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

SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

CASE NO: 08/2013

Reportable

In the matter between:

ABSA BANK LIMITED **APPELLANT**

and

DANIEL JOSEPH HANLEY **RESPONDENT**

Neutral citation: *Absa Bank v Hanley* (08/13) [2013] ZASCA 183 (29 November 2013).

Coram: Malan, Wallis, Petse, Saldulker JJA et Van der Merwe AJA

Heard: 01 November 2013 Delivered: 29 November 2013

Summary: Bank and customer relationship - payment instruction unauthorised - duties of customer in drawing payment instrument - proximate cause of loss - negligence of bank.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Mothle J sitting as court of first instance):

The appeal is dismissed with costs including the costs of two counsel.

JUDGMENT

Malan JA (Petse, Saldulker JJA et Van der Merwe AJA concurring)

[1] This appeal concerns a fraud perpetrated on both the appellant and the respondent by an international fraudster, who had been sought by Interpol and the South African and other police services. Mr Joe Hanley, the respondent, is an Irish solicitor. The appellant, which was the defendant in the court below, is ABSA Bank Limited, a South African bank with its offices for its private bank based in Parktown, Johannesburg. The fraudster was introduced to Hanley as Roger Wilcox but he was known to ABSA as Jean- Claude Olivier Alain La Cote. La Cote was subsequently arrested but escaped. His present whereabouts are unknown.

[2] Hanley claimed an amount of US$ 1,6 million that ABSA, without his authority, debited to and transferred from his currency investment account held at ABSA Private Bank. Fortunately, some of the proceeds of La Cote's elaborate fraud were recovered and Hanley's claim was eventually agreed in an amount to US$ 896 500.

[3] Mothle J, sitting in the North Gauteng High Court, upheld Hanley's claim. He found that, although Hanley had been negligent in some respects the proximate cause of
Hanley's loss was the negligence of the appellant's employees.

The background

[4] On 23 June 2003, Hanley was introduced to Andriëtte Fourie, an assistant of Tim Hewan, a private banker, at the offices of ABSA's private bank. She opened the account and subsequently telephoned Hanley to give him the account number. Hanley then made arrangements for US$ 1,75 million to be transferred from his solicitor's account in Ireland into this account. Hanley was the only signatory on the account. On 7 July an amount of US$ 100 000 was transferred, with Hanley's authority, from this account to the bankers of Aer Lingus, AIB Bank, Dublin. On 9 July an amount of US$ 1,6 million was transferred to Coutts & Co, London, via Harris Bank, the appellant's correspondent bank in New York, for an account in the name of 'Storacar / client account Joe Hanley'. Hanley's case is that he did not authorise the transfer of the US$ 1,6 million. During the course of the trial it became clear that he in fact did not. It was accepted on appeal that this transfer was unauthorised and that it was brought about by the presentation of a fraudulent transfer instruction to ABSA by La Cote and his cohorts.

[5] Hanley became involved with ABSA because his brother, Noel Hanley, required finance to purchase certain aircraft on behalf of Euroceltic Airways Limited, a company controlled by him, from Aer Lingus for US$ 3 million. In terms of the sale agreement a deposit of US$ 590 000 had to be paid, the balance being payable on delivery of the aircraft. The purchaser was obliged to take delivery by 30 June and, if not, the deposit was to be increased by US$ 100 000. In terms of a subsequent variation of the agreement, however, the deposit was not to be increased provided delivery was taken on 4 July.

[6] Noel Hanley paid the deposit, had some cash available (US$ 600 000) but still required finance for the balance. An aircraft broker referred him to La Cote, who was then in South Africa, and who had placed an advertisement on the internet under the name Roger Wilcox - CP CORPCAN offering to finance aircraft deals. In terms of a funding agreement dated 24 June 2003 concluded between the latter and Euroceltic, CP CORPCAN agreed to advance, subject to

Government authorisation (that is, Reserve Bank approval), US$ 3,5 million to Euroceltic on the deposit by the borrower of US$ 1,75 million as a security deposit into either Euroceltic or Hanley's account in Johannesburg. Thereafter, the amount of the security deposit had to be transferred to an escrow account controlled by both parties.

[7] AIB Bank in Ireland was prepared to advance an amount of US$ 1,150, 000 to Noel Hanley against a mortgage on his house. One of the bank's conditions was that the amount of their advance be deposited into the account of a solicitor until the whole of the purchase price was received. Hanley, who practised in partnership with his sister under the name Hanley and Lynch, agreed to hold the loan amount subject to this condition. He received the amount of US$ 1,75 million, that is, the amount his brother had available plus the amount advanced by AIB in the partnership account. He had full control over it.

[8] La Cote initially wanted the security deposit to be paid into an account controlled by him. To this end and with the assistance of Hewan, Hanley opened a bank account with the appellant under his name but trading as Euroceltic Airways. Hanley, however, refused to make the deposit into this account because La Cote had sole signing powers on it. It was then agreed that Hanley would come to South Africa to open a foreign currency account with the appellant in his own name.

[9] Aer Lingus had agreed not to impose the penalty, provided payment was made by 4 July but required that it be paid if the extension was to be to the end of July. A supplementary agreement between Euroceltic and CP CORPCAN was concluded on 26 June 2003 in terms of which the latter agreed to provide this amount so as to extend the date. It was eventually paid by Hanley in the circumstances referred to below.

The attempts

[10] La Cote made two attempts to misappropriate the funds in Hanley's account. The first was a letter sent by facsimile from the Mostyn Hotel, London, dated 30 June and addressed to Fourie requesting the transfer of US$ 1,75 million from Hanley's account to Coutts & Co for the account of 'Storacar / client account Joe Hanley'. The letter purported to be signed by Hanley. It is clear that he did not do so. When Fourie referred the letter to the Rosebank office of the appellant, the transfer was declined because the instruction had come by way of facsimile. Hewan was made aware of the fax. He called the number given on the letter, spoke to a person he thought was Hanley and informed him that the bank required the original documentation. Hewan also told the person that a certain amount had to be left in the account for it to remain open. Hewan had neither met nor

spoken to Hanley before.

[11] The second attempt was made on the same date by letter also from the Mostyn Hotel but for the transfer of US$ 1,74 million to the same beneficiary (which would have left a credit balance in the account). A letter was addressed to Hewan, also purporting to have been signed by Hanley and containing the same contact telephone number as the first. Hewan telephoned the person he thought was Hanley and arranged for his nephew, who was travelling from London to South Africa on that day, to bring the letter with him. He fetched his nephew at the airport and left the letter at their Rosebank office. One Adele at that office noticed that the signature differed from Hanley's specimen signature and declined to authorise payment. Fourie and Hewan communicated again with this person in London and arranged for the bank's transfer document, form 702, to be faxed for completion to London.

The transfer forms

[12] The bank's transfer form, headed 'Application for overseas payment', consisted of a single document printed on both sides with spaces to be filled in on the front page indicating the amount, customer name and address, as well as details of the beneficiary and its bank account. At the foot the words 'Continues overleaf' were printed. The back page of the form contained a section where the purpose of the payment and the beneficiary's details were to be filled in. Other particulars also had to be supplied. The applicant had to sign the back page twice indicating the date and place of signature. A blank section for the bank's stamp was at the foot of the back page. The back page of the form did not contain a space where the amount to be transferred had to be filled in. It had to be specified on the front page only. The form could not be sent by facsimile as a document consisting of one page with printing on both sides. The back and front pages had to be transmitted separately. A blank 702 form was faxed in this manner to the person in London. It arrived in London as two separate pages.

The first transfer

[13] Hanley was not in London on 30 June. On that day he flew with his daughter from Dublin to the south of France for their holiday until 12 July. La Cote telephoned him there and said that he was sending his secretary to Paris with some documents, for him to sign. Hanley flew to Paris, met her on 3 July and signed two Cathedral Rock loan agreements on behalf of his brother. They were similar to the ones he had already signed on 24 June but La Cote had explained to him that they first required Reserve Bank approval for the transfer of the purchase price of the aircraft. Hanley refused, however, to sign a third document (the second page of a blank 702 transfer form).

[14] On the insistence of his brother and La Cote, Hanley travelled to Johannesburg again and arrived on 4 July. He had to attend to the transfer of US$ 100 000 to Aer Lingus being the penalty for the extension of the date of payment for the aircraft, to the end of July. La Cote told him to wait at his hotel and arranged for the transfer forms to be taken to the bank. One of La Cote's associates, Nick Havvas (who was known to Hanley as Peters), arrived with two copied pages of the front and back of a 702 transfer form. Hanley signed at least five transfer forms during the course of that day and completed at least four first pages with the payment instructions. All of them were signed and dated 3 July 2003, London when he was in fact in Johannesburg. On the second page of the first one and in the space where the beneficiary details had to be filled in Hanley wrote, 'AER LINGUS LIMITED DUBLIN AIRPORT DUBLIN VIA NEW YORKDOLLAR A/C'. He gave it to Havvas. At this time he also wrote his first letter, referred to in paragraph 16 below, to the bank and gave it to Havvas to take it to the bank. After Havvas had left the hotel, La Cote telephoned Hanley to tell him that the first form was not acceptable to the Reserve Bank because he had written in the space reserved for filling in by the bank. Havvas returned with another two page form and Hanley filled in both pages and on the second page wrote 'DEPOSIT PENALTY PAYMENT OF 100 000 US DOLLARS to AER LINGUS LIMITED' in the space reserved for the purpose of payment. La Cote was not satisfied and said that the Reserve Bank would require the contract with Aer Lingus which would delay the transfer. Havvas brought him yet another transfer form which he completed. He wrote in the space where the purpose of the payment had to be set out, 'TO AER LINGUS LIMITED'. La Cote was, yet again, not content.

[15] La Cote sent Havvas back again with another two page form. Hanley was to remove all reference to Aer Lingus. Hanley filled it in and on the second page wrote '100 000 USD DEPOSIT SEE PAGE 1'. La Cote was now satisfied. The scene was now set for La Cote to misappropriate the balance on the account. The amount on the last document was subsequently altered to provide for payment of US$ 1,6 million and the first page substituted with a false document containing an instruction to the bank to make payment of the amount as altered.

[16] Hanley's chronicle relating to his completion and signing of the different forms is hardly satisfactory. He could not explain a fifth form signed by him where, in the space for the details of the beneficiary, he wrote, 'AER LINGUS LIMITED', and underneath it, 'DUBLIN VIA NEW YORK DOLLAR ACCOUNT'. On the first page the beneficiary was specified as Allied Irish Bank (together with its address and account number) and the amount as US$ 100 000. This document was received by ABSA and formed the basis of the transfer of US$ 100 000 which Hanley admitted he had authorised. It is clear from the minutes of the Rule 37 conference that Hanley admitted signing it. In his evidence, however, he stated that he thought it was a forgery. He was simply unable to explain it. The letter that he gave to Havvas was delivered to the appellant and was stamped by the

bank on 7 July 2003. It was dated 3 July 2003, London, and read ('the first letter'):

'Please transfer immediately today for value today the sum of 100 000 (one hundred thousand US Dollars) to:

Allied Irish Bank New
York Branch 405 Park
Avenue New York NY
10022 USA
ABA 0260-0885-3 Beneficiary
Aer Lingus Limited
Account No 01……..
from my account 8…….
Please fax details of Swift transfer ASAP to Aer Lingus legal Department Attention John Gourley Fax No. +353-1-886 2460.
Regards
[Signed Daniel J Hanley].'

[17] The last form referred to and Hanley's first letter were delivered to Fourie in an open Fedex envelope by Havvas. She approved of them and the transfer requested was done through the Rosebank office of the appellant. The two pages of the transfer form each contained two stamps of the appellant's international division, both of which were dated 7 July 2013. Fourie, however, had dealt with this transfer already on 4 July when she sent the confirmation to AIB and Hanley. Owing to the public holiday in the USA, the transfer was to be effected on 7 July only. AIB received the funds and Fourie faxed confirmation of the payment to Hanley at the fax number of the Mostyn Hotel in London. Hanley did not receive it but said he had heard from his brother that the payment to Aer Lingus had been made.

[18] All the forms signed by Hanley were dated as at 3 July 2003 in London but were in fact signed by Hanley on 4 July at his hotel in Johannesburg. He had done so at the request of La Cote. He explained that he did what La Cote had told him to do in order to obtain Reserve Bank approval for the payment of the penalty amount so as to extend the closing date of the aircraft purchase agreement. He testified that he was not familiar with South African banking law and business affairs and had accepted what La Cote had told him. While Hanley was on vacation in France he spoke to Fourie and told her to expect two transfers to be made into the account (that is for the purchase price of the aircraft and the amount of the penalty La Cote undertook to provide). Shortly thereafter, he received a call from La Cote telling him not to communicate with the appellant as it would

jeopardise negotiations with the Reserve Bank.

The second transfer

[19] US$ 1,65 million was left in Hanley's account after the first payment was made. On 5 July Hanley, reunited with his family in the south of France, received a call from La Cote who wanted to fax to him some 'pro forma' documents for signature to expedite obtaining the Reserve Bank's approval for the transfer of the purchase price to the sellers of the aircraft. Hanley received the fax at the post office of the small village where he and his family were staying. It read:

'Please in hand writing nothing more nothing less and signed 3 times. Also fill in the transfer form, fax everything except the back pages of the transfer I only need the details of transfer at this stage. +27 11 4769087 to my attention. Keep the originals, I will send a courier on Wednesday to pick them up.
Thanks
Remember the transfer has not been done yet! We are just getting ready and will need the originals in order to proceed.'

Hanley wrote the letter to Fourie insisted on by La Cote and completed the first page of the transfer form. The first page provided for the transfer of some US$ 5 415 million (this is the total of US$ 3,5 million and the amount remaining in Hanley's account plus interest) to the account of Hanley and Lynch. Although not everything made sense to Hanley, he wrote the letter which La Cote had insisted he complete in his own hand. It was dated 8 July 2003, London, and read as follows (the second letter):

'To Andriëtte Fourie
Thanks again for the transfer to Aer Lingus as it was a very urgent matter. Please proceed immediately with the transfer as instructed on the attached document. The funds will be used in Europe as collateral for an airplane business.
Please keep 25,000 US Dollars on my account and 25,000 US Dollars on my brother's account in order to keep our accounts open for further business.
Thank you
[Signed Daniel J Hanley (three times)].'

Hanley faxed all these documents from the village post office to the number supplied by La Cote.

[20] An imposter pretending to be Hanley telephoned Fourie on 8 July and told her that a second

request for a transfer was coming through. Havvas made his appearance at the bank again and gave her a copy of the second letter and a two page transfer form in which the transfer of US$ 1,6 million was requested. The documents were in an open Fedex envelope. Fourie was suspicious because the envelope was opened but thought that, because there was a pending business transaction between La Cote and Hanley, it was not unusual for one party to deliver the other's documents. Fourie signed a stamp on the transfer document confirming that Hanley's signature had been verified. She did not notice the alteration on the second page reading '1,600,000 USD DEPOSIT SEE PAGE 1'. It is not disputed that the amount of US$ 100 000 was altered to 1,6 million by writing a '1' before the 100 000 and changing the original '1' into '6'. Fourie did not pay attention to the alteration and did not think that it stood out. In any event, Hewan told her that the amount of US$ 1,6 million was going out of the account. She authorised the transfer which was effected by the Rosebank office. In deciding to authorise the transfer she did not rely on the accompanying letter (which could not have been the original) at all. The alteration was not initialled, nor was there a signature on the first page of the form.

[21] Hanley requested a bank statement from Fourie on 25 July 2003 and realised then, for the first time, that an amount of US$ 1,6 million had been transferred out of his account.

Findings of the High Court

[22] Mothle J found that Hanley was a reliable and credible witness. He was, however, generally critical of the appellant's witnesses. He found that Gert Smith, a forensic investigator employed by the appellant, had made concessions under cross-examination to the effect that the conduct of Hewan and Fourie was irregular and contrary to banking practice. Fourie, he found, was not an impressive witness. She could not recall events that tended to implicate her and the appellant but remembered those that were not contentious. Alan Bentley, who was called as a banking law expert, readily admitted that he was not. He conceded that neither Fourie nor Hewan conducted themselves in accordance with normal banking practice. Hewan was found to be unreliable and not credible.

[23] Mothle J found that Hanley was naïve to have acted in the way he conducted himself. He did, however, take some precautions to protect the funds in his account. For example, he refused to have the funds paid into La Cote's account and refused to sign a blank transfer form in France. In writing the two letters, completing the transfer form and dating them 3 July 2003, London, Hanley was found to have been negligent. He may have been gullible in believing La Cote that the documents were required for Reserve Bank permission. However, he was under pressure from his brother which compromised his objectivity. He failed, the judge below found, to have exercised the care a reasonable customer owed his bank. His conduct, however, did not amount to a

misrepresentation to induce the bank to make payment. The plea of estoppel was therefore dismissed. The court below found the conduct of both Fourie and Hewan to be negligent and the proximate cause of the loss. During the hearing of the appeal, counsel for the appellant, for obvious reasons, indicated that the appellant was no longer relying on estoppel.

The bank and customer relationship

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

[25] The relationship between a bank and its customer is unique and involves a debtor and creditor relationship. The relationship is contractual and may involve several agreements establishing different accounts. These agreements, generally, require the bank to perform certain services for the customer. Whether it relates to one or more of these services, the agreement giving rise to them is an agreement of mandate.[1] The agreement between Hanley and the appellant involved the rendering of payment services to him. A bank undertaking to transfer funds on the instructions of its customer acts as a mandatary.[2] The principal duty of the bank effecting a credit transfer is to perform its mandate timeously, in good faith and without negligence.[3]

[26] The duty of the customer to draw his payment instructions with reasonable care in order to prevent forgery or alteration and to warn of known or suspected fraud or forgery arises from this relationship. It has been accepted that in the case of a telegraphic transfer the same principles as those governing the drawing and payment of cheques apply. No doubt this is also the case where the payment instruction is given by way of an application for an overseas credit transfer, such as in this case. It was stated that 'a customer owes a duty to draw his cheques with reasonable care in order to prevent forgery'.[4]The customer's duty is a restricted one:[5]

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[1] See J T Pretorius 'The Forgery of a Drawer's Signature on a Cheque: Proposals for the Reform of the South African Law' in Coenraad Visser (ed) Essays in Honour of Ellison Kahn (1989) at 271; See F R Malan, J T Pretorius and S F du Toit Malan on Bills of Exchange, Cheques and Promissory Notes in South African Law 5ed (2009) at 300ff and R J Pothier Verhandeling van het Wissel-Recht (translation J van der Linden) 1.4.54.

[2] Malan at 275ff.

[3] McCarthy Ltd v ABSA Bank Ltd 2010 (2) SA 321 (SCA) para 22. See Royal Products Ltd v Midland Ltd and Bank of Valetta Ltd [1981] 2 Lloyds LR 194 (QB) at 198; Selangor United Rubber Estates Ltd v Cradock & others [1968] 2 All ER 1073 (ChD) 1119E-H and the authorities cited in n 5.

[4] OK Bazaars (1929) Ltd v Universal Stores Ltd 1973 (2) SA 281 (C) at 288.

[5] *Big Dutchman (South Africa) (Pty) Ltd v Barclays National Bank Ltd* 1979 (3) SA 267 ((W) at 283A-B. See *Holzman v Standard Bank Ltd* 1985 (1) SA 360 (W) at 363H-I; *Barclays Bank DCO v Straw* 1965 (2) SA 93 (O) at 95D-F; *Standard Bank of SA Ltd v Kaplan* 1922

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

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

cheque or payment instruction was drawn.[6]

[27] The appellant, however, contended that the requirement that the negligence of the customer had to be in the transaction itself, that is, in the manner in which the document was drawn, is not as limiting as it may seem. It was contended that the relationship between a bank and its customer is a continuing one and therefore involves a continuing duty on either side to act with

reasonable care to ensure the proper operation of the account.[7] Attempts to widen the duty that a

customer owes to his bank have not been successful.[8] It required legislation in South Africa to place a somewhat more extensive duty on certain selective customers to exercise reasonable care

in the custody of cheque forms and the reconciliation of bank statements.[9] The fact that the relationship is a continuing one means no more than that the customer has a continuing duty to inform the bank of known or suspected forgeries and to draw his payment instructions with care. The appellant does not contend that Hanley had been aware of the forgery or alteration or that he suspected forgery or alteration of his payment instruction.

Hanley's conduct

[28] The question is whether Hanley complied with his duty to give his instructions with reasonable care. The court below found that he had been negligent in writing the letters purporting to be from London. Whether he had been negligent in doing so seems to me irrelevant. The reason why the appellant's employees were under the impression that Hanley was in London rather lies in the two attempts made by the two letters both dated 30 June 2003 and sent from the Mostyn Hotel, London and the subsequent telephone calls Hewan made to the London number reflected on the letters. Hewan also arranged for his nephew to collect a document at Heathrow. Any impression on the part of the appellant's employees that Hanley was in London had been caused by La Cote, not Hanley. Fourie's evidence is, in any event, that she did not rely on Hanley's second letter which also purported to have been written in London when deciding to make payment of the US$ 1,6 million.

[29] Hanley did indeed try to link the two pages of the various transfer forms signed by him. He was aware of the fact that he was signing two separate pages and that there was no blank space for a signature on the first page. He attempted to link the two pages by adding various notations on the second page in the blocks left blank. Not all of them were acceptable to La Cote. He completed the different forms and signed them under the most bizarre of circumstances. He did not go to the bank, as he could and should have done, but sat in a hotel room. How he could have been persuaded by La Cote is difficult to believe. Nevertheless, Hewan was also taken in by La Cote. Hanley's attempts to reduce the risk involved in signing these forms were ineffective. He realised that his signature on the second page had to refer to the first page where the amount and particulars of the beneficiary appeared. It must have been obvious to him that his signature on the second page could be used with a different, substituted, first page. This is what happened. In doing so, despite having been aware of the risks involved and anxious to safeguard his position, he acted in breach of his contractual duty to draw his payment instruction with reasonable care. Page two of the transfer document in which he instructed the bank to transfer US$ 100 000 was indeed used with a fraudulent page one in which payment of US$ 1,6 million was sought. It was, however, not foreseeable that the figures and words used to link the two pages, '100 000 USD DEPOSIT SEE PAGE 1', would be altered as they were. Nor did the manner in which Hanley wrote them on the

second page facilitate the alteration.

The bank's negligence

[30] The appellant conceded in its heads of argument that the acts and omissions of the bank's officials left much to be desired but submitted that they did not amount to negligence and were not the proximate cause of the loss. In view of the many concessions made by the appellant's witnesses, these submissions cannot be accepted.

[31] It was contended that the alteration of the US$ 100 000 to US$ 1,6 million was not noticeable but only discernible on a close inspection. It was also contended that the alteration was not apparent so as to put the bank on guard: it was not a cheque which permits of no alterations. The alteration was contained in a space where the purpose of the payment had to be set out and not where the amount of the payment ordered had to be filled in. Moreover, so the appellant argued, the amount as altered corresponded with the amount on the first page of the two page document. Fourie accepted that it was a coarse alteration although she did not notice it at the time she received the document. This is also my observation. Bentley required an initial on the first page. He said in his evidence-in-chief that he would not have observed the alteration and would not have expected the amount of the transfer to be in the space providing for the purpose of the payment. He did concede, however, that where the payment instruction was contained in two separate pages, a signature on the first would have assisted. He would have been concerned and would have telephoned the customer to confirm all the details of the transfer. It would have been prudent to verify the signature. He also conceded that there was some overwriting of the six over the zero next to it and agreed that if Fourie had noticed the alteration she should have acted upon it by going to a superior.

[32] Hanley gave both his mobile phone and office numbers to Fourie when he opened his account. Neither Fourie nor Hewan called him at these numbers. They simply assumed that the person they were talking to was Hanley. As I have said, any belief they might have had that Hanley was in London was caused by the first two attempts by La Cote to withdraw the funds, not by Hanley's carelessness in writing the two letters.

[33] The appellant, however, submitted that there was no reason to verify the identity of the person who telephoned them or to whom Hewan spoke because he was merely conveying information and not requesting it. The matter is not as simple as that. Hewan had neither met nor spoken to Hanley. Hewan telephoned a person he thought was Hanley after receipt of the letter dated 30 June in which transfer of US$ 1,75 million was requested, not to receive information from

him, but to inform him that some money had to be left in the account after the amount requested had been transferred. His call resulted in the request being changed to one requesting transfer of US$ 1,74 million only. He telephoned the Mostyn Hotel where Hanley was supposed to be staying. Hewan thereafter caused transfer forms to be sent to the person in London. He did all this without verifying his identity. He asked no security questions as he admitted he ought to have done. He then gave instructions to an official that the transfer be made urgently assuring him that he had spoken to the customer personally.

[34] Hewan opened a resident account for La Cote well knowing that he was a non-resident. He assisted La Cote in drafting the loan agreement between Noel Hanley and Cathedral Rock. He opened an account for him without checking his place of residence or inquiring about him. He attempted to open the account in the name of Euroceltic without any resolution by the company and ended up opening an account for La Cote trading as such. He was prepared to change the latter's non-resident status to resident well knowing that La Cote lived overseas. Indeed, he drafted and signed the loan agreement between La Cote and Cathedral Rock on behalf of the latter on 24 June 2003. He knew that the agreement containing false particulars was going to be presented to the exchange control authorities and that he had no authority to sign it. Hewan was actively involved in the 'transaction' between the Hanleys and La Cote, and told Fourie about it. Although none of his actions resulted directly in the fraud, they facilitated La Cote's perpetration of it.

[35] The first letter and the 702 form were delivered to the bank. Fourie received them in a Fedex envelope that was torn open. The second instruction followed a call from a person she also assumed was Hanley. The documents providing for the second transfer as well as a copy of the second letter were also delivered by Havvas in a Fedex envelope that was torn open. Fourie's suspicions were raised:

'I did not like the fact that the documents were delivered to our offices, but as I said my thinking was that because there was a business transaction between the two parties, you know maybe it is not unusual that the documents come through the messenger of the other party.'

Hewan, however, had told her that she should not discuss the two clients with each other. Nevertheless, her suspicions were such that she googled Havvas to see whether he in fact worked for La Cote. Neither did she ask him why the envelope had been opened, nor checked the sender's address on it. The Rosebank office of the appellant indeed required that the signed 702 form be couriered to them directly after completion. Indeed, Fourie was not comfortable that they were delivered through an intermediary. In these circumstances, it was unnecessary for her to ascertain whether Havvas worked for La Cote, but she should have instead confirmed the details of the transfer requested with Hanley.

[36] By failing to notice the alteration and to confirm the details of the transfer with Hanley, Fourie was negligent: her conduct fell short of the conduct demanded of a reasonable banker. She knew that the Rosebank office of the appellant had refused payment on the second letter that arrived from London because the signature on it did not match Hanley's specimen signature. She should have been concerned and watchful. The very fact that photocopies of the bank's 702 form were used should have made her aware of the risks involved. Hanley appreciated the risks. Her discomfort concerning the opened envelopes and the delivery of the documents by someone other than the customer added to her concerns. If the circumstances warrant it, a bank, before making

payment, must make inquiries. It was said:[10]

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

The proximate cause

[37] Hanley should have, and probably did, realise that in signing the second page of the 702 form the first page could be substituted with a different one reflecting a different amount and a different beneficiary. He could not, however, reasonably have foreseen the possibility that the amount stated on the second page would be altered as well. He did not facilitate the alteration, and wrote the figures and words with care. In these circumstances Fourie’s negligence is the real,

immediate or proximate cause of the loss.[11] The appellant therefore did not show that it was entitled to debit Hanley's account in the absence of his authority.

[38] In the result the appeal is dismissed with costs including the costs of two counsel.

F R MALAN
JUDGE OF APPEAL

Wallis JA (concurring for different reasons)

[39] I have read the judgment of Malan JA and agree with him that the appeal should be dismissed. However, I do so on the basis that I do not think that Mr Hanley breached his contractual duty to the bank not to prepare his payment instructions in a manner that would facilitate fraud or forgery. Had I reached the contrary conclusion I would not have agreed with him that the cause of the bank's loss was negligence on the part of Ms Fourie.

[40] It is unnecessary for me to recapitulate the facts as they are fully dealt with in Malan JA's judgment. Those demonstrate that there are many unexplained features of the dealings between the Hanley brothers and Mr La Cote and his henchmen. For my part I find it extraordinary that a solicitor of 35 years experience could have conducted himself in the fashion Mr Hanley described. I find particularly extraordinary his failure to speak to the bank directly about these transactions; his behaviour in Johannesburg on 4 July 2003 in signing multiple payment instructions on the directions of Mr La Cote, when it must have been apparent that La Cote was seeking to remove the connection he was at pains to establish between the two pages of those instructions; and his writing a letter to the bank on 8 July 2003 from France on terms dictated by La Cote and having no connection with any transaction of which he was aware. But that is not relevant to this case, which concerns a single payment instruction used to perpetrate a fraud on Mr Hanley and the bank, although it will be the bank, and not Mr Hanley, that will bear the loss arising from that fraud. The cases cited by Malan JA demonstrate clearly that the customer of a bank owes no general duty to conduct their affairs without negligence so as to avoid causing loss to the bank. Accordingly Mr Hanley's general conduct in regard to his dealings with La Cote is irrelevant.

[41] I stress that, in the first instance, the primary issue in this case is whether Mr Hanley drew up the payment instruction that was used by La Cote to extract payment from the bank of US $1.6 million in a manner that facilitated fraud or forgery. More exactly it is whether he drew up the

instruction in a way that facilitated the very fraud that occurred, namely the alteration of the amount reflected on the second page of the form and the substitution for the first page of a different page making provision for the payment to be made to Coutts Bank for the benefit of an account under the name ‘Storacar / Joe Hanley client account’. Unless the bank can cross this hurdle we do not reach the issue of causation or the question whether the bank’s own negligence operated to break the chain of causation flowing from Mr Hanley’s breach of obligation, so as to preclude the bank from debiting his account with the sum of US $1.6 million.

[42] Malan JA finds Mr Hanley to have been negligent in that he completed the payment instruction in two separate pages with, at the end of the day, no clear link between them and handed the instruction to a third party, who then substituted for a page dealing with a legitimate payment of US $100 000 to Aer Lingus, a page providing for US $1.6 million to be paid to the Storacar account. Seen in the abstract, divorced from the circumstances of the present case, I would agree with him, particularly in the case of an experienced solicitor who was alive to the potential for fraud arising from that conduct. However, I think that in this case it is not open to the bank on the facts to contend that he was negligent in doing so.

[43] My reasons for reaching that conclusion can be expressed simply. First, it was the bank that provided the payment instruction form in two separate pages notwithstanding the fact that in its printed manifestation it was printed on two sides of a single page with the notation at the foot of the first page ‘continues overleaf’. Second, the fact that payment instructions could be submitted to the bank in this form and be accepted and processed was apparent from the fact that the form providing for payment of US $100 000 to Aer Lingus was accepted and processed on that basis. Third, it is clear from the fact that officials of the bank added details, in the form of Mr Hanley’s address and settlement instructions, to the form by way of which the payment to Aer Lingus was made, that even if a form was incomplete in some respect the bank regarded itself as entitled to complete the missing items in accordance with what they understood the customer’s wishes to be. Lastly, it is apparent that the bank would accept documents furnished to it via intermediaries - a practical necessity one would have thought in modern conditions.

[44] In those circumstances it is apparent that when making such a payment the bank principally placed reliance on the genuineness of its client’s signature on the payment instruction furnished to them. If that was genuine then they proceeded with the transaction unless something else alerted them to the possibility of fraud. They were not concerned with the form in which they were given payment instructions and conveyed that message to their customers. They did not make it a term of

the relationship with their customers that they would only act on instructions if they were provided in a particular form. That is entirely understandable in a day and age where customers have neither the time nor the inclination, leaving aside the logistical issues that arise in international dealings, to go to a local branch of the bank in order to complete standard forms. On many occasions such forms will have to be furnished to the customer by electronic means. It does, however, carry with it the risk that, if a customer adopts a less formal way in which to give instructions, reliance on the authenticity of their signature alone may not be a sufficient guarantor against fraud. That is what occurred in this case.

[45] The bank effectively communicated to Mr Hanley that he could complete the payment instruction form in the manner that he did. That being so, I do not think that it can now blame him for doing so and accuse him of negligence in drawing his payment instructions to it. The form came to him in two separate sheets that may have been supplied by the Rosebank branch of the bank responsible for international transactions, but not Ms Fourie or her superior, Mr Hewan. Mr Hanley filled it in and signed it twice. He handed it to a trusted intermediary for delivery to the bank. It transpires that he had been duped in wording the form in the manner he did and that the intermediary was not worthy of the trust placed in him. But that does not mean that the bank can claim that he completed the form in a manner that facilitated this fraud. If a bank indicates to its customers that they can give instructions to it by completing a particular form provided to them in a particular way, it is the bank's responsibility if that mode of giving instructions enables a dishonest individual to perpetrate a fraud. The bank cannot lay the blame for the fraud at the door of the customer when the customer did what the bank had conveyed was acceptable to it as a means of giving it payment instructions.

[46] That conclusion means that the bank did not satisfy the first requirement for it to debit its customer's account with the amount of a payment that it concedes was unauthorised and made as a result of fraud. It is strictly unnecessary for me then to deal with the issue of negligence on the part of Ms Fourie, which Malan JA holds is the cause of the bank's loss. However, I respectfully disagree with that finding and will briefly indicate why this is so.

[47] As regards Ms Fourie's failure to notice the alteration of the figure of US $100 000 to read US $1,600,000 I think that she is being condemned with the benefit of hindsight. The trial was fought in circumstances where everyone knew about the alteration. The alteration has been the subject of lengthy forensic scrutiny and pored over by witnesses, counsel and judges. In those circumstances its existence is now obvious to all of us. But that is not how Ms Fourie or any other member of the bank's staff came to examine this document. In their case it arrived as a two page document instructing them to pay an amount of US $1.6 million to the Storacar account. That

amount was set out in both figures and words on the first page of the instruction. The change was effected in the top left hand corner of the second page in a section dealing with the purpose of the payment. It was not where any banker would look to discover the extent of their instructions. Of far more importance to them would be that Mr Hanley's signature appeared twice on that page. As I have said the authenticity of that signature was central to the bank's consideration of the document. In those circumstances I would expect even a reasonably careful bank official to give the figures inserted in a note that refers the reader back to what appears on page 1 only the most cursory examination. If the alteration had been picked up it would undoubtedly have been attributed to a slip of the pen rather than a sophisticated fraud.

[48] As regards the failure to interrogate more closely whether the payment instruction undoubtedly came from Mr Hanley, it seems to me that insufficient weight is given by my colleague to the fact that, only three days before she dealt with this payment instruction, Ms Fourie had processed an application in identical form for the payment of US $100 000 to Aer Lingus. Prior to receipt of the earlier instruction Ms Fourie had been told to expect such an instruction in a telephone conversation with a person she believed to be Mr Hanley at the Mostyn Hotel in London. She and her superior, Mr Hewan, had been led by the fraudsters to believe that this was where Mr Hanley was at the time. When the payment was made it was accompanied by a genuine letter written by Hanley, stressing the urgency of the payment and asking that proof of the payment be sent to the legal compliance officer of Aer Lingus in Dublin. This was done and a letter sent to Mr Hanley at the Mostyn Hotel confirming that fact. There had been no response to this payment querying its authenticity and there could have been none because it was in fact authentic.

[49] In those circumstances I do not think that it was negligent for Ms Fourie to process the second payment. Once again she had received a phone call telling her to expect the instruction and it was delivered to her in the same way as the first one. She checked that the instruction was signed by Mr Hanley and sent it to the Rosebank branch as before. The fact that it was accompanied by a letter from Hanley and signed by him, which referred to the Aer Lingus transfer and on its face appeared to authorise the second transaction, can only have lent further authenticity to the instruction, whether or not she paid much, or any heed, to its contents. As before she had a letter in Mr Hanley's handwriting and signed by him accompanying a payment instruction also signed by him and she accepted them at face value. To hold her negligent is to say that she should have realised that a fraud was being perpetrated, when Mr Hanley, who had far greater knowledge of and insight into the situation, had never appreciated that fact. That is in my respectful view unfair to her and overly generous to Mr Hanley.

[50] Malan JA attaches considerable weight to the background that in his view should have caused Ms Fourie to approach this instruction with greater caution. In my view, whatever concerns

should have been awakened by that background would have been dispelled by the authentic instruction received to pay US $100 000 to Aer Lingus and the fact that nothing untoward had emerged from giving effect to that instruction. For those reasons had it been necessary to address this issue finally I would not have held that Ms Fourie was negligent or that any negligence on the part of the bank was the proximate cause of the loss occasioned by the fraud.

M J D WALLIS

JUDGE OF APPEA

APPEARANCES: FOR	**L**André Gautschi SC and Lara Grenfell
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FOR RESPONDENT:	

CPD 214 at 223-4; *Trull v Standard Bank of South Africa Ltd* (1892) 4 SAR 203 at 205; *Union Government v National Bank of South Africa* 1921

[6]See Malan para 220 nn 32 and 33 and fn 5 above. For criticism of the way in which the customer's duties is formulated, see J T Pretorius 1985 *Annual Survey* 349 and his contribution to *Essays in Honour of Ellison Kahn* at 271 ff (fn 1 above). For criticism, in the case of estoppel, that the negligence must be 'in the transaction itself', see Rabie and Sonnekus *The Law*

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of Estoppel in South Africa original text by the Hon P J Rabie and 2nd ed by J C Sonnekus at 154-5.

[7] *Greenwood v Martins Bank Ltd* [1932] 1 KB 371 (CA) at 380-1.

[8] See *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1985] 2 All ER 947 (PC); [1986] AC 80 (PC) and *Canadian Pacific Hotels Ltd v Bank of Montreal* (1988) 40 DLR (4d) 385

[9] See s 72B of the Bills of Exchange Act 34 of 1964 introduced by s 29 of the Bills of Exchange

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Amendment Act 56 of 2000 and the discussion in Malan para 220.

[10] *AL Underwood Ltd v Bank of Liverpool* [1924] 1 KB 775 (CA) at 793 quoted with approval in *Columbus Joint Venture v ABSA Bank Ltd* 2002 (1) SA 90 (SCA) para 24.

[11] *Saambou-Nasionale Bouvereniging v Friedman* 1979 (3) SA 978 (A) at 1005F-G and cf *Union Government v National Bank of South Africa Ltd* 1921 AD 121 at 131, 134, 145 and 151. See, more recently, *Stellenbosch Farmers' Winery Ltd v Vlachos t/a The Liquor Den* 2001 (3) SA 597 (SCA) para 20.