IN THE CAPE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

REPORTABLE CASE NO: 21068/2008

In the matter between:

PETER JÄCK Plaintiff/Appellant

and

JACOBA MAGDALENA DU PLESSIS Defendant/Respondent

JUDGMENT BY	:	Z F JOUBERT, AJ
For the Applicant	:	Adv. J T LOUW
Instructed by	:	MARAIS MULLER YEKISO INC 16th Floor, The Pinnacle c/o Burg & Strand Street Cape Town (Ref: TR de Wet)
For the Respondents	:	Adv. W P COETZEE
Instructed by	:	DU PLESSIS & PARTNERS 22 Bloemhof Street BELLVILLE c/o MILTON DE LA HARPE ATTORNEYS 39 Adderley Street 201 Groote Kerk Building CAPE TOWN
Date(s) of hearing	:	Monday, 16 March 2009
Judgment delivered	:	Friday, 27 March 2009

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: 21068/2008

In the matter between:

PETER JÄCK Plaintiff/Appellant

and

JACOBA MAGDALENA DU PLESSIS Defendant/ Respondent

JUDGMENT

Z F JOUBERT AJ

1. This is an application for Summary Judgment.

2. The Defendant is an attorney. On or about 13 October 2006 the Plaintiff paid the amount of R100 075,00 to the Defendant's Trust Account held at ABSA Bank.

3. In his Particulars of Claim the Plaintiff relies on three alternative causes of action. The first relates to an alleged agreement in terms of which the Plaintiff would lend and advance an amount of R100 075,00 to seven borrowers ("the prospective mortgagees"). The names of the prospective mortgagees and the amount to be paid in respect of each prospective mortgagee are set out in annexure "**B**" to the Particulars of Claim. It is alleged that each of the prospective mortgagees required the amount set out in the annexure to clear the adverse credit records relating to each of the prospective mortgagees. It is further alleged that mortgage bonds had been approved in principle for the second prospective mortgagees and that these bonds could only be finally approved once the creditors had agreed to clear the mortgagee's adverse credit records. Upon securing payment to the creditors the amounts reflected in the annexure, and upon the creditors agreeing to clear the adverse credit records, the Defendant would receive instructions from a financial institution to register a mortgage bond over the immovable property of each prospective mortgagee in favour of the relevant financial institution. It is further alleged that it was agreed that the Defendant would ensure that each of the prospective mortgagees sign an Acknowledgment of Debt in favour of the Plaintiff, for repayment to the Plaintiff of the amount to be lent to each prospective mortgagee, together with interest thereon, against registration of each mortgage bond. It is further alleged that it was agreed that the Plaintiff would pay and that the Defendant would keep the amount of R100 075,00 on behalf of the Plaintiff in her Trust Banking Account in terms of Section 78(1) of the Attorneys' Act, (Act 53 of 1975) until all the conditions referred to above, had been fulfilled.

4. In the alternative, it is alleged that during the period 16 October 2006 to 8 December 2008, the Defendant breached her fiduciary duty to the Plaintiff as her Trust Creditor, alternatively, acted negligently, in disbursing the monies by paying the monies out to a third party from her Trust Account.

5. The Plaintiff further contends that the Defendant breached the terms of the agreement, alternatively, breached her fiduciary duty to the Plaintiff as her Trust Creditor, alternatively, acted negligently in failing to ensure that:

    5.1 proper Acknowledgment of Debts were signed by the prospective mortgagees;

    5.2 the agreement of the creditors to cancel and/or clear the adverse credit records was obtained;

    prior to the funds deposited by the Plaintiff being paid out to the creditors or to third parties.

6. The Plaintiff further alleges that if it had not been for the fact that the Defendant was an attorney and that the assurances encapsulated in the agreement referred to above had been given, the Plaintiff would not have paid the funds to the Defendant.

7. In her Affidavit resisting Summary Judgment, the Defendant states that during 2006 she met two gentlemen who were the Directors in a company Bond Success (Edms) Bpk., ("Bond Success"). She further states:

> "*4. Mnre Snyman en Diamond het my meegedeel dat dit deel is van Bond Success se besigheid om skuldenaars, wat onroerende eiendom met 'n netto batewaarde besit, te help om hulle skulde te delg op die volgende wyse:*
>
> *4.1 Bond Success bekom oorbruggingsfinansiering van 'n derde party wat aangewend word om alle skulde van sodanige skuldenaar te betaal sodra sodanige skuldenaar 'n skulderkenning onderteken het.*
>
> *4.2 Nadat alle skulde van sodanige skuldenaar betaal is, word gereël dat enige vonnisse teen sodanige skuldenaar tersyde gestel word.*
>
> *4.3 'n Verband word oor die onroerende eiendom van sodanige skuldenaar geregistreer, die opbrengs waarvan aangewend word om die oorbruggingsfinansiering terug te betaal aan die verskaffer daarvan.*

5. *Op ongeveer 13 Oktober 2006 het Mnr Snyman my meegedeel dat daar 'n bedrag van R100 075,00 in my trustrekening betaal was deur die Eiser, synde oorbruggingsfinansiering wat die Eiser namens Bond Success in my trustrekening betaal het. Gemelde bedrag sou aangewend word om die skulde van sekere skuldenaars te betaal nadat hulle skulderkennings geteken het wat ek sou opstel en sou die besonderhede van gemelde skuldenaars mettertyd aan my verskaf word deur Bond Success. Ek sou ook toesien tot die registrasie van die verbande oor sodanige skuldenaars se onroerende eiendomme.*

6. *Bond Success* ***het nooit enige inligting oor die betrokke skuldenaars aan my verskaf nie. Ek het met verloop van tyd die volle bedrag van R100 075,00 aan Bond Success terugbetaal deurdat ek op versoek van Mnr Diamond op 16 Oktober 2006, 1 November 2006 en 8 Desember 2006 onderskeidelik R70 000,00, R25 000,00 en R5 075,00 aan Bond Success betaal het.***

7. *Ek het nooit enige ooreenkoms met die Eiser aangegaan nie. Die eerste keer wat ek met die Eiser gepraat het was toe hy my telefonies gekontak het nadat gemelde bedrae reeds aan Bond Success terugbetaal was. Liezl de Vries was in my diens as 'n*

sekretaresse en was nie gemagtig om die ooreenkoms wat in die Besonderhede van Vordering gepleit word, of enige ander ooreenkoms, namens my aan te gaan nie. Volgens my kennis het Liezl de Vries ook nie sodanige ooreenkoms aangegaan nie en dra sy nie eers kennis van die bedrag wat in my trustrekening betaal was nie.

8. *Liezl de Vries het intussen my diens verlaat en ek weet nie waar sy haar tans bevind nie.*

9. *Ek heg hierby aan as Aanhangsel "**B**" 'n bevestigende eedsverklaring van Mnr Snyman.*" (my emphasis)

8. In his Confirmatory Affidavit Snyman confirms the contents of the Defendant's Affidavit insofar as they refer to him and further states:

"*2.1 Defendant was told by me that the amount of R100 075,00 was paid into her trust account by Plaintiff on behalf of Bond Success.*

2.2 The said amount was to be utilized to settle the debts of certain debtors, the particulars of which were never furnished to her.

2.3 The said amount was paid by Defendant to Bond Success by way of three payments of R75 000,00, R25 000,00 and R5 075,00 on 16 October 2006, 1 November and 8 December 2006 respectively. "

9. It was common cause that the monies in question were deposited in the Defendant's Trust Account by the Plaintiff. Section 78(4) of the Attorneys' Act expressly provides that attorneys shall keep proper records containing the particulars and information of any money received, held or paid into an attorney's Trust Account. The Defendant does not state in her Answering Affidavit whose name the deposit was reflected in her Trust Account. The inference is irresistible that it must have been reflected in the Plaintiff's name, as he deposited the money into her Trust Account.

10. In **Barlett and Another v Hirschowitz Flionis** [2005] 2 All SA 567 (W) Schwartzman J., referred to the expert evidence led in that case in regard to the duties of an attorney insofar as they relate to trust accounts at 579g:

"*[36] Faris has practiced as an accountant for 42 years. Since 1972 he has conducted forensic audits on behalf of the Transvaal Law Society. For the past 16 years he has acted as a consultant to examiners of the Law Society and has assisted in setting the bookkeeping admission examination for candidate attorneys. His expertise was not in issue. In*

his expert summary, and in evidence, he dealt in detail with an attorney's duties in relation to his or her trust account. He confirmed t he following extracts from his summary:

36.1 "The conduct and duties of an attorney in relation to his trust account is governed and regulated by Statute, the rules of the Law Society, the purpose of the account and the generally accepted principles of general practice management."

36.2 "Subject to a limitation that does not apply in this action, money in a trust account is not, by Statute, the property of the attorney. For this reason, an especially high standard of care is expected of practising attorneys in regard to the opening, keeping and management of a trust account."

36.3 "Money in a trust account may be that of a client or third party. It is common practice that, without notice, a person other than a client may pay money into an attorney's trust account. It also happens that funds may be deposited into an attorney's trust account where the actual depositor's name is not disclosed. This can happen when the deposit is made

electronically or when payment is made by a bank cheque or, as in this case, by way of an interbank clearance voucher, and the deposit slip does not identify the person paying in the money."

36.4 *"**When money is deposited into a trust account it should be credited to the client's account and dealt with strictly in accordance with the client's instructions.** When the identity of the client is not known or the purpose of the deposit is not known, the deposit should be credited to a Trust Suspense account until the identity of the trust creditor is established, whereafter the money should be dealt with in accordance with the trust creditor's instructions."*

36.5 *"In terms of the Law Society Rule 69.5, it is an attorney's duty to ensure that all withdrawals from the trust are only made for or on behalf of the trust creditor."*

36.6 *"Attorneys should be alert to the possibility that their trust account is being used for money laundering*

purposes. This is governed by Statute, but was not so governed in 1999." "

11. At 585 (she) the Learned Judge stated the following:

"[52] *Money deposited into an attorney's trust account is not his or her property – see section 78(7) of the Attorneys Act, 53 of 1797. Faris gave an uncontradicted account of the duties and responsibilities of an attorney in relation to money in a trust account (see paragraph [36] hereof).* ***In relation to such money, an attorney must deal with it strictly in accordance with the client's instructions.***" (my emphasis)

12. In **Hirschowitz Flionis v Bartless and Another** 2006 (3) SA 575 (SCA) Howie P., stated the following at 589 C-F:

"*[30] On the contrary, there are a number of considerations which, in my opinion, compel the conclusion that Flionis was indeed subject to the legal duty under discussion. First and foremost, the appellant, as recipient, was a firm of practising attorneys. As such, it proclaimed to the public that it possessed the expertise and trustworthiness to deal with trust money reasonably and responsibly. Second, Bartlett relied on that and particularly on the fact that the money would be in the appellant's trust account until*

he instructed otherwise. Faris' exposition of an attorney's obligations in properly managing a trust account demonstrates that Bartlett's reliance on the money being safe in a trust account was reasonable, even if, as I shall point out, his failure to communicate with Flionis was not. Third, even where an attorney discovers an anonymous and unexplained deposit, it requires minimal management to transfer the money to a trust suspense account. It is then a task of no difficulty to trace the depositor with the aid of the firm's own bank. After that, one need merely leave the money where it is until receipt of instructions by or on behalf of the depositor or the person for whose benefit the deposit was made. Fourth, unreasonable conduct that might put the money at risk would, as a reasonable foreseeability, cause loss to the depositor or beneficiary. The legal convictions of the community would undoubtedly clamour for liability to exist in these circumstances."

13. In **Du Preez and Others v Swiegers** 2008 (4) SA 627 (SCA), the Supreme Court of Appeal again dealt with the question of attorney's trust accounts and the duty of attorneys in this regard. At page 632 A-F the Learned President stated the following:

"*[19] I find it difficult to see what possible scope there is for the contention that there is no legal duty in this situation. An attorney is under a legal duty to deal with trust account*

money in such a way that loss is not negligently caused, inter alia, to the depositor. That was decided in Hirschowitz Flionis v Bartlett and Another. No acceptable reasons have been advanced which take this case outside the scope of what was there found in regard to unlawfulness.

[20] What the Court below did not make any express finding that the respondent had been negligent but there are indications in the judgment that the court considered his failure to make certain enquiries to have been remiss. What the court went on to say, however, would mean the same even if the respondent had been found negligent. ***What the court in effect held was that as long as a depositor is silent as to what is to be done with the money deposited in an attorney's trust account the latter can, as long as there are specific instructions from the attorney's client as to that money, negligently, but still lawfully, ignore what the depositor might want done with the money. The proposition's mere articulation warrants its rejection.***

[21] It was also wrong, in my view, to hold, as a corollary, that it was up to the depositor to look after its own interests. Vis-à-vis the depositor the attorney is not just another member of the public who is entitled to expect fellow citizens to take

reasonable care to protect their own interests. ***An attorney into whose trust account money is paid owes a duty to the depositor even if the depositor is not existing client of the practice. That duty, at the risk of repletion, is to deal with the money in such a way that harm is not negligently caused, to the depositor among others.***" (my emphasis)

14. The Learned President went on to state (at 632F-633B):

"*[22}* *Moving on to the element of fault, the test is that laid down in* ***Kruger v Coetzee****. Upon receipt of the letter from the plaintiffs' attorneys of 11 May the respondent knew that at that juncture the impending deposit was to be held for the benefit of DLA, his supposed client. He did not respond that DLA was not his client. Had he made contact with the letter-writer the true picture would have emerged. Then he heard from Louw that the deposit he was expecting was owed on a completely different basis. The respondent made no effort to ascertain the plaintiffs' attitude to Louw's version. Later still the Plaintiffs' letter was cancelled but the money was nevertheless deposited. The respondent chose to ignore – he could not simply have been inadvertent about this – what the depositor wanted done with the money. He*

closed his mind to the depositor's intention and confined his attention to what Louw instructed. Significantly, the respondent dealt with the money in relation to Louw as he should have dealt with it in relation to the plaintiffs. Louw said clearly enough that he wanted the money paid to Asset Allocation Consultants but the respondent refused to pay out, even though Louw was the beneficiary – or perhaps one should say because Louw was the beneficiary – without Louw putting that instruction in writing so that no later dispute would arise. Had this expedient been followed in relation to the plaintiffs no loss would have resulted. Indeed the required care was more simply taken. It needed only a telephone call to the plaintiffs' attorney to establish exactly the purpose of the deposit and that in no circumstances ws the money to go to Louw or his designated payee."

15. As was pointed out by Mr Louw on behalf of the Plaintiff in his submissions, the Defendant admits that the sum of money was paid into a Trust Account and that she paid the monies out to a third party.

16. It was further common cause that the money was deposited by the Plaintiff, that it was earmarked for the payment of debt on behalf of certain debtors, that such payment would only take place after they (the debtors) had signed Acknowledgment of Debt agreements which the Defendant would draw up

and that the Defendant would ensure that mortgage bonds be registered over the immovable properties belonging to the debtors.

17. The Defendant suggests (in paragraph 6 of her Affidavit) that the reason why she did not do that which she was obliged to do in terms of the agreement contended for by her, was because she never received details of the debtors.

18. What is clear from the Defendant's version is that she did not take the precaution of confirming with the Plaintiff, her trust creditor, that it would be in order for her to disburse the monies to a third party, Bond Success. It further appears from her Affidavit that she did not take the elementary precaution of confirming with the Plaintiff the correctness of that which was conveyed to her by the Directors of Bond Success. In fact, as she puts it in her Affidavit (in paragraph 7): "*Die eerste keer wat ek met die Eiser gepraat het was toe hy my telefonies gekontak het nadat gemelde bedrae reeds aan Bond Success terugbetaal was.*"

19. In my view it is clear that the Defendant acted negligently in paying out the monies to Bond Success. This emerges from the Affidavit to which she deposed in resisting Summary Judgment. The defence set out in an Affidavit Resisting Summary Judgment must be a defence valid in law and the facts set out in the Affidavit must be sufficient to support such a defence. See: **Maharaj v Barclays National Bank Ltd** 1976 (1) SA 418 (A).

20. In my view the Defendant has set out no such defence and the Plaintiff is entitled to Summary Judgment.

21. I accordingly grant Summary Judgment against the Defendant for:

(1) payment of the amount of R100 075,00;

(2) interest on the amount of R100 075,00 from 9 December 2006 to date of payment at the rate of 15.5% per annum;

(3) costs of suit.

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Z F JOUBERT AJ

24 March 2009