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

**REPORTABLE**

**CASE NO: A02/19**

In the matter between:

**DE WAAL INCORPORATED** Appellant

and

**PROPERTY AND PIP SOLUTIONS (PTY) LTD** Respondent

Coram: P.A.L.Gamble and M.K.Parker JJ
Date of Hearing: 15 March 2019
Date of Judgment: 27 June 2019

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## JUDGMENT DELIVERED ON THURSDAY 27 JUNE 2019

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**GAMBLE, J:**

INTRODUCTION

[1] The respondent ("*PIP*") successfully sued the appellant ("*De Waal*") in the Regional Court, Bellville for payment of the sum of R 158 570,40, interest and

costs. De Waal is dissatisfied with the outcome and seeks to appeal that order. While the quantum of the order of the Regional Court is low, the interest awarded on the judgment debt is to be calculated from 2009 at the rate of 28,835% per annum. That most likely explains the reason for the continuation of litigation which has its origins as far back as 2008.

[2] The Regional Magistrate delivered a detailed and comprehensive judgment in this matter on 12 September 2018 setting out all the material facts and it is therefore not necessary to go into any great detail. The factual findings of the Regional Magistrate, which were not seriously attacked on appeal, will serve as the basis for this judgment and I shall accordingly give only a brief outline.

BACKGROUND FACTS

[3] PIP is a money lender which specializes in so-called bridging finance. Its guiding mind is one Piet Koen who commercially exploited a niche in the property market in circumstances where a party was short of funds and unable to cover the outstanding costs (rates and taxes and the like) necessary to effect transfer of a property. PIP would then lend such a seller money and pay the agreed amount into the conveyancing attorney's trust account in advance to enable the outstanding amounts to be settled. The loan agreements used in cases such as these usually provide for the conveyancing attorneys to repay the capital and interest to PIP out of the proceeds of a home loan which is secured through the registration of a bond over the property in question or from the proceeds of the sale. The purpose of such

bridging finance is then a short term loan with interest above the usual market rate, with the transferring attorney playing an important role in the arrangement.

[4] De Waal conducts an attorneys' practice in Durbanville through an incorporated entity. He dabbles in property development himself and, when he does so, uses his firm to do the necessary legal work. In 2008/9 the firm did not employ a conveyancer and so de Waal made used of the services of another Durbanville firm, Lucas Deysel Crouse Inc. ("*Lucas Deysel*") to do his property transfers for him. As I understand the position, Lucas Deysel was contracted as a consultant by de Waal.

THE FIRST TRANSACTION

[5] In 2008 de Waal and a certain Leonard van der Burgh ("*van der Burgh*") were the directors and shareholders of a company known as Shockproof Investments 49 (Pty) Ltd which owned Erf 5036 Eversdal. They wished to dispose of the property an on 8 February 2008 PIP advanced to each of de Waal and van der Burgh the sum of R120 000 by way of bridging finance. Separate loan agreements were concluded with each of them, it being contemplated that the amounts would be repaid upon transfer of the property to the purchaser.

[6] The sale of the property fell through and de Waal settled his indebtedness to PIP. However, van der Burgh was unable to settle his liability and he remained indebted to PIP in the sum of R120 000. The parties then sought, and eventually found, a way to address the problem with de Waal playing a prominent role in initiating the solution.

THE SECOND TRANSACTION

[7] De Waal and van der Burgh jointly owned another property in Eversdal – Erf 4915. This was owned in equal shares in their personal capacities and in January 2009 it was sold for R2,5m with transfer to be given as close to the end of April 2009 as possible. The deed of sale was subject to the approval of a mortgage bond in favour of the purchaser in the amount of R1,5m by 13 February 2009 (a suspensive condition that was met timeously) and the contract of sale recorded further, inter alia, that transfer of the property to the purchaser was to be effected by de Waal, while the bond registration was to be attended to by a different firm. For the sake of convenience I shall refer to this as "*the second transaction.*"

[8] On 26 February 2009 van der Burgh concluded a so-called "*discounting agreement*" with PIP in terms whereof it was recorded that the sum of R158 570,40 had been advanced to him. This amount was not a fresh advance but rather it represented the capitalization of the existing indebtedness of R120 000 on the first transaction together with interest and other costs subsequently incurred. The discounting agreement would run hand-in-hand with the second transaction and upon transfer of Erf 4915 to the purchaser, de Waal, as conveyancing attorney, would make payment to PIP of the aforesaid sum of R158 570,40 on behalf of van der Burgh.

[9] As I have said, contrary to the express terms of the discounting agreement to which I shall refer later, there was no payment of any monies to van der Burgh under this agreement. Payment had already been advanced to him under the

first transaction and the discounting agreement effectively provided the contractual basis for the transfer of that earlier indebtedness to PIP. The description of the transaction as a discounting agreement is then somewhat of a misnomer for what was, in essence, a novation (or possibly an assignment) but since that is the term which has been used throughout this litigation I shall similarly do so.

[10] When Erf 4915 Eversdal came up for transfer in May 2009 it was rejected because there was an interdict which had been registered against transfer of the property by the Deeds Office on 8 October 2008. This interdict (in essence the consequence of judicial attachment generally referred to as a "*caveat*") had been procured by a company called Sentronics (Pty) Ltd in August 2008 after it had obtained a warrant of execution from the Registrar of this Court attaching van den Burgh's half share in the property. The warrant of execution was issued pursuant to an order for summary judgment in the amount of R128 360,57 (together with interest and costs) granted in favour of Sentronics by this Court against van den Burgh on 23 April 2008. In the result, the purchaser of Erf 4915 was unhappy with the delays and cancelled the deal. There was then no pending property transaction upon which PIP could rely for repayment of its short-term loan to van der Burgh, who continued to be indebted to PIP.

[11] Van den Burgh was clearly financially embarrassed and as the creditors began circling, on 12 August 2009 he signed an acknowledgement of debt in favour of PIP in the amount of R158 570,40. That acknowledgment of liability was rendered valueless when, on 15 September 2009, Lucas Deysel, relying on an unpaid invoice

for professional services rendered, applied for van den Burgh's sequestration in this Court. The provisional order granted on that date was subsequently confirmed and, in the result, PIP was unable to recover anything from van der Burgh's insolvent estate. It could, I suppose, have walked away from the deal at that stage and written off van der Burgh's obligation as a bad debt. However, it decided to look elsewhere to make good its losses and turned to de Waal.

THE CLAIMS BROUGHT AGAINST DE WAAL

[12] On 12 December 2011 PIP issued summons against de Waal for recovery of the advance made to van der Burgh under the first transaction and relied on the terms of the discounting agreement as its primary cause of action – an alleged breach of warranty by de Waal. There was a first alternative claim for breach of an implied (alternatively tacit) term in the discounting agreement that de Waal had failed to exercise the reasonable professional skill, care and diligence expected of him as an attorney. The second alternative claim against de Waal was delictual, it being alleged that he had been negligent as an attorney in failing to become aware of the fact that the property was the subject of judicial attachment.

[13] During the course of a protracted and expensive trial (which ran over several years and included a successful appeal to this court against an earlier ruling of absolution from the instance by the Regional Magistrate in favour of de Waal), the plaintiff's particulars of claim were amended in order to amplify its cause of action.

That amendment ultimately limited the issues for determination by the trial court as will be seen shortly.

THE MATERIAL TERMS OF THE DISCOUNTING AGREEMENT

[14] To consider the contractual claim against de Waal it is necessary to have regard to the contract relied upon. PIP made use of its *pro forma* document entitled "*Discounting Agreement"* in respect of both the February 2008 advances of R120 000 each to de Waal and van der Burgh, and the February 2009 advance of R158 570,40 to van der Burgh. The two agreements concluded are identical in form save for the manuscript insertions therein relating to, *inter alia*, names, addresses, erf numbers and amounts of indebtedness. For the sake of convenience I shall refer only to the second document dated 26 February 2009 as it is the agreement ultimately relied upon by PIP in seeking to hold de Waal contractually liable for the amount advanced to van der Burgh under the first agreement. That document expressly records (by way of manuscript insertion) that it replaces the first transaction.

[15] The material terms of this second discounting agreement were as follows.

(i) PIP would advance money to van der Burgh on the terms and conditions set forth in the agreement;

(ii) Van der Burgh was entitled to certain proceeds arising from the sale of Erf 4915;

(iii) Van der Burgh sold or ceded to PIP the proceeds (or part thereof) of the sale;

(iv) The advance required by van der Burgh from PIP amounted to R158 570,40 and was ostensibly required for "*Seller's Profit*". I take this to mean that van der Burgh did not need an advance on the proceeds of the sale to cover, for example, outstanding municipal rates but rather that he was taking his profit on the deal early;

(v) On acceptance of the terms of the agreement PIP would immediately pay the said amount into de Waal's attorneys trust account;

(vi) The amount advanced to van der Burgh would become due and repayable to PIP on either the date of registration of the sale of Erf 4915, or the date of registration of the bond of R1,5m over it;

(vii) In the event that the sale of the property was cancelled for whatever reason, the amount advanced by PIP would become due and payable to it by van der Burgh forthwith; and

(viii) The amount advanced by PIP was for a maximum period of 120 days, and irrespective of what else occurred, that sum would

become due and payable by van der Burgh after the lapse of such period.

[16] The discounting agreement comprises 2 distinct parts. The first (comprising clauses 1 to 11) contains the details, terms and conditions just referred to with various manuscript insertions therein and makes provision for signature by PIP and van der Burgh.

[17] The second part of the discounting agreement contains clause 12 with the following wording which is central to this litigation. The relevant portion thereof (*sans* manuscript insertions) is accordingly cited in full.

> "*12.* ***UNDERTAKING AND WARRANTIES BY TRANSFERRING/BOND REGISTRATION ATTORNEY****……*
>
> *12.1 All suspense (sic) conditions relating to the transaction applicable to this agreement has (sic) been met.*
>
> *12.2 All parties have signed all relevant documentation.*
>
> *12.3 I have been duly authorised and instructed to attend to the registration mentioned in 1.*
>
> *12.4 The full amount advanced plus interest and costs will be paid over to PIP on date of registration of the sale or registration of the bond of the transaction applicable to this agreement.*

*12.5* ***I confirm that there are sufficient funds available from the proceeds to cover the advance plus interest and costs.*** (Emphasis added.)

*12.6 Attorneys Trust account details…"*

Provision is made at the end of clause 12 for signature by the conveyancing attorney involved. In this matter, it is common cause that de Waal signed in his capacity as the attorney responsible for the registration of the transfer from himself and van der Burgh to the purchaser. As already stated, a manuscript annotation to clause 12 records that it is in substitution of the undertaking given in respect of the first transaction.

[18] At the conclusion of the evidence before the Regional Magistrate (and after the matter had been sent back to him by this Court), it was common cause that the issue for determination was whether clause 12.5 of the discounting agreement placed any personal contractual obligation on de Waal in favour of PIP and, if so, whether he was in breach thereof. The Magistrate answered both questions in the affirmative and found in favour of PIP. He also found in favour of PIP on the 2 alternative causes of action.

PIP's CONTRACTUAL CLAIM UNDER CLAUSE 12.5

[19] As alluded to above, PIP relied, firstly, on a contractual claim for what it termed a breach of warranty by de Waal. This was eventually narrowed down (after the amendment of the pleadings referred to earlier) to reliance exclusively on clause 12.5 of the discounting agreement. In the result it was said that de Waal's signature to

the second part of that agreement constituted a warranty by him that there were sufficient funds available from the proceeds of the sale of Erf 4915 to cover the full extent of van der Burgh's indebtedness to PIP, which in fact was not the case. The claim is for de Waal to "make good the warranty".[1]

[20] PIP contended further that de Waal's liability to it under the clause in question was strict because it constituted a warranty in the sense referred to by *Van der Merwe et al*[2]

> "*A warranty is a contractual term by which a contractant assumes absolute or strict liability for proper performance, to the extent that he cannot rely on the impossibility of performance or absence of fault to escape liability. A warranty is an incidentale (accidentale) of a contract that extends the liability of a contractant beyond the liability imposed by the essentialia and naturalia of the contract. Inasmuch as it is an incidentale a warranty is a consensual term of the contract."*

[21] In *Masterspice*[3] Farlam JA dealt in detail with the legal derivation of the word "*warranty".*

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[1] Protea Property Holdings (Pty) Ltd v Boundary Financing Ltd (formerly known as International Bank of Southern Africa Ltd) and others 2008 (3) SA 33 (C) at 43B *et seq.*

[2] Van der Merwe, van Huyssteen, Reinecke and Lubbe, Contract General Principles, 4th ed at 256.

[3] Masterspice (Pty) Ltd v Broszeit Investments CC 2006 (6) SA 1 (SCA)

"*[33] The expression 'warranty' comes from English law. In England it has been described as 'one of the most ill-used expressions in the legal dictionary' (Finnegan v Allen [1943] 1 KB 425 at 430). A 'warranty' is usually distinguished from a 'condition', the point of distinction being that a condition is a term whose breach entitles the injured party to treat a contract as discharged, while a 'warranty' is a term whose breach entitles the injured party only to damages: See Chesire, Fifoot and Furmston Law of Contract 14 ed at 166 and ss 11(1)(b) and 62 of the Sale of Goods Act, 1893, and ss 11(3) and 61 of the Sale of Goods Act, 1979, of the United Kingdom.*

*[34] As appears, however, from the extract from Small v Smith (supra)[4], the expression 'warranty' is sometimes used to describe a term the breach of which entitles the injured party to cancel the contract, what is, as has been seen, more properly described in English law as a 'condition'. I agree with the view expressed by Prof RH Christie in The Law of Contract 4 ed at 598, that the use of the words 'condition' and 'warranty' to describe contractual terms is best avoided, not only because of the danger of confusion between conditions in the sense of contractual terms whose breach entitles the injured party to cancel, and what Prof Christie calls 'true' conditions, i.e. suspensive or resolutive conditions, which are not contractual terms at all, but also because we*

[4] 1954 (3) SA 434 (SWA) at 437 A-E

*have adopted the English terminology of describing as 'warranties' terms in insurance policies and some other contracts which are really terms the material breach of which justifies cancellation.*

*[35] In view of the fact that the word 'warranty' can mean a term whose breach only gives rise to a claim for damages but can also mean a term whose material breach gives rise to a right to cancel, it is necessary, in every case where the expression is used, to examine the terms of the contract in question closely in order to endeavour to ascertain in what sense the parties have used it. I do not think that the parties in the present case attached any special significance to the word or that there is any basis for holding that they intended it to mean a term whose breach gives rise to a claim for cancellation even if, notionally, a monetary payment could remedy the problem."*

[22] PIP's claim under this cause of action is predicated on an assumption of personal liability on the part of de Waal, when assenting to the provisions of clause 12.5, that in the event that there were, at the end of the day, insufficient funds to pay over to PIP what was due to it, PIP could look to him to make good its losses under the discounting agreement. In the result, PIP sought to recover, by way of damages for breach of contract, its positive *interesse* from de Waal, asking that it be placed in the position in which it would have been if indeed there were sufficient funds available to effect registration of transfer of the property.

[23] Gardiner J approached the question of a contractual warranty thus in *Naude* [5], a case involving an action for damages for breach of contract flowing from the sale of a house where there was a representation by the seller regarding its good condition and a failure on his part to disclose certain defects in the *merx.*

> "*We have to ascertain whether both parties intended to contract that the thing sold should be as represented, whether the seller intended to bind himself in law that the thing would comply with what he had stated, or at any rate so acted as to estop himself from denying such intention. It is not sufficient that the purchaser relied on the statement - that may be enough for a dictum, but not for a promissum - it must also be shown that the seller contracted that the statement would be made good. That he made the statement in answer to a question may be an argument for holding that there was a promissum, but it is an argument which is not conclusive. The circumstances in which the statement was made, the fact that nothing was done to confirm it in writing, the vagueness of the statement - lead me to think that the defendant had no intention of binding himself to make the statement that the house was well-built. At all events the plaintiff has failed to satisfy me that there was such an intention…"*

[24] In the context of the facts at hand, PIP consequently bore the onus to show that the parties had agreed that de Waal intended personally to stand in for

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[5] Naude v Harrison 1925 CPD 84 at 90

payment of the funds due to PIP by van der Burgh under the discounting agreement, in the event that there were not sufficient funds available when the transfer of the property ultimately took place. I should stress that this case is not about an actionable misrepresentation (whether fraudulent, negligent or innocent) on the part of de Waal inducing the contract.

[25] There have been a number of decisions more recently involving instances of bridging finance where a party (often the conveyancing attorney) has furnished a guarantee that a specified state of affairs exists and that payment will be made pursuant to that state of affairs.[6] Those decisions have repeatedly stated that each case must be considered on its merits and, in particular, that the so-called warranty clause must be contextually interpreted against the factual matrix within which the parties were operating so as to give it commercial sensibility.[7]

[26] Moreover, there is no magic to be found in the use of words such as "*warranty*" or "*guarantee*" as Diemont JA observed in ***List***[8] -

> "*[It is] an unrewarding and misleading exercise to seize on one word in a document, determine its more usual ordinary meaning, and then, having*

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[6] See, for instance, Kruger v Property Lawyer [2011] ZASCA 80 (27 May 2011), North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd 2013 (5) SA 26 (SCA), Stupel & Berman Inc. v Rodel Financial Services (Pty) Ltd 2015 (3) SA 36 (SCA) and Steyn Lyell Maeyane Attorneys v Oelofse [2017] ZASCA 18 (23 March 2017)

[7] Kruger at [8]; Steyn Lyell at [4] – [5]

[8] List v Jungers 1979 (3) SA 106 (A) at 118D-G

*done so, to seek to interpret the document in the light of the meaning so ascribed to that word…"*

[27] In *Hermes*[9] Kriek J was required to deal with a document in which a third party had undertaken to pay the debt of a supplier of goods to a vessel to avoid it being arrested. After a detailed discussion of the cases the Learned Judge concluded as follows.

"*The passages from the various judgments I have mentioned deal with the popular or ordinary meaning of the word 'guarantee', but it seems to me that they demonstrate only that the word is capable of bearing different meanings depending upon the context in which it is used. It seems to me also that when the meaning of the word in a particular document is being considered, it is undesirable to commence the enquiry on the basis that any one of its possible meanings predominates, and that the proper approach to the question is to be alive to the various meanings which it can bear and by a consideration of the context in which it is used (together with such other circumstances as may be permissible) to decide which meaning must be attributed to it in that context."*

[28] The judgment in *Hermes* highlights what has since been endorsed as the contemporary approach to contractual interpretation: consideration of *"the*

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[9] Hermes Ship Chandlers (Pty) Ltd v Caltex Oil SA Ltd 1973 (3) SA 263 (D) at 267

*backdrop of the factual matrix providing the context in, and the purpose for which,*" the document was drafted.[10]

[29] In this case we are dealing with an ordinary commercial document - an agreement of loan for short-term bridging finance between PIP and Van der Burgh - and one asks, firstly, why a conveyancing attorney such as de Waal would allow himself to become a party to such an agreement ? And, flowing from that, one asks whether it makes commercial sense for the attorney entrusted with the conveyancing of the property to expose himself to personal liability in the event of default by the debtor under such agreement? In my view, to answer those questions one must look at the contextual setting of the entire clause 12 in the relation to the discounting agreement as a whole.

[30] It will be observed that the clause is headed "*Undertaking and Warranties by Transferring/Bond Attorney"* and contains, firstly, a recordal that the necessary paperwork has been attended to in order to facilitate transfer of the property. Then, in cl 12.4, there is an undertaking by de Waal that he will pay over to PIP the full amount of the loan granted to van der Burgh on transfer of the property. Finally, the clause records confirmation by de Waal that there were indeed funds available for repayment of the loan to PIP.

[31] In my view, firstly, cl 12.4 does not constitute an unconditional warranty by de Waal in favour of PIP. As in *Steyn Lyell*[11], the clause constitutes no more than

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[10] Kruger at [4] and the cases referred to therein.

an undertaking by de Waal that, when placed in funds, he would pay over to PIP what was due to it under the discounting agreement. It cannot be construed as an unconditional guarantee by de Waal that he would pay over R158 570,40 to PIP "*regardless*". Such an undertaking (which is really akin to him standing surety for the obligations of van der Burgh) cannot be adduced from the context of the clause in the agreement as a whole and, importantly, would lack commercial rationale since "*(i)t would have been absurd for the appellant to have given an unconditional, independent undertaking in these circumstances*"[12], particularly where he knew of van der Burgh's financial problems.

[32] In the result, PIP did not rely on cl 12.4 as constituting a warranty by de Waal in its favour. Rather, as I have already said, it looked to cl 12.5 as constituting the basis for relief under this leg of the claim. But cl 12.5 does not contain any words or phrases suggesting that it constitutes a warranty in any of the senses referred to above. Indeed, the only reference to a warranty anywhere in the discounting agreement is the use of the word in the general heading to cl 12.

[33] In my view, cl 12.5 constitutes no more than the recordal of a statement of fact upon which PIP was entitled to rely when it considered whether to conclude the loan agreement with van der Burgh or not. The representation by de Waal that there were funds available to effect repayment of the loan to PIP was, no doubt, a factor which induced PIP to lend money to van der Burgh but it went no further than that. At

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[11] At [16].

[12] *Kruger* at [10]

best for PIP, the confirmation of the availability of funds by de Waal was a *dictum* in the sense referred to by Gardiner JP in ***Naude*** and I am not persuaded that PIP established that such confirmation in fact constituted a *promissum.*

[34] If cl 12.4 then does not constitute a warranty, I cannot see any basis for holding that cl 12.5 afforded PIP a cause of action based on breach of warranty either. The latter clause contains no reference to a warranty nor does the language employed by PIP in this clause of its *pro forma* document suggest anything approximating a clear and unequivocal undertaking by de Waal to pay anything to PIP in the event that there were not sufficient funds available at the time of transfer. In my view cl 12.5 does not sustain any argument for a warranty on the part of de Waal which was capable of being breached and subsequently sought to be "made good". In the result, I am of the view that the Regional Magistrate erred in finding in favour of PIP on the main cause of action.

THE CLAIM FOR BRACH OF A TACIT TERM

[35] The first alternative cause of action relied upon by PIP was that the discounting agreement incorporated a tacit term that de Waal would exercise reasonable professional skill and due care and diligence in performing his mandate and thereby establish that Erf 4915 was in fact the subject of a *caveat* and advise PIP accordingly.

[36] The well-known test for the importation into an agreement of a tacit term was articulated by Corbett AJA in *Alfred McAlpine*[13] and is commonly referred to as "*the innocent bystander"* test. Accordingly a tacit term will not be readily imported into the discounting agreement and before it may be so imported –

> "*the Court must be satisfied, upon a consideration in a reasonable and businesslike manner of the terms of the contract and the admissible evidence of surrounding circumstances, that an implication necessarily arises that the parties intended to contract on the basis of the suggested term… The practical test to be applied - and one which has been consistently approved and adopted in this Court - is that formulated by Scrutton L.J., in the well-known case of Reigate v Union Manufacturing Co 118 L.T. 479 at p483:*
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> > 'You must only imply a term if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that you can be confident that if at the time the contract was being negotiated someone had said to the parties: "What will happen in such a case?" they would both replied: "Of course, so-and so. We did not trouble to say that; it is too clear."
>
> *This is often referred to as the 'bystander test'."*

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[13] Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration 1974 (3) SA 506 (A) at 531D – 533C

[37] Applying this test to the facts at hand, the question to be posed is the following: at the time the discounting agreement was concluded, was it understood and agreed upon between the parties that de Waal, in discharging his contractual obligations, would be required to act with the professional skill, care and diligence of a reasonable attorney? If the parties would unequivocally have confirmed that to be the basis for their agreement, and it was necessary to give business efficacy to the agreement, then the term is capable of being imported into the discounting agreement.

[38] I have little doubt that such a term may be imported in the instant case. Firstly, there is the importance of the role played by de Waal in the current milieu. By virtue of his professional calling he was trusted by the parties to do what a reasonable professional person would be required to do. Moreover, not only was de Waal required by PIP to become a party to the discounting agreement (as would any attorney charged with overseeing the transfer of the property in question), he was specifically alerted to the importance of the deal proceeding unhindered by Koen in an email of 23 February 2009 to which reference is made hereunder. Of course, de Waal did not really need to be alerted thereto in light of the fact that he was part and parcel of the failed first agreement and had played an active role in setting up a second agreement whose object was to ensure that PIP was not out of pocket in the circumstances.

[39] But at the end of the day, the point is really this. De Waal's involvement in both the first and second transactions was both as a co-contractant and as an

attorney, acting in his professional capacity. It is axiomatic that in the latter role he would be required to discharge his function in a reasonable and professional fashion.

THE CLAIM BASED ON PROFESSIONAL NEGLIGENCE

[40] The second alternative cause of action is founded in delict. As a claim based on pure economic loss, it was necessary for PIP to prove, not only negligence on the part of de Waal, but also that his conduct was wrongful in failing to establish that the statement contained in cl 12.5 was wrong. Wrongfulness in turn depends on the existence of a legal duty or a duty of care on the part of de Waal in the circumstances.[14] PIP's argument was predicated on the fact that de Waal, as the attorney with the ultimate responsibility for the transfer of the property, had a legal duty to PIP to ascertain whether Erf 4915 was under attachment or not and that he failed to do so thereby occasioning PIP its loss. The alternate claims will be conveniently considered together since there is an obvious overlap in the evidence relevant thereto.

EVIDENCE RELEVANT TO THE ALTERNATIVE CAUSES OF ACTION

[41] It was common cause that de Waal and van der Burgh were on amicable terms and had been jointly involved in property development and related dealings before 2008. The self-evident facts in relation to the first transaction in February 2008 are that van der Burgh was unable to repay PIP what was due to it

[14] Administrateur, Natal v Trust Bank van Afrika Bpk 1979 (3) SA 824 (A) at 833A; Siman & Co (Pty) Ltd v Barclays National Bank Limited 1984 (2) SA 888 (A) at 913G – 914C.

when the sale of the property in question fell through and de Waal would undoubtedly have been aware of van der Burgh's inability to do so at that stage. That fact would have alerted him to the possibility that van der Burgh was financially stretched and that caution should be applied in regard to any future financial dealings with him.

[42] It was not conclusively established on the evidence that de Waal knew that Sentronics had taken judgment against van der Burgh in April 2008 or that the Registrar had issued the warrant of execution against van der Burgh's half-share in Erf 4915 in August 2008. That having been said, De Waal's claim that he did not know of the judgment must be considered in the context of his poor performance in the witness box and his patent dishonesty at times. Just one example will suffice. De Waal said that he knew nothing about the steps taken by Lucas Deysel to urgently sequestrate van der Burgh in September 2009, yet it later transpired that he had in fact commissioned the founding affidavit deposed to by Mr. Crause in those proceedings. The ineluctable inference is that de Waal assisted his business partner by arranging for Lucas Deysel to launch a friendly sequestration application to relieve van der Burgh of his financial misery.

[43] And, while one might easily speculate about the probabilities in regard to the veracity of de Waal's denials regarding knowledge of van der Burgh's financial predicament during the second half of 2008, there is clear proof that on 23 February 2009 de Waal was alerted thereto when Koen informed him in an email of the fact that van der Burgh had been given the statutory notice required under s129 of the National Credit Act to enable PIP to proceed to recover the debt due to it under the first

transaction. Any reasonable attorney would have realized that this process signaled a recalcitrant debtor. More importantly, de Waal was cautioned by Koen in that email of van der Burgh's failure to honour his promises in the past and was instructed by Koen to ensure that there would be no obstacles in the way of the transfer of Erf 4915.[15]

[44] It is a matter of undisputed fact that when de Waal signed the discounting agreement on 26 February 2009, the property was not capable of being transferred due to the *caveat* and that the statement regarding the availability of funds contained in cl 12.5 was accordingly incorrect. Mr. Nabal (who appeared for de Waal in the court *a quo* and on appeal) submitted in argument that the probabilities were that neither de Waal nor Lucas Deysel knew of this. He elaborated on this point by arguing that it would have served no purpose, nor made commercial sense, to put up a deed for transfer in circumstances where the property was still the subject of judicial attachment and thus incapable of transfer. For the purposes of this judgment I will assume that this is a fair inference in the circumstances.

[45] The question that therefore arises for the purposes of determining the two alternative causes of action is what steps a prudent attorney ought to have taken to ensure the integrity of the allegation made in clause 12.5. To be sure, cl 12.4 and 12.5 are central to the attorney's participation in any discounting agreement given that PIP would only advance a short-term loan to the borrower if it was satisfied that the

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[15] *"Ongelukkig het Leon nie aan sy beloftes teenoor ons gehou nie en versoek ek dat daar by die nuwe geval* [i.e. the transfer of Erf 4915] *geen rede moet wees hoekom die transaksie nie sal kan registreer nie."*

money would be repaid within the 120 day period stipulated in the agreement. And, given that such monies were to be sourced either from the proceeds of a mortgage bond to be registered by the purchaser or from the balance of the purchase price once paid by the purchaser, PIP would want to be assured by the attorney handling the transaction that the funds would be available in either event.

[46] In the circumstances that prevailed, the question is whether a reasonable and prudent attorney would have conducted a Deeds Office search to establish whether there was a *caveat* over the property or not, or, for that matter, whether there was any other impediment to its transfer. For, if there were such an impediment, then PIP would not be able to recover its loan from the proceeds of the transaction at transfer and the purpose of the discounting agreement would be thwarted. PIP could therefore expect that a reasonable and prudent attorney would inform it of the fact that it was not likely to recover its loss from the proceeds if that were indeed the case.

[47] It is common cause that on the same day that Koen sent the email referred to above to de Waal, a Deeds Office search was conducted on the latter's behalf by Lucas Deysel. The problem for de Waal is that that search was conducted, not in respect of Erf 4915 in particular, but rather in respect of properties owned by van der Burgh. In other words, Lucas Deysel's search sought the wrong information – not what the status (if any) was regarding any *caveat* over Erf 4915, but whether van der Burgh was indeed the owner thereof.

[48] In argument Mr. Nabal fairly conceded that neither de Waal nor his agent for the purposes of the enquiry, Lucas Deysel, conducted the correct search. He further accepted that, had the correct search had been conducted, de Waal would have been alerted to the existence of the *caveat* before he signed the discounting agreement and was likely to have acted otherwise than he did. Certainly, in my view, de Waal would have been duty bound to inform PIP that it was unlikely to recover its loan from the proceeds of the transfer. That, after all, was the intention behind the provisions of cl 12.5.

[49] Mr. Nabal, himself an experienced conveyancer, also fairly accepted that while, generally speaking, a conveyancer owes a duty of care to both the seller and the purchaser, in the circumstances which prevailed in this matter, de Waal undoubtedly owed such a duty to both seller and purchaser as well as to PIP. Mr. Nabal accepted, further, that it was fair to demand of Mr. de Waal a high degree of vigilance in dealing with the transfer in light of Mr. Koen's express instructions to him in the email of 23 February 2009 that there should be no problems. To that I would add that in light of the importance, generally, of the role played by a conveyancer in bridging finance arrangements such as those offered by PIP, it would be expected of de Waal to have discharged his functions without any short-comings.

[50] Mr. Nabal did not concede, however, that de Waal acted in breach of the tacit term as pleaded in the first alternative cause of action nor negligently as alleged in the second alternative cause of action. In that regard it was submitted that before negligence could be found to exist it had to be shown that de Waal, firstly, was in

breach of a duty of care owed to PIP and secondly, that any damages suffered by PIP were causally linked to such breach.

DUTY OF CARE

[51] The approach in assessing the circumstances in which an attorney is saddled with a duty of care in a matter such as this was dealt with in detail on behalf of the Full Bench by Magoka J in *Doug Parsons*[16]. The matter involved a claim against a conveyancing firm arising out of its alleged failure to conduct certain enquiries regarding a party's VAT status and the incorrect payment of monies accruing from a property transaction to a third party.

> "*[19] I start with the enquiry whether there was a legal duty, i.e. whether there was wrongfulness of the part of the respondent. This is so because, conceptually, wrongfulness is anterior to negligence. Simply put, absent the legal duty, the issue of negligence becomes irrelevant. See Loureiro and others v Imvula Quality Protection (Pty) Ltd [2014 (3) SA 394 (CC) at para 54]. The development of wrongfulness as a criterion for determining the boundaries of delictual liability has its basis in Minister van Polisie v Ewels [1975 (3) SA 590 (A)]. In that case the Appellate Division found that our law had reached the stage of development where an omission is regarded as unlawful when the circumstances of the case are of a nature that the legal convictions of*

[16] Doug Parsons Property Investments (Pty) Ltd v Erasmus De Klerk Inc. 2015 (5) SA 344 (GJ)

*the community demand that the omission should be considered wrongful.*

*[20] It must be borne in mind that negligent causation of pure economic loss is not regarded as prima facie wrongful. Its wrongfulness depends on the existence of a legal duty. The imposition of this legal duty is a matter of judicial determination involving criteria of public or legal policy… In determining in a given case whether the defendant's conduct which resulted in foreseen or foreseeable economic loss was unlawful or wrongful, the question is always whether it would in all circumstances be reasonable to recognise that the defendant owed the plaintiff a duty not to cause loss. Put differently, the question is whether the reasonable person in the defendant's position would in all circumstances have recognised that he owed the plaintiff a duty of care. Certain guidelines have been laid down by our courts in this regard. See, for example, Coronation Brick Pty Ltd the Strachan Construction Co (Pty) Ltd [1982 (4) SA 371 (D) at 384D-E)]….*

*[22] In Knop v Johannesburg City Council [1995 (2) SA 1 (A) at 27 G-I] Botha JA…said:*

> 'The existence of the legal duty to prevent loss is a conclusion of law depending on a consideration of all the circumstances of the case. The general nature of the enquiry is stated in the well-

known passage in Fleming The Law of Torts 4th ed at 136, quoted in… [Administrator, Natal v Trust Bank van Afrika Bpk 1979 (3) SA 824 (A) at 833]:

> "In short, recognition of a duty of care is the outcome of a value judgment, that the plaintiff's invaded interest is deemed worthy of legal protection against negligent interference by conduct of the kind alleged against the defendant. In the decision whether or not there is a duty, many factors interplay; the hand of history, our ideals of morals and justice, the convenience of administering the rule and our social ideas as to where the loss should fall. Hence, the incidence and extent of duties are liable to adjustment in the light of the constant shifts and changes in community attitudes."

*The enquiry encompasses the application of the general criterion of reasonableness, having regard to the legal convictions of the community as assessed by the Court…"*

[52] It will be observed from the aforegoing *dictum* (based as it is on a long line of established authorities) that the occasioning of loss to a party lies at the heart of consideration of the opposing party's duty of care. Indeed, that is what Holmes JA

stressed in *Kruger v Coetzee*[17], the *locus classicus* in which the test for negligence is set out.

> "*For the purposes of liability culpa arises if –*
>
> *(a) a diligens paterfamilias in the position of the defendant-*
>
> *(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and*
>
> *(ii) would take reasonable steps to guard against such occurrence;*
>
> *and*
>
> *(b) the defendant has failed to take such steps…*
>
> *Whether a diligens paterfamilias in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case. No hard and fast basis can be laid down."* (Emphasis added)

[17] 1966 (2) SA 428 (A) at 430E-F

[53] I have little hesitation in finding, in the specific circumstances which prevailed in this somewhat unusual commercial transaction, that de Waal was duty bound to establish the accuracy of the statement contained in cl 12.5. The very purpose of that clause was intended to give PIP the assurance that it was commercially prudent to conclude the discounting agreement. De Waal had been cautioned by Koen that there should be no impediment in the second agreement involving van der Burgh and in agreeing to be bound by the provisions of cl 12.5 de Waal effectively assured Koen of this.

THE LOSS SUFFERED BY PIP

[54] The evidence in this matter establishes, without debate, that PIP suffered a loss of R120 000 when van der Burgh was unable to repay his half-share of the bridging finance loan which formed the basis of the first transaction when that deal fell through. At that stage PIP would have been fully within its rights to take action against van der Burgh to recover its loss but it elected not to do so. Rather, it decided to hold matters in abeyance (most likely because of the entreaties of de Waal on behalf of his business partner) and await the sale of a different property in which van der Burgh had an interest before recovering its loan.

[55] And, when such an opportunity presented itself a year later, PIP calculated its capitalized loss at R158 570,40, being the initial sum of R120 000 together with interest which had accrued in the interim and legal costs which it had incurred. This was the loss which PIP and van der Burgh agreed was due to the

former in February 2009. The question that then arises is what patrimonial loss PIP suffered through de Waal's admitted failure to establish that transfer of the property was not possible due to the interdict. Put differently, how would PIP's patrimony have affected if de Waal had done what he was supposed to do, conducted the correct Deeds Office search and advised PIP of the interdict lodged against the property?

[56] The facts here resemble, to a degree, those before the Appellate Division in ***Siman*** , a case involving a misstatement by a bank official regarding the alleged non-availability of foreign exchange at a time when devaluation of the Rand was imminent and which was subsequently found to have financial implications for the client requesting same. In the judgment for the majority Trollip AJA found that the bank official had indeed made a misstatement but that this had not caused the client's loss as it had not been proven in evidence that such foreign exchange would have been available to it as a matter of fact even if there had been no misstatement. The bank official's negligence was therefore not causally connected to the customer's loss and was regarded as "*negligence in the air.*"[18]

[57] The answer to the question posed earlier, in my view, is therefore that de Waal's failure to perform the Deeds Office search that he was duty bound to conduct had no patrimonial consequences for PIP. The damage to its patrimony had occurred a year earlier when van der Burgh defaulted on his obligations under the first transaction and the loss occasioned by that default was held in abeyance and carried

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[18] See also Sea Harvest Corporation (Pty) Ltd and another v Duncan Dock Cold Storage (Pty) Ltd and another 2000 (1) SA827 (SCA) at 840E.

through to 2009 when it was subsumed in the discounting agreement. There can be little doubt that, had de Waal done his homework and informed PIP that there was a *caveat* in place and that the transfer could therefore not proceed, PIP would not have concluded the discounting agreement. What it would then have done to make good its patrimonial loss remains a matter of speculation.

[58] But what is clear is that by then the loss had already been suffered and there was no further damage which could be occasioned to PIP's patrimony by de Waal's failure to do what a reasonable attorney would have done. In the result, de Waal's breach of the duty of care which he owed to PIP did not cause it any harm since it was not causally linked to PIP's damage. It was, in the classic sense, negligence in the air. These findings, in my view, dispose of both the first and second alternative causes of action.

CONCLUSIONS

[59] In the result, I am of the view that PIP, firstly, failed to establish that de Waal was in breach of any warranty contained in cl 12.5. Secondly, I am satisfied that PIP established the tacit term contended for and the breach thereof. Thirdly, I am satisfied that PIP established that de Waal was negligent in failing to establish that there was a *caveat* over the property.

[60] However, I am not persuaded that it was established that de Waal's breach of the duty of care owed to PIP or his negligence was causally linked to PIP's loss. It follows in my view that the Regional Magistrate erred in upholding PIP's claims

against de Waal which should, in the circumstances, have been dismissed. The appeal must therefore succeed.

COSTS

[61] In light of the conclusion that the findings of the Regional Magistrate fall to be set aside and that PIP's claims fall to be dismissed, it is open to this court to consider afresh the question of costs in the trial court. Ordinarily, costs should follow the result and PIP should be ordered to bear de Waal's costs in that forum. However, in light of his overall conduct in this matter, his breach of his professional duty to PIP and, most importantly, his poor performance in the witness box in giving evidence which was riddled with untruths and improbabilities, I believe it is appropriate for the court to express its displeasure towards the attorney's conduct by depriving him of his costs in the trial court. This will be just and equitable in the circumstances.

ORDER OF COURT

Accordingly it is ordered that:

A. The appeal is upheld with costs.

B. The order of the Regional Magistrate is set aside and replaced with the following –

1. The plaintiff's claims are dismissed.

2. Each party is to bear its own costs in the trial court, save for the costs order made in respect of the appeal to this court under case number A 230/2015, against the granting of absolution from the instance, which order will stand.

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GAMBLE, J

I AGREE.

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PARKER, J