IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: 5766/06

In the matter between:

MAARTEN PETRUS ALBERTUS JONES	First Plaintiff
ANNAMARIE JONES	Second Plaintiff

and

VORSTER & STEYN INCORPORATED	First Defendant
ST MICHAEL INTERIORS CC	
t/a JUMBO BUILDING & RENOVATING	Second Defendant
ST MICHAEL PIERRE KOTZÉ	Third Defendant
GOLD BAY PROPERTIES 29 CC	Fourth Defendant

JUDGMENT DELIVERED ON 26 JANUARY 2010

YEKISO, J

INTRODUCTION

[1] The first and the second plaintiffs have instituted an action out of this court against the first, second, third and fourth defendants, jointly and severally, the one paying the other to be absolved, for payment of an amount of R300,000-00, being in respect of damages allegedly suffered by the plaintiffs arising from an alleged payment, without authority, by the first defendant to the second defendant of an amount of R300,000-00 entrusted to it by the plaintiffs.

DESCRIPTION OF THE PARTIES

[2]

[2.1.] The plaintiffs are Maarten Petrus Albertus Jones and Annamarie Jones, first and second plaintiffs respectively, who are married to each other and residing at 18 Compagne Crescent, Strand,in the Province of the Western Cape.

[2.2.] The first defendant is Vorster & Steyn Incorporated, a company duly incorporated in terms of the laws of the Republic of South Africa, conducting practice as attorneys, notaries, conveyancers, administrators of

estates and sworn translators at Mitchell House, 16 Mitchell Street, Hermanus,in the Province of the Western Cape.

[2.3.] The second defendant is St Michaels Interiors CC, a close corporation with limited liability, incorporated in terms of the laws of the Republic of South Africa, carrying on trade as Jumbo Building and Renovating, having its principal place of business at 923 Buffels Road, Pringle Bay, in the province of the Western Cape.

[2.4.] The third defendant is St Michael Pierre Kotzé, an adult male person of 923 Buffels Road, Pringle Bay, in the province of the Western Cape. The third defendant is the sole member of the second defendant.

[2.5.] The fourth defendant is Golden Bay Properties 29 CC, similarly a close corporation with limited liability, duly incorporated in terms of the laws of the Republic of South Africa, having its registered office at 287 Lynwood Road, Menlo Park, in the province of Gauteng and having its principal place of business at 923 Buffels Road, Pringle Bay, in the province of the Western Cape. The fourth defendant was added as the fourth defendant

in these proceedings in terms of the Order of this Court issued on 27 June 2006.

BACKGROUND TOWARDS INSTITUTION OF THE PROCEEDINGS

[3]

[3.1.] On 30 October 2004, and at the Strand, the first and the second plaintiffs each concluded three separate written agreements with the second and the fourth defendants, St Michael Interiors CC and Golden Bay Properties 29 CC, respectively. The second and the fourth defendants were each represented by the third defendant when all three sets of agreements were concluded.

[3.2.] The respective written agreements were an agreement of purchase and sale, in each case, in terms of which each plaintiff purchased from the fourth defendant a vacant piece of land in an anticipated residential development marketed under the name “St Michael’s Nest”.

[3.3.] The second written agreement, in each case, entailed a building agreement, concluded with the second defendant, in terms of which the

second defendant undertook to erect a dwelling on each vacant piece of land purchased by each plaintiff from the fourth defendant.

[3.4.] The third such written agreement entailed an acknowledgement of debt, by each plaintiff, in favour of the second defendant in terms of which each plaintiff acknowledged himself/herself to be truly and lawfully indebted to the second defendant in a specified amount of money, the *causa* in respect of each acknowledgement of debt being described "as per part of the building agreement". The three separate written agreements are briefly elaborated on in the paragraphs which follow.

THE ACKNOWLEDGEMENT OF DEBT

[4]

[4.1.] This agreement, in each case, is under the heading "Acknowledgement of Debt". In terms thereof, the first plaintiff bound himself to be truly and lawfully indebted to the second defendant in an amount of R200,000-00 "as per part of the building agreement". There is no indication in the written agreement, in the instance of first plaintiff, as regards when and how the aforementioned amount had to be repaid nor

any indication of consequences which would ensue in the event the debtor defaulting.

[4.2.] In the instance of the second plaintiff, she bound herself to be truly and lawfully indebted to the second defendant in an amount of R100,000-00 similarly "as per part of the building agreement". In the case of the second plaintiff, the aforementioned amount of R100,000-00 is indicated as being repayable on date of bond approval.

THE PURCHASE AND SALE AGREEMENT

[5] The plaintiffs, in each case, concluded a purchase and sale agreement with the fourth defendant in terms of which each plaintiff purchased from the fourth defendant a vacant piece of land. In the case of the first plaintiff the property purchased is described as Erf 10, "St Michael's Nest" and, in the case of the second plaintiff, the property purchased is described as "Unit 19 St Michael's Nest". In each case, the purchase consideration is in an amount of R200,000-00 payable on date of transfer of the properties concerned in the names of the respective purchasers. In terms of clause 9.2 thereof, the transfer, in each case, would be effected by attorneys

Vorster & Steyn, Mitchell House, 16 Mitchell Street, Hermanus. The seller, in each instance, was the fourth defendant, Golden Bay Properties 29 CC.

THE BUILDING AGREEMENT

[6] The building agreements, in each case, provide for the erection of a dwelling on each vacant piece of land purchased. In each case the builder, who is the second defendant, undertook to carry out the building works on the property at a consideration of R340,000-00 in the instance of the first plaintiff and, in the instance of the second plaintiff, at a consideration of R299,900-00. In terms of clause 1.1 of the agreement the builder undertook to carry out and complete the work, at its sole risk, cost and expense according to the plans, elevations and specifications annexed to the Building Agreement.

[7] The marketing of the proposed development was undertaken by Seeff Properties, a well-known organisation in auctions, marketing and property development. In the instance of this matter Seeff Properties were both marketing and sales agents for the developer in the proposed development. All the agreements referred to in the preceding paragraphs were concluded at the business premises of Seeff Properties as agents for

the developer. The transferring attorneys, as indicated in clause 9.2 of the agreement, were indicated as being attorneys Vorster & Steyn, the first defendant in these proceedings. Their address was indicated as being Mitchell House, 16 Mitchell Street, Hermanus and their telephone and fax numbers were indicated as being (028) 313 0033 and (028) 312 3348. The names of the transferring attorneys as well as their telephone and fax numbers thus also feature in the marketing of the proposed property development.

PAYMENTS INTO THE TRUST ACCOUNT OF FIRST DEFENDANT

[8] When offering to purchase the vacant pieces of land, both the first and the second plaintiffs indicated to the sales agent, Mr Kuhn, that they had available amounts of R200,000-00 and R100,000-00 respectively, as deposits towards the purchase price of the properties and the building works to be undertaken thereon. According to the evidence of Mr Jones, the amounts of R200,000-00 and R100,000-00 referred to in the Acknowledgement of Debt and the subsequent payment into the trust account of the first defendant of the total amount of R300,000-00 was at the backdrop of a discussion pertaining to payment of a deposit and the

costs of the building works to be undertaken on the vacant pieces of land purchased.

[9] According to the evidence of Mr Jones, sometime during December 2004, he and his wife were called upon to pay the amounts of R200,000-00 and R100,000-00, respectively, which each one of them, on the occasion of the conclusion of the agreements, had indicated they had available to pay. The required amount of R300,000-00 was paid by way of two payments into the trust account of first defendant, Vorster & Steyn Incorporated: an amount of R75,000-00 paid by the second plaintiff on 4 January 2005, such payment having been made by way of a bank guaranteed cheque; an amount of R225,000-00 paid by the first plaintiff on 7 January 2005, such payment having been made by way of an internet bank transfer. When called upon to make the required payments, the first plaintiff insisted that such payment be made in an interest-bearing trust account whereupon the sales agent, in the person of Mr Kuhn, furnished him with the trust account details of the transferring attorneys in the persons of attorneys Vorster & Steyn Incorporated. In the meantime the plaintiffs were informed that transfer of the relevant properties in their respective names would be

effected towards the end of January 2005 and that building works on the properties concerned would be completed towards the end of April 2005.

[10] In the meantime, and as per conditions attached to their respective purchase and sale agreements, both the first and the second plaintiff applied for home loans with Absa Bank the proceeds of which would be utilised towards payment of the balance of the purchase price. In the instance of the first plaintiff, a home loan in an amount of R340,000-00 was approved. Attorneys Vorster & Steyn Inc were instructed to attend to the registration of the bond per a letter addressed to them dated 29 December 2004. In the instance of the second plaintiff, a bond in an amount of R399,900-00 was approved and, similarly, attorneys Vorster & Steyn Inc were instructed to attend to the registration of the relevant bond per letter dated 10 January 2005.

PAYMENT TO SECOND DEFENDANT

[11] The third defendant had become aware of payments made, first, by the second plaintiff, of an amount of R75,000-00 made on 4 January 2005 into the trust account of attorneys Vorster & Steyn Incorporated who, as has already been pointed out, are first defendant in these proceedings.

According to the evidence of Mr Bierman, a director in the aforementioned firm of attorneys, the third defendant, who it appears was a client in the firm at that stage, called at the first defendant's offices and demanded that an amount of, initially, R75,000.00-00 paid into the first defendant's trust account by the second plaintiff be paid to him on the basis that it was paid into the firm's trust account in discharge of an indebtedness due to him. In proof of this assertion, so Mr Bierman states in his evidence, the third defendant produced the acknowledgements of debt referred to in paragraph [4] of this judgment. On the strength of these acknowledgements of debt, Mr Bierman authorised three payments to the second defendant, those being payment to the second defendant of an amount of R75,000-00, by way of cheque no 6889 dated 7 January 2005; a further payment to the second defendant of an amount of R200,000-00, by way of cheque no 6896 dated 13 January 2005; and a further payment to the second defendant of an amount of R25,000-00, by way of cheque no 6897 dated 13 January 2005, all such payments totalling an amount of R300,000-00 which is the subject of a claim in this action.

[12] In the meantime, the plaintiffs kept on enquiring from Mr Kuhn, a sales and marketing agent, as regards the delay in the transfer of the vacant

pieces of land into their respective names and the delay in the commencement of the building development. As at 27 June 2005 no transfer had as yet taken place despite several advices that those would have occured towards the end of January 2005 and no building works had commenced despite similar advices that those would have been completed towards the end of April 2005. Under the circumstances both plaintiffs felt that their patience had been thoroughly exhausted and felt that they had no option but to resile from the agreements concluded.

[13] By way of a joint letter dated 27 June 2005, the plaintiffs addressed a letter to Mr Kuhn of Seeff Properties advising that they were cancelling all the agreements concluded in view of the unacceptable delays in effecting the required transfer, commencement and the completion of the development project. Mr Kuhn communicated the plaintiffs' notice of cancellation to the third defendant. The response received was that the third defendant refused to cancel the agreements. Once the plaintiffs were informed that the third defendant refused to cancel they consulted their legal representative in the person of Mr Le Roux. On 14 July 2005 the plaintiffs were informed, for the first time according to first plaintiff's evidence tendered at trial, that the total amount of R300,000-00 entrusted

to the first defendant had since been paid by the first defendant to the second defendant and that such payment had been made as far back as January 2005. By way of separate actions, the first and the second plaintiffs instituted actions out of this court against the first, second and the third defendants for the recovery of the amounts each plaintiff deposited into the first defendant's trust account.

PLAINTIFFS' CASE ON THE PLEADINGS

[14] As has already been pointed out in the preceding paragraph, the first and the second plaintiffs initially instituted separate actions against the defendants, in the instance of first plaintiff, for recovery of an amount of R200,000-00 and, in the instance of second plaintiff, for recovery of an amount of R100,000-00, such actions having been instituted out of this court under case no: 12740/2005 and 12741/2005, respectively. The said actions were subsequently consolidated into one action in terms of rule 11 of the Uniform Rules of Court per an order of court issued on 27 June 2006.

[15] As against the first defendant, the plaintiffs' claim is based on an allegation that the first defendant, acting beyond the scope of its mandate

as an attorney and agent for the plaintiffs, paid to the second defendant an amount of R300,000-00 entrusted to it by the plaintiffs without authority to do so or without the plaintiffs having consented thereto.

[16] In the course of trial the plaintiffs amended their particulars of claim by introducing an alternative cause of action based on an alleged breach of duty of care allegedly owed by the first defendant to the plaintiffs thus bringing the plaintiffs' alternative cause of action within the realm of delict. In their claim, in its amended form, the plaintiffs pleaded, as an alternative cause of action, that if it is found that the first defendant did not act as an attorney or agent for plaintiffs in effecting payment to the second defendant of the aforementioned amount of R300,000-00, then, in that event, the first defendant breached its duty of care owed by it to the plaintiffs to ensure that the amount of R300,000-00 paid into to the first defendant's trust account was retained, as part payment of the purchase price owed to the fourth defendant, in an interest bearing trust account; the first defendant breached its duty to ensure that the aforementioned amounts, on the date that transfer of the properties were registered in the names of the plaintiffs, were paid over to the fourth defendant; and, if, for whatever reason,

[17] transfer did not take place, the first defendant breached its duty to ensure that the aforementioned amounts were repaid to the plaintiffs with interest.

[18] As against the second defendant, the plaintiffs' claim is for recovery of an amount of R300,000-00 paid to it by the first defendant on the basis that such payments were made to the second defendant without it being entitled to such payment resulting in the second defendant being unduly enriched, at the expense of plaintiffs, as a result of such payment.

[19] As against the third defendant the plaintiffs' claims are based on an allegation that the third defendant, through collection and receipt from the first defendant of the amounts claimed, acted fraudulently, alternatively, recklessly and further alternatively, grossly negligent and that such conduct constitutes abuse of corporate juristic personality attracting personal liability as contemplated in section 65, alternatively, section 69 of the Close Corporation Act, 69 of 1984.

[20] Apart from the first defendant, none of the other defendants attended trial in defence of claims against them as pleaded, the third defendant's

attendance at trial, in person, having been limited to the first day of a trial which lasted somewhat six court days.

FIRST DEFENDANT'S DEFENCE

[21] The plaintiffs' claim, in the main, is based on an alleged contractual relationship between the plaintiffs and the first defendant as their attorney and agent and that the amount claimed was paid to the second defendant in breach of that contractual relationship. To this leg of the plaintiffs' claim the first defendant denies having acted as attorneys for the first and second plaintiff in any form of a contractual relationship, pleading that the amount paid into the first defendant's trust account was paid pursuant to the acknowledgements of debt concluded between the plaintiffs and the second defendant, St Michael's Interior CC, trading as Jumbo Building and Renovating and that the first defendant's trust account was nominated for purposes of payment of the amounts due to the second defendant as contemplated in clause 5 of the respective acknowledgements of debt. Thus, first defendant denies that there existed any contractual relationship between it and the plaintiffs, thus putting first and second plaintiff to proof thereof.

[22] As for the claim based on the alleged breach of duty of care, the first defendant pleaded that this aspect of the plaintiffs' claim, based as it is on delict, was introduced as an alternative cause of action by an amendment served on the first defendant by plaintiffs on 11 July 2008; that the claim based on delict introduced a new cause of action different from the initial claim based on contract; that the plaintiffs became aware of the existence of the debt, which is a subject of this claim, as far back as January 2005; that the plaintiffs, through exercise of reasonable care, should have or ought to have acquired knowledge of the existence of the debt by not later than June 2005; and that, as at the date of service of an amendment introducing the alternative cause of action on 11 July 2008, this aspect of the plaintiffs' claim had already become prescribed as contemplated in section 12 of the Prescription Act, 68 of 1969. This defence is advanced by way of a special plea to the plaintiffs' alternative claim based on an alleged breach of duty of care.

[23] In the alternative, the first defendant pleaded that if it is found that the first defendant, in effecting payment of the amount claimed to the second defendant, was negligent as alleged in paragraphs 9.3 and 10.3 of the plaintiffs' amended consolidated particulars of claim, and that the first

defendant is liable to pay plaintiffs' claim, such liability falls to be reduced by virtue of the provisions of section 1 of the Apportionment of Damages Act, 34 of 1956 due regard had to the degree the plaintiffs were at fault in relation to the damages suffered. These defences will be considered in relation to the plaintiffs' claims, as pleaded.

THE CONTRACTUAL CLAIM

[24] As correctly pointed out by *Mr Oosthuizen* SC*,* for the first defendant, in his submissions and argument before me that at this day and age of our legal development it has been established beyond dispute that a contract only comes into being when there is consensus between the contracting parties as regards the subject matter, the terms and conditions thereof. When it comes to tacit contracts, our law requires of the party seeking to rely on such a contract to show, by a preponderance of probabilities, unequivocal conduct, which is capable of no other reasonable interpretation, that the parties intended to and did in fact contract on the terms alleged. Thus, it must be proved that there was in fact *consensus ad idem.* It has been held in authorities such as *Roberts Construction Co Ltd v Dominion Earthworks (Pty) Ltd* 1968(3) SA 255(A) that a party relying

on a tacit contract must set out, in its pleadings, the facts from which such contract is to be inferred.

[25] As further correctly pointed out in the first defendant's submissions, in the instance of this matter, the plaintiffs have neither pleaded, nor attempted to prove, any facts unequivocally showing that the parties, that is the plaintiffs and the first defendant, had reached *consensus ad idem* in relation to the alleged contract. There being no proof, or reliance, on a tacit contract, what then next has to be determined is whether an express contract was concluded and, if so, whether the conclusion of such express contract has been proven.

[26] It is, similarly, a matter of trite law of contract that a contract comes into being by an offer and acceptance, coupled with a deliberate intention to be bound by the terms and conditions thereof. In the instance of this matter, first plaintiff says it in so many words that there absolutely was no communication between the plaintiffs and the first defendant, either before or after payment of the funds into the trust account of the first defendant nor was there any communication to the plaintiffs by the first defendant after payment of such funds. Indeed, there is no evidence, in the matter

before me, of any offer or acceptance thereof or, of any discussions, negotiations or correspondence between the parties on basis of which there can be any suggestion of a conclusion of an express contract between the plaintiffs and the first defendant.

[27] I am thus unable, on the basis of the principles set out in the preceding paragraphs and on the basis of evidence tendered at trial, to find that there was in existence, as between the plaintiffs and the first defendant, a contractual relationship as the plaintiffs seek to allege in their particulars of claim. It therefore follows that the plaintiffs' claim, based on an alleged contract, ought to fail.

ST MICHAEL'S NEST DEVELOPMENT

[28] The interaction between the first defendant and the third defendant, St Michael Pierre Kotze, ostensibly representing the second defendant, St Michael Interiors CC, as regards the payments based on the acknowledgements of debt, obviously cannot be looked at in isolation. It obviously has to be looked at in the light of the entire evidence tendered at trial, the extent, magnitude and the marketing of the proposed

development. The first defendant, as transferring attorneys, were aware of the extent and magnitude of the proposed development.

[29] At a pre-trial conference held on Monday, 23 June 2008, the parties agreed to compile a bundle of documents which each one of the parties might use at trial. It was agreed between the parties that such documents would be admitted for what they purport to be, but without necessarily admitting the truthfulness of the contents thereof. One such document is a document referred to as “sole marketing and sales mandate” contained at page 782 of bundle B placed before court by the parties. A reference to this document will be made in paragraphs which follow.

[30] On 17 September 2004 and at the Strand the second defendant, as a developer, concluded a “sole marketing and sales mandate” with Seeff Properties for the marketing and sale of 20 units in a property situate at the Main Road, Strand, fully described and commonly known as Erf 25113, Main Road, Strand. The marketing and sale of the units in the aforementioned property was part of a property development undertaken by the second defendant. In the definition clause of the “sole marketing and sales mandate”, the term “development” is defined as “the

development of the property previously referred to as St Michael's Nest". Similarly, the term "transferring attorneys" in the definition clause is defined as meaning "Vorster & Steyn Attorneys, 16 Mitchell Street, Hermanus, Ref: C J Bierman". The agreement was signed by the third defendant, ostensibly in his capacity as the sole member of the second defendant. Seeff Properties had the sole mandate to market and sell the 20 units in the envisaged development. The implementation of the development would be preceded by transfer of the land in question from the owner thereof, Saayman Property Trust, to the fourth defendant, Golden Bay Properties 29 CC, who, in turn, on basis of a suspensive condition, sold the individual units to the prospective purchasers. The transfer of the properties from the Saayman Property Trust to the fourth defendant, and from the fourth defendant to the individual purchasers would be undertaken by the first defendant.

[31] Clause 6 of the "sole marketing and sales mandate" provides "if an agreement of sale of a unit makes provision for the payment of a deposit, the said deposit shall be paid immediately to the developers' transferring attorneys' trust account. Any interest earned on a deposit will accrue for the benefit of the purchaser prior to registration of transfer". The

implication of this clause is that payments received from purchasers were to be held in an interest bearing trust account and any interest earned would accrue to the purchaser who, invariably, would be the depositor of such funds. The three separate agreements concluded by each plaintiff and the fourth defendant (purchase and sale agreement) and the second defendant (the building agreement and the acknowledgement of debt) were concluded within the context of and in anticipation of the proposed development. Seeff Properties is designated as "the agent" in the "sole marketing and sales mandate". The developer signed its portion of the agreement on 6 October 2004 and ostensibly at the offices of the first defendant. The commissioning stamp of Coenraad Johannes Bierman is affixed on the portion of the document designated for signature by a second witness.

[32] According to the evidence of Mr Jones payments of the respective amounts of R75,000-00 and R225,000-00 were towards payment of the deposits despite an explanation by Mr Kuhn to both plaintiffs on the day each one of them signed the three separate agreements, that the amounts reflected in each acknowledgement of debt represented the difference between acquisition costs of the vacant pieces of land and home loans to

be procured. Once the aforementioned payments were received by the first defendant, these were credited to the account of St Michael Interiors CC. No separate ledger accounts were opened in respect of each such payment. Both in terms of receipt numbers 53423 and 53438 dated 4 January 2005 and 7 January 2005, respectively, such payments are indicated as being for the account of St Michael's Nest. There is no indication on the receipts themselves that such payments were in respect of an acknowledgement of debt or discharge of a liability arising therefrom. The receipts were not posted to the respective depositors of the funds, but were retained in a general file relating to the St Michael's Nest development. What has thus been stated in this paragraph constitutes a background towards payment of an amount of R300,000-00 into the trust account of the first defendant.

DUTY OF CARE

[33] At the outset, it has to be pointed out that funds deposited into an attorney's trust account do not form part and parcel of that particular legal practitioner's private estate. Section 78(7) of the Attorneys Act, 53 of 1979 provides that no amount standing to the credit of any practitioner's trust

account shall be regarded as forming part of the assets of the practitioner or may be attached on behalf of any creditor of such practitioner.

[34] As pointed out in paragraph [27] of this judgment the first defendant was aware of the St Michael's Nest development project. In terms of the "sole marketing and sales mandate" document the first defendant was appointed "the transferring attorneys" in the entire development project. In terms of clause 6 of the "sole marketing and sales mandate" document it is required of the first defendant, in those instances where an agreement of purchase and sale makes provision for payment of a deposit, that such deposits be paid immediately to the first defendant's trust account; that such deposits be held in an interest bearing trust account and any interest earned to accrue to the benefit of the purchaser. The funds deposited and received on 4 January 2005 and 7 January 2005 were clearly marked for the account of St Michael's Nest. Once such deposits were received, these would have prompted the first defendant to investigate if such funds were intended for payment of a deposit as contemplated in clause 6 of the "sole marketing and sales mandate" in which event the funds would have had to be dealt with in a manner provided for in clause 6 of the "sole marketing and sales mandate". An enquiry from each depositor would

have clarified the purpose of the deposits and whether such deposits would have had to be dealt with in terms of clause 6 of the "sole marketing and sales mandate".

[35] The amount of R300,000-00 was paid out in bits and pieces and in drips and drabs as indicated in paragraph [11] to the second defendant ostensibly on the strength of the acknowledgements of debt given to Mr Bierman of the first defendant firm by the third defendant. Each acknowledgement of debt stipulates that each debtor is truly and lawfully indebted to the second defendant in amounts specified therein "as per part of the Building Agreement". The building agreement referred to was not amongst the documents handed over to Mr Bierman by the third defendant. As the transferring attorneys in the development project the first defendant was aware, in as much as the individual units in the proposed development had not as yet been transferred to the individual purchasers, that building operations in the proposed development had not yet commenced. Despite this, the first defendant did not refer to the building agreement to ascertain under what circumstances each depositor is liable to the second defendant "as per part of the Building Agreement" when the building operation itself

had not yet commenced, let alone not a single unit had as yet been transferred to each individual purchaser.

[36] The amount of R75,000-00 was paid into the trust account of the first defendant by the second plaintiff on 4 January 2005. In the instance of the second plaintiff, the acknowledgement of debt stipulates that the amount due, which, in her instance, is in an amount of R100,000-00, is payable on date of bond approval. A letter from Absa Bank advising of approval of the bond is dated 10 January 2005, yet the amount of R75,000-00 deposited into the trust account of first defendant was paid to the second defendant by way of cheque no 6889 dated 7 January 2005, somewhat three days before the date of a letter advising of the approval of the bond. There is no evidence on record to suggest that earlier approval of the bond was communicated to the first defendant or evidence by way of a file note or correspondence to indicate that an enquiry was made, before 10 January 2005, whether the bond was approved or not. Clearly, the payment of an amount of R75,000-00 to the second defendant on 7 January 2005, deposited by second plaintiff on 4 January 2005, was made outside of the first defendant's authority or mandate to do so.

[37] The evidence of Mr Bierman, of the first defendant's firm, is to the effect that prior to making payments to the second defendant, there was communication with the plaintiffs to verify if indeed the deposits made were in discharge of liability arising from the acknowledgements of debt. This communication was ostensibly made through Mr Bierman's secretary in the person of Ms Oberholzser. Ms Oberholzser does indeed confirm in her evidence that she did make such communication with plaintiffs; that at that stage the firm did not have the plaintiffs' telephone numbers; that such communication was by way of the third defendant's cellphone who had dialled the plaintiffs' number before handing over the cellphone to Ms Oberholzser; that the person Ms Oberholzser spoke to indeed confirmed that the deposits made were in discharge of liability arising from the acknowledgments of debt although Ms Oberholzser could not recall as regards which of the plaintiffs she had spoken to. Once Ms Oberholzser received such confirmation, she communicated same to Mr Bierman who subsequently authorised payment to the second defendant. Once again, there is no evidence, either by way of correspondence or file note, other than Mr Bierman and Ms Oberholzser's *ipse dixit*, to suggest that mandate to effect payment was indeed received. Mr Jones denies in his evidence having received such communication from the first defendant's personnel.

[38] A duty on an attorney to account, limited to the attorney's client, derives from rule 14.3.7 of the rules of the Cape Law Society. But when funds have been entrusted to an attorney by a third party with a specific mandate as regards how such funds have to be utilised and applied, there is a duty on an attorney concerned to account to the depositor of such funds that the funds so deposited have been utilised and applied in accordance with such mandate. Howie P made a similar observation in *Du Preez & Others v Zwiegers* 2008 (4) SA 627 (SCA) para 21 at p632 when he observed that an attorney into whose trust account money is paid owes a duty to the depositor even if the depositor is not an existing client of the practice. That duty entails dealing with such funds in such a way that harm is not negligently caused to the depositor. Failure to do so constitutes unprofessional conduct as contemplated in rule 14.3.14 of the rules of the Cape Law Society which enjoins the members of the profession to refrain from doing anything which could or might bring the attorneys' profession into disrepute.

[39] Even on a simple collection matter, there is a duty on an attorney to account to the debtor, from time to time, as regards how the funds

deposited by the debtor have been utilised and applied, inclusive of any legal costs deducted from such funds and, ultimately, to reflect any balance outstanding which is due and payable. Not only is this good practice, but it is standard practice in any firm of attorneys of repute. No such account was made in the instance of this matter nor was any communication addressed to each plaintiff to indicate whether the funds deposited were dealt with in accordance with the mandate given. As the Supreme Court of Appeal observed in *Hirschowitz Flionis v Bartlettt & Another* 2006 (3) SA 575 (SCA) para [30] at p589 the legal convictions of the community would undoubtedly clamour for liability to exist in these circumstances.

[40] Payment of funds on the basis of a similar acknowledgement of debt is not without precedent in the first defendant's practice. A letter by the first defendant dated 7 January 2005 (see page 533 of bundle B) addressed to attorneys Webber Wentzel Bowens suggests that the first defendant were placed in funds by the aforementioned firm of attorneys which were ostensibly paid out in terms of an acknowledgement of debt. Once such funds were paid out, ostensibly in terms of the acknowledgement of debt, the first defendant addressed a communication to the aforementioned attorneys confirming payment of such funds in terms of the

acknowledgement of debt. This is good and standard practice. In the instance of this matter, no such communication was addressed to either of the plaintiffs.

[41] The plaintiffs, in their amended particulars of claim, allege that the first defendant owed the plaintiffs a duty of care to ensure that the funds paid into the first defendant's trust account would be retained as part payment of the purchase price; that such funds would be paid over to the fourth defendant on date of transfer of the properties in the names of the plaintiffs; and that payment of such funds by the first defendant to the second defendant before the date of transfer breached the duty of care owed by the first defendant to the plaintiffs.

[42] Neethling et al: *Law of Delict*: 5th Edition p137 note that in the determination of a question whether a duty of care was owed, the criterion was traditionally whether a reasonable person in the position of the defendant would have foreseen that his conduct might cause damage to the plaintiff. The authors go on to observe that this issue (the duty issue) is a policy-based value judgment in which foreseeability plays no role as to whether interests should be protected against negligent conduct. In

Administrateur, Natal v Trust Bank van Afrika Bpk 1979 (3) SA 824 (A) 833 the court emphasized that the "duty issue" is not at all concerned with reasonable foresight; it has to do with a range of interests which the law sees fit to protect against negligent violation.

[43] In *Knopp v Johannesburg City Council* 1995 (2) SA 1(A) 27 it was stated as follows:

> "For present purposes … the difference between the two elements of a duty of care is perhaps more aptly described by Milner: Negligence in Modern Law, at 230 'The duty concept in negligence operates at two levels. At one level it is fact based, at another it is policy based. The fact based duty of care forms part of the enquiry whether the defendant's behaviour was negligent in the circumstances. The whole enquiry is governed by the foreseeability test, and "duty of care" in this sense is a convenient but dispensable concept. In the phraseology of our law the "policy based or notional duty of care" is more appropriately expressed as a 'legal duty', in consonance with the requirement of wrongfulness as an element of delictual liability."

[44] Although the concept "duty of care" has consistently been applied by our courts it has been a subject of much debate and criticism by academics and legal commentators (See Joubert: *The Law of South Africa* Volume 8 Part 1 para 116; Neethling *et al supra* p137) The authors in Neethling *et*

al note that our courts sometimes use the duty of care concept as a synonym for a legal duty as used in determining wrongfulness and that, to avoid the confusion, it would be preferable to describe the duty involved in the test for wrongfulness as a "legal duty" (and not as a duty to take care). Adopting the approach as set out in this and the two preceding paragraphs, I shall now proceed to determine if the first defendant owed the plaintiffs a duty of care as alleged.

[45] In the instance of the matter before me, Mr Bierman was presented with signed acknowledgements of debt in respect of each plaintiff. In each instance, the amount allegedly due is described as being due: "as per the building agreement". A reference to the building agreements, in each case, indicates an amount agreed upon to undertake building operations. Nowhere in the building agreements, in each instance, is it indicated that the amounts specified therein, being costs of building works, are immediately due and payable. Mr Bierman, as a transferring attorney, should have known that the contemplated building operations had not as yet commenced, so that the underlying cause of the debtors' indebtedness, in each case, had not as yet come into existence. The amounts allegedly due would be immediately due and payable only on a specific agreement to

the effect that such funds are immediately due and payable even though the building operations had not as yet commenced or even though the creditor had not as yet performed its part of the obligation.

[46] Mr Bierman, as a transferring attorney, ought to have known that the piece of land, on which building operations would be undertaken, was still registered in the name of the Saayman Trust; that the seller of the units, the fourth defendant, had not yet performed in the form of transfer of the individual units to each plaintiff; that whatever building agreements concluded between the parties would have been subject to plaintiffs being owners of the units concerned and that, therefore, whatever costs of building operations agreed upon, would not have been immediately due and payable in the absence of a specific agreement to the contrary.

[47] In my view, the fact that there is reference to the building agreement in the instance of each acknowledgement of debt should have prompted Mr Bierman, in the first instance, to refer to the building agreement itself to ascertain if indeed the amounts agreed upon in respect of costs of building operations were immediately due and payable despite the fact that the building operations themselves had not as yet commenced and, in the

second instance, to ascertain from each debtor if the amounts specified in each acknowledgement of debt was immediately due and payable despite the fact that building operations had not as yet commenced. In the circumstances of this matter, Mr Bierman, as a transferring attorney in the project, had a legal duty do so, and this is over and above the duty to ascertain if the funds so deposited fell outside the provisions of clause 6 of the "sole marketing and sales mandate", and that such funds could be dealt with differently.

[48] Directing an employee to enquire from each debtor if the funds could be paid out, without even a reference to the building agreement, which is the underlying cause of the debtors' indebtedness, is just not good enough and does not constitute good practice. I therefore find that Mr Bierman, in his capacity as a director in the first defendant firm, had a legal duty, in the form of a duty of care, to have first established from each plaintiff if the funds deposited in the firm's trust account were immediately due and payable to the second defendant, particularly in view of a reference to "the building agreement" as the underlying *causa* in each acknowledgement of debt. Thus I find that the first defendant has failed to discharge the legal

duty owed by it to the plaintiffs at the time and, as such, such failure constitutes gross negligence.

PRESCRIPTION

[49] As has already been pointed out in paragraph [21] of this judgment the plaintiffs' alternative claim, based on the alleged breach of duty of care, was introduced as an alternative cause of action by an amendment to the consolidated particulars of claim served on the first defendant on 11 July 2008. To this alternative claim, and by way of a special plea, the first defendant pleaded that the plaintiffs were aware of the facts from which the debts arise as far back as January 2005; that, in any event, the plaintiffs, by exercise of reasonable care, ought to or should have been aware of the existence of the facts from which the debts arise by no later than June 2005; and that, in view thereof, at the time the plaintiffs' amended consolidated particulars of claim, introducing a new cause of action as they did, were served on the first defendant on 11 July 2008, the plaintiffs' claim, based on delict, had already become prescribed.

[50] In advancing this defence it is submitted on behalf of the first defendant that the plaintiffs were aware that they each signed an

acknowledgement of debt for an amount representing the difference between the acquisition costs of the land and the amount of bond to be procured; that the plaintiffs acquired this knowledge on 30 October 2004, the latter being a date each plaintiff signed an acknowledgement of debt; and that they were aware that they had paid the amounts due in terms of the acknowledgements of debt into first defendant's trust account in discharge of their liabilities arising from such acknowledgements of debt.

[51] The plaintiffs, on the other hand, and in reply to the first defendant's special plea, deny that they became aware of the facts from which the debts arise as far back as January 2005 as contended or, alternatively, by no later than June 2005. The plaintiffs thus persist with their assertion contained in paragraph 21 of the amended consolidated particulars of claim that they became aware, for the first time, of the payment of the amounts of R200,000-00 and R100,000-00 to the second defendant on 14 July 2005.

[52] I have already stated elsewhere in this judgment that the underlying cause of the amounts allegedly due in terms of the acknowledgements of debt is the building agreement. I have further already stated elsewhere in this judgment that, on a proper perusal and consideration of the building

agreements, there is nothing therein to indicate, or which justifies an interpretation or conclusion that the amounts specified in the acknowledgements of debt were immediately due and payable despite the fact that the units of land, on which building operations would be undertaken, had not as yet been transferred to the plaintiffs or that the amounts specified in the building agreements were immediately due and payable despite the fact that the building operations had not yet commenced. There is no evidence on record to suggest that the plaintiffs agreed to expose themselves to the risk of liability in circumstances where the second defendant had not as yet discharged its part of the obligation or had not as yet rendered its part of the performance. To suggest that the plaintiffs ought to or should have been aware that a deposit of the funds into the trust account of the first defendant was to discharge their obligation to the second defendant in terms of the acknowledgements of debt is to read into the building agreements a term or condition which the plaintiffs had not agreed to. It should be recalled that the building agreements are the underlying cause of the plaintiffs' alleged indebtedness.

[53] In paragraph [37] of this judgment I stated that when funds have been entrusted on an attorney, not necessarily by a client, but by a third party

which is a member of the public, with a specific mandate as regards how such funds have to be utilised and applied, there is a duty on an attorney concerned to account to the depositor of such funds as regards how such funds have been utilised and applied. This is a duty which arises *ex lege*, by virtue of holding an office of an attorney dealing with public funds and that failure to discharge this duty constitutes unprofessional conduct as contemplated in rule 14.3.14 of the rules of the Cape Law Society. No such account, in the instance of this matter, was given to each plaintiff as regards how their funds deposited into the firm's trust account were utilised; whether such funds were utilised and applied in accordance with the mandate given and, in the instance of this matter, confirmation of the telephonic mandate that funds so deposited had to be paid to the second defendant. Had the first defendant rendered the necessary account, the plaintiffs would have been aware during January 2005 and, in any event, by no later than June 2005, that the funds so deposited had since been paid out to the first defendant.

[54] It will be recalled that Mr Jones, the first plaintiff, stated in his evidence that once they were called upon to pay what he refers to in his evidence a deposit, he insisted that such deposits be paid, not in a private account, but

in a trust account to ensure that the funds so deposited would be protected. Once the funds were paid into a trust account the plaintiffs felt that the funds were sufficiently secured. It would thus be unreasonable to have expected of the plaintiffs to telephone the transferring attorneys, from time to time, to ascertain if the funds had not been paid out when even the development project to which the funds were linked had not as yet commenced in the first place.

[55] In the light of what has been stated in this and the two previous paragraphs it cannot, by any stretch of imagination, be found that the plaintiffs ought to have been aware of the existence of the facts out of which the debts arose during January 2005 or by no later than June 2005. It therefore, follows in my view, that the first defendant's special plea of prescription cannot be upheld.

APPORTIONMENT OF DAMAGES

[56] In paragraph [47] of this judgment I held that the first defendant had a legal duty to have first established from each of the plaintiffs if the amounts allegedly due in terms of the acknowledgements of debt were immediately due and payable in view of a reference therein to the building agreement as

the *causa* for the alleged indebtedness. I simultaneously found, in the aforementioned paragraph, that the first defendant failed to discharge this legal duty on its part and that such failure constituted negligence. In the likely event of this finding, it was submitted on behalf of the first defendant that whatever extent of the first defendant's liability could be, same falls to be reduced by virtue of the provisions of section 1(1)(a) of the Apportionment of Damages Act.

[57] Section 1(1)(a) of the Apportionment of Damages Act provides as follows:

> "1(1)(a): Where any person suffers damage which is caused partly by his own fault and partly by the fault of any other person, a claim in respect of that damage shall not be defeated by reason of fault of the claimant but that the damages recoverable in respect thereof shall be reduced by the court to such an extent as the court may deem just and equitable having regard to the degree in which claimant was at fault in relation to the damage."

The plaintiffs' claim against the first defendant is based on delict to which the provisions of the Apportionment of Damages Act do apply.

[58] The submission for apportionment in the event of the first defendant being found negligent, as has happened in the instance of this matter, is based on a contention that the plaintiffs were guilty of at least three separate and distinct acts of negligence all of which causally contributed to the damages suffered, these being:

[58.1.] They signed contractual documentation indicating that these amounts were owed to the second defendant well knowing that the documentation was important and would be relied on by other parties to the transaction. The contention is thus the plaintiffs willingly and openly signed documents which created an erroneous impression as to their contractual intentions.

[58.2.] They failed to contact the first defendant to issue instructions as regards how the funds deposited into the first defendant's trust account were to be utilised and applied.

[58.3.] The plaintiffs instituted defective proceedings for the attachment of funds due to the second defendant which were held in first defendant's trust account subsequent to damages being caused.

[59] As regards the contention that the plaintiffs signed documentation indicating that the amounts specified were owing to the second defendant and that the documents could be relied on by other parties, including the first defendant, the following should be noted: the acknowledgements of debt were not signed in isolation; the acknowledgements of debt were part of a series of documents signed by the plaintiffs, these being a purchase and sale agreement and the building agreement, each one being a separate document but constituting one composite transaction; at the time the acknowledgements of debt were signed, Mr Kuhn explained to each plaintiff that the documents they were about to sign, and which they eventually signed, were acknowledgements of debt and that the amounts specified therein represented the difference between the acquisition costs of the respective units and home loans to be procured; Mr Kuhn did not say to each plaintiff that the amounts specified in each acknowledgment of debt was owed and immediately due and payable. According to the evidence of Mr Kuhn, he himself constantly communicated with Mr Bierman, as well as Mr Kotze, the third defendant, as regards the use of such documentation and that at any given point in time the understanding between all of them was that the amounts specified in the acknowledgements of debt

represented the difference between the costs of acquiring the individual units and the home loans to be procured. According to Mr Kuhn, Mr Bierman was aware of the entire sets of documents and the significance thereof long before payment was effected to the second defendant. Mr Kuhn stated it clearly in his evidence that he was greatly surprised to learn that payment was made to the second defendant on the strength of the acknowledgements of debt at a stage when the development project had not even commenced.

[60] The evidence of Mr Bierman that he had discussed the interpretation of the document with his partner, ostensibly in isolation of the other composite documents, and concluded that payment to the second defendant could be made on basis thereof is, with the greatest of respects, unconvincing. Mr Bierman goes further and denies that there ever were any discussion between him and Mr Kuhn despite the fact that he was a transferring attorney in the entire project. The evidence of Mr Bierman that he first became aware of the acknowledgements of debt when same were presented to him by Mr Kotze just simply cannot be believed. Thus I do find that Mr Bierman, at the time of payment to the second defendant of funds deposited into his firm's trust account, should have been aware that

the funds so deposited could not have been immediately due and payable and that there is no way he could have been misled by the contents of the acknowledgements of debt that such funds were immediately due and payable.

[61] As regards the contention that the plaintiffs failed to contact the first defendant to issue instructions as regards how the funds deposited into the firm's trust account were to be utilised and applied, the following should be noted: during December 2004 the plaintiffs were, according to the evidence of Mr Jones, called upon to pay the required deposits; when called upon to do so, he immediately pointed out to his wife and Mr Kuhn, that no way should such funds be paid into a private account; he suggested to Mrs Jones that such funds be deposited into a trust account as he was aware that if that happens, not only would their funds be protected, but that their funds would be repaid to them in the event the transaction falling through. Mr Jones made a similar suggestion to Mr Kuhn when they called on him to make the required payment whereupon Mr Kuhn furnished them with the trust account details of the first defendant. That the funds were paid into the first defendant's trust account was as suggested by Mr Kuhn and the plaintiffs did not, out of their own volition, select the first defendant's trust

account for purposes of payment of the required deposit. Once that had happened they laboured under what ultimately turned out to have been a false sense of security and did not see a need to contact the first defendant with a view to ensuring if the funds were securely held. In the circumstances under which the funds were deposited, in my view, there was no need on the part of the plaintiff to contact the first defendant to give instructions as regards how such funds were to be utilised.

[62] As regards the contention that the plaintiffs instituted defective proceedings for the attachment of funds due to the second defendant, it ought to be borne in mind that those proceedings were not instituted to mitigate the plaintiffs' damages or to recover damages which they thought were due to them. These would still have to be proved in a trial in due course. The defective proceedings were instituted to attach funds due to the second defendant as security for the satisfaction of a judgment debt in the event the plaintiffs were successful in their contemplated action for damages, particularly in view of the fact that it had since become apparent to the plaintiffs that the second defendant was, in any event, a so-called "close corporation of straw". To suggest that the defective proceedings contributed causally to the damages suffered is to view such defective

proceedings entirely out of context. More so, the damage to the plaintiffs had already been caused so that it is difficult to fathom how the defective proceedings could have mitigated such loss when same had already occurred as distinct to providing security for satisfaction of a judgment debt in the event the plaintiffs' claim being successful in their contemplated action. In the event the attachment proceedings would have been successful, the funds so attached would not have constituted damages recovered but such funds would only have been available as a source to satisfy a judgment debt in the event of the plaintiffs being successful in their contemplated action and, as already stated, would not have constituted recovery of damages. In my view, therefore, none of the factors mentioned in paragraph [57] of this judgment causally contributed to the plaintiffs' damage so that the provisions of section 1(1)(a) of the Apportionment of Damages would not apply.

THE POSITIONS OF THE OTHER DEFENDANTS

[63] As has already been pointed out elsewhere in this judgment initially, the plaintiffs based their claim against the first defendant on an alleged breach of contract. In paragraph [26] of this judgment I held that a claim against the first defendant, based on contract, cannot be sustained for

reasons stated in the aforementioned paragraph but, in paragraph [47] of this judgment I held that the first defendant is liable to the plaintiffs in delict based on breach of duty of care which the first defendant owed to the plaintiffs.

[64] The second defendant (since liquidated) was a close corporation incorporated in terms of the Close Corporation Act. As a juristic person, the second defendant could not act on its own but could do so only through the instrumentality of its members or persons with authority to act on its behalf. The claim against the second defendant boils down thereto that the second defendant received payment from the first defendant in circumstances where it was not entitled to such payment with the consequence that the second defendant became unduly enriched at the expense of plaintiffs.

[65] But the second defendant did not act on its own when it procured payment from the first defendant. It acted through the instrumentality of its sole member, in the person of the third defendant, St Michael Pierre Kotze who procured funds from the first defendant fraudulently and in circumstances where the third defendant was aware that the second

defendant was not entitled to such funds. The conduct of the third defendant in procuring such funds, on behalf of the second defendant, in circumstances where the third defendant was aware that the second defendant was not entitled to such funds, in circumstances constituting fraud, constituted abuse of corporate juristic personality which renders him personally liable for any consequential damage arising from such fraudulent conduct as contemplated in section 65 of the Close Corporation Act. I therefore direct that third defendant be held liable, in his personal capacity, for such damage as may have been caused to the plaintiffs arising from his fraudulent conduct.

[66] As regards the fourth defendant, it is quite apparent on basis of evidence tendered at trial that it did not render performance of its obligation in terms of the purchase and sale agreement and, consequently, the conduct of the plaintiffs in cancelling the purchase and sale agreements appears perfectly justified. However, there is no evidence to suggest that the funds fraudulently procured from the first defendant were passed over to the fourth defendant so that, in the circumstances of this matter, there is no basis for an order of *restitutio in integrum* as against the fourth defendant. In the instance of the fourth defendant, the remedy available to

the plaintiffs appears to be limited to a mere declaration that the contract of purchase and sale concluded between the plaintiffs and the fourth defendant has since been validly cancelled.

[67] On the basis of the facts I found to have been proved I hold that the first defendant is liable to the plaintiffs on the basis of breach of duty of care the first defendant owed to the plaintiffs. As regards the third defendant, St Michael Pierre Kotze, I hold that he is personally liable in respect of any claims, based on undue enrichment, that the plaintiffs may have against the second defendant on the basis of abuse of corporate juristic personality. For the record, I must state that to the extent that payment was made to the second defendant, without the latter having rendered its part of the performance, resulted in the second defendant having been unduly enriched at the expense of the plaintiffs to the extent of the damage suffered. The second defendant‘s liability is thus of a quasi-contractual nature.

[68] Thus, whereas the first defendant’s liability to the plaintiffs is based on delict, the second defendant’s liability, which is attributed to the third defendant, is based on a quasi-contract. The first, second and third

defendants thus cannot be joint wrongdoers, in delict, *vis-à-vis* the plaintiffs' damages. This is so because the basis of their respective liabilities are different. Whereas the first defendant is liable to the plaintiffs in delict, the second and third defendants' respective liabilities are not, based as they are on unjust enrichment and abuse of corporate juristic personality, respectively.

[69] But it is important to note that both the conduct of the first and the third defendants caused the same harm to both plaintiffs. The liabilities of the first and the third defendants not only arise from substantial and similar facts, they arise from the same facts in circumstances where the first and the third defendants are, so to speak, co-wrongdoers. Their respective liabilities arise from the same facts and their respective conducts caused the same harm. In my view, there is no reason why they should not be held to be jointly liable. Thus, although the first and the third defendants are not joint wrongdoers in delict, the facts and the circumstances of this matter justify an order of joint and several liability. To the extent the remedy or order of joint and several liability may have been limited to joint wrongdoers to the cause of action, in my view, such a remedy or order ought to be extended to cover circumstances where the parties are co-

wrongdoers in circumstances where their respective conducts attract different basis of liability but arise from the same set of circumstances.

[70] The matter of quantum of each plaintiff's claim has at no stage in the proceedings been a matter of serious dispute, so that the quantum of each plaintiff's claim may be taken as having been proved. At the time of the institution of this action, the first plaintiff claimed an amount of R203,842-47 being the capital amount deposited into the first defendant's trust account, together with interest thereon at the rate of 3,75% per annum reckoned from 13 January 2005 up to the date of the institution of the proceedings. In as far as the second plaintiff is concerned, the amount claimed at the time of the institution of these proceedings is an amount of R101,793-15 being the capital amount deposited into the first defendant's trust account, together with interest thereon at the rate of 3,75% per annum reckoned from 13 January 2005. As already mentioned the quantum of the aforementioned amounts was not disputed in these proceedings so that these may be taken as proved. Thus, in my view, each plaintiff is entitled to the amount claimed. This brings me to the order I have to make in the light of what I have found in this judgment on the basis of evidence tendered at trial.

[71] In the result I make the following order:

[71.1.] The third defendant is declared to be personally liable in respect of the obligations of the second defendant, arising from undue enrichment, in terms of section 65 of the Close Corporation Act, 69 of 1984.

[71.1.1.] As regards the first plaintiff, the first and the third defendants are ordered to pay the first plaintiff an amount of R203,842-47, jointly and severally, the one paying the other to be absolved.

[71.1.2.] Interest on the aforementioned amount of R203,842-47, at the prescribed rate of interest, from date of issue of summons until date of payment.

[71.1.3.] Costs of suit, as between party and party, drawn on a high court scale, duly taxed or as agreed.

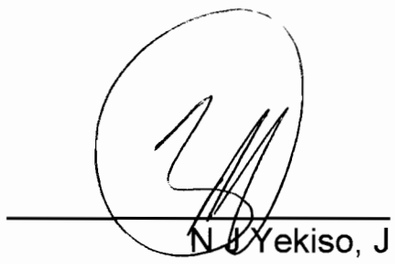
[71.2.]

[71.2.1.] As regards the second plaintiff, the first and the third defendants are ordered to pay the second plaintiff an amount of

R101,793-15, jointly and severally, the one paying the other to be absolved.

[71.2.2.] Interest on the aforementioned amount of R101,793-15, at the prescribed rate of interest, from date of issue of summons until date of payment.

[71.2.3.] Costs of suit, as between party and party, drawn on a high court scale, duly taxed or as agreed.



N S Yekiso, J