IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No.: 5456/2009

In the matter between:

RODEL FINANCIAL SERVICES (PTY) LTD **Applicant**

and

VELILE TINTO CAPE INC **First Respondent**

FATIMA FLORIS **Second Respondent**

ABDURAGMAAN FLORIS **Third Respondent**

JUDGMENT DELIVERED: FRIDAY 10 DECEMBER 2010

SALDANHA, J

[1] This application is based on an alleged discounting agreement between the applicant and the second and third respondents.

[2.] The first respondent against whom judgment was sought at the hearing of the application is a firm of attorneys who had represented the second and third respondents in a conveyancing transaction and who assisted them in obtaining finance from the applicant. The second and third respondent had signed a discounting agreement on the 23rd of January 2008 in which the applicant was to discount the purchase price owed to the second and third respondents under a sale agreement in respect of certain immovable property. The second and third respondent had entered into a Deed of Sale in respect of immovable property and after the discharge of the mortgage bond obligations and estate agents

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commission the respondents expected to receive from the sale a net surplus of R718 497,04. In terms of the discounting agreement the applicant was to pay the respondent an amount calculated in terms of the discount agreement as the difference between the surplus and the discounting fee and which amount was to be paid in two installments the first to be paid within two days of signature of the agreement.

[3.] The applicant claimed that it had paid the amount of R206 659,00 on the 24 February 2008 into the trust account of the first respondent.

[4.] It appeared that the sale agreement upon which the discounting agreement was based was terminated and the applicant cancelled the discounting agreement and sought payment against all of the respondents jointly and severally for the amount of R258 332,02 together with interest at the rate of 27% per annum as from the 30th of July 2008 to date of payment and costs on an attorney client scale.

[5.] The application was not opposed by the second and third respondent but only by the first respondent.

[6.] Various defences were raised by the first respondent including *inter alia* challenging the authority of the deponent to bring the proceedings on behalf of the applicant, the applicability and compliance with the National Credit Act 34 of

2005. More particularly the first respondent claimed that in so far as the applicant had not informed the respondents that it had accepted the application (the discounting agreement signed by the second and third respondent) and as the applicant itself had not signed the agreement no contract had come into existence between the applicant and the second and third respondents. The first respondent further claimed that there was no contract between the applicant and the first respondent in which it was obliged to repay any amounts paid by the applicant into its trust account.

[7.] At the hearing of the application **Mr. Sievers** who appeared on behalf of the applicant handed up a draft order in which the applicant claimed against first respondent repayment of the amount of R206 659.00 together with interest and costs. He submitted that the basis of the order sought was based simply on the application of the principle as set out in the decision of **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623 A** and referred in particular to the dicta of Corbett JA at **paragraph E;**

> "Secondly, the affidavits reveal certain disputes of fact. The appellant nevertheless sought a final interdict, together with ancillary relief, on the papers and without resort to oral evidence. In such a case the general rule was stated by Van Wyk J (with whom De Villiers JP and Rosenow J concurred) in Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd 1957(4) SA 234 (C) at 235E-G, to be:

> ".....where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondent together with the admitted facts in the applicants affidavits justify such an order..... Where it is clear that facts, though not formally admitted cannot be denied, they must be regarded as admitted."

[8.] He argued that insofar as the first respondent has admitted that the amount of R206 659.00 was paid into its trust account on the 24th January 2008 and given that the first respondent has denied that the discounting agreement between the second and third respondent and the applicants have come into effect the first applicant was therefore obliged to re-pay to the applicant the amount of R206659.00. In effect he submitted there was no legal basis on which the first respondent could or should have dispensed the amount on the instructions of the second and third respondents as the first respondents believed that there was no contractual basis between the second and third respondents and the applicants.

[9.] Ms Kusevitsky who appeared on behalf of the respondent submitted that insofar as there was no contractual relationship between the applicant and the first respondent and that the first respondent had accepted that the amount paid by the applicant was intended for its clients (second and third respondents) it had simply acted on its clients instructions in dispensing the amounts and there was

no obligation on the part of the first respondent to repay the amount to the applicant.

[10.] During the course of argument there was much debate between the court and both Mr. Sievers and Ms Kusevitsky with regard to the obligations of an attorney who receives amounts paid into his trust account on behalf of clients.

[11.] Mr. Sievers submitted that there was a special obligation on the part of attorneys to ensure that amounts of monies received in their trust account were properly and lawfully administered and where there was no basis to administer it on behalf of any particular client such as in the circumstances of this matter the first respondent ought to have repaid the amount back to the applicant.

[12.] Ms Kusevitsky on the other hand submitted that the first respondent has merely acted as a conduit on behalf of the second and third respondent and upon receipt of the amount from the applicant accepted that it was intended for them and upon their instructions dispensed the amounts.

[13.] Insofar as their are significant disputes of fact in this application this court is unable to resolve such disputes on the papers before it. In the circumstances this matter is to be referred to trial in the fourth division.

[14.] With regard to the question of costs the court is of the view that it is appropriate that it be determined by the trial court after having considered the versions of the respective parties in this matter.

In the circumstances the following order is made:

1 The matter is referred to trial in the fourth division.

2 The question of costs is to be determined at the trial thereof.

SALDANHA, J