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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Full Court Appeal Case No: A5012/2022

Court a quo Case No. 32975/2018

(1)REPORTABLE: YES/NO

(2)OF INTEREST TO OTHER JUDGES: YES/NO

(3)REVISED YES/NO

SIGNATURE:

DATE:

In the matter between:

HARTOG, GAVIN ROY

APPELLANT

and

DALY, BRIGITTE

FIRST RESPONDENT

FOULKES-JONES, KARIN INGRID

SECOND RESPONDENT

(to be replaced by the Executor/Executrix of
her deceased estate)

DALY, PATRICK FREDERICK

THIRD RESPONDENT

**STANDARD BANK OF SOUTH
AFRICA LIMITED**

FOURTH RESPONDENT/THIRD PARTY

JUDGMENT

STRYDOM, J

[1] This is an appeal against the decision of a single judge (the court *a quo*), dated 2 June 2021, in which the appellant was held liable to the first and second respondents to make payment pursuant to the terms of a mandate agreement (“the mandate”) to transfer an immovable property. Leave to appeal was granted by the Supreme Court of Appeal (SCA) on 27 February 2022 to the Full Court of this Division.

[2] The appellant is an attorney practising for his own account, under the name and style of Gavin Hartog Attorneys.

[3] The appellant was cited as the respondent in the main application launched by way of motion proceedings on 6 September 2018 by Ms B Daly, the late Ms KI Foulkes-Jones SC and Dr PF Daly (the respondents in this appeal, hereinafter referred collectively as “the respondents”).

[4] If reference is made to individual respondents their first names will be used, i.e. Ms B Daly (the first respondent) will be referred to as “Brigitte”, the late Ms Foulkes-Jones SC (the second respondent) as “Karin” and Dr Daly (the third respondent) as “Patrick” or “PF Daly”.

[5] Karin and Brigitte were the joint owners of an immovable property situated in Parkwood, Johannesburg (“the property”). They provided the appellant with an oral mandate to act as the conveyancer to transfer the property should it be sold. The property was duly sold and on 5 June 2018, the new owner took transfer. The initial mandate was provided to the appellant during or about September / October 2017 but further instructions were provided at a later date as to how the proceeds of the sale should be disbursed.

[6] It is common cause that in terms of the mandate and subsequent instructions, the appellant had to pay R 100 000 of the proceeds of the sale into Karin’s account. This was duly done. The balance of R 1 421 228.06 had to be paid to Brigitte and Patrick into the nominated account of Patrick, her husband. Some of these monies

became payable to Patrick to discharge Karin's debt owing to him. In this context, Patrick would have received the money in an account in his name, acting as an agent for Karin, who owed him money, and of Brigitte, who was a joint signatory on this account.

[7] It is common cause that this money was never received into Patrick's account but was paid into a Standard Bank account opened in the name of a fraudster, one Mr Simelane. The money was withdrawn from this account and therefore stolen.

[8] The dispute between the parties is who should be held liable for the loss which was caused through so called Business Email Compromise ("BEC"). The fraudster intercepted email communication between the parties and sent an email to appellant, as if from Patrick, with instructions to pay the monies into the account controlled by the fraudster.

[9] Relying on the appellant's alleged breach of the mandate, the respondents filed an application in terms of which they sought an order against the appellant for payment of the amount of R 1 421 228.06. On the papers before the court *a quo* it can be accepted that in terms of the mandate, the appellant had to account for the proceeds of the sale and pay the monies into the nominated accounts of Karin and Brigitte.

[10] It should be noted that the claim of the respondents in which they held appellant liable for the loss was founded on contract and not on delict.¹

[11] The appellant disputed the terms of the mandate, and in particular, relied on a tacit term of the mandate which was allegedly breached by the respondents.

[12] The appellant applied for the joinder of Standard Bank and sought an order holding Standard Bank liable should the court find that he was liable to pay the amount of R 1 421 228.06 to the respondents. It should be noted that Standard Bank did not oppose the joinder application and became a party to these proceedings.

¹ In the recent matter of *Hawarden v Edward Nathan Sonnenbergs Inc* (113849/2020 [2023] ZAGPJHC 14 (16 January 2023) the defendant was held liable in delict for negligently causing the plaintiff loss in a matter where the court was also dealing with a Business Email Compromise.

[13] When the application was heard in the court *a quo*, counsel for the appellant requested from the outset that the matter should be referred to trial in light of alleged material disputes of fact which exist on the papers, both as between himself and the respondents on the one hand; but also as between himself and Standard Bank, on the other.

[14] This request was refused and the application was heard and the court *a quo* found the appellant to be liable to pay the respondents the amount claimed, plus interest and costs. The delictual claim for holding Standard Bank liable for the loss was also dismissed with costs.

[15] In paragraph 22 of the judgment, the court *a quo* found the following:

“The respondent contends that there were serious disputes of fact which cannot be resolved on paper. I do not agree based on the common cause facts in this matter. It is common cause that the balance of the payment of the purchase price was paid to a thief. Whether or not the respondent should be liable to the applicants on the facts as pleaded in the respective affidavits turns on the proper interpretation of the law.”

[16] Before this court, the appellant persisted that the application could not have been decided on the papers and that the court *a quo* misdirected itself by not referring the application for the hearing of oral evidence or to trial, pursuant to the terms of Rule 6(5)(g) of the Uniform Rules of Court. The appellant submitted before us that the appeal must be upheld and that the matter should be referred to trial.

[17] In the appellant’s notice of appeal, it was stated that the two key disputes of fact which should have been referred to trial were:

“2.1 The terms of the Appellant’s mandate and who should bear the loss of the compromise of Patrick’s email to him (advising of his banking detail) and

2.2 The issue whether the Bank owed the Appellant a legal duty (of care) and if so, whether the duty was breached such that the Bank should bear the loss.”

[18] The respondents before us, as well as Standard Bank, denied the existence of a factual dispute and supported the judgment of the court *a quo*.

[19] In heads of argument filed on behalf of the appellant, reference was made to a factual dispute pertaining to the terms of the mandate. This alleged factual dispute was not related to the alleged tacit agreement. It was argued that the respondents contradicted themselves in the founding affidavit. This related to what was said at the first meeting between Brigitte, Karin and the appellant at the home of Karin during September/October 2017 when the mandate was given to the latter to transfer the property. It was pointed out that according to the founding affidavit on behalf of the respondents, it was at this first meeting already agreed that the balance of the proceeds were to be paid into the account of Patrick, held at Standard Bank with account No. 0[...]. Later in the affidavit, it was however stated that this instruction only came later.

[20] It was the version of the appellant that the instruction to pay the proceeds into Patrick's account in fact came later. This is also what was stated on behalf of the respondents later in their affidavit. It was explained by counsel for the respondents that the first part of the affidavit was just an introduction stating the full extent of the mandate and that the parties were in fact in agreement that this instruction only came later. In my view, this does not establish a factual dispute and what transpired later in fact became common cause and is evidenced in the correspondence between the parties. The only factual dispute relates to the existence or not of an alleged tacit term of the agreement of mandate.

[21] Before dealing further with this issue of the alleged tacit agreement, the background circumstances pertaining to this case should briefly be stated. Most of these facts are common cause and have been fully canvassed in the judgment of the court *a quo*.

[22] The starting point was the mandate which was provided to the appellant during or about September/October 2017. On 7 November 2017, the property was sold and on 5 June 2018 transfer of the property into the name of the purchaser took place. In

fulfilment of his mandate, the appellant caused the transfer to take place and then held the proceeds of the sale in his trust account.

[23] On 6 June 2018, the appellant phoned Karin advising her of the transfer and requested payment instructions. Such instructions were given.

[24] On 7 June 2018, the appellant transmitted an email to Karin and Brigitte informing them that an amount of R 1 521 228.06 was payable to them. This included an amount of R100 000.00 which was going to be paid to Karin directly, leaving a balance of R 1 421 228.06. Attached to this email was the full account of distribution of the proceeds of the sale. In this email, it was stated that an amount was payable to them and a request was made to “*send me instructions and bank details*”.

[25] On 8 June 2018, Gareth Foulkes-Jones, the son of Karin, transmitted instructions, on behalf of Karin, to the appellant concerning part payment of the sale proceeds to her.

[26] On the same date the appellant communicated telephonically with Brigitte, requesting banking details for payment.

[27] On 10 June 2018, Patrick transmitted an email to the appellant providing details for payment by the appellant of the purchase price into an account he was the holder, with account no. 0[...]. A Standard Bank statement containing the account details was attached to this email. This email was received by the appellant.

[28] On 11 June 2018, the appellant transmitted an email to Patrick advising that he has already spoken to Karin. It was noted in this email that as per her instructions, the appellant was to transfer R 100 000 to her Capitec Bank account and the full balance to Patrick’s account. It was stated that this transfer would be done on the same day, to wit, 11 June 2018.

[29] On the same day, the appellant effected payment of R 100 000 to Karin in accordance with her instructions. Payment of the balance was however not made to Patrick.

[30] On 12 June 2018 the appellant sent a further email to Patrick at 13:14 confirming having received instructions to pay the amount of R 1 421 228.06 into his Standard Bank account. It was asked of Patrick to confirm the details of the account which were stated to be:

“PF Daly

Standard Bank Limited

Account: W[...] I[...]2[...]9[...]0[...].”

[31] According to Patrick, he replied to this email from the appellant later on the same day at 19:34 confirming his account and account number. This email was attached to the papers of the parties. The version of the appellant is that he never received this email.

[32] On 13 June 2018, the appellant received a further email which, on the face of it, appeared to have been sent by Patrick, in which email the appellant was requested to use “...*my Cheque account with Standard Bank for payment*”. Attached to this email was a purported account confirmation letter from Standard Bank dated 21 May 2018. This letter provided the name of the account to be that of Dr PF Daly with the account number 1[...]. According to this document, the account was held at Fourways Branch and Standard Bank’s rubber stamp appeared on the letter.

[33] It is the version of the appellant that he accepted the authenticity of the email and the stamped letter from Standard Bank and effected payment of the amount of R 1 421 228.06 into that account.

[34] It became common cause between the parties when the matter was argued before us that this account was opened by Standard Bank, Volksrust Branch, in the name of one Mr Simelane. From this account, the money was withdrawn shortly after the deposit and was therefore stolen.

[35] Considering this factual background, it becomes clear that after the appellant received confirmation from Patrick what the nominated account would be for payment of the proceeds, the appellant required further confirmation of the correctness of said nominated account. In the papers before court, the appellant did not explain why this further confirmation was again requested by way of email. What further became apparent was that an email was sent by a fraudster purportedly from Patrick's email address. Without further enquiry as to the reason for the change of account number, payment was made by the appellant into this alternative account.

[36] Now turning to the alleged dispute of fact. There is no dispute between the parties that it was agreed the appellant would pay R 1 421 228.06 into Patrick's account and that the latter would provide to the appellant the details of the account into which payment should be made. It was argued on behalf of the appellant that the key dispute of fact relates to what was agreed in respect of the means by which Patrick's banking account details would be provided and identified and the security of the means which would be used.

[37] Considering the common cause facts set out hereinabove, including the affidavits filed in this matter, there is no indication that the parties expressly agreed that the bank account particulars would be provided by way of email. The only indication that this mode of communication was going to be used is provided from what later transpired. The appellant sent an email to Karin and Brigitte, dated 7 June 2018, in which it was stated that they should "*send me instructions and bank details*". As the appellant was communicating by way of email, it is probable that he expected of them to send the instructions and bank details by the same method. From there onwards, the instructions and details were mostly, but not exclusively, provided by email. The second request for confirmation was also sent by the appellant by way of email. The reply, albeit alleged to have never been received by the appellant, was similarly sent per email.

[38] In my view, it cannot be said that any party made a specific election to use emails as the manner of communication as both parties used this platform. In such circumstances, the question arises who bears the risk for the loss occasioned by the

receipt of a fraudulent email sent to the appellant upon which he reacted and made payment into a wrong account?

[39] In the affidavits filed by the appellant and in heads of argument it was stated that the email of 13 June 2018, providing the wrong account number, emanated from Patrick. Before us, counsel for the appellant did not persist with this line of attack. It can now be accepted that this email was compiled and sent by a fraudster, from a different email address and was not sent by Patrick. It was referred to as a “spoofed” email, meaning it was compiled to look as if it emanated from Patrick while it was not. The appellant’s expert, Mr Van der Molen established that the email was sent from a different email address than that of Patrick. The question then is how the fraudster obtained the necessary information to have perpetrated this fraud?

[40] The fraudster must have become aware of an eminent transfer of a substantial amount of money from the appellant’s trust account to Patrick’s account. Further, the fraudster must have obtained the email addresses of Patrick and the appellant and fraudulently sent the email and attachment to the latter to look as if it originated from Patrick.

[41] It is the appellant’s case that the respondents are to be held liable for the loss as the mandate also had a tacit term to the effect that the respondents will exercise the utmost caution when instructing the appellant to make payment, and that they would do all that was reasonably possible to ensure the integrity of the emails addressed to the appellant and keep and maintain their data security. There is no evidence that the fraudster obtained this information from the respondents, but the appellant suggested that it could have been the case. The fact remains however, that Patrick sent the correct instruction, which was received by the appellant. The alleged tacit term is cast in such wide terms that if found to be part of the mandate, it would have placed a duty on the parties to have taken all reasonable steps to avoid information falling into the hands of third parties during the emailing process.

[42] The respondents denied the existence of this tacit or implied term. It was stated that no evidence was adduced by the appellant in support thereof. It was argued to be a bald, vague and unsubstantiated assertion.

[43] The court *a quo* did not deal with the alleged tacit term of the mandate but found on the question whether a factual dispute presented itself that was incapable of being resolved on the papers. It found that such dispute was not shown. It should be noted that on the papers filed in the court *a quo*, emphasis was not on the alleged tacit term as the main contributing factor establishing the alleged dispute of fact. This issue became pertinent in the appellant's replying heads of argument. At the outset, emphasis was placed on the question which party should bear the risk of loss should a third party commit a fraud causing loss to a party.

[44] An appeal is aimed at the order of the court *a quo* and not against every individual finding. To consider the soundness of the ultimate order of the court *a quo* and whether it is wrong, in the sense that the matter could not have been decided on the papers, the court should consider what a tacit term is and how a party who wants to incorporate such term in an agreement could prove such term. In this context, it must be decided whether a factual dispute, not capable of being resolved on the papers, presented itself in this matter.

[45] In Harms *Amler's Precedents of Pleading*² a tacit term to a contract is defined to mean "*an unexpressed provision of the contract, derived from the common intention of the parties*". In this work, it is further explained with reference to case law that this intention is to be inferred from the express terms of the contract and from surrounding circumstances, including the conduct of the parties after the conclusion of the contract. The term is imputed if the parties would have agreed on such a matter if only they had thought about it.³

[46] In *McAlpine*⁴ it was with reference to an "*implied term*", which reference included a reference to a "*tacit term*", where the court found as follows at 531H-532A:

² 9th edition at page 108.

³ See *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A); see also *Wilkens NO v Voges* 1994 (3) SA 130 (A).

⁴ *Supra*.

“In the second place, “implied term” is used to denote an unexpressed provision of the contract which derives from the common intention of the parties, as inferred by the Court from the express terms of the contract and the surrounding circumstances. In supplying such an implied term the Court, in truth, declares the whole contract entered into by the parties. In this connection the concept, common intention of the parties, comprehends, it would seem, not only the actual intention but also an imputed intention. In other words, the Court implies not only terms which the parties must actually have had in mind but did not trouble to express but also terms which the parties, whether or not they actually had them in mind, would have expressed if the question, or the situation requiring the term, had been drawn to their attention”

[47] In the recent matter of *City of Tshwane Metropolitan Municipality v Brooklyn Edge (Pty) Ltd & Another*⁵ with reference to *Alfred McAlpine & Son* it was found as follows:

“[16] A tacit term is an unexpressed provision of a contract. It is inferred primarily from the express terms and the admissible context of the contract. A court will not readily infer a tacit term, because it may not make a contract for the parties. The inference must be a necessary one, namely that the parties necessarily must have or would have agreed to the suggested term. A relevant factor in this regard is whether the contract is efficacious and complete or whether, on the other hand, the proposed tacit term is essential to lend business efficacy to the contract. The ‘celebrated’ bystander test constitutes a practical tool for the determination of a tacit term. To satisfy the test the inference must be that each of the parties would inevitably have provided the same unequivocal answer to the bystander’s hypothetical question. Even if the inference is that one of the parties might have required time to consider the matter, the tacit term would not be established.”

[48] In this matter, the court is not dealing with a tacit term which the parties had in mind but did not trouble themselves to include in their oral agreement. Rather, it was contended on behalf of the appellant that the tacit term should be included in the

⁵ [2022] 2 All SA 334 (SCA).

contract as the imputed intention of the parties. The argument advanced was that although the parties did not consider the tacit term, if they were subsequently asked what would happen should the security of emails be compromised, they would have been in agreement as to the terms of this tacit term.

[49] For purposes of a decision whether this matter should have been referred to evidence or trial, it should first be determined whether the appellant's contention that the afore-mentioned tacit term formed part of the mandate created a factual dispute which could not have been resolved on the papers. It was argued that the appellant made this allegation *plainly and unambiguously* in paragraph 3.2 of the answering affidavit. On behalf of the respondents, it was argued that the allegation of the existence of the tacit term was a bald and an unsubstantiated allegation. Moreover, it was denied.

[50] Before deciding this, the court must consider when a tacit term will be imputed in a contract. Further, what is required to avoid a conclusion that the allegation of the existence of a tacit term is bald and unsubstantiated? I intend to apply the so-called "*innocent bystander test*" to determine this, which was expressed in *Reigate v Union Manufacturing Co (Ramsbottom) Ltd*⁶ as follows:

*"A term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated someone had said to the parties: 'What will happen in such a case,' they would have both replied: 'Of course, so-and-so will happen; we did not trouble to say that; it is too clear'."*⁷

[51] The business efficacy of the contract, and what reasonable parties to a contract would have agreed upon in the circumstances of the particular case, are part of the facts from which the inference of the alleged intention can be made. To this extent, the bystander test has been objectified. If such an inference cannot be made, a consensual tacit term cannot be read into the contract.⁸

⁶ [1918] 1 K.B. 592.

⁷ At 605.

⁸ Van Huyssteen *et al Contract: General Principles* 5 ed (Juta & Co Ltd) at para 9.132.

[52] With this summary of the legal position in mind, I will now return to the question whether a factual dispute arose on this question concerning the imputation a tacit term.

[53] It is trite that in motion proceedings a dispute of fact is not created if a denial is bald and unsubstantiated. In such a case, a court can find that there is not a genuine dispute of fact and decide the matter. Or, a court can decide that a defence is so far-fetched and untenable that the court could reject a defence merely on the papers. None of these findings were made by the court *a quo* as the court did not deal with the issue concerning the alleged tacit term. The court *a quo* found that the matter could have been decided on common cause facts and the law. This decision ignored the existence or not of a tacit term which requires a factual enquiry. This would, however, does not mean that the court *a quo*'s order stands to be dismissed. This court will have to decide this, more particularly, whether the matter should have been referred to oral evidence as a factual dispute arose on the papers concerning the tacit term.

[54] The appellant placed much reliance on the matter of *Mathewson v Van Niekerk*⁹ for the submission that the court *a quo* erred in its finding that the liability of the appellant could have been decided with reference to common cause facts and the proper interpretation of the law. It was argued that the decision in *Mathewson* was on all fours with the case of the parties in this appeal and should be followed when the existence of a tacit term was considered.

[55] The facts of *Mathewson* should be considered to understand the conclusions reached in that matter. Reference will be made to the appellant in that matter as "Mathewson" and to the respondent as "Van Niekerk".

[56] Van Niekerk brought motion proceedings against Mathewson for relief that depended on the valid cancellation by Van Niekerk of a sale agreement to purchase immovable property. Mathewson was the seller/developer and Van Niekerk the

⁹ 2012 JDR 0414 (SCA).

purchaser of the immovable property. Van Niekerk purported to cancel the agreement on the basis that Mathewson failed to install certain services to the vacant stands as was agreed between the parties, pursuant to clause 17 of the sale agreement. The court *a quo* found for Van Niekerk, that the sale agreement was validly cancelled. This decision was appealed against by Mathewson and Cloete JA, on appeal, found that the court *a quo* ignored Mathewson's contention "*which was plainly and unambiguously*" made in the answering affidavit as to the existence of a tacit term which would require from Van Niekerk to point out where on this large stand, the services should have been installed. The court *a quo* also ignored Mathewson's assertion that despite his repeated requests Van Niekerk had not given an indication where the services should be installed.

[57] It was argued on behalf of Van Niekerk on appeal that the existence of this tacit term was an afterthought and with reference to the *Plascon Evans*¹⁰ rule, that the alleged tacit agreement was so far-fetched or clearly untenable that it could be rejected on the papers.

[58] On appeal, it was found that the test to be applied before a finding can be made to reject a version as far-fetched and clearly untenable is a stringent test not easily satisfied.

[59] At paragraph [5], Cloete JA found as follows:

"The court a quo ignored the respondents' contention, which was plainly and unambiguously made in the answering affidavit, that the obligation to install the services referred to in clause 17 was subject to the tacit term that the applicant had to indicate to the respondent where the services were to be installed on the erf which they purchased."

[60] The court went ahead to consider the email correspondence between Mathewson and Van Niekerk, the express terms, the surrounding circumstances and the wider context in which the emails were sent and found in paragraph 10 of the

¹⁰ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C.

judgment, that the probabilities support the existence of the tacit term which Mathewson contended for.

[61] In conclusion, the court found as follows in paragraph 11:

“In the circumstances it cannot be said that the respondents’ version that the deed of sale contained the tacit term on which they found their defence, is so far-fetched or clearly untenable that a court would be justified in rejecting this version merely on the papers.”

[62] The *Mathewson* matter did not deal with the issue whether the matter should have been referred to trial resulting from a factual dispute. Final relief was sought and granted both in the court *a quo* and on appeal.

[63] In the matter before us, the appellant is seeking a referral of the matter to trial whilst the respondents persist in support of the final relief which was granted. The two approaches concern two separate enquiries. First, whether as a result of a factual dispute, the matter should have been referred to trial and second, if the matter was not to be referred to trial, whether the relief sought by the respondents could have been granted on the papers before court.

[64] In my view, the mere allegation of the existence of a tacit term on the papers of the appellant and the denial thereof by the respondents does not create a factual dispute in itself for the simple reason that a tacit term is to be inferred or imputed, having regard to the express terms of the mandate, the surrounding circumstances and the conduct of the parties. An opposite view held by the parties as to what can be inferred or imputed does not create a factual dispute. The dispute of fact must present itself at the level of the express terms, the surrounding circumstances and the conduct of the parties in the implementation of the mandate. If there is a factual dispute at this level, then the probabilities cannot be considered and the matter stands to be referred to oral evidence. Final relief would not be competent. If no factual dispute has arisen on that level, then the court can consider the probabilities and decide the matter. The latter situation presented itself in the matter of

Mathewson. The court could consider the probabilities and concluded that the probabilities supported the existence of a tacit term.

[65] It is trite that in motion proceedings probabilities are not to be weighed and considered to establish the facts of a matter.¹¹ In my view, the situation is different when it comes to establishing the existence of a tacit term. If the facts are common cause or if the facts stated by a respondent are to be accepted, probabilities can be considered upon such facts to decide whether such probabilities support the existence of a tacit term.

[66] As already stated, the court *a quo* failed to deal with the alleged tacit term. In *casu*, the existence of this alleged tacit term became the main ground upon which the appellant relied to have the matter referred to oral evidence or trial. It was argued that the relevance of the tacit term is that if it is found to exist, it would be for the respondents at trial to prove that they have complied with this term. If it is found that respondents breached this term, their claim should be dismissed.

[67] In my view, the facts of this matter upon which it can be decided whether a tacit term can be inferred or imputed are common cause. The surrounding circumstances and the conduct of the parties in the implementation of the mandate is also before court and are not in dispute. What is in dispute is whether the tacit term can be inferred or imputed. A court can decide this issue on the papers as they stood at the time when the matter was heard. In my view, the court *a quo*, albeit for different reasons, was correct in its finding that the matter should not have been referred to trial on the basis of a dispute of fact.

[68] The question remains whether the court *a quo* was correct to have granted the relief sought by the respondents? This will depend on whether the tacit term should have been imputed into the mandate.

¹¹ See *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 SCA at para [26] where it was stated - "*Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities.*"

[69] In my view, the allegation regarding the tacit term was bald and unsubstantiated. It is common cause that to give effect to the mandate, the parties, *inter alia*, corresponded with each other by way of email. Does this now mean that this manner of exchanging information can be imputed to have been agreed upon between the parties as part of the mandate? Or, is it merely what happened subsequently during the execution of the mandate? Further, should it be imputed as a term of the mandate that if emails were going to be used to provide instruction regarding payment, that everything reasonable and possible would be done to ensure the integrity of the email addresses, and that the parties would keep and maintain their data security?

[70] It should be remembered that the initial mandate was provided to the appellant orally at the home of Karin. There was telephone communication as well as communication by way of email. To use the test expressed in the *Reigate* matter, if someone asked the parties shortly after the mandate was given how details of bank accounts in which proceeds of the sale after transfer of the immovable property were going to be provided, would the answer have been “*of course*” by way of email? Further, and if the answer would have been by way of email, would the respondents have answered that they would have used utmost caution when instructing the appellant to make payment, and further, that they would do all that is reasonably possible to ensure the integrity of the emails addressed to the appellant and would keep and maintain their data security?

[71] In my view, if the express terms of the mandate are considered together with the surrounding circumstances, the probabilities do not support the existence of the tacit term averred by the appellant. Moreover, even if the probabilities would support a tacit term that emails would be used, there is no indication that either party would have included a term relating to the security and integrity of the emails. This “*guarantee*” or acceptance of risk is not to be imputed as a tacit term. If the question was raised after the mandate was given, the parties might have said that details of the account would be transmitted through email, but this is not the only obvious answer. There could have been different answers provided as to how account details for payment would have been provided by the parties. For instance, the answer could have been that such details would be hand-delivered, or communicated

telephonically, or that they would be sent by email but subject to telephonic confirmation.

[72] The endeavour to achieve business efficacy does not require that a tacit term, as suggested by the appellant had to be inferred to render performance in terms of the agreement of mandate. This is where the matter of *Mathewson* is to be distinguished on the facts. In that matter, the services could not have been installed before Van Niekerk had indicated where on the large stand the services were required. That is why the Supreme Court of Appeal found, on the probabilities, that it was a tacit term of the agreement of sale that the buyer would indicate to the developer where the services should be installed.

[73] In my view, the common cause facts, the surrounding circumstances and the conduct of the parties subsequently is not indicative that a tacit term as submitted by the appellant became part of the agreement of mandate. The court *a quo* exercised a discretion not to refer the matter to oral evidence and, although it did not refer to the alleged tacit term in the judgment, the conclusion not to refer the matter to oral evidence or trial cannot be faulted. A court, in the exercise of a discretion cannot refer a matter for the hearing of evidence on the basis that there might be facts revealed during a trial which support a version of a party. The question at the application stage is whether such factual dispute had presented itself.

[74] It was the appellant who invited the respondents to “*send*” the instructions and bank details. This invitation was done by email and there was a response to this email using the same means.

[75] The fact that a fraudster intercepted or obtained information which led to the fraudulent email and payment in terms thereof cannot be used to support the existence of this tacit term. That will amount to using hindsight as a consideration to determine what terms should be imputed into the mandate.

[76] It was argued on behalf of the appellant that the importance and probability of the tacit term is ironically established by the significant attention devoted in the respondents’ founding papers to the “*Business Email Compromise*” (BEC). It is

indeed so that the respondents employed the services of an expert to prove that the BEC did not occur on Patrick's computer. This behaviour is expected from a person who realized that as a result of fraud, monies due to him or her were stolen. Moreover, the appellant also employed the services of an expert to determine where the interception of details occurred.

[77] A request was made by appellant for the inspection of Patrick's computer and server to ascertain whether the fraudster obtained the information needed to perpetrate the fraud from him. Access was granted but conditionally, dependent on whether the same right of access would be granted to the respondents' expert to examine the computer system of the appellant. At the end no such investigation was done by either expert.

[78] The respondent's expert examined Patrick's email system and concluded that the fraudulent email did not emanate from Patrick's computer or server. On behalf of the appellant it was argued that oral evidence in one or other form as envisaged by Rule 6(5)(g) should be allowed if there are reasonable grounds for doubting the correctness of the allegation concerned. The court was referred to the matter of *Moosa Bros & Sons (Pty) Ltd v Rajah*¹² which found, correctly in my view, that in circumstances where facts are peculiarly within the knowledge of the applicant, and cannot be directly contradicted or refuted by the opposite party, this may be a factor to refer a matter to oral evidence.

[79] In light of the finding of this court that the tacit term was not established this consideration does not apply.

[80] I am further in agreement with the finding of the court *a quo*, referencing the matter of *HSE Potgieter v Capricorn Homeowners Association and another*¹³, that the appellant failed to discharged his mandate by paying the amount into an account different from which was nominated by Patrick on behalf of Karin and Brigitte.

¹² 1975 (4) SA 87 (D).

¹³ Unreported judgment of the Western Cape High Court, case number 13667/2008.

[81] Accordingly, the court finds that the alleged tacit term never became part of the mandate agreement. Consequently, there is no need to make any finding regarding where the compromise occurred which enabled the fraudster to send an email to the appellant, which resulted in him making payment into an account other than the one to which payment should have been made, i.e. Patrick's account. Appellant breached the mandate agreement by not making payment of the proceeds of the sale into the account of Patrick and remains responsible for such payment. The finding of the court *a quo* to this effects should be upheld.

[82] The appeal should be dismissed with costs, including the costs of senior and junior counsel.

The delictual claim against the third party (Standard Bank)

[83] The relevant prayer of the amended Rule 13 application read as follows:

“3. In the event of the above Honourable Court holding the applicant liable to pay an amount of R1,421, 228.06 plus interest at the rate of 3,5% per annum above the repurchase rate as determined from time to time by the South African Reserve Bank to Brigitte Daly, Karin Ingrid Foulkes-Jones and Patrick Frederick Daly under the above case number in the application instituted by them against the applicant as respondent, the Standard Bank of South Africa Limited as third party be directed to pay the amount of such liability plus interest thereon to the applicant.”

[84] Now that the court has held the appellant liable to make payment to the respondents pursuant to the mandate, the court must now consider whether there exists a factual dispute between the appellant and Standard Bank which could not have been decided on the papers, and consequently should have been referred to trial as was requested by the appellant when the matter was heard in the court *a quo*. If the appeal is not upheld on this referral issue, this court will then have to decide whether the finding of the court *a quo* on the merits is to be upheld.

[85] The court *a quo* was not prepared to refer the issue pertaining to the alleged liability of Standard Bank to trial and found that the appellant had not pleaded sufficient facts, nor canvassed sufficient allegations “*to bring into question the delictual liability of Standard Bank*” or “*to find Standard Bank delictually liable.*”

[86] The court then held as follows:

“This is however not to say that if sufficient facts are pleaded and alleged the respondent cannot separately make out a case against Standard Bank. That is however an issue that in my view does not require consideration here because of my finding that sufficient facts have not been alleged and pleaded to find that Standard Bank has been delictually liable to the applicants.”

[87] This part of the decision of the court *a quo* seems to suggest that the appellant could still have pursued his claim against Standard Bank in another court. This would not have been procedurally possible without a referral to trial.

[88] In my view, the court *a quo* came to a finding without providing proper reasons for the conclusion reached. This does not mean that the conclusion is wrong. This court will have to consider whether the ultimate finding was the correct one. The appellant has pleaded sufficient facts to at least raise the question whether Standard Bank is liable in delict. The appellant pertinently raised the issue in the Rule 13 application with reference to facts known to him, albeit that some of the facts were shown to be wrong. A basis was laid to argue wrongfulness.

[89] In the appellant’s notice of appeal, he made it clear that the appeal against the decision of the court *a quo* in relation to Standard Bank is, firstly, pursued on the question whether the court *a quo* should have referred the issue whether Standard Bank owed the appellant a legal duty of care to trial. Only if the matter is not to be referred to trial then the second question for decision will arise; whether the appellant has proven the existence of a legal duty owed by Standard Bank towards the appellant to prevent a loss being suffered.

[90] The question will be whether the court *a quo* misdirected itself by not concluding that a material factual dispute has arisen between the appellant and Standard Bank which should have been referred to trial.

[91] I am in agreement with counsel for the appellant that the court *a quo* dealt with these issues superficially making it difficult to consider if the court exercised its discretion judicially by not referring this issue to trial. For this reason, this court will consider whether a factual dispute existed which should have moved the court *a quo* to have referred the matter to trial.

[92] The court will now have to consider the facts as stated in the various affidavits to consider whether the matter should have been referred to trial.

1.

[93] The facts which underpin the possible delictual liability of Standard Bank are limited. Most of these facts are common cause or if unknown to appellant, could be accepted by court on the version of Standard Bank. These are –

93.1 A Mr Simelane opened a bank account on 7 May 2018 in his personal capacity at the Volksrust Branch of Standard Bank. The account number assigned to this account was 1[...]. A FICA process was followed. The identity of Mr Simelane was verified against his identification document. Proof of residence was obtained. Copies of the documents were uploaded onto Standard Bank's computer system to which Mr Kajee, the deponent to the answering affidavit of Standard Bank had access to. These records were generated in the ordinary course of the business of Standard Bank. There was no reason to suspect that the account was going to be used for fraudulent purposes.

93.2 On 14 June 2018, the appellant used his ABSA Bank EFT platform to transfer R1 421 228.06 into the Standard Bank account number 1[...] whilst under the impression that it was PF Daly's account. When concluding this internet payment from the ABSA Bank EFT (electronic fund transfer) platform, he inserted the account number 1[...], the name of the account holder was stipulated to be "*PF Daly*".

93.3 The amount was transferred into the above-mentioned account number, the account which was opened by Mr Simelane in his own name and not into the account held by account holder PF Daly. After the amount was paid into the account, it later transpired to be that of a fraudster, the bulk of the money was withdrawn the next day.

[94] The facts stated above do not show a factual dispute, alternatively, a dispute of fact incapable of decision on the papers. The enquiry why a factual dispute is alleged needs a more comprehensive consideration.

[95] It was submitted in the heads of argument filed on behalf of Standard Bank that the appellant's case against Standard Bank has three main branches to it:

95.1 First, the appellant contended that Standard Bank was negligent in regard to the opening of the bank account into which the funds were deposited. At first, the appellant laboured under the wrong impression that the account was falsely opened in the name of "*PF Daly*", but later accepted that the account was opened in Mr Simelane's name. The appellant then shifted his attack against Standard Bank alleging that the bank failed to comply with the prescripts of the Financial Intelligence Centre Act¹⁴ ("FICA") when the account in the name of Mr Simelane was opened. This will be referred to as the "*account opening case*".

95.2 Second, the appellant contended that when receiving (collecting) payment by way of EFT, Standard Bank, as the collecting bank, should have ensured that the account name on the EFT instruction matched the name of the account holder into which the funds were collected. This will be referred to as the "*EFT case*".

95.3 Thirdly, it was contended that a duty existed on Standard Bank to have monitored the account after receiving payment, to prevent the withdrawal of funds from that account. This case will be referred to as the "*account monitoring case*".

¹⁴ 38 of 2001.

[96] It was argued on behalf of Standard Bank that each of these three grounds suffered from the same fundamental flaw, that is, they were premised on speculation with no evidence being put up to support these claims. This being the case, no factual dispute existed on the papers.

[97] The appellant's *account opening case* was premised on the assumption that a customer whose name was not Daly, had opened an account with Standard Bank in the name of the third respondent, Dr PF Daly (Patrick). It was stated that if the FICA requirements were properly applied, this would not have happened.

[98] It was alleged by Standard Bank that this premise was factually wrong. Mr Kajee, an employee of Standard Bank with access to all documentation attached to this account, deposed to an affidavit and attached the documentation which Mr Simelane apparently provided to the bank when the account was opened. According to these documents, one Mr Simelane applied to Standard Bank to open a current account and did so in his own name. He produced the necessary identification to prove that he was in fact Mr Simelane and it was argued that there was consequently no basis to contend that Standard Bank had been in breach of FICA legislation or negligent in opening this account.

[99] Concerning the second point raised, Standard Bank has shown that it was general banking practice in South Africa that EFTs are done by way of account numbers only and not with reference to the name of the account and account number. This practice was commensurate with the Payment Association of South Africa ("PASA") rules. No duty exists on Standard Bank to match an account name with an account number. This was the uncontroverted evidence adduced by Standard Bank and no factual dispute presents itself in this regard.

[100] It was common cause that there now exists an account verification facility on EFT platforms of some of the banks. This facility provides a service to match the name of the account with an account number. The evidence provided by Standard Bank indicated that this is not a standard feature but it can be introduced by the payor bank at a cost to its client.

[101] It was averred on behalf of the appellant, without credible evidence, that the matching of an account number to the name of an account was, at the time the transfer was done, commonly available in the retail banking environment in South Africa. This averment cannot be accepted, more so as Standard Bank has shown that this is not the case. It is around this issue where the appellant avers the presence of a factual dispute. It is suggested, without credible evidence, that the payment instruction from ABSA Bank to Standard Bank would have included, not only the account number into which payment must be collected, but also the name of the account holder. There is no evidence that through ABSA Bank's internet banking platform, an instruction would include the name of the account holder. It can be accepted that when the appellant processed the EFT, it included the name of PF Daly, but that is on the ABSA EFT banking platform. What instruction went to Standard Bank is a different question. The appellant could have provided expert evidence in this regard but failed to do so. The evidence of Mr Van Der Molen did not assist the appellant. Moreover, he is an intelligence technology expert and not an expert on internet banking. He speculated what account verification services should be in the EFT environment. According to him, there should be a system in place whereby a collecting banker could verify the name of the account holder against the account number in which payment is received. Standard Bank has shown that in terms of the PASA rules, it is accepted that inter-bank transfers are conducted with reference to account numbers only and that the electronic banking system in South Africa does not have in place the technological functionality in place where account numbers are matched with the name of accounts.

[102] The third contention referred to as the "*account monitoring case*" has not been supported with sufficient factual allegations to indicate that there was a duty on Standard Bank to monitor withdrawals of funds from Mr Simelane's account. It should be noted here that even if such duty existed, the funds were withdrawn from the account within a short period of time after the deposit. No evidence was provided how this could have been avoided. Similarly, no factual dispute had arisen in this regard. The matter could have been decided on the papers.

[103] A factual dispute relates to fact and not to legal conclusion. A matter cannot be referred to trial for a trial court to conduct an inquiry into a party's liability premised

on a duty of care “*after hearing all the relevant evidence*”. The dispute of fact must relate to the evidence and not the legal consequences. A party is not permitted to lead oral evidence to make out a case which is not already made out in his affidavits.¹⁵

[104] The central premise of the appeal should therefore fail. There was no relevant factual dispute between the parties which require a referral to trial. In my view, the court *a quo* was correct in not referring the matter to trial as far as the liability of Standard Bank is concerned.

[105] The next enquiry, which has already been dealt with to some extent hereinabove, is whether on the papers before this court the appellant established a factual and legal foundation to hold Standard Bank liable in delict for the loss of the monies.

[106] It was argued on behalf of the respondents that the evidence on the papers did not sustain a cause of action against Standard Bank. For the appellant, to hold Standard Bank liable in delict, he had to establish wrongfulness, negligence, causation and damages.

[107] The appellant referred to statutory duties which applied to Standard Bank in terms of FICA. It was argued that these duties constitute legal duties owed to members of the public, including the appellant. In his affidavit, the appellant referred to the legal duties contained in section 20A. This section provides that Standard Bank (an accountable institution) may not establish a business relationship or conclude a single transaction with an anonymous client or a client with an apparent false or fictitious name. This attack became moot after it was established that Mr Simelane was not an anonymous client.

[108] The appellant further relied on section 21A of FICA which determines that when an accountable institution engages with a prospective client to establish a business relationship as contemplated in section 21, the institution must obtain information to reasonably enable the accountable institution to determine whether future

¹⁵ *Minister of Land Affairs and Agriculture v D&F Wevell Trust* 2008 (2) SA 184 at 205D-206B.

transactions that will be performed in the course of the business relationship concerned are consistent with the institution's knowledge of that prospective client. The information must describe the nature of the business relationship; the intended purpose of the business relationship; and the source of the funds which that prospective client expects to use in conducting transactions in the course of the business relationship concerned. No evidence was presented that Standard bank acted in breach of this provision.

[109]Section 21C of FICA was also relied upon which requires an accountable institution to conduct ongoing due diligence in respect of a business relationship which includes, monitoring transactions throughout the course of the relationship and keeping that information. Monitoring of transactions is done with the object of reporting suspicious transactions pursuant to the terms of section 29 of FICA. There is no evidence that Standard Bank should have conducted a due diligence on this account or that it could have prevented the receipt of these funds into Mr Simelane's account.

[110]The appellant relied on these provisions to argue that Standard Bank, as the collecting banker, should be held liable to the true owner of the funds, particularly where Standard Bank negligently credited an incorrect account and where the owner of the amount suffered damages. Even on the acceptance of this duty for argument's sake, the appellant had to prove negligence on the part of Standard Bank. As indicated hereinabove, Standard Bank had opened the account after the required identification of the account holder was done. The payment into the account was collected on the account number only, and not with reference to the account holder's name. This is what the PASA rules require. Moreover, the appellant failed to prove on the papers that the payment instruction from his banker, ABSA Bank, informed Standard Bank that the money should be collected in an account with the name PF Daly. In this regard, the payment advice is not evidence that the instruction to Standard Bank included the name of the account holder.

[111]As referred to hereinabove the main thrust of the argument on behalf of the appellant was to submit that Standard Bank owed him a duty of care with reference to the *EFT* case. The appellant averred that such duty should rest with the collecting

banker (Standard Bank) to match the account number of the account with the name of the account holder where monies are transferred. If this is not done, then such duty is breached. Standard Bank has shown on the papers that this is not done in the banking industry in this country. This is not required by the PASA rules which is generally accepted. Such functionality exist on the payor bank's internet banking platform (ABSA Bank which was the bank appellant used to do the transfer to Standard Bank) but that comes at a cost to the client of the payor bank.

[112]The appellant placed reliance on the decision in *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd*¹⁶. In this matter it was found that a collecting banker could be held liable under the extended *lex Aquilia* for negligence to the true owner of a cheque, provided that all the elements or requirements for *Aquillian* liability have been met.

[113]The *Indac* matter is distinguishable from the case in *casu*, the court there was dealing with a cheque, which on the face of it gave certain instructions. This is different from an electronic transfer which occurs in an electronic environment with technological functionalities. Whether a particular duty will be imposed on a collecting bank in a case of electronic transfer will depend on a number of factors including the likelihood of loss and the cost and practicability of taking measures to guard against the loss.

[114]As it was the appellant who contended for delictual liability, which requires the development of our law, it was for him to put up evidence to show that it would be affordable and practicable for Standard Bank to take measures to guard against such loss. This required expert evidence which was lacking, as the evidence of Mr Van Der Molen fell way short in this regard. Moreover, he is not an expert in this regard.¹⁷

[115]The appellant expected from the court *a quo* to develop the common law without any knowledge of the consequences should it do so. The appellant wanted the court to go beyond the PASA rules and to impose an obligation that those rules

¹⁶ 1992 (1) 783 (A).

¹⁷ *Commissioner, SARS and Another v ABSA Bank Ltd and Another* 2003 (2) SA 96 (W) at para [30].

do not themselves contemplate. When the appellant realised the shortcomings in his case on paper, he wanted the court to refer the matter to trial to bolster his case.

[116] In my view, insufficient evidence was placed before the court *a quo* to find wrongfulness or negligence on the part of Standard Bank to establish a delictual liability in favour of appellant.

[117] There is no need for this court to decide whether the requirements contained in FICA establish a duty owed to the public, and if breached, whether that constitutes wrongfulness for purposes of a claim in delict. The reason for this is that there is no evidence to support a finding that the FICA requirements were negligently breached.

[118] The appeal against the decision of the court *a quo* in relation to the third party claim against Standard Bank should be dismissed with costs, including the cost of two counsel.

[119] The following order is made:

1. The appeal is dismissed with costs, including costs of senior and junior counsel, when so employed.

RÉAN. STRYDOM
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION
JOHANNESBURG

M. M MABESELE
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION
JOHANNESBURG

I agree,

J. J Strijdom
Acting Judge of the High court
Gauteng Local Division
Johannesburg

I agree

APPEARANCES

For the Appellant: Adv. C. J Badenhorst SC
Instructed by: Fluxmans Attorneys

For 1st-3rd Respondents: Adv. Constantianiata SC
Instructed by: Van Hulsteyn Attorneys

For the 4th Respondent: Adv. M.A Chohan SC
Instructed by: Walter Swanepoel Attorneys

Heard on: 07 November 2022

Delivered on: 24 January 2023