REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CIRCUIT LOCAL DIVISION, GEORGE)

CASE NO: 7533/2015
H245/2013

In the matter between:

HERRIE WINDSOR CONSTRUCTION (PTY) LTD Plaintiff

And

RAUBENHEIMERS INC Defendant

Coram:	Yekiso, J
Dates of Hearing:	7, 8, 9 September 2015 & 19 November 2015
Date of Judgment:	22 April 2016

JUDGMENT

YEKISO, J

[1] Legal advice by a legal practitioner to a non-client has a potential to expose the legal practitioner concerned to liability should the non-client act to its detriment following that advice. However, in order to attract liability, it will have to be established in respect of the legal practitioner concerned that it owed the non-client a legal obligation to act reasonably and, in particular, a duty not to make a negligent representation. In this judgment I find that a legal practitioner is liable to a non-client on the basis of failure to

act reasonably and on the basis of negligent representations which, in itself, constitutes a basis for liability. The reasons for holding the legal practitioner liable are contained in the judgment which follows.

[2] On 29 January 2010 and at George, in the province of the Western Cape, Herrie Windsor Construction (Pty) Ltd, a company with limited liability incorporated in terms of the laws of the Republic of South Africa ("plaintiff") concluded a lease agreement with Parexel International South Africa (Pty) Ltd ("Parexel"), similarly a company with limited liability incorporated in terms of the company laws of the Republic of South Africa. At the time of the conclusion of the lease agreement the plaintiff was represented by one of its directors, J J Sieberhagen ("Sieberhagen"), whilst Parexel was represented by A T Smith ("Smith"), one of its directors. That agreement superseded an earlier lease agreement concluded between the parties on 1 July 2005.

[3] At the time of the conclusion of the lease agreement, the plaintiff was the owner of a sectional title scheme known as Windsor Park situate at erf 19787, George, in the province of the Western Cape ("Windsor Park") and erven 1308 and 1309, George, in the province of the Western Cape ("the Windsor houses"). Parexel leased the Windsor houses and a portion of Windsor Park ("the George premises").

[4] It was a material term of the lease agreement that the lessee would have an option to renew the lease for a further period of five years commencing from 1 July 2010. In terms of clause 13 of the lease agreement the lessee would, if so required in

writing by the lessor, restore the premises on termination of the lease agreement to the condition the premises were prior to any alteration, addition or improvements effected thereon. Parexel exercised its option to renew the lease so that same was valid and binding until 30 June 2015.

[5] Parexel utilised the leased premises for a specific purpose of testing medicine. Its main core of business was to contract with pharmaceutical companies to pre-test products the pharmaceutical companies wished to release in the market. The pre-testing and accreditation of medicine is a specialised industry and, in order to achieve optimal quality exercise, Parexel procured specialised and very expensive equipment which it had to have installed in the leased premises over and above other alterations, additions and improvements it had to have effected. Although a South African based company operating from the leased premises in George, Parexel was an international company with its parent company based in the USA. Dr Michelle Vivienne Middle ("Dr Middle") was one of its directors.

[6] Later during 2010 Parexel announced that it would withdraw its operations in South Africa. Dr Middle, who happened to be a director of both Parexel and the plaintiff, and, thus, co-owner of the leased premises, (she had a 10% shareholding in the property) seized the opportunity and decided to set up and start off the same business for her own account under the name of Ubuntu utilising an entity Ibunti Trade 56 (Pty) Limited ("Ibunti") as a vehicle to procure the business from Parexel as a going concern.

Dr Middle and one Daniel Petrus Wessels were the only directors of Ibunti at the relevant time.

[7] Dr Middle approached Parexel and commenced negotiations with a view to procure Parexel's business as a going concern. Parexel agreed to the proposal subject to two conditions, the first being that there would have to be concluded a sub-lease agreement between Parexel and the entity Dr Middle had intended to utilise in procuring and taking over the business from Parexel. In the event the suggested sub-lease agreement being concluded between Parexel and the new entity, Parexel would guarantee rental payment for the duration of the remaining period of the lease. The second condition was that Dr Middle could acquire the equipment installed at the leased premises for no consideration at all but that, as a *quid pro quo*, Parexel required to be released from its obligation arising from the restoration clause. It was estimated that it would cost approximately R8m to restore the premises to the condition they were prior to any alterations, additions and improvements effected thereon.

[8] In the course of the operation of the lease agreement Parexel added fixtures and effected certain improvements in the form of additions and alterations to the premises. These were with the prior written consent of the plaintiff. The costs of restoring the premises to the condition they were prior to such additions and alterations, as has already been pointed out, were estimated to be in an amount of R8m. In the ensuing negotiation to procure Parexel's business operation, it was ultimately agreed that Parexel would enter into a sub-lease agreement with Ibunti, to be countersigned by the

plaintiff, in terms of which the George premises were to be sub-let to Ibunti. It was further agreed that any and all liabilities to have been borne by Parexel in respect of restoration costs would be assumed by Ibunti. But Ibunti, being a start-up company, did not have R8m to meet the estimated restoration costs.

[9] Dr Middle discussed the idea of taking over the business of Parexel as a going concern with the plaintiff's board of directors. At the time plaintiff had five directors. Dr Middle was part of that board. Johannes Zaaiman, who testified in plaintiff's case at this trial, is one of the five directors. The plaintiff's board of directors were prepared to accommodate Dr Middle in her endeavour and, to this end, were prepared to consent to the conclusion of the sub-lease agreement between Parexel and Ibunti, subject to plaintiff's interest flowing from the head lease agreement being fully protected. It was anticipated that it would be a tripartite agreement which would also require plaintiff's signature. After numerous discussions amongst the plaintiff's board members, which included Dr Middle, it was agreed that, in order to achieve the stated objective, plaintiff would waive its rights arising from the restoration clause, thereby releasing Parexel of its obligation to restore the premises to the condition they were prior to any alterations and additions effected thereon; that Ibunti assumes the obligation arising from the restoration clause subject thereto that Ibunti, for the duration of the sub-lease agreement, transfer ownership to plaintiff of all movable goods in the leased premises and that these conditions be incorporated and/or included in the proposed sub-lease agreement.

[10] From then on, it was left to Dr Middle to instruct her attorneys to draw the proposed sub-lease agreement between Parexel and Ibunti, which would have had to be countersigned by plaintiff; and would have had to incorporate a clause in terms of which ownership of all improvements, equipment and movable assets in the lased premises transferred from Parexel to Ibunti. Ibunti, in turn, would have to incorporate in the sub-lease agreement a clause in terms of which ownership of the movable assets would be transferred to the plaintiff, such transfer to endure for the duration of the remaining period of the lease. The transfer of ownership of movable assets would be in exchange of plaintiff waiving its right against Parexel arising from the restoration clause. Dr Middle had expressly agreed to these terms. Dr Van Breda, of the defendant firm of attorneys, who acted for Dr Middle, was to attend to the drafting of the sub-lease agreement. Dr Middle acted in her capacity as the director of Ibunti when she instructed Dr Van Breda to draw the proposed sub-lease agreement.

[11] In the course of the drafting of the sub-lease agreement, Dr Middle was in constant contact and frequently communicated with her fellow directors in plaintiff's board. Similarly, plaintiff's other directors (Sieberhagen and Zaaiman) were in constant contact and regularly communicated with Dr Middle. One such communication was by way of an email of 17 June 2011 sent by Sieberhagen to Dr Van Breda and copied to Dr Middle. The email reads as follows:

> "Ingesluit hierby is die basis waarop ek en Johan vanoggend met Michelle gepraat en ooreengekom het.

> Item 4 is nog nie gefinaliseer nie en Michelle sal kommentaar daarop lewer. Ons het egter baie sekuriteite tov die bostaande gebou en meubelment en gegewe dat Michelle nie sommer sal misluk nie, is hierdie voorstel slegs geldig indien Michelle die besigheid verkoop binne 'n sekere tydperk. Hierdie item is tussen HWC en Newco (Michelle) en het nie enige invloed op haar relings/onderhandelings met Parexel nie."

[12] The email referred to in the preceding paragraph was preceded by an email of 15 June 2011 sent by Zaaiman to Dr Middle and copied to Dr Van Breda. That email refers to a meeting of the plaintiff's board of directors at which Dr Middle was present. Attached to this email is a document entitled "Finale Ooreenkoms – Michelle, Parexel + HWC" the reference being to Dr Middle, Parexel and the plaintiff. This email conveys a clear and express agreement between Ibunti and plaintiff that ownership of the movable assets in the leased premises would be transferred from Parexel to Ibunti and that Ibunti, in turn, would incorporate in the sub-lease agreement, to be drawn by Dr Van Breda, a clause in terms of which movable goods in the leased premises would be transferred to plaintiff.

[13] Prior to the conclusion of the final draft of the proposed lease agreement, and by way of an email dated 28 July 2011 sent by Zaaiman to Dr Middle, and copied to Dr Van Breda, the following was conveyed to Dr Middle:

> "Die hele aangeleentheid gaan oor die uitgooi van die 'Restoration clause' By be-eindiging van Parexel se kontrak sou ons 'geld' kon kry om die gebou terug na kantore te verander. In jou geval by voortydige staking van besigheid kry ons 'n ingerigte gemeubileerde gebou vir 'n moontlike 'hospitaal' huurder. By hernuwing van 'n verdere termyn is die verdere huurkontrak ons bate en doen ons dan afstand v/d sessie op die 'movable' items. Indien 'n verdere huur termyn nie realiser nie en ons nie die 'movables'

> by verstryking v/d huurtermyn kan opeis nie, het ons niks om die gebou verhuurbaar aan ‘n nuwe party te kry nie.”

The email conveyed in the clearest possible terms that, as security against waiver by plaintiff of its right arising from the restoration clause, a clause had to be inserted in the proposed sub-lease agreement in terms of which ownership of movable assets would be transferred to plaintiff.

[14] Sometime between the middle of June 2011 and the end of July 2011, and in the course of the preparation and the drafting of the proposed sub-lease agreement, Dr Van Breda telephoned Zaaiman and, in the course of such telephonic conversation, Dr Van Breda pointed out to Zaaiman that because he, (Dr Van Breda) was not furnished with an inventory of the movable assets which Ibunti had agreed to have transferred to the plaintiff; and because, in the nature of things, movable assets could change in the course of the sub-lease agreement, the best way to achieve the protection sought by the plaintiff could be by way of incorporating a clause, in the sub-lease agreement, in terms of which Ibunti would, in the event of it (Ibunti) ceasing business operation before the expiry of the sub-lease agreement, transfer ownership of all improvements, equipment and other movable assets to plaintiff. The plaintiff, through Zaaiman, accepted that advice.

[15] The advice given by Dr Van Breda was ultimately incorporated in the sub-lease agreement in the form of clause 4 under the heading “Movable Goods” which reads as follows:

> "Should the sub-lessee, before the expiry date, discontinue the business conducted by it on the premises or not renew the lease for at least two years, the sub-lessee shall deliver and transfer to the landlord its right, title and interest in and to all movables owned by it as used in its business on the premises."

[16] The waiver by plaintiff of its right against Parexel arising from the restoration clause was communicated to Parexel by way of a letter dated 16 August 2011 which bears the heading "Waiver of Claim against the Lessee for Restoration Costs". The waiver itself is contained in paragraph 5 of the letter. It reads as follows:

> "The lessor hereby waives any and all claims of whatsoever nature which it may have against the lessee or in the future in respect of the restoration costs and undertakes to recover such restoration costs from the sub-lessee in accordance with the sub-lease agreement."

[17] The contemplated transfer to the plaintiff of ownership of the movable goods, its purpose and the thinking behind it, was clearly set out in the summary compiled by Sieberhagen and transmitted to Dr Van Breda as early as 17 June 2011. The document containing this summary, which the plaintiff referred to as "Finale Ooreenkoms", was transmitted to Dr Middle with instructions that it be given it to Dr Van Breda. Dr Middle, in turn, transmitted the document to Dr Van Breda as an attachment to her email of 17 June 2011. The impression on the part of the plaintiff's board was that in drawing the lease agreement, Dr Van Breda would act on behalf of both plaintiff and Ibunti. Dr Van Breda, on the other hand, in drawing the sub-lease agreement, was aware of the nature

of the protection the plaintiff sought in the event of Ibunti ceasing business operation before the expiry of the sub-lease agreement.

[18] The relevant portion of the summary compiled by Sieberhagen and transmitted to Dr Van Breda via Dr Middle, reads as follows:

> "Ten einde die gebou in die toekoms aan 'n ander huurder te verhuur indien Newco sou staak met besigheid, word daar 'n sessie vir die los toerusting en inhoud met Newco onderteken waar hierdie toerusting en inhoud aan HWC oorgedra word. Hierdie sessie bly in plek vir ± 4 jaar (verstryking van huidige huurkontrak).
>
> Na 4 jaar:
>
> Indien Newco na die huurkontrak staak met besigheid bly die sessie in plek en word die toerusting na HWC oorgedra."

[19] The sub-lease agreement and the supplement thereto was signed by Zaaiman, on behalf of plaintiff, on 3 August 2011 and by Dr Middle, on behalf of Ibunti, on 17 August 2011. Based on the sub-lease agreement Ibunti took over Parexel's Business of testing medicine for its own account. In doing so, it concluded contracts with pharmaceutical companies to test their pharmaceutical products prior to their release to the market. However, things did not go as anticipated as some of the contracts concluded were either cancelled or postponed by some pharmaceutical companies, thereby severely affecting Ibunti's income. Under these circumstances, voluntary liquidation was the only option. Ibunti, which subsequently changed its name to Q Dot Pharma (Pty) Ltd, was provisionally liquidated on 7 June 2012. The provisional liquidation order was confirmed on 17 August 2012. Upon liquidation of Ibunti, the

liquidators took possession and ownership of all movable goods in the leased premises. Plaintiff's endeavour to claim the goods from the liquidators did not succeed.

[20] The evidence of Zaaiman was, to a large extent, based on communication, by way of email exchanges, between Sieberhagen and Zaaiman on behalf of plaintiff on the one hand, and Drs Middle and Van Breda on the other hand. The thrust of the communication in these emails was security for the plaintiff, pursuant to release of Parexel of its obligation arising from the restoration clause, in the event Ibunti ceased business operation prior to the expiration of the sub-lease agreement. Once Zaaiman had concluded his testimony, plaintiff closed its case. The defendant, on the other hand, elected not to call any witness and closed its case.

THE DEFENDANT'S PLEA

[21] As pointed out in the preceding paragraph, the defendant closed its case without calling any witness. Its stance to the claim by the plaintiff against it, prior to the commencement of trial, can thus be gleaned from the pleadings. In paragraph 8 of its amended plea the defendant denied having received an instruction from Dr Middle to prepare the then contemplated sub-lease agreement. In paragraph 8.3 thereof the defendant pleads as follows:

> "8.3 At all material times the plaintiff, Parexel and Ibunti duly represented by its various office bearers and without any intervention, assistance or advice otherwise, agreed upon the terms and conditions applicable to the sub-lease and supplementary agreement *in ter se*. Defendant did not hold any instructions from either Parexel or the plaintiff and advised only Ibunti."

[22] The defendant's stance, through cross-examination of Zaaiman by defendant's counsel, was that the understanding between the plaintiff's board and Dr Middle was that the document the parties referred to as the "Finale Ooreenkoms" would merely be presented to Dr Van Breda only to be converted into a more formal legal document and did not constitute any formal instruction in this regard.

[23] Further, the defendant, in paragraph 10 of its plea, initially denied the telephonic discussion which allegedly took place between Zaaiman and Dr Van Breda as alleged by the plaintiff. Furthermore, the defendant also denied the very receipt of the handwritten "Finale Ooreenkoms" by Dr Van Breda. The receipt thereof was only admitted when the defendant was confronted with an application to make discovery of its file so that receipt thereof could be demonstrated. And further, apart from denying the very telephonic discussion which allegedly took place between Zaaiman and Dr Van Breda, the defendant similary denied the advice allegedly given in the course of that telephonic discussion. It was only in the course of defendant's counsel putting his client's version to Mr Zaaiman towards the conclusion of his cross-examination, that it appeared to have been conceded that the discussion did indeed take place.

[24] In the further instance the defendant, in paragraph 11.3 of its plea, denied the fact of the telephonic discussion between Zaaiman and Dr Van Breda and, as has already been pointed out, the advice given in the course of such a telephonic discussion. Zaaiman was cross-examined at length with regards to the alleged

telephonic conversation, ostensibly on the premise that the alleged telephonic conversation would be placed in issue. However, towards the close of Zaaiman's cross-examination and when defendant's counsel was enjoined to put his client's version to Zaaiman it became apparent, on the basis of statements put to Zaaiman, that such telephonic conversation did in fact take place.

[25] Despite statements on these issues having been put to Zaaiman and the issue of the receipt of written instructions and the telephonic conversation having been raised in cross-examination, Dr Van Breda was not called to testify in order to put such statements and assertions into a proper perspective.

[26] In the final analysis in the instance of this matter, the plaintiff complains that it suffered loss as a consequence of failure by the defendant, through one of its directors in the person of Dr Van Breda, that the latter, in drafting a sub-lease agreement between Parexel and Ibunti, omitted to provide the security plaintiff required in the sub-lease agreement in terms of which plaintiff would secure ownership of the movable assets in the leased premises in the event Ibunti ceased business operation before the expiry of the lease and that such omission or failure constitutes negligence which attracts liability.

[27] As plaintiff was not the party who instructed the defendant to prepare the agreement (such instructions having been given by Dr Middle to Dr Van Breda on behalf of Ibunti) the issues which arise are whether the defendant, in the circumstances of this

matter, owed the plaintiff a legal obligation to act reasonably in preparing the sub-lease agreement, due regard had to the various communications between the plaintiff and the defendant (via Dr Middle) by way of email exchanges and, in particular, pursuant to a telephonic conversation between Zaaiman and Dr Van Breda in terms whereof Dr Van Breda advised Zaaiman with regards to the contents of the clause in the sub-lease agreement on the basis of which plaintiff sought security of ownership of the equipment and other movable assets in the leased premises; whether the defendant, having been made aware of plaintiff's concerns with regards to the required security, owed the plaintiff a legal duty, in drafting the sub-lease agreement, to act reasonably in the circumstances of this matter; and whether the defendant owed the plaintiff a legal duty not to misrepresent to the plaintiff that the security afforded by clause 4 of the sub-lease agreement provided the kind of security sought by the plaintiff.

[28] In a nutshell, the question is whether the defendant, in drafting the sub-lease agreement, owed plaintiff a duty to act reasonably and whether the alleged failure by the defendant in formulating a clause in the sub-lease agreement which fell short in providing the plaintiff the kind of security sought, and in terms of which ownership of the movable assets in the leased premises would vest in plaintiff for the duration of the lease, as opposed to such ownership only vesting in plaintiff on cessation of business operation by Ibunti.

[29] Thus, the question I am called upon to determine is the question as to whether, as a consequence of the defendant's alleged failure to provide plaintiff with the kind of

security sought, constitutes negligence which attracts liability by the defendant in favour of plaintiff arising from such alleged failure. This, of course, would depend whether the defendant had a duty towards the plaintiff to draft the contract in a reasonable manner and in the manner required by plaintiff, which duty could lie either by way of a contractual obligation; or a legal duty of care; and/or a duty not to make a negligent representation. In the determination of this issue, any one of the aforementioned issues would suffice for the defendant to attract liability.

THE LAW

[30] In various jurisdictions such as the United States of America; Germany; the Commonwealth and other civil law and common law jurisdictions legal advisors have been held liable in delict in respect of their actions which affect parties other than their own formal clients in a wide variety of situations. Our courts have not had much opportunity to consider the specific issues relating to attorneys' liability to non-clients. There is justification, in my view, to consider foreign case law dealing with such issues and to follow guidance from the approaches followed, and the problems encountered in those jurisdictions in the resolution of such issues. It appears that in Commonwealth and American jurisdictions courts have had little difficulty in exchanging concepts and ideas in this area of the law.

[31] In *Hawkins v Clayton* 1988 79 ACL 69 a firm of solicitors was held liable for failing to draw a will timeously, causing would be beneficiaries to be disinherited; in *Midland Bank Trust Co Limited and another v Hett, Stubbs & Camp* [1978] 3 All ER 571

a firm of solicitors was held liable for failing to register an option to purchase land, causing the grantee of the option to be unable to purchase the land because it had already been sold; in *Trustees of the Property PAF Foster & others v Crusts* [1986] BCLC 307 a firm of solicitors was held liable for failing to advise sureties of a company that a suretyship securing the company's debt had to be registered, causing the sureties to lose their right of subrogation in respect of the suretyship; and in *Penn v Bristol & West Building Society* [1996] 2 FCR 729 a firm of solicitors was held liable for failing to check with the wife of their client whether she wished her house to be transferred, in a case where the husband co-owner obtained the transfer by fraudulent means. In all these cases the omission by the firms of solicitors concerned attracted liability to disappointed beneficiaries from whom they had no formal instructions or any form of contractual nexus.

[32] J R Midgley, in his work *Lawyers' Professional Liability* 1992, in a chapter dealing with liability to non-clients, and at p92 of his work, cites the authority of *Biakanja v Irving* 49 Cal 2d 647 where the California Supreme Court, in the determination of liability to a non-client, said the following:

> The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff would suffer injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct and the policy of preventing future harm."

[33] Midgley, still at p92 of his work, refers to a further authority in the form of *Lucas v Hamm* 56 Cal 3d 583, 15 Cal Rptr 821, 364 P 2d 685 (1961) which the California Supreme Court had an opportunity to consider not long after *Biakanja v Irving.* In that case an attorney had negligently drafted a will and the beneficiaries sued. In that case the court incorporated an additional factor for consideration into the *Biakanja* test, namely, the profession's interest. Midgley notes that the court, on that occasion, deleted the moral blame standard from the *Biakanja* formulation. The balancing test was therefore formulated to include:

> "the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff would suffer injury, the closeness of the connection between the defendant's conduct and the injury… the policy of preventing future harm… [and] whether the recognition of liability… would impose an undue burden on the profession".

In this authority the court held that since the burden of the profession would be the same if the clients were plaintiff, no reason prevented it, in cases where the other factors indicated the existence of liability, from extending relief to third parties.

[34] Several other authorities in the Commonwealth, such as *Whittingham v Crease & Co* [1978] 5 WWR 45 a decision of the British Columbia Supreme Court in the province of British Columbia, Canada; the decision of the Australian Court in *Watts v Public Trustees Western Australia* [1980] WAR 97; the New Zealand Appeal Court in the matter of *Cartside v Sheffield, Young & Ellis* [1983] NZLR 37; and the Scottish

Supreme Court in the matter of *Weir v JM Hodge & Son* [1990] SLT 266 all of which appear to follow the same approach adopted in *Biakanja v Irving* and *Lucas v Hamm*, supra.

[35] There are several cases in South Africa where legal advisors were found to be liable to non-clients for professional liability, such as in circumstances where an attorney negligently advised a trustee to act with a trust in a way that a capital beneficiary suffered damage as was the case in *Jowell v Bramwell-Jones & others* 1998 (1) SA 836 (WLD) at 894A-895I; for drafting a will negligently causing it to be invalid with the consequence that beneficiaries were disinherited as was the case in *Pretorius & andere v MacCallum* 2002 (2) SA (C) at 423K.

[36] Basil Wunsh, in an article published in *Tydskrif vir die Suid-Afrikaanse Reg* at p58-59, opines that there is no conceptual obstacle in our law to an attorney being held liable in delict to a non-client for damages caused by negligence. He refers to the authority of *Arthur E Abrahams & Gross v Cohen & others* 1991 (2) SA 301 (C), a matter which was decided on exception, where the court held that the plaintiffs could have a claim arising out of the failure of the defendants, a firm of attorneys employed by the executors of a deceased estate to do work for the executor, to inform the plaintiffs that they were beneficiaries under a retirement-annuity policies taken out by the deceased and that they were required to return signed discharge forms to the insurers, resulting in a five-year delay in payment. In granting the relief sought Marais J at 309D-F summed up the position as follows:

> "a defendant may be held liable *ex delicto* for causing pure economic loss unassociated with physical injury, but before he is held liable it will have to be established that the possibility of loss of that kind was reasonably foreseeable by him and that in all the circumstances of the case he was under a legal duty to prevent such loss occurring. It is not possible or desirable to attempt to define exhaustively the factors which would give rise to such a duty because new situations not previously encountered are bound to arise and societal attitudes are not immutable. However, that does not mean that capriciousness in the adjudication of claims of this kind is permissible. If liability is to be imposed, a court must satisfy itself that there are adequate grounds for doing so, and be able to say what they are."

CONTRACTUAL LIABILITY

[37] As is evident from the discussion in Midgley: *Lawyers' Professional Liability* 1992, supra, at pp90-91 lawyers, despite being formally retained and paid by one client only, in certain circumstances, inevitably also act for other parties and that by entering into a contractual relationship a lawyer accepts an additional client. This is normally referred to as the "privity doctrine".

[38] The privity doctrine is best illustrated by Sir Robert Megarry VC in *Ross v Caunters (a firm)* [1979] 3 All ER 580 (Ch) where the learned judge made the following observation:

> "(1) A solicitor who was instructed by his client to carry out a transaction to confer a benefit on an identified third party owed a duty to that third party to use proper care in carrying out the instructions because:

(i) It was not inconsistent with the solicitor's liability to his client for him to be held liable in tort to the third party, having regard to the fact that the solicitor could be liable for negligence to his client, both in contract and in tort;

(ii) There was a sufficient degree of proximity between a solicitor and an identified third party for whose benefit the solicitor was instructed to carry out a transaction for it to be within the solicitor's reasonable contemplation that his acts or omission in carrying out the instructions would be likely to injure the third party; and

(iii) There were no reasons of policy for holding that a solicitor should not be liable in negligence to the third party, for the limited duty owed to him of using proper care in carrying out the client's instructions differed from the wider duty owed to the client of doing for the client all that the solicitor could properly do, and far from conflicting with or diluting the duty to the client, was likely strengthened.

(2) The fact that the plaintiff's claim in negligence was for purely financial loss, and not for injury to the person or property, did not preclude her claim, for, having regard to the high degree of proximity between her and the solicitors arising from the fact that they knew of her and also knew that their negligence would be likely to cause her financial loss, the plaintiff was entitled to recover the financial loss she had suffered by their negligence."

[39] This point is further illustrated by Wunsh in an article "Aspects of the Contractual and Delictual Liability of Attorneys", published in *Tydskrif vir die Suid-Afrikaanse Reg,* supra, at p9 where he notes that there is in our law no reason why a client's mandate in terms of which an attorney acts, cannot be analysed as a contract

which, *inter alia*, confers rights on the non-client as a third party, so that non-clients remedy against the attorney will be based on contract.

DELICTUAL LAIBILITY (LEGAL DUTY)

[40] In the matter of *Lucas v Hamm,* cited in paragraph [32] of this judgment, the California Supreme Court took the view that a third party action could be founded in contract or in delict. In a further authority of *Heyer v Flaig* 70 Cal 2d 223, 449 P 2d 161, 74 Cal Rptr 225 (1969), the California Supreme Court held that the contractual theory, on the basis of which solicitors could be contractually held liable to third parties, was "conceptually superfluous since the crux of the action must lie in tort in any case". In that authority, Tobriner J stated the following:

> "The duty thus recognised in *Lucas* stems from attorney's undertaking to perform legal services for the client but reaches out to protect the intended beneficiary. We impose this duty because of the relationship between the attorney and the intended beneficiary; public policy requires that the attorney exercises his position of trust and superior knowledge responsibly so as not to affect adversely persons whose rights and interests are certain and foreseeable."

[41] Midgley, in his work *Lawyers Professional Liability* 1992, supra, navigates several authorities in the United States of America and concludes that in Anglo-American law two tests have been used to determine whether contracting parties owe third parties any delictual duties, these being: foreseeability tests and the multi-criteria balancing tests. Midgley further notes that traces of both approaches can be found in our law of delict, but the foreseeability tests, so he opines, has lost much of its

influence. Thus, following guidelines as illustrated in foreign case law, the court's decision as to whether liability will be founded or not depends on policy considerations and the multi-criteria balancing tests. The policy considerations would include factors such as foreseeability of harm; knowledge of the extent to which the transaction was intended to affect non-clients; reliance on opinion given; and potential excessive burden on the profession, amongst other factors to be taken into account.

[42] Midgley, in dealing with this topic, concludes that in South Africa the foreseeability test has been the subject of judicial and academic scrutiny in recent years. He cites the debunking of the duty of care concept by the Appellate Division in *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A) where foreseeability of harm was relegated from being the dominant test for wrongfulness to be merely another factor to be considered in conjunction with others. He concludes that *Arthur E Abrahams & Gross v Cohen & Others,* supra, a case involving lawyers' liability to non-clients, is an example of the application of the foreseeability requirement in much the same manner as the English and American Courts.

MISREPRESENTATION

[43] In as far as misrepresentation is concerned, once again, Midgley at p109 and the following pages, notes that where a lawyer makes representations which are relied upon by a third party, there is no need to deviate much from the usual criteria of delictual liability. As a general rule, a lawyer who intentionally or negligently misrepresents a fact or situation to a third party acts unlawfully. This is no more than an

application of the general principle stated in *Administrateur, Natal v Trust Bank van Afrika Bpk,* supra, at 824 where the Appellate Division held that in appropriate circumstances a claim lies in delict for pure economic loss and that a negligent mis-statement can give rise to a delictual liability.

EVALUATION

[44] Based on the guidance and approaches followed in foreign case law on the question of attorneys' liability to a non-client, I shall now proceed to determine, based on the evidence and facts found to be proved, if a case has been made out for the relief the plaintiff seeks. In the determination this issue, it is worth repeating that once the plaintiff's board of directors had consented to the conclusion of the sub-lease agreement between Parexel and Ibunti, the plaintiffs insisted on the inclusion in the sub-lease agreement of a clause in terms of which Ibunti would transfer ownership of the equipment and other movable goods in the leased premises to the plaintiff; although Ibunti would retain physical control of the equipment in the leased premises, ownership thereof would vest in plaintiff as a quid pro quo for the release of Parexel of its obligation arising from the restoration clause; that delivery of the equipment and other movable goods, in the circumstances of this matter, would thus be in the form of *constitutum possessiorum* in terms of which the transferor (Ibunti) would retain physical control of the goods, ownership of which the transferor had agreed to transfer to the plaintiff; and that Ibunti would retain possession of such goods on behalf of plaintiff. (See Badenhorst *et al*: Silberber & Schoeman's *The Law of Property* 5th ed. At p188)

[45] The insistence by plaintiff on transfer of ownership was contained in the document entitled “Finale Ooreenkoms” transmitted by Sieberhagen to Dr Middle for onward transmission to Dr van Breda. In the course of the preparation of the sub-lease agreement Dr Van Breda telephoned Zaaiman when the former (Dr Van Breda) pointed out to Zaaiman that because he (Van Breda) had not been furnished with the inventory of the movable goods which Ibunti had agreed to be transferred to the plaintiff; and that because movable goods could change in the course of the sub-lease agreement, the best way to achieve the form of security the plaintiff sought could be by way of incorporating in the sub-lease agreement a clause in terms of which Ibunti would transfer ownership of the movable assets to the plaintiff in the event Ibunti ceases business operation before the expiry of the sub-lease agreement. As it turned out, this form of security did not materialise as the movable goods were seized by the liquidators on the granting of the final order of liquidation. The plaintiff’s claim to the liquidators for the release of the goods to it was unsuccessful.

[46] Dr Van Breda did not have formal instructions from the plaintiff to protect its interests. Dr Van Breda had formal instructions from Dr Middle. But, Dr Van Breda knew at the time of the drafting of the lease agreement the interest the plaintiff sought to protect and the incorporation thereof in the sub-lease agreement. The interest sought to be protected is clearly set out in the document entitled “Finale Ooreenkoms” and other email exchanges. As pointed out by Sir Robert Megarry VC in *Ross v Caunters (a firm)*, supra, “a solicitor who [is] instructed by his client to carry out a transaction to confer a benefit on an identified third party owed a duty to that third party to use proper

care in carrying out the instructions". Mindful of the plaintiff's concerns with regards to the security the plaintiff sought and the interest sought to be protected, Dr Van Breda clearly had a duty to use proper care in favour of the plaintiff in carrying out his instructions.

[47] With regards to the telephonic conversation between Dr Van Breda and Zaaiman which, on the probabilities I do find did take place, a contractual relationship came into being once Dr Van Breda offered Zaaiman an advice and Zaaiman, on behalf of plaintiff, accepted the advice given. It later turned out that the advice so given did not afford the plaintiff the form of security it sought and thus, the defendant, in the person of Dr Van Breda, failed to carry out a duty of care it owed to plaintiff. The assurance to the plaintiff that the advice given would provide the plaintiff with the security it sought was thus clearly a misstatement which constitutes a basis for liability.

[48] I have already pointed out elsewhere in this judgment that Zaaiman was the only witness who testified at trial. The evidence of Zaaiman was satisfactory in all material respects; he was a forthright witness at all levels; he gave evidence which, at virtually every level, was supported by the documentation which was exchanged at the time; the evidence so given was entirely logical, and in any event, remained uncontested throughout this trial. The evaluation of the evidence and the conclusion arising therefrom is thus be based on the evidence tendered by Zaaiman. It is worth noting that in none of the authorities referred to in paragraphs [36] to [41] of this judgment was there a direct communication between the legal practitioners concerned

and the third party, yet the legal practitioners concerned were held to be liable. In the instance of this matter, there is evidence of a direct communication with a third party in the form of the telephonic conversation between Zaaiman and Dr Van Breda which, in my view, strengthens the degree of proximity between the defendant, in the person of Dr Van Breda, and the plaintiff.

[49] In conclusion I find that the defendant is liable to the plaintiff for such damages the plaintiff may have suffered by reason of the fact that ownership of the equipment and the other movable goods in the then leased premises had not been transferred to the plaintiff.

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N J Yekiso
Judge of the High Court

Counsel for Plaintiff:	Adv R S Van Riet SC Adv F J Smuts
Attorneys for Plaintiff:	JS Marais & Co
Counsel for Defendant:	Adv P E Jooste
Attorneys for Defendant:	Joubert Galpin & Searle

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CIRCUIT LOCAL DIVISION, GEORGE)

CASE NO: 7533/2015
H245/2013

In the matter between:

HERRIE WINDSOR CONSTRUCTION (PTY) LTD Plaintiff

And

RAUBENHEIMERS INC Defendant

Coram: Yekiso, J

Judgment: Yekiso, J

Summary: Liability of an attorney to a non-client: Basis of liability explored with reference to international trends
Attorney found liable to a non-client on the basis of negligent mis-statement and/or negligent representation.

Counsel for Plaintiff:	Adv R S Van Riet SC Adv F J Smuts
Attorneys for Plaintiff:	JS Marais & Co
Counsel for Defendant:	Adv P E Jooste
Attorneys for Defendant:	Joubert Galpin & Searle
Dates of Hearing:	7, 8, 9 September 2015 & 19 November 2015
Date of Judgment:	22 April 2016