Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case no: 13927/2009

PAYMATE (PTY) LTD Plaintiff

v

LOUIS JOSEPH HERBERT Defendant

DESMOND ALEXANDER SOMERVILLE Third Party

Court: Judge J I Cloete

Heard: 5 and 6 November 2014, 23 – 25 February 2015

Delivered: 27 March 2015

JUDGMENT

CLOETE J:

Introduction

[1] The plaintiff company, represented at all material times by Mr Adriano Vernetti (*'Vernetti'*), claims damages from the defendant, a practicing attorney, of R630 000, arising out of an alleged breach of their agreement of mandate (*'the mandate agreement'*) concluded on 16 October 2008; alternatively, breach of the defendant's legal duty towards the plaintiff in his capacity as a practicing attorney. The third party, Mr Desmond Somerville (*'Somerville'*), was joined at the instance of the defendant, and indemnifies him in the event of the plaintiff proving its claim.

[2] In his plea the defendant admitted the existence of the mandate agreement but disputed its terms. He further denied having breached any legal duty towards the plaintiff.

Background

[3] On 16 October 2008 the plaintiff represented by Vernetti, and The Window Guys (Pty) Ltd (*'TWG'*) represented by Somerville, concluded a written agreement in terms whereof TWG sold a SSLD PH 32 outdoor LED electronic screen (*'the screen'*) to the plaintiff for the sum of R1 880 000.

[4] Clause 1 of the written agreement contains the following terms:

4.1 The plaintiff was to pay a deposit of R630 000 on account of the purchase price to TWG;

4.2 Such payment was to be made into the defendant's trust account;

4.3 The deposit was to be released to TWG only on sight by the defendant of a bill of lading (the screen was to be manufactured in China); and

4.4 The balance of the purchase price was to be paid in the manner set out in clauses 18 to 22 thereof.

[5] The plaintiff alleged that the express, alternatively implied, alternatively tacit material terms of the mandate agreement were as follows:

5.1 The defendant would accept payment of the deposit into his trust account;

5.2 Pending payment of the deposit to TWG, the defendant would retain same in his trust account and would not deal with it in any manner unless expressly instructed to do so by the plaintiff;

5.3 The defendant would only pay the deposit to TWG once it became due and payable and when he had been furnished with the bill of lading;

5.4 The defendant would immediately repay the deposit to the plaintiff in the event that the written agreement was cancelled and/or if he was instructed to do so by the plaintiff; and

5.5 The defendant would deal with and administer the deposit without negligence and with the proficiency, care and prudence that one could expect of the average practicing attorney.

[6] On 16 October 2008 and upon conclusion of the written agreement between the plaintiff and TWG, Vernetti handed over a bank guaranteed cheque to the defendant in the sum of R630 000. The defendant deposited it into his trust account on 17 October 2008, marked “special clearance”.

[7] The defendant did not retain the deposit, but paid it out in various instalments either to Somerville personally or to third parties or himself on Somerville’s express instructions. Most of the deposit was paid out over the period 17 October 2008 to 23 October 2008. The balance of R25 000 was appropriated by the defendant on Somerville’s instructions as part payment of outstanding fees apparently due to him by another entity controlled by Somerville, the Rose Trust, on 1 December 2008.

[8] On 24 March 2009, at a meeting held between himself and Hugo Van Bilsen (the sole director of TWG), Vernetti came to understand that the screen was not going to be manufactured and/or delivered. The circumstances relating to how this came about,

and whether what Vernetti was told was correct, were disputed on the pleadings, as was the plaintiff's allegation that Vernetti thereupon orally cancelled the written agreement. However, the plaintiff's version on these aspects (which was confirmed by Vernetti in his testimony) must stand unchallenged, given that: (a) in his evidence the defendant admitted having no personal knowledge thereof; and (b) Somerville, who was present throughout the trial, closed his case without testifying or calling any witnesses.

[9] By letter dated 25 March 2009 Vernetti instructed the defendant to repay the deposit to the plaintiff together with interest accrued thereon. In a letter dated 30 March 2009 the defendant advised Vernetti inter alia that:

> *'In the event that* [the plaintiff] *does not wish to proceed with the transaction, then we would certainly suggest that the deposit be returned, though we were not party to this* [written] *agreement or the terms thereof. Further, as you are aware, the funds deposited were released to Mr Desmond Somerville and we hold no funds from the deposit in our trust account.*
>
> *To the best of our knowledge the deposit is still held by Mr Desmond Somerville. We do not know how the parties have arranged their affairs, and it may be that the contract is still in place.*
>
> *We suggest you take this issue up directly with Mr Somerville, who is the person most involved.'*

[10] In a letter dated 18 May 2009 the defendant informed the plaintiff's attorneys inter alia that:

'We finally got instructions this weekend from client [sic]*, and further to your query:*

1. *The money was deposited into Trust under file reference U23 (Unitex/Paymate) towards the purchase of an electronic LED Billboard.*

2. *The Billboard would only be assembled in China once the full deposit is paid over to the manufacturer in China, and only thereafter delivered.*

3. *There was thus absolutely no question of the money being held in Trust pending delivery of the Billboard.*

4. *It was your client's earnest wish that the money be transferred to Hong Kong as soon as possible. Mr Vernetti may recall he was upset by the delays caused by Nedbank* [sic] *in transferring the money from his account into Trust against the backdrop of an accelerating slide of the Rand last year.*

5. *The writer paid Mr Des Somerville the deposit paid in by Mr Vernetti on the express instructions inter alia of Mr Somerville, a director of Unitex and he being duly authorised thereto.'*

Issues in dispute

[11] The issues in dispute at the trial were thus:

11.1 The terms of the defendant's mandate;

11.2 Whether the defendant breached his mandate; alternatively, his legal duty towards the plaintiff, in paying out the deposit.

[12] The parties accepted that the plaintiff bore the onus.

The evidence

[13] Vernetti testified on behalf of the plaintiff. The defendant also testified and called one witness, Mr Benjamin Trabelsi (*'Trabelsi'*).

[14] The salient aspects of Vernetti's evidence may be summarised as follows. He and Somerville had been introduced to each other by a mutual friend during 1996 or 1997. They became business associates and over time, friends. Vernetti had various companies, one of which, Parkshade (Pty) Ltd, owned a factory in Airport Industria outside Cape Town on which it had erected a static advertising billboard. By 2008 this billboard was generating an average income of R65 000 per month net.

[15] At the time Somerville, who similarly had various business interests, became involved with a company based in Hong Kong, namely Unitex (H.K.) Ltd, which in turn represented a company in China that manufactured electronic advertising screens. Somerville wanted to introduce these to the South African market. Vernetti was very interested in purchasing one of these screens which he intended to install at the factory in Airport Industria. The most attractive feature of the screen was that it would generate at least four times the income of the static advertising billboard, thus increasing Vernetti's income (through his company or companies) from a monthly average net income of R65 000 to R260 000.

[16] Negotiations started; however the quoted price for the screen was $253 567.40 which was beyond Vernetti's means. Somerville's response was to offer him a special deal on payment terms so as to make it affordable to Vernetti.

[17] In the first draft agreement presented to Vernetti during August 2008 the seller was reflected as Unitex (H.K.) Ltd (represented by Somerville and Omar Chui) and the purchaser Parkshade (Pty) Ltd. The purchase price was reduced to $235 000 payable by way of a deposit of $60 000 in the form of an irrevocable letter of credit to be paid bank to bank upon presentation of a bill of lading; $20 000 by 30 September 2008; and the balance in monthly instalments over a period of 18 months following upon an initial *'payment-free'* period of 6 months from date of installation of the screen. It was recorded that Parkshade (Pty) Ltd (and related entities) earned R65 000 per month net from the site, including rental income, and that:

> *'The instalment shall be equal to the sum of all moneys* [sic] *accruing from the site during the month in excess of such amount* [i.e. R65 000]*, for the month, less reasonable accounting expenses also as set out above.'*

[18] This proposal was also not acceptable to Vernetti, who knew that Parkshade's ability to meet the monthly instalments was directly dependent upon the income which it would generate from the screen. He did not want to place Parkshade's asset (the factory) at risk if the instalments could not be met. He also had concerns about the breach clause in the draft. He advised Somerville of his concerns.

[19] A second draft agreement was presented to Vernetti. The payment terms (including those pertaining to the deposit being payable by way of letter of credit) were largely identical, but the manner in which the subsequent instalments were to be calculated was amended to read as follows:

> *'The instalment shall be equal to the sum of all moneys* [sic] *accruing from the L.E.D. board rental during the month in excess of such amount* [i.e. R65 000] *for the month, less all expenses related to the above installation.'*

[20] In addition the 18 month period stipulated for payment of these instalments had been deleted; and the breach clause had also been amended. It was Vernetti's testimony that this proposal was acceptable to him, in particular because payment of the instalments was now clearly dependent upon income generated by the screen itself – without any specific period being prescribed for payment. He informed Somerville accordingly and he, Somerville and Chui signed the agreement on 15 September 2008.

[21] Vernetti then approached Standard Bank to obtain the letter of credit but his request was declined. Vernetti communicated this to Somerville. The following portion of his testimony is relevant:

> *'' Okay and what did you do then when you established that Park Shade could not get a letter of credit? --- I went back, advised Mr Somerville that the deal couldn't be done because the letter of credit wasn't available.*

> *And what was his response? What happened then? --- Well his response was that to try to find a way and we had a meeting, try to find a way to – to go around it, the problem of the letter of credit and that's why we had a meeting at – in his offices.'*

[22] Present at the meeting (which it turned out was held at Somerville's office on 16 October 2008) were Vernetti, Somerville and Van Bilsen. Vernetti could not recall whether the defendant, who had an office in the same building, was also present. Three specific issues were discussed and addressed. First, Vernetti's concern that the rand at that stage was under pressure against the US dollar. Second, a suitable alternative had to be found for Vernetti's inability to obtain a letter of credit from Standard Bank. Third, because of Vernetti's concerns about the exchange rate, what entities should be substituted as the seller and purchaser respectively.

[23] Vernetti told Somerville that he was not prepared to assume the fluctuation risk of the rand against the dollar; and that the seller would have to become a South African company so that the purchase price could be fixed in rands in order to avert that risk. Somerville agreed, and TWG was substituted as seller, with the plaintiff (instead of Parkshade) being substituted as purchaser, the latter being Vernetti's *'operating company'* in his advertising business, which, by all accounts, did not own any fixed assets.

[24] What was also agreed was that, instead of providing a letter of credit, Vernetti would furnish the defendant (Somerville's attorney) with a bank guaranteed cheque which would be deposited and held in trust by the defendant, to only be released to TWG

once the screen had been loaded in China for shipment to South Africa and the bill of lading issued. Vernetti was adamant – and he was consistent in this throughout his testimony – that it was never his intention to allow any funds to be released before the screen was on its way to South Africa. In his mind there was no difference between the letter of credit and the new arrangement for the bank guaranteed cheque and funds being held in trust because *'the funds would not leave the trust fund* [i.e. account] *until the – a bill of lading was produced'.*

[25] After the meeting Vernetti left to attend to the agreed amendments and to obtain the bank guaranteed cheque. He returned to Somerville's office later that day; he presented the agreement to Somerville (he could not recall whether Van Bilsen was present on that occasion) and Vernetti and Somerville signed it. (Vernetti was cross-examined about other changes that he made to the agreement, allegedly without informing Somerville thereof. Nothing turns on this for present purposes). Vernetti could not recall exactly when the defendant arrived at the meeting; all that he remembered was that the defendant made his appearance at some point, signed the agreement as a witness, and took the cheque which Vernetti handed over to him.

[26] During his evidence in chief Vernetti was asked to explain his instruction to the defendant. He replied:

> *'My instruction, it was clearly stated on the* [written] *agreement that the funds, they were supposed to be only released once there was sight of the bill of lading and the equipment was on the way.'*

[27] Vernetti denied the defendant's version contained in his letter of 18 May 2009 to which I have already referred. His evidence was that:

> *'That's completely untrue, because it's been specified over and over again on all the* [written] *agreements that the money was not going to be released until there was a shipment of the billboard, and a proper bill of lading…My contract was with a local company. The funds, they were only supposed to be released once the shipment was on the way. How they found the funding – they knew that the cash was available. The fund, how they fund the Hong Kong situation was not part of my problem.'*

[28] During cross-examination Vernetti was asked if he remembered that Trabelsi had also been present when *'the meeting'* took place. Vernetti had no recollection thereof; and maintained that he did not even know Trabelsi.

[29] In respect of his mandate to the defendant (which it was common cause could only have been given to the defendant at one or other of the meetings on 16 October 2008) the following portions of Vernetti's testimony are instructive:

> *'* *Then, Mr Vernetti, you accept that Mr Herbert didn't read this agreement at the meeting on 16 October, or can you not remember? --- I can't accept one thing or the other. I don't know what he did. I know that the agreement was there, they all signed it, and I would have expected somebody to read it…*
>
> *So you can't contest, from your memory, from the circumstances, that Mr Herbert never read this agreement. --- I can't contest that.*
>
> *So you can't contest that Mr Herbert didn't have any knowledge of what was contained in this agreement. --- I can't comment on that.*

Ok. And if I can understand then what your case is then, and I think now it's making your evidence in chief a bit clearer, is that what you are saying, is, well, if there is a document sitting there that I've prepared that says X, and I pay money into the attorney's trust account, well, then I expect the attorney to find out what's in the document, and then to pay according to the document. --- That's correct.

Ok. It's not that you're saying, I instructed him; my mandate to him was, hold this money until the bill of lading happens. --- No…

Well, just for the record, Mr Herbert will testify that he had never read that agreement, he wasn't aware of what was contained in the agreement, he was never asked to read the agreement, and he wasn't aware of the terms contained in it. You can't contest that, can you? --- I can't contest that, but I know that he received my cheque, he accepted my cheque on the trust fund, and before disposing of [the money] *should have sent me a little note: I am disposing X,Y to Joe Soap or to whoever, whatever, is that ok, or advise me. You know? I never had that…*

What I understand happened at that meeting is that you, essentially what was happening is you arrived with a cheque, you arrived with this document, you said you managed to put things together. … You gave the cheque to Mr Herbert to be deposited into his trust account. You asked for the agreement to be signed. The agreement was signed. Mr Herbert was asked to witness the agreement as well. Is that all correct? --- That is correct…

Do you confirm that you never instructed Mr Herbert to read this agreement, to understand the agreement and to act in terms of the agreement? You never specifically said that to him? --- I don't, I don't specifically recall that I did say to mister, I did expect Mr Herbert to look at the agreement or to ask me what do I do with this money…

Ok, now we have already established that you never, it seems that you never ever explained anything to Mr Herbert. You were relying on your belief that he would read the agreement. Is that correct? --- Correct.'

[30] Vernetti's evidence was also that he had not given any mandate to the defendant as the plaintiff's attorney *'because he was not my attorney'* but rather Somerville's company attorney.

[31] The defendant's testimony on the issues in dispute may be summarised as follows. On 16 October 2008 he was working in his office when he was interrupted (he could not recall by whom or in what manner) and asked to go down immediately to Somerville's office.

[32] When he arrived there he was told that there was a payment to be made by cheque, and asked if he could deposit it into his trust account. The payment was from Vernetti and the defendant was given to understand that Somerville and Vernetti (who was also known to him through Somerville) had signed an agreement. They asked him to witness the agreement. After initialling the pages of the agreement he realised that they had already signed on the last page and asked them to identify and confirm their signatures thereon, which they did. His evidence was that:

> *'Before I left all the parties there agreed that time was of the essence, the exchange rate was volatile, they wanted the money transferred to Hong Kong as soon as possible and Des was appointed…as the person who would do that and I must follow his instructions…Mr Vernetti actually said it does not matter what you do, I don't care. He used a swear word I think … Just make it happen, just get it there, words to that effect. The people in the room were Mr Vernetti, Mr Van Bilsen, Des Somerville and Benny Trabelsi, who is an associate of Mr Somerville.'*

[33] Vernetti himself handed the cheque to the defendant. Those present did not mention the terms of the agreement to the defendant or point out that it was in any way linked to the cheque that was being handed over. No-one at the meeting informed the defendant that he should *'operate'* in terms of that agreement. The defendant accepted that logically there must have been some connection, but he had not paid any attention to the terms of the agreement because he was not asked to do so. His work had been interrupted and he wanted to get back to it as soon as possible. The defendant maintained that he had not been furnished with a copy of the agreement at the meeting or thereafter. The first time he saw a copy was after Vernetti demanded repayment of the deposit. He had been in Somerville's office for two to three minutes, and certainly no longer than four minutes.

[34] His evidence was further that:

> *'I might just add I was, I viewed it as I was doing them a favour, they asked for this.*
>
> *Okay, so if you can just reiterate then, what was the specific instruction to you? --- Take the cheque, put it into your trust account, the money must get to China as soon as possible no matter what way. Listen, take instructions from Des.*
>
> *Did you accept that instruction? --- I said sure.*
>
> *Did you take the cheque? --- Yes. I do recall that I just handed the cheque to my secretary. I said to her deposit that today, special clearance.'*

[35] The defendant testified that, had he been made aware that the deposit was to remain in trust for any significant period, he would have obtained an instruction to invest it (in accordance with s 78(2) of the Attorneys Act 53 of 1979). Had he been instructed to deal with the deposit as Vernetti alleged, he would have insisted on charging a fee (which it is common cause he did not). He explained:

> *'I do sometimes do things for nothing if it is a good case, but here this is a commercial, … I would have insisted on payment. The management of funds in that context would be quite responsible. Each transaction would have to be verified in writing with a formal instruction or something because it is quite easy for business partners to fall out. It has been known to happen. I knew that both parties were friends here. I gave no account to Mr Vernetti…I did not bill Mr Vernetti…or Paymate.'*

[36] The defendant conceded that he had been aware of ongoing discussions between Vernetti and Somerville about the purchase of a billboard and that Vernetti had been unable to obtain a letter of credit; however his testimony (which was not materially disputed) was that he had not been personally involved in any aspect thereof. In hindsight he accepted that the arrangement about the cheque reflected in the written agreement would have been an eminently suitable substitute for the letter of credit; but was consistent in his evidence that in the few minutes he was at the meeting, this had not occurred to him, particularly given the express instruction to the contrary.

[37] During cross-examination the defendant was consistent on these essential aspects. When asked why, if his version was to be accepted, he had admitted the existence of any mandate at all, his evidence was as follows:

> *‘ So why did you need a mandate from him? --- Well, he handed me the cheque and he said pay this. He was not my, my. He could have said, he could have said there was not a mandate or, if he wanted to, but I think the way it was pleaded is that I was instructed to do something and that is a mandate…*
>
> *All the people were there. I did not think, I really did not think that Mr Vernetti was my client, but I got an instruction from him just as Des is not actually director of The Window Guys, but he was the guy who was, who was making the decisions on behalf of them. He was the person who signed the agreement although the director was right there, the sole director* [i.e. Van Bilsen]*. So I thought all these gentlemen were ad idem and they wanted this please to be done and for some reason they instructed me that way.’*

[38] The defendant was cross-examined at length; much of this was directed at the careless manner in which he had presented his defence on the pleadings and his conduct subsequent to receiving the “mandate”. I will deal with the relevance thereof hereunder.

[39] Trabelsi, the only independent witness, testified that he knew Vernetti, Somerville and Van Bilsen as well as the defendant. Trabelsi could not understand how Vernetti claimed not to know him, given that they had met and interacted with each other on more than 20 occasions during the period of Trabelsi’s association with Somerville from 2007 to 2009. Over that period Trabelsi had shared an office with Somerville and Van Bilsen, and had worked in that office on an almost daily basis.

[40] Trabelsi was able to remember details of certain occasions that he had interacted with Vernetti, including a meeting at the latter’s home when he recalled workmen having

been present repairing tiling outside. Trabelsi's unchallenged evidence was that he had not had any contact with Somerville since starting an independent business venture in 2009.

[41] Trabelsi recalled the events at the meeting on 16 October 2008 as follows. He happened to be in the office with Somerville and Van Bilsen, working on his computer. He was aware that Somerville and Van Bilsen were involved in a deal with Vernetti about a billboard. Vernetti came into the office with a written agreement which Vernetti and Somerville signed. They then called the defendant down from his office two floors above.

[42] When the defendant arrived he was distracted as he had been interrupted in the middle of something that he was doing. Trabelsi remembered that the defendant *'was very restless, he wanted to go back to his office'*. Vernetti and Somerville asked the defendant to witness the agreement. The defendant initialled the pages thereof and after confirming the identity of the signatories, signed as a witness.

[43] Vernetti handed the defendant a cheque to deposit into his trust account. The defendant agreed to do so. The stated purpose was to move the funds as soon as possible to Hong Kong. Trabelsi understood the reason to be a problem with the exchange rate. The defendant was told that Somerville was in charge of the transaction and that the money would be withdrawn from the account by Somerville as and when required. The defendant accepted this arrangement, took the cheque and

left. He did not leave with a copy of the agreement. Trabelsi recalled that the only agreement at the meeting was the original, and that no copies had been made available. The defendant had been there for no longer than three to four minutes before he left to return to his office.

[44] During cross-examination Trabelsi testified that no discussions had taken place about the terms of the agreement itself, and that *'this* [meeting] *was for the final signature; there were no discussions, Mr Vernetti came with the final agreement'*. Vernetti had been very clear in his instruction to the defendant. Trabelsi's evidence was that *'he said something like I don't give a* [expletive] *how you get it there, just get it there as soon as possible'.* Trabelsi was a good witness whose evidence was not challenged in any material respect.

Evaluation

[45] It appeared from much of the defendant's cross-examination that the plaintiff had lost sight of the fact that *it* bore the onus to prove the terms of the mandate agreement and that, only if it did so, would any question of a breach thereof (in the context of the defendant's subsequent conduct) arise. Although Vernetti remained adamant throughout his testimony that his intention was for the defendant to hold the deposit in trust until presentation of a bill of lading, *on his own version* he had never conveyed that intention to the defendant. In addition, he could not even recall what, if anything, he had specifically told the defendant to do. Vernetti had merely acted on the assumption that the defendant would take it upon himself to ensure that he was

familiar with the terms of a written agreement which he had not drafted or negotiated and to which he was not a party, and act in accordance therewith.

[46] On the other hand, the defendant's version about his express instruction at the meeting was supported by Trabelsi's testimony; and, to a certain extent, by the contents of his letter of 30 March 2009 which was sent in response to Vernetti's initial letter of demand.

[47] I found Vernetti to be generally a good witness, although his poor recall of events was clear and was in fact conceded by him. He was candid about his failure to convey his intention about the cheque to the defendant. He was similarly candid about his failure to recollect what (if anything) he had told the defendant at the meeting. The high-water mark of the plaintiff's case thus crystallised into the following, namely that Vernetti had *only assumed* that he had given the defendant a mandate. In these circumstances it would be too far a stretch to find that the contradictions in certain aspects of the defendant's testimony on issues unrelated to the terms of the mandate somehow proved the plaintiff's case for it. To do so would also ignore Trabelsi's version which was essentially unchallenged.

[48] I thus cannot find that the plaintiff succeeded in discharging the onus which it bore to prove the terms of the mandate agreement as alleged.

[49] Because the plaintiff failed to discharge its onus, a consideration of the evidence relating to any breach becomes redundant. However two further issues need to be addressed.

[50] First, the plaintiff pleaded breach of the defendant's legal duty in the alternative as follows:

> *'15 The defendant accordingly, negligently breached his legal duty to the plaintiff in that he:*
>
> *15.1 paid the deposit to Somerville, despite the fact that the plaintiff never instructed the defendant to make such payment; and/or*
>
> *15.2 paid the deposit to Somerville, despite the fact that he never received a bill of lading and knew alternatively, should have known with the exercise of reasonable care, that the bill of lading had never been issued;*
>
> *15.3 failed to take any steps whatsoever to obtain the plaintiff's instructions as to whether the deposit may be paid to Somerville or not; and/or*
>
> *15.4 failed to take any steps whatsoever to prevent loss to the plaintiff by, inter alia, obtaining the plaintiff's instructions as to how the deposit should be dealt with and/or*
>
> *15.5 acted unreasonably or irresponsibly with the deposit by paying it to Somerville; and/or*
>
> *15.6 paid the deposit to Somerville despite the fact that the risk existed that the plaintiff would suffer damages as a result thereof; and/or*

15.7 failed to deal with the deposit with the expertise, trustworthiness and prudence as can be expected of the average practicing attorney.'

[51] From the aforegoing and the evidence adduced at the trial it appeared that the claim based on breach of a legal duty was underpinned by the defendant's alleged failure to follow Vernetti's instructions (whatever they might have been). Put differently, the claim was premised on the defendant having known, because of an instruction given, what he was required to do, but failing to do it. Again, on the plaintiff's own version, Vernetti never told the defendant what to do.

[52] During argument the plaintiff relied on *Hirschowitz Flionis v Bartlett and Another* 2006 (3) SA 575 (SCA) and *Du Preez and Others v Zwiegers* 2008 (4) SA 627 (SCA) in support of its claim based on breach of a legal duty. In my view both of these decisions are distinguishable on the facts, given that in both of these cases the attorneys concerned had acted *without instructions*, and not *contrary to the instruction given*.

[53] In *Hirschowitz* an attorneys firm had received a deposit of R3.1 million into its trust account without information as to the identity of the depositor or the purpose for which the deposit was intended.

[54] The Supreme Court of Appeal pointed out that the incidence of a legal duty to act without negligence is a matter of legal policy; and that the attorneys should have taken

reasonable steps to enquire about the depositor and the purpose of the deposit, and to safeguard it, particularly where, on the facts of that case, the instruction from a third party to pay it out had been patently suspicious. In *casu* the evidence showed that the defendant received the deposit both with knowledge of the depositor's identity and the purpose for which it was intended. The defendant's version (supported by Trabelsi) that, irrespective of the terms of a written agreement of which he had no knowledge, he was to pay out the deposit on Somerville's instruction; and that he acted in accordance with that instruction, does not translate into acting without an instruction.

[55] In *Du Preez* the attorney paid out monies held in trust to the designated payee of a client who claimed to be entitled to the monies, without first making contact with the depositor. The court found that even though the depositor had not given the attorney a mandate, the latter's error lay in failing to establish whether the depositor intended giving him a mandate and, if so, what it was. The court held that a reasonable attorney would have done so and that the attorney concerned was thus negligent. The distinction between the facts in *Du Preez* and those in the present matter is self-evident. I am accordingly compelled to find that the plaintiff has failed to discharge this onus as well.

[56] The second issue relates to legal causation, and I deal with it on the assumption that my finding of a failure to prove breach of a legal duty is wrong.

[57] In *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (AD) the court explained the test for legal causation at 700H-701C as follows:

> *'On the other hand, demonstration that the wrongful act was a* causa sine qua non *of the loss does not necessarily result in legal liability. The second enquiry then arises, viz whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part. This is sometimes called "legal causation". (See generally* Minister of Police v Skosana *1977 (1) SA 31 (A) at 34E - 35A, 43E - 44B;* Standard Bank of South Africa Ltd v Coetsee 1981 (1) SA 1131 (A) *at 1138H - 1139C;* S v Daniëls en 'n Ander *1983 (3) SA 275 (A) at 331B - 332A;* Siman & Co (Pty) Ltd v Barclays National Bank Ltd *1984 (2) SA 888 (A) at 914F - 915H; S v Mokgethi en Andere, a recent and hitherto unreported judgment of this Court, at pp 18 - 24.) Fleming* The Law of Torts *7th ed at 173 sums up this second enquiry as follows:*
>
> > *'The second problem involves the question whether, or to what extent, the defendant should have to answer for the consequences which his conduct has actually helped to produce. As a matter of practical politics, some limitation must be placed upon legal responsibility, because the consequences of an act theoretically stretch into infinity. There must be a reasonable connection between the harm threatened and the harm done. This inquiry, unlike the first, presents a much larger area of choice in which legal policy and accepted value judgments must be the final arbiter of what balance to strike between the claim to full reparation for the loss suffered by an innocent victim of another's culpable conduct and the excessive burden that would be imposed on human activity if a wrongdoer were held to answer for all the consequences of his default.'*

[58] In his letter of 30 March 2009, the defendant had stated that, to the best of his knowledge, the deposit was still held by Somerville. He invited the plaintiff to take up the matter directly with Somerville. In Somerville's affidavit of 2 September 2009 in the summary judgment proceedings, the following allegation was made:

'13. The Vernetti deposit of Seventy Thousand United States Dollars (USD 70 000) is at present secured in a Unitex-controlled account in Hong Kong for purposes of payment to the various manufacturers of the LED billboard.'

[59] However, the plaintiff failed to adduce any evidence about whether it had taken steps to recover the deposit from Somerville, and if so, the outcome thereof. The court is thus left in the dark, and has no factual matrix from which it could conclude that any wrongful act on the part of the defendant is linked sufficiently closely or directly to the loss which the plaintiff contends it has suffered. Put differently, this court is unable to determine whether, or to what extent, the defendant (if his conduct was indeed wrongful) should have to answer for the consequences which his conduct helped to produce.

Conclusion

[60] **In the result the following order is made:**

'The plaintiff's claim is dismissed with costs, including any reserved costs orders.'

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J I CLOETE