

SOUTH AFRICA / JUDGMENT

Ixocure (Pty) Ltd v Firststrand Bank Ltd (19619/2014) [2017] ZAWCHC 139 (30 November 2017) [2017] ZAWCHC 139

COURT

Western Cape High Court, Cape Town

BEFORE

Bozalek

CASE / FILE NUMBER

19619/2014

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THE
REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH
AFRICA
(WESTERN
CAPE DIVISION, CAPE TOWN)
Case
No: 19618/2014
Before
the Hon. Mr Justice Bozalek
Hearing: 6 –
9 November 2017
Judgment
Delivered: 30 November 2017
In

the matter between:

IXOCURE
(PTY)
LTD Plaintiff
and
FIRSTRAND
BANK
LTD Defendant

JUDGMENT**BOZALEK J**

[1] The plaintiff, a construction company, claimed payment of the amount of R623 645.32 from the defendant bank primarily on the basis that the defendant had unlawfully, unilaterally and without the plaintiff's authorisation transferred the said amount out of the plaintiff's bank account on 29 July 2014.

[2] The defence raised by the defendant was that another of its clients, Likhanyile Trading Enterprises (Pty) Ltd ('Likhanyile'),

from whose account the said sum had ostensibly been transferred to the plaintiff's account, had instructed it to stop the transfer due to a suspected fraud. The transfer was stopped and the amount was never finally credited to the plaintiff's account and therefore never transferred out of Likhanyile's account. The defendant also relied on clause 7.8 of its standard banking agreement which provides that:

'7.8. In case of fraud, suspected fraud, or the law compels the bank to do so, the (bank) reserves the right to freeze or close the customer's account and/or stop a service without notice'.

[3] In its replication the plaintiff pleads that in the event of it being found that the said amount was never credited to and/or transferred

out of its account the defendant was estopped from relying upon such facts for a number of reasons which I shall canvas later.

Background

[4] Plaintiff company was controlled by Mr LJE Lombard ('Lombard'). It held a bank account with the defendant as did Lombard in his personal capacity. The transactions in question arose out of a business relationship between the plaintiff/Lombard and Likhanyile which during 2013/2014 won a tender from the City of Cape Town ('the City') to perform repairs to the Glencairn seawall. Likhanyile, represented by its sole director, Ms Bongiwe Baleni, appointed the plaintiff as a sub-contractor to take overall charge of the project. Plaintiff was entitled to be reimbursed for its services out of monies paid to Likhanyile by the City as authorised by certificates issued by the City engineer from time to time. Since the plaintiff was using its own funds in the short term to complete the project, Lombard insisted that he be appointed as a signatory to Likhanyile's bank account with the defendant and this was duly effected on or about 19 December 2013.

[5] On behalf of Likhanyile Ms Baleni also granted Lombard the right and the ability to operate its account electronically and this he did from time to time reimbursing the plaintiff for monies he had spent on the project against monies released or paid out by the City.

[6] The present dispute relates to the last occasion on which Lombard accessed the Likhanyile's account on 28 July 2014 when he

transferred or sought to transfer the sum of R623 645.32 to the plaintiff's account. Having apparently achieved this he then transferred the sum of R620 000.00 from the plaintiff's account to his personal account.

[7] The following day it came to Lombard's attention that although his personal account had been credited with the sum of R620 000.00

the plaintiff's account now registered a debit of some R615 000.00 and showed no trace of the transfer to it of the sum of R623 645.32 from Likhanyile's account.

The evidence

[8] On behalf of the plaintiff Lombard gave evidence in accordance with the background set out above save for denying that the sum in dispute was not received into the plaintiff's account. He emphasised that the only 'security' which he had arising out of his agreement with Likhanyile was his status as a signatory to its account and his ability to operate the account electronically. He confirmed that between December 2013 when he was appointed as a signatory and July 2014 when the disputed transactions took place he received no notification from anyone that he was no longer a signatory to Likhanyile's account. On 23 May 2014 he had transferred monies out of Likhanyile's account, this being the last occasion he had done so prior to the transactions on 28 July 2014. He testified that just prior to these transaction he noted on 28 July another payment had been received from Likhanyile from the City. This, I interpolate, proved to be incorrect since the payment he was referring to, R3.9mil, was received from the City of Ekurhuleni and this is apparent from the bank statement. Seeing this payment, he transferred the sum of R623 645.32, this being an amount which he calculated was owing to the plaintiff by Likhanyile arising out of the work it had done on the Glencairn project. Immediately thereafter he had transferred R620 000.00 from the plaintiff's account to his personal account since the monies he used on the project were his personal funds. He testified that when he logged on to FNB's online platform and went to his profile it indicated that he could operate various accounts, namely, the plaintiff's, his personal account and Likhanyile's.

[9] The following day, when he logged on again, he found that the plaintiff's account had been debited with R620 000.00, putting the account into debit to the extent of some R615 000.00 despite the fact the he had no overdraft facility. He immediately called an official of the defendant and was told that he had no authority to transfer monies out of Likhanyile's account and that he had been removed as a signatory with effect from 23 May 2014. This he was told in response to his enquiries at the defendant's Sea Point branch. Subsequently he transferred the credit of R620 000.00 in his personal account back to the plaintiff's bank account in order to bring it out of overdraft. He did this because he had no option but to do so and it was also necessary in order to 'unfreeze' the plaintiff's account and his personal account. The nett result was that he was back in the position he had been in before he had

performed the banking transactions on the night of 28 July 2014.

- [10] Under cross-examination he agreed that the terms of the agreement between the plaintiff and Likhanyile were that the latter would repay him for expenses incurred on the Glencairn project as and when income was received from the City on that project. Various statements relating to the plaintiff's account were put up as exhibits and dealt with by Lombard. The first was an online banking transaction history dated 29 July 2014 which reflected an internet transfer from Likhanyile to the plaintiff's account in the amount claimed and preceded by a transfer from the plaintiff's account to Lombard's personal account in the amount of R620 000.00. Significantly, neither of these transactions show an ensuing balance, only the figure zero. The second statement was the plaintiff's for the period 11 July to 11 August 2014. It reflects a transfer to Lombard's personal account of R620 000.00 on 29 July and a transfer back to the plaintiff's account of the same sum on the following day 30 July. That statement reflects no transfer into the account of the sum of R623 000.00. Lombard also conceded that six payments had been made by the City in respect of the Glencairn project and that he had drawn against all six payments. He conceded

that no seventh payment had been made by the City and the plaintiff's claim for R623 000.00 had not been matched or covered by any corresponding payment from the City. He insisted, however, that he was entitled to withdraw the sum claimed because of the plaintiff's exposure to the project and an agreement with Likhanyile that he could withdraw from its account at any time if there were funds therein, in order to keep the project going.

- [11] In answer to the Court's question Lombard confirmed that he was never a director of Likhanyile and that to the extent that he was appointed as a signatory of Likhanyile he could be removed as one. After the disputed transactions he had terminated his relationship with Likhanyile because it was in breach of their agreement. He had been advised by his legal representative to sue the bank as opposed to Likhanyile.
- [12] Lombard testified that his essential complaint was that the bank should have advised him that he was no longer a signatory after he was removed in which event he would have limited his financial exposure to Likhanyile. He added also that he had been removed as a signatory he should not have been able to operate Likhanyile's account electronically.
- [13] The defendant called three witnesses, namely, Ms Baleni, Ms Jeanette Buda, an employee at the defendant's Hyde Park branch who dealt with Likhanyile's account, and Ms Karen Botha, the head of the defendant's Digital business channel.
- [14] Ms Baleni confirmed the business agreement between Likhanyile and the plaintiff but explained that she had in fact appointed the latter as a subcontractor after Likhanyile had won the tender. This was because, being based in Johannesburg, she could not devote herself to the Glencairn project. Likhanyile had three accounts with the defendant, and she arranged with it that she would use the particular account involved in this matter for the Cape Town tender and that she would appoint Lombard as a signatory. On 23 May 2014 she had called the defendant's Hyde Park branch and, by signing a form, had removed Lombard

as a signatory from the account. The reason for this was that the project had been terminated by the City even though it was incomplete and notwithstanding Likhanyile's application for its extension.

- [15] There had been six payments by the City during the term of the contract pursuant to six certificates issued by the City's engineer. The plaintiff had claimed against all the certificates. Since no seventh certificate could or would have been issued by the City and accordingly no payment made, she had removed Lombard as a signatory so that he could no longer draw monies from Likhanyile's account. She had not been able to notify him that she had removed him as a signatory because he had refused to take her calls and the business relationship had effectively ended.
- [16] On 29 July 2014 she noticed an sms on her phone advising her of a withdrawal or transfer from Likhanyile's account in the amount R623 645.32 at the instance of plaintiff. She had immediately gone to the defendant's Hyde Park branch and spoken to Ms Buda advising that the transfer had been made without authorisation. She was asked whether this was fraud and when she replied in the affirmative the defendant undertook to put a hold on Likhanyile's accounts subject to her laying a charge of fraud and supplying the defendant with a case number. This she duly did that day. She pointed out that the funds which had become available in Likhanyile's account i.e. R3.9mil, and from which the transfer had been made by the plaintiff, was a payment by the City of Ekurhuleni in relation to a completely different contract. Neither plaintiff nor Lombard had any right to effect transfers or settle claims against monies in Likhanyile's account emanating from contracts other than the Glencairn contract. As far as she was concerned the transfer of R623 645.32 by the plaintiff was fraudulent in that the plaintiff had no claims to those monies. Baleni testified further that she received minimal monies arising from the Glencairn project and in fact had incurred a loss of R1mil.
- [17] Ms Buda, an employee of the defendant for some 20 years and a team leader at its Hyde Park branch, confirmed Ms Baleni's account

of how Likhanyile's account came to be frozen on 29 July 2014. She had taken the necessary action after Ms Baleni had complained

that an unauthorised transfer had been effected on the account and she, the witness, had consulted a manager. She confirmed that she had been the bank employee who attended on Ms Baleni on 23 May 2014 when the latter had removed Lombard as a signatory. Ms Baleni had explained that she had had a contract in Cape Town which had come to an end and she was now the only person who should operate Likhanyile's account. After so doing Ms Buda updated Likhanyile's account electronically indicating that there was only one signatory. As a matter of protocol the defendant did not inform signatories who were being removed as such of this fact except in the case of directors. In the present instant Ms Baleni was the only director of the company. Furthermore, a director is not removed as a signatory until such time as the bank receives CIPC documentation to the effect that such person is no longer a director. She had only

become aware of Mr Lombard when he called the branch after the disputed transaction. Ms Buda also had no prior knowledge that Lombard was a secondary electronic user of the account. That information is not reflected on the account and in normal circumstances would only be known to the person operating the account, in this case Ms Baleni. As a bank official she herself would not be able to remove a secondary user, however, but would be able to advise the operator of the account how this should be done. To do so does not involve visiting the bank or interacting with the officials since the account operator can do that in private and online. Contradictorily, she testified that had she been aware that Lombard was a secondary user she would have notified Online Banking to remove him as such. Ms Buda testified that the transfer of R623 645.32 from Likhanyile to the plaintiff had not been completed since the hard-hold which she put on the account as result of the complaint of fraud had prevented this.

- [18] Ms Botes testified that she had been employed by the defendant for 35 years and was in charge of its business internet banking system. She confirmed that account operators/holders can utilise online banking through their username and password, a process which is initiated by a pin number known only to the client. An option available to clients was to set up a secondary user of an account which involves allowing another party to operate the account electronically. This can only be permitted or effected by the person who initially operates the account using their username and password and going through the appropriate process as a change to the standard settings. The bank played no role in this process which involves filling in fields and the primary user giving the secondary user a username and password. The bank cannot and does not do this on behalf of the primary user. Just as the primary user would be responsible for registering a secondary user, he or she would be responsible for removing a secondary user. Referring to a letter from the defendant's Sea Point branch dated 19 December 2013 Ms Botes testified that it served no more than to confirm that at that point in time Likhanyile had two authorised signatories i.e. Ms Baleni and Mr Lombard. That letter confirmed Lombard's authority to operate the account in what she termed 'the physical world' i.e. drawing cheques, arranging debit orders, making deposits. The authority did not extend to operating the account electronically i.e. by way of the online banking system. She testified that the bank's duty was to take directions from the account holder as to who the signatories were at any given time and that the bank's duties did not extend to notifying a person whose signatory authority was removed that he/she was no longer a signatory. This was deemed to be the responsibility of the account holder.
- [19] Shown the relevant banking transaction history, the witness confirmed that it showed transactions which had been processed at a certain point in time and that if the document was printed the following day it might show a different sequence of transacting. She distinguished between the bank's real-time processing of transactions and batch processing which happens at different times of the day in relations to transactions which were effected after 8 o'clock at night and before 6pm the following day. She likened the transaction history to a provisional statement and testified that the first two transactions reflected there i.e. the transfer from Likhanyile to the plaintiff and the transfer from it to Lombard's personal account were in a state of memory or memo-posting, the result being that the balances were

not updated and would only be updated once full batch processing had taken place. That batch processing would take place between approximately 5:45am the following day and midnight. Ms Botes testified that the transfer from Likhanyile to the plaintiff had not been finally completed, the transaction history indicating no more than that funds had been made available in good faith and could be used subject to them successfully passing through the normal cycle of processing. This had not been completed in the case of the transfer from Likhanyile because a so-called hard-hold had been placed on Likhanyile's account pursuant to the complaint of fraud made the following day by the account operator, Ms Baleni.

[20] Ms Botha testified that the ultimate failure to reflect the transfer of R623 645.32 into the plaintiff's account was not a reversal of a transaction, but a case of the transferred funds meeting a barrier by reason of the hard-hold and being redirected

into a suspense account before making their way back into Likhanyile's account. By contrast the plaintiff's and Lombard's banking transactions were not inhibited because there had been no fraud report by the plaintiff account holder so the transfer from the plaintiff to Lombard's personal account had been permitted with the result that the plaintiff's account had

gone into substantial debit even though there was no overdraft facility. This would have resulted in him receiving a phone call from his branch manager, pursuant to which Lombard had given permission for the R620 000.00 to be transferred back from his personal account to the plaintiff's account. She confirmed that a secondary user profile could be created only by the primary user and not by the bank, and similarly, a secondary user could be removed only by the primary user. Ms Botha further confirmed that if Ms Buda had gone into Likhanyile's account on the bank system she would not have been able to see that there was a secondary user. She conceded that it would be good banking practice, when a customer called to remove a signatory, to advise the customer that if the signatory was a secondary user they should be removed as such. As far as the entry in the plaintiff's account reflecting it as having a debit of R620 000 at some point Ms Botes explained that since the anticipated transfer from Likhanyile had failed to materialise the plaintiff had been recorded as having gone into overdraft.

Discussion

[21] In *Nedbank Ltd v Pestana*[1] the Court had to deal with a mistaken transfer of funds where the bank had unilaterally reversed the transfer. Griesel AJA, in

discussing the legal position stated that,

'It is well established that, in general, entries in a bank's books constitute prima facie evidence of the transaction so recorded. This does not mean, however, that in a particular case one is precluded from looking behind such entries to discover what the true state of affairs is.'[2]

[22] Discussing instances where a credit might validly be reversed by a bank Griesel AJA referred to a dictum by Zulman JA in *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in Liquidation)*[3] to the following effect,

‘(I)f a customer deposits a cheque into its bank account, the bank would upon receiving the deposit pass a credit entry to that customer's

account. If it is established that the drawer's signature has been forged it cannot be suggested that the bank would be precluded from reversing the credit entry previously made. So, too, if a customer deposits bank notes into its account the bank would similarly pass a credit entry in respect thereof. If it subsequently transpires that the bank notes were forgeries it can again not be successfully

contended that the bank would be precluded from reversing the credit entry.’

[23] Griesel AJA went on to state:

‘Further examples where credit may be validly reversed, include cases where a cheque has been deposited into a client’s account and the resultant credit entry is treated as provisional (or conditional), subject to a hold period in terms of “standard banking practice”; or where the client came by the money by way of fraud or theft; or where a wrong account was erroneously credited.

Absent some legitimate reason for reversal, however, the general principle is that once an amount has been validly transferred by A to the credit of B’s bank account, the credit belongs to B and the bank has to keep it at B’s disposal; it cannot simply re-transfer the money back into the account of A without the concurrence of B.’

[24] On the evidence placed before the Court the transfer from Likhanyile to the plaintiff fell squarely within the above quoted dicta of the Zulman JA and Griesel AJA. The evidence of Botes, a senior bank official with extensive knowledge of its online banking system, was that the credit entry into the plaintiff’s account was treated as provisional (or conditional) in terms of standard banking process. This was as a result of the fact that the transaction was initiated after 8pm at night on the online banking system. The evidence was further that before this credit entry could be made final Likhanyile’s director had alleged that the transfer was fraudulent and succeeded in having a hold placed on her account, which had eventually led to the transfer not being completed or finally credited to the plaintiff’s account. This is borne out by both banking documents relating to this transaction, namely the transaction history reflecting the contemporaneous record of these transactions on 29 July and the final statement relating to the plaintiff’s account over the relevant period. In the first document the provisional nature of the transfer is evidenced by the fact that the balance after both the transfer in and out of the plaintiff’s account is reflected as nought and, in the second document there is no evidence of the transfer of R623 645.32.

[25] It follows that the principle established or confirmed in *Nedbank Ltd v Pestana*, namely that in general a bank may not reverse a credit to a client’s account without the latter’s authority does not apply, and the result is that the plaintiff’s claim cannot succeed on the first leg of its case.

[26] This leaves the alternative basis upon which it sought relief, namely the defence first raised in the plaintiff's replication that, in the event that the said amount was never transferred out of Likhanyile's account into the plaintiff's account, the defendant was estopped from relying on such fact for various reasons.

The law relating to estoppel

[27] The following appears as a general statement of the doctrine of estoppel by representation in LAWSA at para 652:

'...the doctrine as applied in the courts of South Africa may be said to amount to the following: namely, that where a person (the representor) has by his or her words or conduct made a representation to another person (the representee) and the latter, believing their representation to be true, acted thereon and would suffer prejudice if the representor were permitted to deny the truth of the representation made by him or her, the representor may be estopped, that is precluded, from denying the truth of the representation. This statement is subject to the qualification that in certain cases estoppel will arise only if there was fault, that is, *dolus* or *culpa*, on the part of the representor when he or she made the representation on which the plea of estoppel is based.

... it is a rule of substantive law, and its function is to provide a defence to a claim or to counter a defence to a claim. It has to be pleaded and proved by the party who raises it. It is not a cause of action and cannot found a claim, but it can, in an indirect way, be defeating a defence to a claim, operate to secure the enforcement of a claim.'

[28] In my view the plaintiff is not entitled to invoke estoppel in support of its claim since, for the reasons furnished, that claim has no substance at all and to allow the plaintiff to invoke estoppel would be permitting it to use the doctrine as a sword and not merely as a shield. However, even if I am incorrect in this conclusion, there are several other reasons why the claim based on estoppel cannot succeed.

[29] As pleaded by the plaintiff the representations it relied on were:

1. to Lombard that, at all material times, he was an authorised user of Likhanyile's bank account;
2. on 28 July 2014 when Lombard accessed the Likhanyile account on defendant's online banking system, that he was a duly authorised user of that account;
3. that the plaintiff had been credited that night with the amount of R632 645.32.

[30] Dealing with the first of these representations. Lombard testified of two ways which the defendant alleged represented that he was an authorised user of Likhanyile's bank account. The first was the letter dated 19 December 2013 issued by the Sea Point branch of the defendant confirming that Lombard was one of two signatories to Likhanyile's bank account held at Hyde Park. However, a reading of this letter, addressed to 'To whom it may concern' confirms the evidence of Ms Botes to the effect that it represented no more than on that

particular day Lombard was an authorised

signatory of the account. It was not a representation to anyone, including Lombard, that he would be retained as the signatory on that account indefinitely or even beyond 19 December 2013. In the result no reliance can be properly placed on this letter by Lombard as a representation extending beyond 19 December 2013.

[31] The second representation relied upon by Lombard was, if I understood the plaintiffs' case, was that when he accessed the defendant's online banking system, with specific regard to his 'profile', it represented, up until 28 July 2014 at least, that he was an authorised user of Likhanyile's bank account. The first difficulty as regards this representation is the uncontroverted evidence by the defendant's witnesses that only a customer i.e. the account holder or its authorised representative, in this case Ms Baleni, could permit a secondary user who would then be able to

operate the account electronically. Ms Baleni did initially alter the settings on the account to permit Lombard to act as an authorised

secondary user of the account in the electronic format but the bank had no authority to effect such an arrangement and, at all material times, was unaware that Lombard was a secondary user. In these circumstances, in my view, any representation so made was that of Ms Baleni or Likhanyile, not that of the defendant. The only role played by the defendant was to set up its online banking system in such a way that a secondary user authorised by the account holder or its representative would reflect as such on the defendant's online banking system until this was revoked by the account holder or its representative. In my view this falls short of a representation on the part of the bank.

[32] The remaining representations relied upon by the plaintiff are those contained in paras 2.2, 2.3, 2.4, 2.6 and 2.7 of its replication.

These all relate either to the events of 28 or 29 July 2014 or to the final statement of the plaintiff's account which was obtained on 4 August 2014. I deal firstly with those representations allegedly made on or about 28 or 29 July 2014. These are that, when he accessed Likhanyile's bank account, he was a duly authorised user; that the sum of R632 645.32 had been transferred to the plaintiff's bank account and thereafter that a further transfer of R620 000.00 from plaintiff's bank account to his personal account had been effected as well as the recordings of one or both these transactions on the transactional history which he printed off the online banking system that night and on the final statement which he received on or about 4 August 2014. I have already dealt with the alleged representation that Lombard was an authorised user of Likhanyile's account, making the point that this 'representation' was made at the instance of Baleni or Likhanyile and not by the bank. As regards as the various provisional indications of the transfer from Likhanyile to the plaintiff's bank account and then onwards to Lombard's personal account, as I have already indicated, the plaintiff cannot use the doctrine of estoppel to trump the non-binding effect of a provisional credit which is not finalised for good reason. The same reasoning applies both to the representations said to be made in terms of the transactional history and the final statement

issued by the bank relating to the plaintiff's account on or about 4 August 2014.

[33] Regarding the other elements necessary for estoppel to operate, I accept that up until 28 or 29 July 2014, prior to Lombard being advised of the circumstances under which a hard-hold had been placed on the account, he was under the bona fide belief that he was an authorised signatory and that the transfers which he purported to effect had been made, at least provisionally. However, the representee must also show that, believing the representation to be true, he acted thereon and would suffer prejudice if the representor were permitted to deny its truth.

[34] Insofar as the representations were made between on or between 28 or 29 July and 4 August 2014 there is nothing to suspect that the plaintiff suffered any prejudice as a result. There was no evidence from Lombard that after the aborted transaction he had continued to advance or expend monies on behalf of Likhanyile. In fact his evidence was that after previously successfully operating

Likhanyile's account against certificate No 6 the plaintiff was left with an outstanding balance of R200 000.00 which increased over the ensuing months to the amount which is now claimed. The only representation which could have effected this amount was the indication on the defendant's banking platform that Lombard remained an authorised secondary user of Likhanyile's account. As I have already indicated, that representation was in truth made by Likhanyile and/or Baleni and cannot be attributed to the defendant. In any event, there is no evidence from Lombard that he utilised the online platform to access Likhanyile's account between 23 May 2014, when he was removed as a signatory by Baleni and when he claimed certain monies against certificate No 6 and 28 July 2014 when he sought to perform the abortive transactions.

[35] Finally, it is incumbent upon the plaintiff in the circumstances of the present matter to prove that he had a valid claim to payment by Likhanyile of the amount which the plaintiff now claims. This was denied by Baleni, acting on behalf of Likhanyile, who testified that the plaintiff received all monies which were due to it under the subcontractor's agreement it held with Likhanyile. The question of the validity of the plaintiff's claim is not an issue in the present matter and can certainly not be determined on the evidence before the court. It is thus doubtful that the plaintiff has been able to establish the prejudice required for a successful invocation of the doctrine of estoppel even bearing in mind that this concept has a 'wide connotation, not permitting a precise definition'. In this regard it must be borne in mind that the function or purpose of estoppel is to prevent prejudice or loss arising, and what a person invoking estoppel is required to prove is, therefore that there will be prejudice if the estoppel raised by the person is denied. I see no sign of any such prejudice.

[36] Finally, there must be a causal connection between the representation and the representee acting to his/her prejudice otherwise known as the proximate cause test. Here the Court must enquire as to whether representation was 'the proximate' or the 'real and direct' cause of such persons having acted to his/her prejudice. I return now to the balance of the defence of estoppel raised by the plaintiff

which was that based on these representations it was induced, to its detriment, to:

‘1. provide loan finance to Likhanyile Trading Enterprises (Pty) Ltd which loan has not been repaid and which otherwise would not have been provided;

2. allow alternatively fail to prevent\, that defendant from reducing the plaintiff’s bank account with the amount of R623 645.32.’

[37] The second allegation makes no sense and can be disregarded. I have, to some extent, already dealt with the first allegation regarding the plaintiff’s provision of loan finance. At best for the plaintiff it expended monies on the project against the security of knowing that it was an authorised signatory/secondary user of Likhanyile’s account. As I have indicated, however, the

representation was not made by the bank. Secondly, there is credible evidence that pursuant to the subcontractor agreement between

Likhanyile and the plaintiff the latter was not entitled to any further monies under the agreement by virtue of a certificate 7 never having been authorised by the City and no further payments being made to Likhanyile on that tender.

[38] In the circumstances for all these reasons I consider that the plaintiff’s claim has no merit and it is accordingly dismissed

with costs.

For the Plaintiff

: Adv M Basson

As Instructed by

: Johan Victor Attorneys

For the Defendant

: Adv L Dzai

As Instructed by

: Glover Kannieappan Inc

c/o Cliffe Dekker Hofmeyr

[1] 2009 (2) SA 189 (SCA).

[2] Para 8.

[3]

[1997] ZASCA 94; 1998 (1) SA 811 (SCA).

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