IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(2) REPORTABLE: YES/ NO

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

(4) REVISED

20/1. 10. 12

DATE

SIGNATURE

CASE NUMBER: A349/19

DATE: 12 October 2021

CATHERINE HELEN THOMPSON First Appellant

COUPLES INVESTMENT CC Second Appellant

V

KRUGEL & HEINSEN INCORPORATED Respondent

JUDGMENT

MABUSE J (Khumalo J et Ceylon AJ concurring)

[1] This matter came before us as an appeal. Leave so to appeal to this Division was granted on petition by the Supreme Court of Appeal on 14 October 2019. The appeal is against the whole of the judgment of Nair AJ (the court a *quo)* granted on 4 January 2019.

[2] On 6 November 2019 the Appellants withdrew their appeal against First Rand Bank (FRB). The Appellants proceed with this appeal against the Respondent, Krugel & Heinsen Incorporated.

[3] **THE PARTIES**

3.1 The First Appellant, Catherine Helen Thompson ("Ms Thompson"), is an adult businesswoman residing at […] Street, Die Heuwel, Witbank. She is the sole member of the Second Appellant.

3.2 The Second Appellant, Couples Investments CC ("Couples"), is a close corporation duly registered as such in terms of the Close Corporation Act 69 of 1984 of the Republic of South Africa with its registered address at 94 President Steyn Street, Witbank, Mpumalanga.

3.3 The Respondent, Krugel & Heinsen Incorporated ("KH"), is a firm of attorneys practising under the name and style of Krugel & Heinsen Incorporated with its principal place of business at Route N4 Business Park, Proffice Building 23 Corridor Crescent, Benflour, Emalahleni, Mpumalanga.

[4] The Appellants approached the Court a *quo* and sought the following relief:

"1. An order declaring that:

1.1 the respondent's repudiated the agreement reached between the parties on 9 December 2014;

1.2 the appellants lawfully cancelled the agreement dated 9

December 2014; and

1.3 *the appellants are, alternatively the second appellant is, entitled to payment of the balance of the proceeds of the sale of Process Park in the amount of R500,000.00;*

2. *An order against the respondents to make payment to the appellants in the amount of R500,000.00 plus interest thereon from 11 January 2017 to date of payment;*

3. *In the alternative to prayer* 2, *an order against the respondent to make payment to the appellants in the sum of R107,250.92 plus interest thereon from 11 January 2017 to date of payment and against the second respondent to make payment to the Appellants in the amount of R392,749.08 plus interest thereon from 11 January 2017 to date of payment;*

4. *In the further alternative an order declaring that the appellants are, alternatively the first appellant, is entitled to* a *reinstatement of the amount of R500,000.00 into the trust by the respondent, alternatively the respondents together with the interest thereon at the prescribed rate of interest from 11 January 2017 to date of payment;*

5. *In the alternative to prayers 1 through* 3 *an order declaring that:*

(i) (3A.1) The second respondent is only entitled to security up to such an amount as its exposure in respect of a contribution to be levied in terms of the confirmed liquidation and distribution account of ILIPS (Pty) Ltd; and

(iii) (3A.2) The respondents reinstate security for any exposure in respect of a contribution to be levied in terms of the confirmed liquidation and distribution account of ILIPS (Pty) Ltd by retaining the amount of R50,000. 00 alternatively such amount as the Court may deem just in trust by the First Respondent; and

(iii) (3A.3) The respondents be ordered to pay to the appellants, alternatively the first appellant, the amount of R450,000.00 alternatively the access to such an amount as the Court may order to be retained in trust."

[5] On 4 January 2019, in a written judgment handed down on the said date, the court a *quo* dismissed with costs the Appellants' application.

[6] The Appellants, being disgruntled by the judgment and order of the court a *quo,* sought, on the grounds fully set out in the application for leave to appeal, leave to appeal against such judgment and order. But leave to appeal was granted by the court a *quo,* not to the extent sought by the Appellants. It was only granted in respect of paragraph 11 of the application for leave to appeal. The Appellants then approached the Supreme Court of Appeal with a petition and the Supreme Court of Appeal granted them leave to appeal and referred the appeal to the Full Court of this Division. This is how the matter came before us.

[7] Counsel for the Appellants is of the view that the court a *quo* should have granted the Appellants' application against KH based on negligence or in the alternative, on the basis of breach of mandate on the part of KH. Furthermore, counsel for the Appellants opines that the court a *quo* should have held that KH were liable to compensate the Appellants for the full amount claimed together with interest from the date of payment of the money to FRB.

THE BACKGROUND

[8] Ms Thompson was a director of a company called Industrial Lifting Instrumentation and Pump Supplies (Pty) Ltd (hereinafter referred to as "ILIPS"). Couples bound itself as surety and co-principal debtor for the fulfilment of certain obligations of ILIPS to the bank. As security, the bank registered a covering bond over a property owned by Couples, situated at plot 24, OR Tambo Road, Witbank, known as Process Park. The Bank also held a cession of ILIPS' book debtors as security for the claims against ILIPS.

[9] On 26 September 2013 ILIPS was placed under final winding-up at the instance of the Bank.

[10] On 14 October 2013 the Bank, represented by Rorich, Wolmarans and Luderitz Attorneys (RWL) applied for the liquidation of Couples, and relied, among others, on the deeds of surety and covering bond which were attached to the papers. The claims against Couples were described as Couples overdraft, Couples known and the ILIPS surety indebtedness. Couples opposed the application for its liquidation.

[11] On 5 December 2014 the Bank and Couples settled the dispute between the parties and their agreement was reduced to writing. In terms of the said agreement the parties had agreed that:

The bank was prepared to cancel the bond on the following conditions:

11.1 from the proceeds of sale, the bank would receive payment in the amount of R2,350,000.00. Payment was made into the Trust Account on registration of transfer;

11.2 upon registration of transfer of Process Park, and as part of the distribution of the proceeds of the sale of Process Park, KH would retain an amount of R500,000.00 in trust. This amount would be invested in an interest-bearing account, on behalf of Couples.

11.3 The confirmation of the liquidation and distribution account of ILIPS would establish and quantify any contribution that the liquidators of ILIPS may levy against the Bank.

11.4 The bank would be entitled to payment of such an amount from the amount of R500,000.00 retained in trust by KH. The amount to be paid would be limited to R500,000.00.

11.5 The amount retained by KH may only be called up and paid to the

bank upon receipt of a confirmed liquidation and distribution account and after having been advised, in writing, that the investment should be called up and the contribution levied by the liquidators against the bank should be paid to the bank. This settlement agreement was reduced to writing by the attorneys acting on behalf of the bank, RWL, on 5 September 2014 and was accepted by all.

[12] The registration of transfer took place, Couples distributions were made, and the amount of R500,000.00 was retained by the attorneys as agreed. During February 2017 Ms Thompson received interest payment on the investment from KH in the amount of R40,000.00. The money retained by KH at **all material times** remained the property of Couples.

[13] On 11 January 2017 RWL wrote a letter to KH in which they enclosed, for the information of KH, a copy of a letter RWL had received from **the bank's insolvency attorneys, K J Cawood Attorneys, dated 16 December 2016** enclosing a copy of the first and final liquidation and distribution account. In terms of the said account, the FRB was to pay into the estate the sum of R516,624.29. This was not a confirmed liquidation and distribution account. In the said letter RWL requested KH to call up the amount of R500,000.00 and pay it into RWL's account. KH duly complied with RWL's request. This was clearly a mistake as a letter from the FRB did not contain any instruction to call up the investment but merely enquired whether the investment was still intact.

[14] on 29 June 2017, Ms Thompson learned that the liquidators had submitted a liquidation and distribution account to the Master of the High Court's Office between January 2017 and March 2017, but that it has not been confirmed.

[15] On 16 December 2016 **FRB,** through KJ Cawood Attorneys, its recovery attorneys, had written a letter to RWL in which they advised the attorneys that in terms of the attached first and final liquidation and distribution account the bank must pay into the estate the sum of R518,624.29 and that this amount may change.

[16] The bank also wanted confirmation that the sum of R500,000.00 was still being held in the interest-bearing account so that it could be used to cover the shortfall. This is the letter, a copy of which RWL sent to KH when RWL informed KH to call up that investment of R500,000.00. KH duly complied and as instructed by RWL Incorporated called up the investment.

[17] It is now contended that by paying over the amount of R500,000.00 into the account of RWL as instructed in this letter dated 11 January 2017, KH breached its duty to care to its client.

[18] RWL had in turn paid the amount of R500,000.00 into the bank account of ILIPS with FNB, account number […] on 2 March 2017. This left the bank account with a credit balance of R392,749.08. The bank in turn paid the sum of R500,000.00 to the liquidator.

[19] In a letter by RWL dated 24 August 2017 to Jaco Roos Inc, RWL admitted that *"payment in the amount of R500,000.00 was paid to our trust account and we in turn paid this amount to the account of Couples Investment Co*." They informed Jaco Roos Attorneys that:

> *"Our client has paid the amount of R500,000.00 to Mr van den Heever."*

[20] On 25 August 2017 Jaco Roos Incorporated, Ms Thompson's attorneys, sent a long letter of complaint to the Deputy Master of the High Court and copied the said letter to RWL, KH and Rossouw Leslie Incorporated ("Rossouw"). In the said letter was directed to the Master of the High Court but circulated to DNT Trust. There was no meaningful reply to the letter, in the least of all any attempt to reverse the payments and to rectify the purchase. On 1 September 2017 Ms Thompson's attorneys addressed a letter to RWL and recorded therein that although KH payment might have been in error, the further payments by and on behalf of the bank were deliberate, that the bank had appropriated the money and dispensed it contrary to the agreement, which was repudiation of the agreement concluded on 9 December 2014. In the letter the attorneys stated

that Couples and Ms Thompson accepted the repudiation and cancelled the agreement between the parties. The attorney also called for the payment of the amount in credit in ILIPS' account and the bank's consent that KH pay the sum of R500,000.00 to the appellants. There has been no meaningful response to this letter.

[21] It is Ms Thompson's case that Couples had no intention to repudiate the agreement dated 5 December 2014 and that if any Court should find that the Respondent acted in good faith with regards to the payment of the monies respectively on 11 January 2017 and 2 March 2017 and that the Appellants were not entitled to cancel the agreement, that the Appellants would honour the agreement.

[22] On 5 December 2014, a settlement agreement was reached in terms of which Couples accepted liability for the Bank's possible contribution obligation to the liquidators of ILIPS to R500,000.00 and that position was secured by a way of an investment with KH. In effect, the mortgage bond was replaced by a payment interest. The money which was supposed to be held in trust by KH at all times belonged to Couples. KH paid the amount of R500,000.00, contrary to the agreement to RWL without having received a confirmed liquidation and distribution account. KH failed to comply with the terms of the agreement and should not have paid out the R500,000.00 on the instructions of RWL without independently confirming that the Master had confirmed the first and final liquidation and distribution account. In fact, the letter from the bank did not purport the call for the payment of the R500,000.00 and referred to a draft liquidation and distribution account, not to a confirmed account.

[23] The bank then clearly decided to snatch at the bargain and unlawfully appropriate the amount contrary to the agreement by effecting payment into that account. This constitutes a repudiation or at least a breach of the agreement of 5 December 2014. The Appellants accepted the repudiation and therefore the agreement was lawfully cancelled on 1 September 2017. In the result, Couples is not liable for the bank's possible contribution obligation to the liquidators of ILIPS and the bank is not entitled to any form of substituted

security. Despite the recent correspondence the bank and KH have failed to rectify the breach of agreement and to do justice.

[24] Therefore, Couples is entitled to a repayment of its own funds in the amount of R500,000.00 plus interest at the prescribed rate of interest from 11 January 2017 to date of payment.

[25] The application was opposed by KH. Against this background KH had raised the following three defences. Its first defence is that it paid over the sum of R500,000.00 on instructions of RWL, the bank's attorneys. It contends that those instructions were in accordance with the agreement. Its second defence was that it could not have been the parties' intention that KH carried a duty of care and incurred personal liability for the bank's carrying out the instructions furnished by the bank's attorneys and agent. Thirdly, it states that it acted as an agent of the bank and not as a principle, as far as the payment instruction was concerned. As agent, KH could not be sued for payment of money, so it contended further. Accordingly, there is, in his view, lack of *locus standi* in suing KH.

[26] I now proceed to deal with these three defences singly.

HE ACTED AS AN ATTORNEY OR AGENT OF THE BANK AND NOT AS PRINCIPAL AS FAR AS THE PAYMENT INSTRUCTION WAS CONCERNED

[27] In his heads of argument, Adv TP Kruger SC has listed several grounds based on which he contends firstly, that the court a *quo* erred in dismissing the Appellants' application and secondly, that this defence raised by the Respondent carries no merit. These grounds are:

27.1 On KH's own version the Appellants instructed it to attend to the registration of the transfer and the mandate was never terminated. So, this was the start of the attorney and client relationship.

27.2 KH advised the Appellants on the terms of the agreement and sought instructions from Ms Thompson, and all the

correspondence confirmed that Ms Thompson dealt with KH as her attorneys. This constituted confirmation that KH was the Appellants' attorneys.

27.3 KH paid the interest on the investment to Ms Thompson since the Appellant's exposure was limited to R500,000.00;

27.4 the money never became that of the bank but was held pending the determination of the amount owed by the bank to the liquidators which was limited to R500,000.00. The clear implication is that if the amount owed was less than R500,000.00, the balance would fall back to the Appellants. The money was held as security for and on behalf of the Appellants, and only upon confirmation of the liquidation and distribution account would a part thereof become due and owing to FRB. The balance remained that of the Appellants. No other construction is possible in law.

27.5 KH, on its own version, was the custodian of the money in trust.

[28] At all material times KH was first the Appellants' attorneys. Its position never changed. At no stage did KH become an agent for the bank. It was as the Appellants' agent and attorney that it would pay over the money to the bank and its mandate was never terminated. Its duty was to ensure that the terms of the contract between the parties were complied with. It failed miserably in that regard.

[29] The relationship between attorney and client is based on a contract of mandate and it places fiduciary obligations upon the attorney. In this regard see **Eksteen v Van Schalkwyk 1991 (2) SA 39 T,** in which the Court made it very clear that:

> *"Dat die verhouding tussen prokureur en klient in ons hededaagse Suid-Afrikaanse reg een van mandaat is, staan vas. Kyk Goodricke & Son v Auto Protection Insurance (in Liquidation) 1968 (1) SA 717 (A) op 722H en die insiggewende artikel van DJ Joubert 'Die Kontraktuele Verhouding tussen Professionele Man en Klient in Acta Juridica (1970) op 9-29. Dit staan eweseer vas dat mandaat en verteenwoordiging nie sinoniem is nie,*

hoewel 'n mandaat tot inhoud kan he dat die lashebber as verteenwoordiger van die lasgewer optree."

An attorney also has a duty of care towards the Court and his opponent and other third parties, but this duty is not a matter which readily admits of a clear definition. See in this regard **Barlow Rand Ltd v Lebos 1985 (4) SA 341 T, 345E-G.**

[30] Seen from the above perspective, KH's first duty was towards its clients, the Appellants, and then towards the third parties with whom the Appellants had contracted. In other words, it was incumbent upon KH to ensure that the trust of their clients is protected in the exercise of its undertaking towards the bank. Put differently, KH in the interest of its client, should have refused to pay over the money held in trust when it was requested from it, particularly in view of the content of the letter of request which did not call for money to be paid over but only enquired whether the money was still held in trust and secondly was safe.

"In terms of the attached draft first and final liquidation distribution and contribution account we must refund the estate with an amount of R518,624.29. This is subject to change."

[31] Accordingly, KH was negligent in the execution of its duties and failed to protect its client's interest thereby breaching its duty of care. The first defence cannot stand and KH must be held to be liable to the Appellants.

IT COULD NOT HAVE BEEN THE PARTIES' INTENTION THAT KH CARRIED A DUTY OF CARE AND INCURRED PERSONAL LIABILITY FOR THE BANK'S CARRYING OUT THE INSTRUCTIONS FURNISHED BY THE BANK'S ATTORNEYS AND AGENT

[32] According to Mr Kruger, this is so because the argument was not worded that way. It was, however, not the terms of the contract between the Appellants and the bank that regulated KH's mandate. Its mandate emanated from the instructions given to it by the Appellants. Its failure to comply with the

agreement between the parties when it had a duty to do so was clearly the basis of its liability to the Appellants.

[33] On a consideration of the above submissions and authorities the second defence put forward by KH lacks merit. It was not the terms of the contract between the Appellant and the FRB that regulated KH's mandate. Its mandate originated from the instructions given to it by the Appellants. KH's failure to comply with the agreement between the parties when it had a duty to do so was clearly the basis of its liability to the Appellants. Thirdly, KH said that it could not have been the parties' intention that it carried a duty of care and incurred personal liability for the FRB in carrying out the instructions furnished by the bank's attorneys. This is so because the bank is a financial institution with considerable resources and therefore able to make good its own damage causing actions. As such the prevailing idea of justice and general criterion of reasonableness did not call for KH to be held liable for the bank's actions. This is the plea and misericordia and has no merit. KH's liability arose from its breach of mandate when it paid over the money when it should not have done so. The bank's liability to pay the money to the Appellants did not remove the breach of KH's duty of care.

[34] The suggestion that the prevailing idea of justice and general criterion of reasonableness did not call for KH to be held liable for the bank's actions was simply a proposal of such **inconceivable** absurdity that could not be sustained.

[35] The court a *quo* erred in the following respects:

35.1 it held that KH did not breach the contract between the parties since *"the parties were Couples and Thompson as its representative and director of ILIPS and FirstRand".* It held furthermore that KH was an agent for Thompson whose mandate was to hold funds in trust until the instructions by RWL to pay out the money. KH subsequently received the instructions and paid out the money.

35.2 *"In the result, the claim against KH must fail as it is not* a *party to the agreement. If he was negligent in respect of* a *duty of care as an attorney to Couples his claim ought to have been in delict which it was not, neither was it pleaded."*

The court a *quo* failed to appreciate that KH was an attorney for the Thompsons and Couples. It was after all Couples' building that had been sold to settle the dispute. The paragraph quoted verbatim above only mentioned Couples and was silent about Thompson. The fact that Thompson represented Couples did not detract from the fact that KH remained the attorney of Couples.

35.3 In the judgment on the application for leave to appeal the court a *quo* once more failed to appreciate that the relationship between the Appellants and KH was based on mandate. In paragraph 6 of the judgment the Court a quo recorded:

> *"The orders sought for breach of the settlement agreement is indeed sought against both Respondents. From the settlement agreement it is clear that the Respondent was not* a *party to same."*

35.4 The liability of an attorney towards his client for damages caused because of his negligence is founded on the contract between the parties. It is an implied term of mandate to the attorney that he will exercise the skill, adequate knowledge and diligence expected of an average practising attorney. KH negligently paid out the money regardless of the terms of the written agreement. Accordingly, the court a quo should have held it liable to compensate the Appellants in the sum of R500,000.00. The court a *quo's* further errors about the approach that it adopted against KH can also be seen from the following paragraphs:

35.4.1 it erred in finding that the Appellant's claim against KH

had to fail because it was not a party to the agreement between the Appellants and the bank;

35.4.2 the court a *quo,* whilst correctly holding that KH was an agent of Couples, failed to appreciate that, as agent, it was bound to properly execute its mandate towards the Appellants. Despite the consensus between the parties that the scope of the mandate was clearly set out in correspondence between the parties, the court a quo failed to hold that KH had breached its mandate by negligently paying out the money on demand of the bank's attorney without a condition having been fulfilled. That condition was that the money could only be paid out if a confirmed liquidation and distribution account was presented to KH.

[36] Accordingly, the court a quo should have held that KH was liable to compensate the Appellants for the full amount claimed together with interest from the date of payment of the money to the bank.

[37] In the result, we make the following order:

1. The appeal is upheld with costs, such costs to include the costs consequent upon the employment of two counsel.

2. The order of the Court a quo is hereby set aside and in its place is substituted the following:

"2.1 The Respondent is hereby ordered to pay to the Appellants the sum of R500,000.00 (Five Hundred Thousand Rand) together with interest thereon at the prescribed rate of interest computed from 11 January 2017 to date of payment.

2.2 The First Respondent is hereby ordered to pay the costs of the

application, such costs to include the costs occasioned by the employment of two counsel.

PM MABUSE
JUDGE OF THE HIGH COURT

NV KHUMALO
JUDGE OF THE HIGH COURT

B CEYLON
ACTING JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Appellants:	Adv TP Krüger (SC)
Instructed by:	Jaco Roos Attorneys Inc
Counsel for the Respondent:	Adv JS Griessel
Instructed by:	Savage Jooste & Adams Inc
Date heard:	12 May 2021
Date of judgment:	12 October 2021