his employment with the plaintiff he held the position of category accountant. During the course of his employment at the plaintiff he worked in every financial department as

well as the financial accounts department in 2000 focussing on creditors. He had vast knowledge of the accounting system which the plaintiff used and he acknowledged that he was very good friends with the first defendant and knew the first defendant for a period of approximately 33 years. Apart from being work colleagues and good friends they are also family friends. He maintained contact with the first defendant even after he had left the plaintiff's employ.

[115] He was approached by the first defendant to testify in these proceedings shortly before proceedings reconvened in August to testify on 6 and 7 August. However, he indicated to the first defendant that he was not available on those dates as he had prior work commitments. He was aware of the allegations against the first defendant since its inception but the first defendant did not inform him as to the precise nature of the evidence he would be required to testify about.

[116] He had knowledge of the supply chain accounts of the plaintiff and he was employed in financial accounts for a period of approximately 1 year where he stood in for the person who had gone on maternity leave. He confirmed the plaintiff used the SAP system, a system applications product which was a fully integrated accounting package. The accounting system at the plaintiff had a general ledger account; the accounts in the general ledger were opened and closed by the financial accounts department, specifically a financial accountant. He confirmed that at the time the first defendant was employed as an assistant financial accountant.

[117] All users of the SAP system had a user name and password which also had parameters in place for safety reasons. He indicated that every time a transaction was done on the system by an employee, one would be able to have regard to the nature of the transaction who performed it and who logged onto the system. The IT department could run a transaction report which tells one each and every time an employee logged onto the system and provides a report on each and every transaction performed by the employee.

[118] All accounts that are created on the SAP system have to have supporting documents which are approved by a financial accountant. He confirmed that a clerk in the financial accounts department would capture a journal entry on the SAP system and this would automatically be forwarded to the clerk's supervisor to be authorised.

Journal entries would be used to correct a debit or credit on the system or rectify a transaction and also used to balance a transaction. There was an approval ranking on the SAP system and these various clerks were linked to their supervisor and the supervisor would authorise or release the transaction. The approval/releasing of the transaction had a record of the date and time authorised by the supervisor.

[119] Mr Baruth confirmed that all transactions and accounts which were opened and closed on the SAP system are recorded; one is unable to open or close an 'undetected account' even if the accounts are dormant or not used often. If entries are captured into those accounts, whoever captured them and authorised them would reflect on the system and could be identified from the transaction report. He did however concede that if someone's user name and password was stolen, these persons could use that stolen information. However, he qualified this to state that because employees have restricted access to the system related to their job function, if such transactions were released or approved by the supervisor, there would be a record thereof.

[120] In response to a suggestion from the first defendant that the first defendant moved departments, namely from the financial accounts department to supply chain department and therefore he could not have authorised/released the transactions, he indicated that he did not think it possible, as when one moved from a department the privileges of one in that department would be revoked and it would not have been possible to still release or authorise those transactions. This was not inconsistent with the evidence of Mchunu that despite the move, the first defendant still approved and released capturing by Mchunu on the system.

[121] He further confirmed that even if one amended the description of the accounts in the general ledger it would still reflect on the system. He confirmed at the time of his employment at the plaintiff the responsibility for the motor vehicle managers, sales representatives and pool cars were the responsibility of the financial accounts department. The financial accounts department would control the petrol cards for each motor vehicle. The overall person who controlled the motor vehicles was the financial accountant and such person would have reason to drive the motor vehicles, repair them and maintain them. He confirmed that at the time he was aware that Mchunu was the fixed assets clerk and he was responsible for controlling the motor vehicles and reporting to the first defendant.

[122] Whilst employed for the year in the financial accounts department he was a credit controller and his responsibility involved doing credit runs for all creditors that needed to be paid. He could not recall whether he had any responsibility or administration in respect of Wesbank arising from usage of garage cards. He confirmed that the payment system involved a 3-way match system, this involved a purchase order which would reflect a quotation for a service provided and a purchase order would be created once approved. Secondly once the service had been provided the responsible employee would capture the delivery notes or do 'goods received notes' on the system.

[123] The creditors clerk would receive the invoice and capture the invoice on the system. All creditors either had a payment term of between 30 or 60 days. At the end of the month his function was to run a payment report or payment schedule. This would pick up all the vendors and the amounts that needed to be paid either in 30 days or 60 days. He would not be responsible for authorising payments, he would merely go through the schedule and do a quick check of the vendors. He would not verify or check each and every transaction linked to a vendor, he would assume the figures were correct and given the high-risk system in place at the plaintiff.

[124] Mr Baruth could not confirm whether Wesbank appeared from the creditors report or creditors transaction list, he also had no knowledge as to how the system worked in the financial accounts department. He confirmed given the nature of the first defendant's role, being that of supervisor to Mchunu, the journal entries captured by Mchunu would be automatically forwarded for approval to the first defendant who would release and authorise them. He confirmed that if a journal entry or an entry on the general ledger had not been authorised, it would be suspended on the system.

[125] There was no one in any position higher that the first defendant in the financial accounts department in 2000 and the first defendant had the final approval of all journal entries and entries in the general ledger account. He confirmed that given his position as supervisor, Mr Naidoo would by authorising and releasing the entry be confirming the accuracy of an entry. If Naidoo had any queries relating to a journal entry or general ledger entry, the first defendant could query this with the clerk seeking

clarity and ask to view any supporting documents.

[126] He also confirmed by virtue of the position the first defendant held, he would have had comprehensive knowledge of the SAP system and what he was verifying. Apart from Mchunu and the first defendant, no one would check the accounts in the financial accounts department on a daily basis. No one knew what was going on or would have cause to check these accounts because of the responsibly parameters in place on the system. Mr Baruth could not comment on whether or not after he left the financial accounts department the first defendant would still authorize Mchunu's transactions and maintained access to the financial accounts department. That then was the evidence of the first defendant.

[127] The first defendant thereafter closed his case. His second witness was reluctant to testify and the reasons he advanced for this are a matter of record. In addition the first defendant indicated that he was not going to testify in his defence and was closing his case. The ramifications of him not testifying was explained and canvassed with the first defendant on record. The first defendant confirmed that he was aware of the consequences of not testifying and still elected to close his case without testifying.

[128] The matter was then adjourned for the parties to exchange written submissions and closing argument.

Analysis

[129] The plaintiff's claim against the first defendant is based on fraud emanating from a fraudulent scheme involving the first defendant and another of the plaintiff's employees, Mchunu, who worked in the plaintiff's financial accounts department. The essential elements for a claim of fraud are the following:

(i) a representation;
(ii) by the first defendant which to the knowledge of the first defendant was false;
(iii) which the first defendant intended the plaintiff to act upon; and
(iv) which induced the plaintiff to act and which resulted in the damages to the plaintiff.

[130] The onus rests on the plaintiff to prove the elements for fraud and it has attempted to do so by leading the evidence of certain witnesses. The plaintiff's case is that the first defendant's representations were false and he was aware that they were false and were made intentionally and wrongfully causing the plaintiff to suffer damages in the amount claimed.

[131] The first defendant, in his plea, admitted that he held the position of supervisor to Mchunu but left this position and moved to another department during the course of 2002. He avers that Mchunu was solely responsible for obtaining, issuing and controlling the Wesbank cards for the plaintiff's fleet of motor vehicles. Prior to his departure from the department in 2002, his employment involved the administration of the Wesbank cards – he made the representations as alleged by the plaintiff and the written portion of these representations comprised the vouchers completed and issued upon the conclusion of each transaction. He, however, further avers that he was unaware of any of the alleged fraudulent activities and did not make any false representations to the plaintiff. Further, that none of the transactions administered by them were as a consequence of the unlawful use of the Wesbank cards.

[132] Consequently, arising from the admissions of the first defendant as contained in his plea, it was incumbent on the plaintiff to prove the following: that the fraudulent transactions took place; that the defendant was aware of them; that he intended the plaintiff to act on the representations to their detriment; and the extent of its damages. Because the first defendant admitted that he represented to the plaintiff that all the transactions under his supervision were lawful, the plaintiff was excused from proving this element.

The legal position

[133] A party wishing to rely on fraud must not only plead it but also prove it clearly and distinctly.[14] The onus is the ordinary civil onus, namely on a balance of probabilities, bearing in mind that fraud is not easily inferred.[15]

[134] The essential allegations for a claim or a defence based on fraud are the

[14] *Courtney-Clarke v Bassingthwaighte* [1991] 3 ALL SA 625 (Nm) at 629.
[15] *Gilbey Distillers & Vintners (Pty) Ltd and Others v Morris NO and Another* 1990 (2) SA 217 (SE).

following:

(a) A representation by the representor to the representee. The representation usually concerns a fact but may relate to the expression of an opinion set to be held but which is in fact not held;[16]

(b) Fraud that the representor knew the representation to be false.[17] In this regard, it is not sufficient to allege that the representation was false because this word implies no more than that the representation was untrue. A mental element must also be alleged.[18] In addition, the representor must intend that the representee will act on the representation;

(c) Causation, ie, the representation must have induced the representee to act in response to it;[19]

(d) If damages are claimed, it must be alleged that the representee suffered damages because of the fraud;

(e) If reliance is placed on a fraudulent nondisclosure, facts giving rise to the duty to disclose must be set out. It is also necessary to show that the breach of the duty to disclose was deliberate and intended to deceive.

[135] In *QuarterMark Investments (Pty) Ltd v Mkhwanazi and Another* [2014] 1 All SA 22 (SCA) paras 13-14, the Supreme Court of Appeal dealt with the aspects of a fraudulent misrepresentation as follows:

> '[13] I deal first with the question whether Ms Mkhwanazi has established a case of fraudulent misrepresentation entitling her to cancel the two agreements. It is trite that in motion proceedings affidavits fulfil the dual role of pleadings and evidence. They serve to define not only the issues between the parties, but also to place the essential evidence before the court. There must, therefore, contain the factual averments that are sufficient to support the cause of action or defence sought to be made out. Furthermore, an applicant must raise the issues as well as the evidence upon which it relies to discharge the onus of proof resting on it, in the founding affidavit.
>
> [14] A misrepresentation has been described as a false statement of fact, not law or opinion, made by one party to another before or at the time of the contract concerning some matter or circumstance relating to it. A party seeking to avoid a contract on the

[16] *Feinstein v Niggli and Another* 1981 (2) SA 684 (A); Aldeia v Coutinho 1997 (4) SA 295 (O).
[17] *Ruto Flour Mills (Pty) Ltd v Moriates and Another* 1957 (3) SA 113 (T).
[18] *Breedt v Elsie Motors (Edms) Bpk* 1963 (3) SA 525 (A).
[19] *Hulett and Others v Hulett* 1992 (4) SA 291 (A) at 331-311; *Thompson v SA Broadcasting Corporation* 2001 (3) SA 746 (SCA); *Seven Eleven Corp of SA (Pty) Ltd v Cancun Trading NO 150 CC* 2005 (5) SA 186 SCA.

ground of misrepresentation must prove that: (a) the representation relied upon was made; (b) it was a representation as to a fact; (c) the representation was false; (d) it was material, in the sense that it would have influenced a reasonable person to enter into the contract; and (e) it was intended to induce the person to whom it was made to enter into the transaction sought to be avoided.' (Footnotes omitted.)

[136] In *Geary & Son (Pty) Ltd v Gove* [1964] 2 ALL SA 50 (A),[20] the Appellate Division held as follows:

'the plaintiff does not base its case upon a misrepresentation negligently made, but upon wilful falsehood, i.e. an intentional wrongful act on the part of the defendant. What it has to allege and prove, therefore, is that the defendant has, by word or conduct or both, made a false representation, that it knew the representation to be false, that the plaintiff has lost or will lose customers, that the false representation is the cause thereof, and that the defendant intended to cause the plaintiff that loss by the false representation.'

[137] In *Ruto Flour Mills (Pty) Ltd v Adelson* 1959 (4) SA 120 (T) at 122 G-123A the court held the following 'Generally speaking fraud is proved when it is shown that a false representation has been made, (i) knowingly or, (ii) without belief in its truth or, (iii) recklessly careless whether it be true or false. If there is an honest belief in the truth of the false statement then fraud is not established. Negligence or unreasonableness in itself, however gross, does not constitute an absence of honest belief in questions of fraud; *R v Myers,* 1948 (1) SA 375 (A.D.) at pages 382-384. In the ordinary case of fraud, apart from such factors as materiality and inducement, a plaintiff has to prove, (a) a false representation or misrepresentation and, (b) the state of mind of the defendant in respect of such representation. In the present case, however, the alleged false representation or misrepresentation itself relates to the state of mind of the defendant at the relevant time or times when the representation was made. A false representation about one's own state of mind can only be made with knowledge of such falsity and it can hardly be said that the false representation was made in an honest belief in its truth. There is, in my view, no room for an investigation whether such a false representation was made, (a) without belief in its truth or, (b) recklessly careless whether it be true or false.'

[138] In relation to the first defendant's awareness of the fraudulent transactions, the plaintiff led the evidence of the following witnesses concerning the first defendant's awareness of and participation in the fraudulent scheme. The first of these witnesses

[20] Geary & Son at 53

was Mchunu who was previously employed by the plaintiff to administer the Wesbank cards under the supervision of the first defendant. During the course of his evidence he provided extensive evidence that the first defendant was aware of the fraudulent transactions. He specifically emphasised that the fraudulent scheme was the first defendant's idea. In 1997 whilst the first defendant was Mchunu's supervisor, the first defendant kept the Wesbank cards and when cars were disposed of used these cards to service his own private vehicle at Quality Street Motors. This was the beginning of the fraudulent scheme according to Mchunu.

[139] He described in detail how the scheme worked, namely that replacement cards would be ordered when a car was in an accident or was replaced. The first defendant and he, Mchunu, would retain the old cards or the new ones if a replacement card was ordered and used the cards initially for services at Quality Street Motors. The scheme initially commenced with Quality Street Motors and then expanded to include other merchants like Select Auto Fitment Center, Tyre and Tube and Basil Tyre and Exhaust.

[140] Mchunu testified that when a car in the plaintiff's fleet was in an accident the driver assigned to such vehicle would be requested to destroy the Wesbank card. Without Wesbank or the plaintiff knowing Mchunu would order a new card for that vehicle under the pretext that the card had been damaged. Wesbank would issue a new card for the car and such card would never be sent to the driver assigned to the vehicle. This was as the car had been written off. Mchunu and the first defendant would retain the card and use it for fraudulent transactions.

[141] On some occasions Mchunu testified that he would change the name of the driver for the replacement card and mark the card they issued as a spare car. The first defendant signed for receipt of the replacement cards and continued to sign for receipt of fraudulent cards even after he had moved departments in 2002. This was necessary in order to protect the fraudulent scheme they were engaged in.

[142] Mchunu testified that it was the first defendant who introduced him to Basil Chetty of Basil Tyre and Exhaust. These were merchants who made the most money

out of the fraudulent scheme. It was the first defendant and himself who delivered the fraudulent cards to the various merchants involved in the scheme. The first defendant also kept some of the cards himself and used the cards which he had retained at Quality Street Motors and the first defendant swiped these cards himself. In addition Mchunu testified that he informed the first defendant of all the benefits which he received from the various merchants involved in the fraudulent scheme as 'those were the first defendant's contacts'.

[143] As part of his functions he would receive all the transaction reports at the end of every month in respect of the vehicles in the plaintiff's fleet. This included all the transaction reports for vehicles which had been disposed of and which were used to commit the fraudulent activities. Mchunu testified that he would keep the transaction reports which reflected the fraudulent transactions in the department and not send them to the relevant sales representative to confirm the transactions. The first defendant was fully aware of the procedure which he utilised and the defendant would on some occasion look at the transaction reports himself. It was both himself and the first defendant who had received their exception reports delivered by Wesbank which they did not investigate but simply filed the reports.

[144] It is evident from Mchunu's evidence that the first defendant was also aware of the fictitious journal entries for the fraudulent scheme as he was required to authorise every journal entry which he did by signing next to such entry. Mchunu corroborated the evidence of Maharaj that the first defendant was aware of the email from Maharaj concerning the large number of suspicious transactions which they had identified on the exception reports. He confirmed that Maharaj initially met with him and Mchunu advised Maharaj that the transactions were part of the Axe campaign. He had discussed this explanation to Maharaj with the first defendant and the first defendant was thus aware of the fictitious explanation provided to Maharaj.

[145] He confirmed that in September 2004, when the plaintiff stopped paying Wesbank by EFT, all amounts over R500k were paid by electronically generated cheques. Because of the change Mchunu testified he discussed this with the first defendant and together they devised a plan whereby they would use old manual cheques which were kept in the safe in the cash office. On a few occasions Mchunu

testified he accompanied the first defendant to the cash office to retrieve the cheques. Everything was done to pursue the fraudulent scheme and was done with both his and the first defendant's knowledge. From time to time Mchunu testified that he would discuss the fraudulent scheme with the first defendant when he had a concern. He often spoke to the first defendant when he read the reports and noticed that the expenditure was too high as he was concerned that someone would find them out and uncover their fraudulent scheme.

[146] Mchunu also testified that he often spoke to the first defendant about pulling out of the fraudulent scheme as he was not benefiting from it as much as the first defendant who was deriving the bulk of the benefit. He testified that he did not pull out of the scheme as the first defendant still had the cards as well as the merchants and consequently he had to carry on administering the transactions so they would not be found out. He testified that he could not have conducted the fraudulent scheme from 1997 to 2005 without the first defendant knowing about it. This was as from time to time Wesbank would need authorisation from someone above him and this would be the first defendant. In addition the first defendant had to authorise the journal entries and the first defendant had access to the accounts which they used to debit the fraudulent transactions with.

[147] As his line manager the defendant was responsible for monitoring and assessing his work performance and had sight of the fraud reports generated by Wesbank. He disputed the first defendant's evidence and submitted that he had no knowledge of what was going on and was not part of the scheme. He testified that had the first defendant not been involved in the fraudulent scheme and was innocent then the first defendant would have commenced an investigation in relation to the fraud reports and exception reports submitted by Wesbank on a monthly basis.

[148] Aatish Maharaj confirmed that when the fraud reports were generated and there was particularly high usage he spoke initially to Mchunu and then the first defendant who corroborated Mchunu's explanation for the high usage. When he spoke to the first defendant, he supported the explanations which Mchunu proffered. This confirms Mchunu's evidence that the first defendant was aware of the fraudulent scheme and the axe project was false.

[149] Maharaj confirmed the contents of his discussion with both Mchunu and the first defendant in a call report which was referred to during his evidence. Such report recorded that the first defendant would send an email to Maharaj confirming the explanation provided that the high usage was as a consequence of the Axe promotion, the first defendant also undertook to notify them in future of any such promotions to explain high usage. Maharaj confirmed his discussions with Mchunu and the first defendant with his superior Farouk and advised him that the first defendant informed him that all the transactions were legal and that the Axe promotion had come to an end.

[150] Sheriff testified conducting the search at the first defendant's home and what was recovered. It is not disputed that the documents found in the briefcase which were indicative of the fraudulent scheme were the same as those analysed by Rous and Irving. Colonel Wellington Mbokazi (Mbokazi) corroborated Sheriff's evidence and confirmed that he was the police official responsible for preparing the inventory of the various items seized at the first defendant's home during the course of 7 June 2005. He confirmed that the first defendant was present throughout the search and once he had completed the inventory and the search had been completed he signed the inventory and his signature appears there on as 'WSM'. In addition, the first defendant was handed a copy of the inventory to check it and made to sign it.

[151] Michael Irving, the handwriting expert, confirmed that he had prepared a report which is an exhibit. He testified that he was provided with the documents which were found during the course of the execution of the search warrant in the briefcase recovered from the first defendant's bedroom. He examined the handwriting on the documents to confirm whether or not it was that of the first defendant. These detailed findings which are contained in his report he confirmed during the course of his evidence were as follows:

(i) The envelope which contained the word 'Sean' contained the handwriting of the first defendant and the First Auto sales voucher in that envelope also contained the handwriting of the first defendant. The handwriting in most instances on the documents consisted of the date, registration number of a vehicle, order number, written value

and numerical value. The piece of paper which was found in envelope A also contained calculations and values which he testified were written by the first defendant;

(ii) The second brown envelope, 'B', which contained the word 'Basil' written on it was in the handwriting of the first defendant. A number of documents also found in this envelope contained the first defendant's handwriting like for example the First Auto sales vouchers, a handwritten list of numbers, several speed point slips and approximately 40 First Auto sales vouchers;

(iii) In the third brown envelope marked 'C', the first defendant's handwriting was identified on the upper flap of the envelope and the letters 'QS' were in the defendant's handwriting. He also found several calculations and three vehicle registration numbers written in the first defendant's handwriting.

[152] Irving further testified that the seven pages of calculations which contained dates, vehicle registration numbers and the initials 'BC', 'SS' and 'QS' which appeared to be odometer readings and rand figures were all written by the first defendant. Five other envelopes which were marked exhibits 'E' to 'I' all contained a variety of documents among them being First Auto sales vouchers, two credit card transactions at Sugar Mill Casino were authored in part by the first defendant. His findings were conclusive that these documents contained the handwriting of the first defendant.

[153] In my view although the first defendant challenged the search warrant in the criminal proceedings such were not set aside. What emanates from Sheriff and the other policeman's evidence is that during the course of the search and seizure documents containing the first auto vouchers, speed point slips and envelopes which contained calculations and garage cards were found. The handwriting on the envelopes was subsequently identified as belonging to the first defendant.

[154] During the course of cross-examination the first defendant did suggest that there were questions relating to Irving's expertise in the Shembe matter and this in my view was a vague reference to an issue arising from Irving's credentials in that matter. This does not detract however from the fact that the report was not challenged seriously in any way and I accept the contents of the report and the findings that the

handwriting on the documents was that of the defendant.

[155] Janet Rous (Rous) a qualified forensic auditor, gave evidence concerning the forensic investigation conducted to ascertain the identity of the individual fraudulent transactions and the quantification thereof. Her expertise was not challenged in any way. She testified that she was present during the execution of the search and seizure warrant at the first defendant's home on 7 June 2005 and witnessed the briefcase which was found being opened in the bedroom of the first defendant.

[156] She observed the items being removed from inside the briefcase being garage cards, deposit slips and documents written in manuscript. Among the documents which were seized found in the briefcase she analysed them and these all correlated to fraudulent transactions. These were speed point slips, cell vouchers, handwritten lists, most of which recorded vehicle registration numbers, dates and initials such as BS (Basil Chetty), SS (Select), TS (Tyre and Tube), TCS (Auto) and QS (Quality Street Motors).

[157] Some of the transactions which were recorded in the list corresponded with the speed point slips and sales vouchers recovered. Ms Rous confirmed that the written lists which she analysed were the same referred to in Mr Irving's report which he testified were written by the first defendant. She also examined the defendant's bank accounts and found that he operated an account at Standard Bank into which his monthly salary was paid, a gold card and other Absa Bank accounts into which he made cash deposits, cheques deposits and withdrawals from casinos from time to time. She confirmed that as part of their forensic investigation a detailed report was prepared and she compiled a table of the total fraudulent transactions on the cards referred to in the written lists which contained the first defendant's handwriting.

[158] She also identified fraudulent transactions which took place in relation to the first defendant's own private vehicles being a Honda Ballade with registration numbers and letters ND45481, a Sierra and a Nissan Sani. All of these fraudulent transactions took place at Basil Tyres. The crux of Ms Rous report was that the documents found at the first defendant's home in the briefcase, among others, linked him to the fraudulent transactions and also that the first defendant received a benefit from the

fraudulent transactions.

[159] During the course of cross-examination Ms Rous was cross-examined extensively about the cash deposits made into the first defendant's bank account and a number of other transactions which she identified. She made concessions in relation to certain of the transactions but overall the first defendant did not during the course of cross-examination dispute her methodology or quantification of the fraudulent transactions committed against the plaintiff.

[160] Kriegler, a fraud manager at Wesbank, testified that at the time he was employed by Wesbank to collate information and deal with the fraudulent transactions. He confirmed Maharaj's evidence that the Wesbank Auto cards issued to the plaintiff were general cards which meant that they had no security features. Wesbank generated transaction reports which were sent to the plaintiff on a monthly basis to enable it to check all of the transactions were legitimate and to deal with any suspected fraudulent transactions. It was the plaintiff's responsibility to identify any anomalies and to take action should any fraud be discovered.

[161] Any anomalies could be detected by analysing the transaction reports and specifically looking at the variants key, the odometer reading and the number of times a card had been used at a particular merchant over a period of time. If the plaintiff picked up an anomaly it could alert Wesbank to cancel or block the specific card. During the relevant period the plaintiff did not make any requests to cancel or block any Wesbank cards but only requested cancellation or replacement cards.

[162] During the course of his investigation Kriegler analysed the transactions and noticed certain patterns and uncovered that the delayed transactions involved the same merchant, the same product and on occasion two or three different cards were used at the merchant on the same day. He then uncovered all the fraudulent transactions from the system and transferred this into excel spreadsheets to identify the fraudulent transactions. The summary of his findings appear in file 3 of the exhibits that were handed in from page 701 and his findings on page 484 A reflect a total loss to the plaintiff emanating from the fraudulent transactions in the sum of R16 288 035.64

[163] The first defendant's only witness, Mr Baruth, confirmed that he had worked with the first defendant until 2007 at the plaintiff when he left for greener pastures. He also had worked in the financial accounts department with the first defendant as a credit controller but given his number of years of service at the plaintiff had a vast knowledge of the plaintiffs accounting system. He confirmed that Mchunu would capture the journal entries all of which would be automatically sent to the first defendant as his supervisor to authorise.

[164] The financial accountant in the financial accounts department was the person at the plaintiff who controlled the plaintiff's fleet of cars and it is common cause that this was a position held by the first defendant until 2002. Baruth confirmed that whilst he was employed in the financial accounts department he did not verify figures submitted to him to pay the plaintiff's creditors were correct but assumed that they were correct. He confirmed that given that the first defendant would have been Mchunu's supervisor the first defendant would have provided the financial approval for all the journal entries captured by Mchunu and the final approval for all general ledger entries.

[165] The first defendant's actions in authorising Mchunu's entries meant that he confirmed the accuracy of the entries and it was the first defendant's duty in such capacity to check anything unusual about the entries. The ultimate responsibility for both the journal and ledger entries vested with the first defendant. Because it was only Mchunu and the first defendant who checked and had access to the accounts which they used and opened, no one knew what was going on in these accounts on a day to day basis and they would have been able to enter transactions undetected for a period of time.

[166] Mr Baruth confirmed that there was no supervisor to supervise Mchunu when the first defendant was transferred out of that department and it was probable that the first defendant still authorised Mchunu's entries when he moved departments.

[167] Given this evidence I accept the plaintiff's submissions that the plaintiff's

witnesses and Mr Baruth's evidence overwhelmingly pointed to the fact that the first defendant was aware of the fraudulent transactions which took place between 1997 until 2005. Although he may not have administered such transactions on a daily basis he was aware of the manner in which they were carried out and the fact that they were continuing. I accept Mchunu's evidence that it was the first defendant who had devised the scheme and was instrumental in every stage of its development but more so was involved in the maintenance of the scheme and would often discuss strategies on how to continue the scheme and avoid detection despite the various changes and obstacles which presented themselves over the such period of time.

[168] In addition, I accept Mchunu's evidence that not only was the first defendant aware of the fraudulent scheme, it would appear that he was on friendly terms with a number of the merchants who were in possession of the garage cards and who used them to generate millions of Rands worth of unlawful transactions. It is also apparent, having regard to the report of Rous and Kriegler, that the first defendant received vast sums of money by way of cash deposits into his account without any legitimate source of income. The plaintiff's income from his salary was simply insufficient to generate such vast sums of cash deposits.

[169] There was damning evidence against the first defendant concerning his knowledge and awareness of the fraudulent scheme. This was the evidence of Mchunu concerning the fraudulent scheme, that it was the first defendant's idea and how it operated with the full knowledge of the first defendant even after he left the department. Second was the briefcase retrieved from his bedroom cupboard during the course of the execution of the search and seizure warrant which contained the fraudulent garage cards, sale vouchers, speed point slips and handwritten notes on envelopes recording the details of the fraudulent transactions including the registration numbers of the vehicles used, the amounts paid, the dates of the transactions but more significantly the reference to the various merchants involved in the fraudulent scheme. These documents were linked to the fraudulent transactions which Rous and Kriegler testified about.

[170] The plaintiff's witnesses as well as the defendant's witness in my view gave good evidence which remained unchallenged during the course of cross-examination.

Most significantly these witnesses, specifically Ms Rous, made significant concessions during the course of cross-examination by the first defendant. However, her evidence and that of Kriegler in relation to the fraudulent transactions remained largely uncontested and unchallenged.

[171] The first defendant elected not to testify, as was his right, and challenge the evidence of the plaintiff's witnesses. Of significance in relation to this stance adopted by the first defendant was the fact that the plaintiff's witnesses, specifically persons like Mchunu, testified about the first defendant's direct knowledge of facts which were placed before the court by him and also of the fraudulent scheme. That he was an assistant financial accountant who was responsible for all the plaintiff's garage cards and aware of the internal procedures about which Mchunu gave extensive evidence placed him in a position of being able to refute all the evidence which pointed to him being the mastermind of the fraud. His failure to testify in this regard and challenge any of this evidence tipped the scales in the plaintiff's favour pointing to his involvement and awareness of the fraudulent scheme.

[172] I agree with the submission that the evidence given by the plaintiff's witnesses was sufficiently weighty to call for an answer by the first defendant and in the absence of him giving evidence, the plaintiff's prima facie case in this regard becomes conclusive proof and it has therefore discharged the onus.

[173] It is self-evident that the plaintiff through the fraudulent scheme adopted by the first defendant and Mchunu was obliged to reimburse Wesbank for the amounts utilised at the merchants. It is clear that the representations by Mchunu and the first defendant induced the plaintiff to act thereupon and it is evident from the schedule compiled by Kriegler as confirmed in the forensic report of Rous, that the plaintiff suffered damages in the amount claimed.

Quantum of the plaintiffs claim

[174] When the plaintiff instituted the action it claimed the sum of R16 281 221.77 million. During the course of the trial in the evidence presented by the plaintiff particularly that of Mchunu, it was apparent that the plaintiff had recovered certain

monies from his pension fund in the sum of R501 274.99. In his written submissions, *Mr Naidoo* raised this aspect and indicated that the plaintiff had not reduced the quantum of its claim.

[175] Ms *Nicholson*, during the course of the argument indicated that even though this was not pertinently raised on the pleadings she had taken instructions from her attorney and confirmed that the plaintiff received this amount from Mchunu's pension fund towards the quantum of its claim. She consequently sought an amendment to the quantum of the plaintiff's claim from the bar. This was explained to Mr Naidoo and he indicated that he had no objection to the amendment of the plaintiff's quantum. The quantum of the plaintiffs claim was accordingly amended to the sum of R15 779 947,78 to take into the amount received from Mchunu's pension fund .

Costs

Costs in the interlocutory application

[176] There are a number of costs orders which need to be dealt with apart from the costs of the trial. The first relates to the interlocutory application brought by the plaintiff after it had led the evidence of its last witness and closed its case. The plaintiff had initially closed its close but subsequently re-opened its case in order that it make the application to have the affidavit of Leslie Chetty admitted into evidence. Such application was brought on 17 February 2016. Prior to the matter being adjourned in order for Ms *Nicholson* to make her submissions and provide necessary authorities to Mr *Naidoo*, Mr *Naidoo* placed on record that he had made arrangements for a witness to testify as he anticipated that he would present his case.

[177] In light of the fact that Ms *Nicholson* sought to re-open the case and present the evidence by way of an affidavit, Mr *Naidoo* could not proceed to lead his witness. Mr *Naidoo* placed on record that he had made those arrangements which was not disputed by the plaintiff. The adjournment of the proceedings on 17 and 18 February 2016 was as a consequence of the plaintiff re-opening its case and bringing the interlocutory application. After the submissions and argument in the interlocutory application were finalised, the matter then stood over to the following day being 19 February 2016 on which date a ruling in the interlocutory application was then made.

The interlocutory application was dismissed with costs.

[178] Ms *Nicholson* incorrectly thereafter sought leave to appeal the ruling in the interlocutory application and subsequently then requested that the matter stand down for her to take instructions. It was dismissed with costs. This she advised was to also enable the plaintiff to further consult and for her to take instructions and decide whether or not it wanted to call a further witness and make a decision as to whether or not it wished to again close its case.

[179] The adjournment of the matter in February 2016 was occasioned as a consequence of the plaintiff applying for an adjournment and seeking to take instructions and make a decision as to whether or not to call any further witnesses or close its case. The adjournment was not at the instance of the defendant and consequently the costs occasioned by the adjournment of the matter which were reserved on 19 February 2016 ought to be borne by the plaintiff.

Costs of the main action

[180] In respect of the costs occasioned in the main action, the plaintiff seeks these costs. The submission of Ms *Nicholson* is that as the plaintiff has been successful there is no reason to depart from the usual rule in relation to costs and deprive the plaintiff of the costs occasioned by the litigation. Mr *Naidoo* similarly submitted that in the event of the plaintiff being unsuccessful then costs should follow the result and the plaintiff directed to pay his costs occasioned by such litigation.

[181] In light of the orders which will follow hereafter and the fact that there is no reason to depart from the usual rule in relation to costs, nor have any submissions have been made to the contrary, the successful party is entitled to the costs occasioned by the litigation. Although the particulars of claim seek a punitive costs order, no submissions were advanced either in the oral argument or the written heads of argument. Despite the plaintiff's claim being based on fraud, there is nothing which warrants a punitive costs order.

Conclusion

[182] In the result the following orders will issue:

1 Judgement is granted against the first defendant jointly and severally with the second defendant as prayed for in the particulars of claim for payment of:

1.1 the amount of R15 779 946,78

1.2 interest according to law

2 The costs of the interlocutory application are to be paid by the plaintiff.

3 The costs occasioned by the adjournment of the trial on 17 and 18 February 2016, reserved on 19 February 2016 are to be paid by the plaintiff.

4 The remainder of the costs of the action including any reserved costs, are to be paid by the first defendant on a party/party scale.

_____

Henriques J

CASE INFORMATION

APPEARANCES

Counsel for the Plaintiff	:	Advocate J.F. Nicholson
Instructed by	:	Shepstone and Wylie 24 Richefond Circle Ridgeside Office Park Umhlanga Rocks Ref: JCS/mr/UNIL1.919 Tel: (031) 575 700 Email: smith@wylie.co.za Ref: ALH/ss/UNIL1.914 Tel: 031 575 7511
Counsel for the Defendant	:	In Person
Address	:	31 Salseeta Road Merebank Email: megannaidoo777@gmail.com 083 777 2624
Dates of Hearing	:	29 October 2012 to 31 October 2012; 1st and 2nd November 2012; 15 to 19 February 2016; 6 to 8 August 2018; 11 October 2018.
Date of Judgment :		12 May 2023

This judgment was handed down electronically by circulation to the parties' representatives by email, and released to SAFLII. The date and time for hand down is deemed to be 09h30 on 12 May 2023.