Editorial note: Certain information has been redacted from this judgment in compliance with the law.

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

Case no: **D12090/2022**

In the matter between:

PINNACLE MICRO PROPRIETARY LIMITED **APPLICANT**
(Registration Number: […])

and

MORGANTHIREN GOVENDER **RESPONDENT**
(Identity number: […])

And in the matter between:

Case no: **D12091/2022**

PINNACLE MICRO PROPRIETARY LIMITED **APPLICANT**
(Registration Number: […])

and

K2K INFORMATION SYSTEMS PROPRIETARY LIMITED **RESPONDENT**
(Registration Number: […])

Coram: Mossop J
Heard: 30 April 2024
Delivered: 14 May 2024

ORDER

The following order is granted:

Case number D12091/2022

1. The relief claimed in Part A of the application is granted and K2K Information Systems Proprietary Limited is directed within 20 days of the granting of this order to disclose the following information to the applicant in writing:

1.1 all applications for credit concluded between itself and its customers over the six-month period immediately preceding the date of this order (the period);

1.2 all orders received by it over the period;

1.3 all invoices issued by it over the period;

1.4 all credit notes issued by it over the period;

1.5 all customers' statements issued over the period; and

1.6 a detailed analysis of K2K Information Systems Proprietary Limited's debtors and creditors over the period.

2. In terms of Part B of the application, judgment is entered against K2K Information Systems Proprietary Limited for payment of the amount of R158 474.50.

3. Such judgment shall be joint and several with the judgment entered against Morganthiren Govender under case number D12090/2022 hereunder.

4. Interest shall run on the judgment amount at the rate of 7 percent per annum, as calculated from the date of demand to the date of payment, both dates inclusive;

5. K2K Information Systems Proprietary Limited shall pay the applicant's costs:

5.1 On the scale as between attorney and client; and

5.2 On the magistrates' court scale.

Case number D12090/2022

1. Judgment is entered against Morganthiren Govender for payment of the amount of R158 474.50.

2. Such judgment shall be joint and several with the judgment entered against K2K Information Systems Proprietary Limited under case number D12091/2022 above.

3. Interest shall run on the judgment amount at the rate of 7 percent per annum, as calculated from the date of demand to the date of payment, both dates inclusive;

4. There shall be no order as to costs in this matter.

5. The applicant's attorneys shall not be entitled to claim any fees from the applicant under this case number.

JUDGMENT

MOSSOP J:

Introduction

[1] Before me are two applications with consecutive case numbers, namely D12190/2022 and D12191/2022. In each application the applicant is the same, but the respondents are different. Different, but not unconnected. Steyn J was initially to hear the application with case number D12091/2022. That is an application in which, inter alia, a money judgment is sought by the applicant against a principal debtor. Case number D12090/2022, which I was scheduled to hear on a later date, is an application in which the applicant seeks an identical money judgment against a surety of the principal debtor.[1] Neither of the applications refers to the existence of the other and judgment in each application is not sought jointly and severally with any other judgment that may be taken. What should be one application has been cleaved in two by the applicant's attorneys and these two applications are the result.

[1] The application with case number D12090/2022, the application against the surety, was on my roll for 2 May 2024. The application with case number D12091/2022, the application against the principal debtor, was on Steyn J's roll on 30 April 2024. Both applications were heard on 30 April 2024.

[2] Steyn J and I agreed that the application that I was scheduled to hear would be advanced to the day upon which Steyn J was to hear the application before her, but that I would hear both applications on that earlier date, and the parties were notified accordingly.

Representation

[3] When the applications were called, Ms A Vorster appeared for the applicants in both applications. Mr Morganthiren Govender (Mr Govender) is the surety in the application with case number D12090/2022 and he appeared in person to argue his matter. He also stated that he appeared on behalf of the principal debtor in case number D12091/2022, namely K2K Information Systems Proprietary Limited (K2K). Mr Govender disclosed that he is one of two directors of K2K, the other being his daughter.

[4] Mr Govender, unsurprisingly, was not aware that a juristic entity such as a private company can only be represented in legal proceedings in the high court by a duly qualified legal representative. He indicated that the reason that he wished to represent K2K was because neither he nor K2K could afford legal representation. He stated the he, with some assistance, had drawn the answering affidavits in both applications which were essentially identical, because the facts were entirely within his personal knowledge.

[5] Having pointed out the prohibition to Mr Govender, I sought Ms Vorster's views on the matter. She, generously, indicated that she was content to allow Mr Govender to represent K2K.

[6] The general principle is that a person in the position of Mr Govender, who himself is not legally qualified, has no right to address a high court on behalf of a juristic entity.[2] That is settled law. But, in certain circumstances, this rule may be

[2] *Yates Investments (Pty) Ltd v Commissioner for Inland Revenue* 1956 (1) SA 364 (A) at 365C-D.

relaxed. As was said by Ponnan JA in *Manong & Associates (Pty) Ltd v Minister of Public Works and another*:[3]

'The main reasons for relaxing the rule are, I suppose, obvious enough: a person in the position of the controlling mind of a small corporate entity can be expected to have as much knowledge of the company's business and financial affairs as an individual would have of his own. It thus seems somewhat unrealistic and illogical to allow a private person a right of audience in a superior court as a party to proceedings, but deny it to him when he is the governing mind of a small company which is in reality no more than his business *alter ego*. In those circumstances the principle that a company is a separate entity would suffer no erosion if he were to be granted that right. There may also be the cost of litigation which the director of a small company, as well acquainted with the facts as would be the case if a party to the dispute personally, might wish to avoid. Such companies are far removed from the images of gigantic industrial corporations which references to company law may conjure up.'[4]

I agree with this reasoning.

[7] If the rule was to be inflexibly applied in this matter, the application against K2K would have had to be adjourned for the purpose of permitting it to attempt to raise funds for a legal representative and then to properly instruct that legal representative. The costs in a matter where the amount in dispute is within the magistrates' court jurisdictional limit would unnecessarily increase. Mr Govender indicated that he wished to avoid such costs and thus acted in person. That is a consideration alluded to by Ponnan JA in the extract referred to above.

[8] The application to represent K2K was made informally from the bar by Mr Govender. Had I insisted on a formal application to permit such representation, the matter would likewise have had to be adjourned and the costs would also have increased.

[9] Mr Govender confirmed that, with the assistance of his niece, a law student, he had prepared the opposing papers, including the heads of argument that he had delivered within the prescribed time period. In this, he established himself to be entirely competent and I was satisfied that he had the ability to advance the defence

[3] *Manong & Associates (Pty) Ltd v Minister of Public Works and another* [2009] ZASCA 110; 2010 (2) SA 167 (SCA); [2010] 1 All SA 267 (SCA).
[4] Ibid para 9.

of K2K. In the exercise of my discretion,[5] I accordingly permitted Mr Govender to represent K2K.

The dispute

[10] The applicant is, inter alia, a supplier of information technology hardware. In the two applications that it has brought, it seeks money judgments against both the respondents in the amount of R158 474.50. In the notice of motion in which judgment is sought against K2K, that relief is sought as part B. Part A is a demand for information and documents arising out of a cession by K2K of its book debts to the applicant. The identical relief framed in part B is sought against Mr Govender in the other application.

[11] K2K describes itself in the signature strap ever present on its emails, a number of which are attached to the papers, as being 'IT Professionals'. In similar fashion, Mr Govender describes himself in the signature strap to his emails as being an 'IT Consultant'. K2K required a computer server[6] (the server) for a client and inquired about acquiring it from the applicant. K2K had a long trading relationship with the applicant covering several years. Immediately prior to the dispute over the server that has led to these two applications, K2K had ordered, and paid for without incident, another server from the applicant (the earlier server).

[12] Ultimately, K2K acquired the server that is the focal point of these two applications from the applicant. Under what circumstances this occurred is the basis of the dispute between the parties. The applicant claims that K2K paid it a deposit but did not pay it the full purchase price and the amount that is claimed by it in the two applications is the balance of the outstanding purchase price.

[13] There is a dispute as to when the sale of the server occurred. K2K and Mr Govender claim that it arose from events in October 2019 (the October transaction) while the applicant contends that it occurred in November 2019 (the November transaction). That would appear to generate a dispute of fact, but the dispute is more apparent than real. This will become evident if the competing allegations are

[5] Ibid para 10.
[6] The technical description of the server is an HPE DL380 Gen10 2x Xeon-G 6230 Kit, 16 x 32GB, 10 server.

considered chronologically. That means commencing the story not with the applicant's version but with K2K and Mr Govender's version of events.

The October transaction

[14] At all relevant times, Mr Govender acted on behalf of K2K. He states that he first contacted the applicant on 20 September 2019 regarding the acquisition of the server. He initially dealt with a representative of the applicant, Mr Thabo Matela (Mr Matela), but over the course of the ensuing discussions with the applicant, he also had dealings with other employees of the applicant, which included Mr Christopher de Vries (Mr De Vries).

[15] The discussions between the parties seem to have occurred in the form of an exchange of multiple emails. These emails have been put up and they demonstrate that there was undoubtedly contact between Mr Govender and bona fide representatives of the applicant. But from these emails it is also apparent that at some stage, notably towards the end of the discussions when payment was being considered, a third party (the fraudster) joined the electronic conversation. The fraudster was unconnected to the applicant, K2K and Mr Govender. How this occurred is never explained by either party. Mr Govender mentions that it occurred but does not develop the point beyond that.

[16] Mr Govender claims that he was not aware that, eventually, he was communicating not with the applicant's representatives but only with the fraudster. The applicant was also not aware that Mr Govender was communicating with the fraudster because it, for obvious reasons, never received the fraudster's emails: only K2K and Mr Govender did. Mr Govender was thus misled into believing that he had reached an agreement with the applicant for K2K to purchase the server for an amount of R318 474.56. According to him, either Mr Matela or Mr De Vries then requested K2K to make payment of that amount by electronic funds transfer to the applicant within 24 hours of receipt of the quote. Mr Govender states that in compliance therewith, he made that payment on behalf of K2K on 11 October 2019. The payment was made into a bank account that he believed was the applicant's bank account. According to him, the banking details that he relied upon to make the payment:

'… had been emailed to me by both Mr Christopher De Vries and Mr Thabo Matela.'

[17] Having ostensibly made the payment, K2K awaited delivery of the server. When this did not occur, Mr Govender made repeated inquiries with the applicant about when it would be delivered and was ultimately advised on 5 November 2019 that delivery could not occur because payment had not yet been received by the applicant. He explained to the applicant's representative that he had made payment but then came to the realisation that:

'… the email containing the Applicant's bank details had been intercepted by a fraudster and altered to reflect the fraudster's bank account details, resulting in the funds being electronically transferred to the fraudster's bank account as opposed to the Applicant's bank account.'

No server was thus delivered to K2K by the applicant arising out of the October transaction.

The November transaction

[18] The applicant states that it has no knowledge of the October transaction. In stating that, it does not appear to deny that K2K made contact with it as alleged by Mr Govender in September and October 2019, but it denies that it entered into any agreement with K2K with regard to the server during that period. It also denies that it gave K2K its banking details. There was no need for it to do this as K2K already had those details and had used them to pay for the earlier server. The applicant does not appear to dispute either that during the course of discussions with K2K, the fraudster intercepted the communications and K2K was deceived into making payment to the fraudster, but it denies that it contributed in any way to that occurring, nor did it know, as previously explained, that this had occurred. The applicant relies, instead, upon the events that form the November transaction.

[19] The applicant explains further that due to the fraud, the unfortunate reality was that K2K had lost the money that it had paid to the fraudster but still required a server for its client, which had already paid it for the hardware. K2K was accordingly in a difficult position and was under pressure from its client to acquire the server and to get it installed and up and running. Hence the need for the November transaction

to be concluded, and concluded urgently, because of the pressure placed on K2K by its client.

[20] In agreeing to the November transaction with K2K, the applicant insisted on its regular procedures being followed despite the urgency of K2K's position. It accordingly required its standard documentation to be completed by K2K. That documentation was, indeed, completed, and it is that documentation that the applicant has presented in support of its claim against the respondents.

[21] The first document presented is an 'Application for Dealership' form (the application form). This document had to be completed by K2K because it was envisioned that it would potentially become a reseller of the applicant's products. That document is comprised of six sections, commencing with section A, and ending with section F. Section A required the furnishing of the details of K2K, such as its physical address, its postal address, email addresses and the like. It also required the disclosure of the particulars of its principals and required the provision of trade references. Section B required that K2K's directors provide information regarding their spouses. Section C contained an acknowledgement by K2K that all transactions would be performed in accordance with the applicant's terms and conditions as published on its website. Section D dealt with a cession of book debts by K2K to the applicant. I pause here to mention that the relief claimed in Part A of the application under case number D12091/2022 relates to this cession and is sought to allow the applicant to put it into effect. Ms Vorster explained that this was a form of security that would assist in ensuring that the applicant was paid in the event of the court granting judgment against K2K as prayed. Section E was the deed of suretyship signed by Mr Govender and section F was a list of assets owned by him. Other documents came to be attached to the application form. These were documents that K2K was asked to supply, such as copies of the personal identity cards of K2K's directors, CIPC records pertaining to K2K, and its VAT registration documents. Also attached to the application form was the applicant's terms and conditions of sale.

[22] Not all the sections of the application form required signatures. Sections A and F did not. The remaining sections required signatures and dates to be inserted.

Those sections that required signatures were, indeed, signed. Sections B and C are dated 6 November 2019 while sections D and E are dated 11 November 2019.

[23] The second document presented by the applicant is the invoice that it generated in respect of the server. It reveals that the purchase price of the server, and an installation fee, came to the amount of R318 474.50, including VAT.[7] The applicant states in its founding affidavit that the invoice is dated 11 November 2019. This is incorrect, for it is, in truth, dated 20 November 2019.

[24] The third document relied upon by the applicant is its delivery note recording that the server was delivered on the same day that the invoice was generated, 20 November 2019, and that it was received on behalf of K2K by one Antonio Dawson.

[25] The fourth document presented is the applicant's account statement in respect of K2K, which is dated 31 May 2022. It details that an amount of R160 000 was paid to the applicant by K2K on 20 November 2019, the date upon which the server was delivered to K2K, and that the balance then outstanding was the amount of R158 474.50, being the amount claimed from the respondents.

[26] The final document presented by the applicant is a certificate of balance confirming that the amount owed by K2K to the applicant is R158 474.50.

[27] Despite the apparent urgency of the situation insofar as K2K was concerned, the applicant was cautious about doing business with it. Accordingly, on 18 November 2019, a representative of the applicant addressed an email to K2K (the 18 November email) setting out additional terms upon which the applicant would agree to the November transaction with it, which included the following:

'2. 50% = R159,237.28 Incl. VAT, payable in advance, to reflect and clear the Pinnacle KZN bank account.

3. Balance of the 50% = R159,237.28 Incl VAT will be processed on terms, conditional to the below mentioned:

…

[7] It will be discerned that K2K paid the fraudster 6 cents more than the applicant required from K2K.

(e) Payable 50% = R159,237.28 Incl VAT = on or before Friday, 20th December 2019 (2019-12-20)'

K2K was accordingly required to first pay a deposit of 50 percent of the cost of the server and was given 30 days to pay the balance of the purchase price. It is common cause that it did not pay the balance.

[28] The applicant records that Mr Govender replied to the 18 November email the same day and said that he had R160 000 in cash, slightly more than the 50 percent deposit required by the applicant, and wanted to go immediately to the applicant's Durban branch and pick up the server. The R160 000 was, however, only paid two days later, and it was on that basis that the applicant and K2K did business and the server was delivered to K2K. It is this payment that is reflected in K2K's account statement with the applicant. The applicant submits that implicit in the fact that business was done is that K2K accepted the contents of the 18 November email and agreed to the further terms imposed by the applicant.

The alleged disputes of fact

[29] The respondents, in their identical heads of argument submitted in both applications, assert that there are disputes of fact that cannot be resolved on the papers. I do not see things that way. It appears to me that both versions are quite capable of being considered without any conflict of fact arising. This is because they are not exclusionary, but complementary, versions and seem merely to cover different moments in the same story.

The applicant's case

[30] A seamless narrative, objectively verifiable by reference to documents, has been presented by the applicant. There is no dispute that the applicant and K2K agreed on the price of the server as being R318 474.50, including VAT, or that the applicant supplied K2K with the server on 20 November 2019. It is also not disputed that all that K2K paid the applicant was the amount of R160 000. The only issue to be determined is whether K2K and Mr Govender have a valid defence.

The respondents' common defences

[31] The respondents raise four identical defences in each of the applications. Those defences are best described by Mr Govender himself, who is the deponent to the answering affidavit in both applications:

'This affidavit is filed to set out my opposition to the Application on the basis that (1) the Applicant had a duty to exercise sufficient care in the conduct of the transaction to warn the Respondent of the dangers of Business email compromise ("BEC") and communicate its bank details in a safe manner; (2) the written agreement ("dealership agreement") was entered into after the agreement had been concluded in respect of the transaction at hand and payment subsequently effected; (3) the conduct of the Applicant and ongoing investigations regarding the BEC incident; and (4) the debt has subsequently prescribed.'

The first defence

[32] The respondents contend that the applicant failed to take all necessary precautions to safeguard against the risk of a cybercrime occurring, ought to have warned them of the dangers of business email compromise, and ought to have communicated its banking details to K2K in a more secure manner. Mr Govender states that:

'The Applicant owed me a duty of care and should have warned me of the dangers of cyber-hacking, spoofing of emails and that PDF documents containing sensitive information (bank details) are not always secure. Prior to this incident, I was unaware of the prevalence of BEC.'

[33] Whether a duty of care exists is a matter for judicial determination requiring the assessment of public or legal policy criteria that are consistent with our constitutional norms.[8] In *Minister of Safety and Security v Van Duivenboden,*[9] the court held that:

'When determining whether the law should recognise the existence of a legal duty in any particular circumstances what is called for is not an intuitive reaction to a collection of arbitrary factors but rather a balancing against one another of identifiable norms.'

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[8] *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* [2008] ZASCA 134; 2009 (2) SA 150 (SCA) para 12.

[9] *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para 21.

[34] The facts of this matter demonstrate that K2K, and Mr Govender, are themselves involved in the sphere of information technology. As indicated earlier, both acknowledge this fact in their respective email signature straps. Neither of them therefore may claim that they were babes in the wood, venturing for the first time into matters involving information technology. They are both involved in the same area of enterprise, yet they submit that they were entitled to be warned by the applicant of the commonly known dangers in that area of enterprise.

[35] Had the respondents had no experience or expertise in information technology matters, or had business email compromise been a rare phenomenon, then there may perhaps have been some substance to their submissions about being owed a duty of care by the applicant. But that is not the case here. I cannot conceive that right thinking members of the community would require information technology practitioners to be warned about a commonly occurring crime within their own area of expertise. Moreover, Mr Govender did not state that he did not know of the existence of business email compromise - he stated that he did not know of its prevalence. I find this to be entirely unlikely. Given his area of expertise, he cannot but have been aware of the frequency of occurrence of cybercrime generally, as most ordinary citizens of this country are. In argument, Mr Govender candidly indicated from the bar that he knew of the phenomena, but never thought that it would happen to him.

[36] As regards a duty of care being owed to Mr Govender personally, the applicant points out that he was not the applicant's client. It therefore did not owe him personally any duty of care. K2K was its client. K2K is a private company with its own legal personality.[10] Mr Govender was not K2K but was merely its representative. That being the case, it is not clear why the applicant personally owed him a duty of care. In my view, it did not. Nor did it owe K2K that duty of care.

[37] In neither of the applications is evidence adduced about the activities of the fraudster, other than the allegation that he began communicating directly with Mr Govender. How this occurred, when it occurred, and where it occurred is not addressed at all and no attempt is made to explain the interception of the electronic

[10] *Hlumisa Investment Holdings RF Ltd and another v Kirkinis and others* [2020] ZASCA 83; 2020 (5) SA 419 (SCA); [2020] 3 All SA 650 (SCA) para 42.

conversation, or the mechanics of the fraudster's conduct. The answers to these issues may have some relevance to the prospects of the respondents' defence.

[38] An email is created on a computer, or another electronic device, using a program designed for that purpose. Most computer users will be familiar with such a program, such as Microsoft Outlook, which is a popular and pervasive program designed for the sending and receiving of emails. The email message to be sent is created in that program. Where it is to be sent requires an appropriate address to be added. Generally, all email addresses have three component parts to them: the username, which comes before the '@' symbol, the '@' symbol, and the domain name, which appears after the '@' symbol. When the message is sent, it is subjected to certain protocols and then sent to a sending server. The sending server locates the receiving server to which the email is addressed and delivers it via the internet to the intended address. The recipient will then be notified of its arrival and will be able to retrieve it using, for example, a program such as Microsoft Outlook.

[39] The process of email transmission and reception accordingly has several stages, some on the sender's side and some on the recipient's side. Each stage, notionally, may be vulnerable to hacking. The point at which such hacking occurs is accordingly of some legal significance. It seems to me that if the point of interception occurred on the sender's side of the communication chain for whatever reason, including inadequate security, then there is no fault on the part of the receiver, nor can there be any liability visited upon it for the consequences of such interception. The same reasoning would apply if the point of interception was on the recipient's side.

[40] That realisation exposes the difficulty inherent in this defence. No attempt has been made to analyse where the email communications were intercepted. I have no understanding of where the entry point was at which the fraudster gained access to K2K's electronic conversation with the applicant. It is just as possible that it occurred on the side of K2K as it is on the side of the applicant.

[41] As to whether the applicant was required to take steps to ensure that cybercrime did not occur, it is not possible to make such a finding in the absence of

evidence that access was gained through a stage of communication controlled by the applicant. There is, in any event, no evidence that it did not do so. There is simply a general allegation, unsupported by any facts, that it did not do so. The fact that the fraudster managed to interpose himself into the communications does not mean that the applicant did not take any steps to prevent this from occurring.

[42] Mr Govender argues further that the applicant ought:

'… to implement adequate security measures to safeguard against harm from occurring.'

What those measures ought to have been are not revealed by him.

[43] Mr Govender contends further that the applicant sent its banking details to K2K electronically but that the communication was intercepted and substituted with the banking details of the fraudster. He, however, puts up no proof of the fact that the applicant ever made such a communication to him. He does put up four pages of email communications, covering the period 8 to 11 October 2019, where banking details feature, and he puts up a further document which purports to be confirmation of the applicant's banking details at a commercial bank, Nedbank Limited (Nedbank), issued by Nedbank. But it is apparent that this communication was not with the applicant, but with the fraudster.

[44] It is possible to be certain about this for several reasons. I earlier referred to the component parts of an email address. The applicant states that it uses the domain name 'pinnacle.co.za' on all its email accounts. The email communications from 8 to 11 October 2019, immediately prior to the payment made by K2K on 11 October 2019, are alleged by the respondents to be communications with the applicant's representatives. They were not. They were communications with the fraudster. This is known because the messages sent to K2K, and responded to by Mr Govender on its behalf, did not bear email addresses with the domain name 'pinnacle.co.za' but used the domain name of 'pirnnacle.com' (underlining added). The letter 'r' was added before the first letter 'n' in the word 'pinnacle'. The suffix of the domain name was also different: the suffix '.com' was now being used and not '.co.za'. Mr Govender was thus not communicating with the applicant's representatives when he used that domain name. He ought to have realised this. Simply looking at the email address would have alerted him.

[45] The only reference to banking details in the chain of emails put up by the respondents is to be found in an email dated 11 October 2019, which was ostensibly sent to K2K by Mr Matela who, as previously noted, is, in fact, employed by the applicant. That email reads as follows:

'Hi Morgan

Please see attached quote and banking details for payment.

This price is valid for today, I managed to get discount for you.

Kind regards'

The email address from which that email came was 'ThaboMa@pirnnacle.com' at 04h54. Five hours later, at 09h56, a further email came from the address 'christopherdv@pirnnacle.com', confirming the delivery date of the server:

'… providing you confirm order today and make payment accordingly into our Nedbank account.'

Again, the incorrect domain names were used.

[46] The Nedbank document that confirmed the banking details into which K2K was to make payment provides further evidence that K2K was not making payment to the applicant. The applicant's name is 'Pinnacle Micro Proprietary Limited'. The certificate of banking details allegedly provided by Nedbank reflects the account holder as being 'Pinnacle (Pty) Ltd'. That is not the name of the applicant. If the entity with that name was paid, then the applicant was not paid.

[47] All the information supplied to Mr Govender regarding the bank account into which payment had to be made was supplied not by the applicant but by the fraudster. The applicant did not send out its banking details because K2K already had them and had made payment to it in respect of the earlier server it ordered prior to the events in question. Moreover, the applicant does not bank at Nedbank, but at First National Bank. K2K and Mr Govender knew this, because of the prior payment K2K made into that account. An email sent from the fraudster, but which purported to come from Mr De Vries on 8 October 2019, stated the following:

'Payment well received. We notice you are still paying into our account please note that this account will be close kindly ensure all further payment are remitted into Pinnacle Pty Ltd Nedbank account, find attached copy of bank confirmation letter.'

Besides the email being addressed to Mr Govender, there are two other addressees to the email: both of those addressees used the domain name 'pirnnacle.com' and were thus addresses utilised by the fraudster.

[48] The point taken by K2K and Mr Govender that the applicant supplied its banking details in an unsafe manner has no basis in fact.

[49] In their separate but identical heads of argument, K2K and Mr Govender draw attention to *Hawarden v Edward Nathan Sonnenbergs Inc*[11] and claim that the same finding made in that matter ought to be made in this matter. In *Hawarden*, the defendant, a large firm of attorneys, had sent banking details electronically to the plaintiff that were intercepted by fraudsters. The firm of attorneys were held liable when payment was made by the plaintiff into the fraudsters' bank account. The distinguishing feature between these two matters, however, is that in *Hawarden*, there was evidence that the defendant had communicated its banking details to the plaintiff, whilst in this matter there is no evidence that the applicant ever provided its banking details to K2K or to Mr Govender.

[50] *Hawarden* is the latest reported matter on the issue of business email compromise. But it is not the only one. In *Fourie v Van der Spuy*,[12] a conveyancer paid funds into a fraudster's bank account after receiving details of the account to be paid from an email that had been sent by the fraudster. The fraudster had intercepted the email conversation between the conveyancer and the client. The conveyancer was held liable, inter alia, because the banking details had not been verified. In *Gerber v PSG Wealth Financial Planning (Pty) Ltd*,[13] a client of PSG had his email account hacked by fraudsters who then impersonated the client and obtained payment of the client's investment to themselves. This was achieved by the fraudsters getting PSG to update the client's banking details from Nedbank to First National Bank, where they banked. Unlike in *Fourie*, PSG did verify the banking

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[11] *Hawarden v Edward Nathan Sonnenbergs Inc* [2023] ZAGPJHC 14; 2023 (4) SA 152 (GJ); [2023] 1 All SA 675 (GJ).
[12] *Fourie v Van der Spuy & De Jongh Inc and others* [2019] ZAGPPHC 449; 2020 (1) SA 560 (GP).
[13] *Gerber v PSG Wealth Financial Planning (Pty) Ltd* [2023] ZAGPJHC 270.

details but did not otherwise act in accordance with its own internal protocols. It was held liable for their client's loss.

[51] The facts of this matter are different from those in the matters just discussed. For a start, the matters discussed all involved professional bodies that owed a fiduciary duty to their clients. The applicant owed no such duty to K2K or to Mr Govender. But what does emerge is the desirability of confirming banking details before making electronic payments. In my view, it does not matter what the standing of the parties is: if a payment in a substantial amount is to be made electronically, the person making the payment should verify the details of the bank account into which payment is to be made. It is a matter of common sense. In this instance, K2K received banking details about which it should have been suspicious, given its previous knowledge of the applicant's banking affairs but made the payment demanded thoughtlessly without verifying that the changed banking details that it had recently received were correct. That verification could have been easily done by contacting the applicant telephonically or by contacting the bank concerned. The applicant was not aware that incorrect banking details had been sent to K2K, so there was nothing that it could have done. If parties are not vigilant and warning signs are not considered and if payment is made without verification, then there may be no way for the party making payment to avoid the catastrophic consequences of its own decision.

The second defence

[52] The second defence raised by the respondents is that the documentation relied

upon by the applicant had been drawn up and completed after the October transaction had run its course and after payment had been made by K2K, albeit to the incorrect party. What is alleged is that the documentation, while brought into existence in November 2019, was intended to cover the October transaction. Implicit in this version is that the applicant acknowledged the validity of the October transaction.

[53] There is no evidence of this acknowledgment, and the applicant has consistently dismissed any allegation of an agreement arising out of the October

transaction. Indeed, there is evidence that it was not the case. Given his reliance on the intercession of the fraudster, Mr Govender must and does acknowledge that only the fraudster, and not the applicant, was paid arising out of the October transaction. That being the case, the applicant would have no interest in creating and formalising documentation relating to that transaction. The applicant has consistently contended that there was no agreement with it in October and that it received no payment arising out of the October transaction. In other words, why would the applicant formalise a transaction that it did not recognise, and which held no benefit for it? The effect of such an agreement would be that the applicant would have to deliver a server without receiving payment for it. The proposition must simply be stated to be rejected.

[54] The applicant has admitted that it received R160 000 from K2K on 20 November 2019. The respondents agree that this is what was paid to the applicant. Thus, despite not recognising the November transaction, the respondents concede that K2K made a payment to the applicant in November 2019. Why this payment was made on their version is not explained by them. On their version, nothing would be due: the full price had been paid and the documentation prepared by the applicant related to that very transaction.

[55] This payment is destructive of the premise upon which the October transaction is based, which according to the respondents, was a complete transaction in respect of which the agreed purchase price was paid in full. The payment of the R160 000 either means that K2K agreed to pay R160 000 more than the server was worth (having already paid R318 474.56) or that the applicant agreed to sell the server to K2K for half its value, because the sum of R160 000 is the only payment that the applicant ever received for the server, which was valued at R318 474.50. The respondents have not suggested that either proposition applies. The payment of R160 000 made on 20 November 2019 by K2K is therefore unexplained if the October transaction is accepted as being the true transaction. It is explained, however, if the true transaction is accepted as being the November transaction.

The third defence

[56] This defence is more a complaint than a legal defence. Mr Govender is dissatisfied that the applicant's accounts department did not inform him immediately that payment had not been made to it. He is also unhappy with the applicant's promise to investigate what happened. This may be a failing on the applicant's behalf. It may demonstrate that the applicant's accounts department took its eye off the ball for a moment. It clearly did not realise that no order had been placed with the applicant and that no payment had been made to it either. I can understand Mr Govender's frustration. But the fact of the matter is that the applicant was not paid, a fact conceded by Mr Govender, and until it was paid, it was under no obligation to deliver the server.

The fourth defence

[57] It is apparent that K2K and Mr Govender rely upon the October transaction for the defence of prescription. They first assert in their respective answering affidavits that the period of prescription began running on 11 October 2019, that being the date of the applicant's final quotation regarding the price of the server. The respondents assert further that the application was served upon them on 17 November 2022, more than three years after 11 October 2019, and that the matter has therefore become prescribed. A quotation has been put up by the respondents. But it is apparent that it is a quotation from the fraudster and not the applicant. This can be determined by virtue of the fact that it is in the amount of R318 474.56, the amount fixed by the fraudster, and which varied from the actual price charged by the applicant by 6 cents. Moreover, as Mr Govender conceded in argument, that quotation had come from the email address used by the fraudster.

[58] However, in their heads of argument, this version is deviated from by the respondents, and a fresh allegation is made that they were notified by a representative of the applicant on 5 November 2019 that payment had not been received and that prescription began to run from this date and was therefore complete by 4 November 2022. On this argument, the debt had also become prescribed. This version does not appear in the answering affidavit.

[59] It is common cause that the applicant never supplied K2K with a server in October 2019. It may well have contemplated doing so, and it may even have

wanted to do so, but the reality is that it still had the server in its possession on both 11 October 2019, being the date of the fake, final quotation, and on 5 November 2019, being the date upon which K2K and Mr Govender were advised that payment had not been made to the applicant. There was thus no complete transaction between K2K and the applicant and no debt arose therefrom. There was accordingly nothing that could have prescribed.

[60] Given that Mr Govender admitted that he had agreed to the terms contained in the 18 November email, prescription would only have been completed by 19 December 2022 and the application papers were served on the respondents on 17 November 2022, well before then. The point of prescription arising out of the October transaction is accordingly without any merit.

Additional defences

[61] In their individual heads of argument, the respondents raised additional defences not raised in their answering affidavits. Given Mr Govender's lack of legal training, he may again not personally have known that defences must be raised on affidavit and not in heads of argument. Rather than penalise him for such assumed lack of knowledge, I shall accordingly briefly consider these additional defences.

[62] The respondents claim that the applications ought to have been brought in the magistrates' court. This point seems to have been taken because of the quantum of the applicant's claim and because in terms of the application form, K2K consented to the jurisdiction of the magistrates' court. However, in terms of s 21 of the Superior Courts Act 10 of 2013, a high court has jurisdiction over all persons residing within its area of jurisdiction. Mr Govender is resident in Durban, and K2K's registered address is also in Durban. In *Standard Bank of SA Ltd and others v Mpongo and others*,[14] in deciding whether a high court could refuse to entertain a matter that fell within the jurisdiction of a magistrates' court, the Supreme Court of Appeal held that:

[14] *Standard Bank of South Africa Ltd and others v Mpongo and others* [2021] ZASCA 92; 2021 (6) SA 403 (SCA); [2021] 3 All SA 812 (SCA); confirmed by the Constitutional Court in *South African Human Rights Commission v Standard Bank of South Africa Ltd And others* [2022] ZACC 43; 2023 (3) SA 36 (CC).

'(1) The High Court must entertain matters within its territorial jurisdiction that fall within the jurisdiction of a Magistrates' Courts, if brought before it, because it has concurrent jurisdiction with the Magistrates' Court.
(2) The High Court is obliged to entertain matters that fall within the jurisdiction of a Magistrates' Court because the High Court has concurrent jurisdiction.'[15]

[63] The fact that K2K consented to the jurisdiction of the magistrates' court does not mean that the applicant was obliged to litigate out of that court. The applicant is *dominus litus* and can choose the court out of which it wishes to litigate and is not necessarily obliged to litigate out of a court consented to. Where there is concurrent jurisdiction, an applicant may therefore choose which court to approach.

[64] A further defence raised by K2K and Mr Govender is that the applicant's founding affidavits were commissioned by a police official holding the rank of constable. Mr Govender submits that only police officials who hold the rank of captain and above are commissioners of oaths. This, so he claims, arises from the provisions of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963 (the Act). In the circumstances, he contends that the founding affidavit has not been properly commissioned and is accordingly defective.

[65] The respondents are, unfortunately, entirely mistaken in this belief. Sections 5 and 6 of the Act read as follows:
'5(1) The Minister may appoint any person as a commissioner of oaths for any area fixed by the Minister.
(2) Any commissioner of oaths so appointed shall hold office during the Minister's pleasure.
6. The Minister may, by notice in the *Gazette,* designate the holder of any office as a commissioner of oaths for any area specified in such notice, and may in like manner withdraw or amend any such notice.'

[66] Government Notice 903, published in *Government Gazette* 19033 on 10 July 1998 (as amended from time to time), designates who are commissioners of oaths. Item number 63 of that Notice reads as follows:

[15] Ibid para 88.

‘South African Police Service: All members of the Force, including temporary members, members of the Reserve Police Force and members of the Police Reserve when on duty as such.’

The point taken is thus misconceived.

Analysis

[67] Rather than there being a dispute of fact arising out of the versions of the two parties, it appears to me that the two versions simply each narrate a different chapter of the same story. There are thus no disputes of fact. The respondents’ version that the documentation relied upon by the applicant recorded the October transaction and not the November transaction cannot be correct, because it does not make logical or commercial sense. The payment of the deposit of R160 000 by K2K on 20 November 2019 is a mortal blow to the respondents’ version. The payment was clearly a deposit, and the balance was to be paid within 30 days.

[68] And thus, I accept the applicant’s version that the November transaction explains how the indebtedness of K2K, and Mr Govender, to the applicant arose.

Part A

[69] There remains the relief claimed against K2K in Part A of the application with case number D12901/2022. The information and documents sought arise out of the cession by K2K of its book debts to the applicant. The application in this regard is pleaded in a rather threadbare fashion. There is no specific allegation in the founding affidavit on the relevance of the documents and information identified in the notice of motion. As there is no real dispute over the applicant’s entitlement to this information, I shall grant the relief claimed, but in pared down form. Some of the information sought is vague and the period over which it is claimed is theoretically the entire period of the existence of K2K. That is too long and cannot be justified. I intend to exclude some of the information sought on the grounds of a lack of relevance to the right being exercised and I intend restricting the period over which the information must be provided to a six-month period immediately prior to the date of this order.

Some bouquets

[70] It would be remiss of me not to comment on the way this application was argued, largely by Ms Vorster and, to a lesser extent, by Mr Govender. Ms Vorster approached the matter in an entirely practical manner and made all the necessary concessions that were required. She immediately proposed that the conduct of the applicant's attorneys in splitting the applications was not acceptable. She was right to do so. In addition, she displayed a remarkable empathy for the plight of Mr Govender and praised him for the way he had prepared his and K2K's defences. Ms Vorster's approach was refreshing and uplifting, and she is thanked for the sensitive way in which she approached the matter.

[71] Mr Govender is a thoroughly decent man who made a mistake that has had unfortunate consequences for his business. It is impossible not to have a great deal of sympathy for him. In argument, he acknowledged his errors, which he did unhesitatingly, and said that if he had the money demanded by the applicant from K2K and himself, he would have immediately paid it to the applicant. I have no doubt that is true. That is the mark of an honourable man. But it is also the death knell of any defence that the respondents have.

Some brickbats

[72] The applicant's attorneys are a pre-eminent firm of attorneys based in Durban with a branch, inter alia, in Johannesburg. It would accordingly be equally remiss of me not to comment on their conduct in bringing two applications when only one was called for.

[73] What they did was plainly undesirable: as the applications are presently framed, there is the potential for the applicant to double recover because the judgments sought are not to be joint and several with each other; the applicant's attorneys have charged fees for preparing two applications when only one should have been prepared; and the time of two judges has been taken up when only one judge ought to have been seized with the matter. These errors were compounded and exacerbated by what then occurred when the matter was argued.

[74] Ms Vorster, as was to be expected, had seen the difficulty of there being two applications when she prepared and advised me that she had consequently sought

instructions from her attorneys on why this had occurred. She indicated that she had been instructed that the application against K2K had first been prepared and launched. Due to some difficulties with details regarding the surety, Mr Govender, the application against him was later launched. That was why there were two applications. I pointed out to her that this could not be so as the applications had sequential case numbers and both applications had been issued by the registrar on the same day. Ms Vorster, very sensibly, acknowledged this to be the case, but said that her instructions were limited to what she had already said and could offer no other explanation.

[75] I, again, have no doubt that this was correct, but it is unacceptable that the applicant's attorneys could arm her with a version that was obviously false and expect her to persuade the court to accept it as being the truth. The end result is that I do not know why the applicant's attorneys acted as they did. It appears to me that it may simply have been out of greed. The applicant's attorneys, and other like-minded attorneys, must be discouraged from acting in a similar fashion in the future. This conduct is not acceptable and there must be consequences.

[76] Ms Vorster made some further submissions on what those consequences should be, with which I entirely agree, and which will be reflected in the order that I intend granting.

Costs

[77] Mr Govender argued that in the event of costs being awarded in both applications, they should be awarded on the magistrates' court scale. Ms Vorster submitted that the application against K2K had to be brought in the high court because the relief sought in Part A of the notice of motion in case number D12091/2022 was for the specific performance of a contractual obligation, namely the cession of book debts, without the alternative of a damages claim, something that is required in the magistrates' court.[16] The flaw in that argument was that Part B, the claim for the money judgment against K2K, was the alternative to the claim for specific performance, even if it was not framed in that fashion. The application could

[16] Section 46(2)*(c)* of the Magistrates' Courts Act 32 of 1944.

have been brought in the magistrates' court. The applicant shall have its costs order on the attorney and client scale, but on the magistrates' court scale.

[78] As regards the costs order sought against Mr Govender in case number D12090/2022, Ms Vorster conceded that the order could not be on the attorney and client scale as the deed of suretyship does not provide for it. In my view, as a mark of the court's displeasure with the conduct of the applicant's attorneys, no costs at all should be awarded in that case.

Conclusion

[79] It is entirely permissible for a money judgment to be granted in application proceedings.[17] The applicant was thus entitled to approach this court on motion with a request for such a judgment to be entered. It was not entitled to approach this court twice, as it has done. Attorneys must not think that matters can be split in two so that they can reap two sets of costs.

Order

[80] I accordingly grant the following order:

Case number D12091/2022

1. The relief claimed in Part A of the application is granted and K2K Information Systems Proprietary Limited is directed within 20 days of the granting of this order to disclose the following information to the applicant in writing:

1.1 all applications for credit concluded between itself and its customers over the six-month period immediately preceding the date of this order (the period);

1.2 all orders received by it over the period;

1.3 all invoices issued by it over the period;

1.4 all credit notes issued by it over the period;

1.5 all customers' statements issued over the period; and

1.6 a detailed analysis of K2K Information Systems Proprietary Limited's debtors and creditors over the period.

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[17] *Lutchman v Perumal* 1950 (2) SA 178 (N) at 180.

2. In terms of Part B of the application, judgment is entered against K2K Information Systems Proprietary Limited for payment of the amount of R158 474.50.

3. Such judgment shall be joint and several with the judgment entered against Morganthiren Govender under case number D12090/2022 hereunder.

4. Interest shall run on the judgment amount at the rate of 7 percent per annum, as calculated from the date of demand to the date of payment, both dates inclusive;

5. K2K Information Systems Proprietary Limited shall pay the applicant's costs:

5.1 On the scale as between attorney and client; and

5.2 On the magistrates' court scale.

Case number D12090/2022

1. Judgment is entered against Morganthiren Govender for payment of the amount of R158 474.50.

2. Such judgment shall be joint and several with the judgment entered against K2K Information Systems Proprietary Limited under case number D12091/2022 above.

3. Interest shall run on the judgment amount at the rate of 7 percent per annum, as calculated from the date of demand to the date of payment, both dates inclusive;

4. There shall be no order as to costs in this matter.

5. The applicant's attorneys shall not be entitled to claim any fees from the applicant under this case number.

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MOSSOP J

APPEARANCES

Counsel for the applicant in both matters	:	Ms A Vorster
Instructed by:	:	Cox Yeats (Johannesburg) Care of: Cox Yeats (Durban) 45 Vuna Close Umhlanga Ridge Durban
Counsel for the respondent in both matters	:	In person
Instructed by	:	Not applicable