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

Case No: 7346/2016

In the matter between:

ANDRE CAREL DE KLERK N.O. Plaintiff

and

FINHAUS FINANCIAL SOLUTIONS (PTY) LTD Defendant

Coram: Justice J Cloete

Heard: 10 November 2021, 14 to 17 March 2022, 12 to 14 April 2022 and 13 June 2022

Delivered electronically: 26 August 2022

JUDGMENT

CLOETE J:

Introduction

[1] The plaintiff, in his capacity as duly appointed executor of the estate of the late Mrs Ursula Kompf ("Kompf") who passed away on 27 March 2013, claims payment from the defendant ("AFS") of the balance of capital and interest

allegedly owing in respect of a loan of R1 million made by Kompf to AFS during September 2010.

[2] It is common cause that the loan was made. AFS has however defended the action on the basis of a delegation agreement, pleaded in the following terms:

> *'5.5 The Defendant pleads that having performed its obligations fully under the agreement up to and including the month of November 2011, during or about December 2011 and at Parow, Kompf, Thiart and the Defendant, Kompf acting in person and Thiart acting both on his own behalf and for the Defendant, entered into a written, alternatively oral agreement in terms of which the Defendant's rights and obligations under its agreement with Kompf were delegated to Thiart who was thereby substituted as Debtor and the Defendant discharged from that agreement (*"the delegation agreement"*). To the extent that the delegation agreement was in writing, the Defendant is not in possession of the written agreement.'*

[3] A considerable amount of evidence was adduced during the trial, in large measure on peripheral issues and due to the haphazard manner in which AFS, an insurance brokerage/financial advisory service, conducted its operations. It is thus convenient to sketch, at the outset, its history and the various role players involved.

[4] During 1996 Mr Alwyn Smit ("Smit") registered a close corporation of which he was the sole member, i.e. Alwyn Smit Finansiële Dienste CC. In 2002 this close corporation changed its name to Dortgyer CC and by all accounts fell out of the picture. At around the same time however Smit registered a new close

corporation but with the same (previous) name of Alwyn Smit Finansiële Dienste CC, of which he was also initially the sole member.

[5] In 2004, Mr Floris Brand, who is Smit's nephew ("Brand") and Mr Andre Thiart ("Thiart") were employed as brokers by Alwyn Smit Finansiële Dienste CC. During 2006, Smit acquired a shelf company, Double Ring Trading 443 (Pty) Ltd, the sole director of which was Mr Christiaan Gouws who thereupon resigned. This company's name was changed to Albarit Financial Services (Pty) Ltd (i.e. AFS). Thiart acquired 60% and Brand 40% of its shares. Thiart and Brand were also appointed directors. Smit could not be a director at the time due to an investigation into his professional conduct, referred to during evidence as the Leaderguard investigation. However Smit continued to operate through Alwyn Smit Finansiële Dienste CC.

[6] During 2009, Mr Peter Campher ("Campher") was appointed as a director of AFS, as was Smit upon conclusion of the Leaderguard investigation. Shares were re-allocated equally between the 4 directors, i.e. 25% each. Smit nonetheless continued to operate through Alwyn Smit Finansiële Dienste CC while Thiart, Brand and Campher operated through AFS. Outwardly however (in terms of branding and the like) the official name of these brokerages/financial advisory services was AFS and all staff were employed by the latter.

[7] In June/July 2011, Smit and Thiart acquired an Old Mutual franchise under the name Albarit Financial Consultants (Pty) Ltd (although they also remained

directors (and presumably shareholders) of AFS until Smit resigned in 2013 and Thiart in 2014. Both have subsequently been sequestrated (Smit's estate in 2014 and Thiart's estate in 2015) and they have been subject to interrogation at insolvency inquiries. On 19 August 2013, AFS changed its name to Finhaus Financial Solutions (Pty) Ltd which is cited as the defendant herein. For convenience however the defendant was nonetheless referred to as AFS during the trial.

[8] In addition to his own testimony the plaintiff called 6 witnesses, namely Smit, Mr Brent Small (a senior detection specialist in Old Mutual's forensic department), Ms Karin Gird (Kompf's step-granddaughter), Ms Natalie Fry (Thiart's half-sister who was also his personal assistant), Ms Amanda Terblanche (who replaced Fry) and Mr Bernard Kurz (who *inter alia* cross-examined witnesses, including Brand, Thiart and Smit, during the insolvency inquiries). The defendant called Brand and Thiart. Although the defendant's counsel indicated that Campher would testify, he was ultimately not called.

Relevant background facts

[9] The following undisputed facts emerged from the pleadings and subsequent evidence. Kompf was born on 16 March 1926 and passed away in 2013 at the age of 87 years. She and Thiart had a close personal relationship. Not only was he her financial advisor for a number of years but she trusted him completely and regarded him as a son.

[10] During September 2010 a written loan agreement was concluded between Kompf, acting personally, and AFS, represented by Thiart. The preamble to the agreement (its English translation) reads as follows:

> *'WHEREAS the First Party* [i.e. Kompf] *is in possession of a capital amount and has need for a monthly income.*
>
> *AND WHEREAS the Second Party* [i.e. AFS] *has the need for a capital amount and has the ability to pay the First Party a monthly income.*
>
> *AND WHEREAS the parties have agreed that the First Party will make available to the Second Party a capital amount* [and] *the parties desire to record the terms and conditions upon which the capital and monthly income will be paid.'*

[11] The agreement provided for Kompf to loan AFS an amount of R1 million for a period of 5 years from date of signature of the agreement, and for AFS to repay Kompf R27 000 per month on the last day of each month from October 2010, of which R12 000 would be paid directly to Kompf in cash and R15 000 would be paid *'into an investment at Old Mutual'*. It was further provided that the loan could be repaid on such earlier date as the parties might agree, and that should Kompf pass away during the period of the loan AFS would continue to pay the amount due to her estate and/or beneficiaries.

[12] On a proper construction of the agreement, the monthly payments of R12 000 were to constitute interest on the loan, while the investment at Old Mutual was to create a fund from which capital would be repaid.

[13] Pursuant to the agreement, an amount of R1 million was advanced by Kompf to AFS on 30 September 2010 by transfer of that amount from a bank account in her name into a bank account in the name of AFS. In addition Max Investment Policy 16078920, providing for payment of premiums of R15 000 per month increasing annually by 10%, was issued by Old Mutual to Kompf in November 2010.

[14] From October 2010 to November 2011 inclusive, monthly payments of R12 000 were made from a bank account in the name of AFS into Kompf's bank account. In addition, for the same period, monthly premiums of R15 000, increasing to R16 500 from October 2011, were paid in respect of the policy by way of debit order from the same bank account held by AFS. From December 2011 to December 2012 inclusive, the monthly payments of R12 000 continued to be made into Kompf's bank account, but from an account held by Thiart. From January 2012 to January 2013 inclusive, monthly premiums of R16 500, reducing to R6 000 from August 2012 and increasing to R6 600 from October 2012, continued to be paid in respect of the policy by debit order, but from one of Thiart's bank accounts.

[15] After Kompf's death on 27 March 2013 the plaintiff, in his capacity as executor, cashed in the policy and received payment of the full proceeds from Old Mutual in the sum of R371 314.18 on 13 May 2013. It is the balance of the full loan plus interest as agreed which the plaintiff claims from the defendant.

Delegation and authority – legal principles

[16] In LAWSA[1] the principles pertaining to delegation are conveniently summarised as follows:

> *'Novation is the termination of an earlier obligation by the creation of a later (new) one in its place by agreement. It can take one of two forms. First, a new obligation may be created between the same creditor and debtor... This is sometimes referred to as specific novation or novation proper. Second, a new creditor or debtor may be substituted for the original creditor or debtor... This is called delegation...*
>
> [Whether it is the creditor or debtor which is substituted]... *In both cases a valid delegation can be effected only by an agreement between all* three *parties concerned, that is, between the original creditor, the new creditor and the debtor or between the original debtor, the new debtor and the creditor. An agreement between only two of the parties cannot effect a delegation...'*

[17] Section 66(1) of the Companies Act 71 of 2008 provides as follows:

> *'The business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the Company's Memorandum of Incorporation provides otherwise.'*

[18] There is no suggestion that the memorandum of incorporation of AFS "provided otherwise" and no reliance was placed by the defendant on any other provision in the Companies Act. It follows that for Thiart to have validly concluded the alleged delegation agreement on behalf of AFS as debtor, he had to be

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[1] 2ed. Vol 19 at para 240.

authorised to do so by the board of AFS. The onus to prove that: (a) Thiart was authorised to conclude the alleged delegation agreement; and (b) if so, whether such an agreement was in fact concluded, rests upon the defendant.

Evidence on the disputed issues

[19] It will be self-evident that, unless the defendant has succeeded in discharging the onus pertaining to Thiart's authority, whether or not a so-called delegation agreement was in fact concluded becomes irrelevant. For the reasons that follow, I focus only on the evidence pertaining to the issue of such authority.

[20] Smit testified that the directors of AFS had regular meetings, at least once every two weeks. He was the *'senior voice'* on the board. The plaintiff ("De Klerk") is an attorney. He occupied office space at AFS's premises and in lieu of payment of rental performed certain administrative and legal functions for AFS.

[21] A Mr Gerlou Roux ("Roux") was appointed by AFS to manage its short term insurance arm. He also became a shareholder, but not a director, and the shares were re-allocated so that Smit, Thiart, Brand, Campher and Roux each held 20% thereof. Roux subsequently expressed interest in purchasing that arm of the business from AFS, but lacked the financial wherewithal to do so, although he hoped to be able to within a year or two thereafter.

[22] In one of the directors meetings Thiart came up with a proposal which involved AFS loaning an amount(s) from one or two of his clients, with Thiart to be the *'middle man'* and his client(s) to be repaid in full once Roux purchased and paid

for the short term insurance arm. The other directors were in favour of this proposal, and gave Thiart the go-ahead, which is what led to the conclusion of the agreement with Kompf, as well as another for a loan of R500 000 with an elderly couple who were her close friends, namely Mr and Mrs Kappelhoff. De Klerk drafted both agreements on instruction of the directors. As Smit recalled, De Klerk had been present at the meeting when the decision was taken. (It appeared to be common cause that no minutes of meetings were taken and no written resolutions passed, and indeed none were referred to during the trial).

[23] When asked whether at the time AFS had *'the need for a capital amount'* as reflected in the preamble to the agreement, Smit replied that it had not, although the directors themselves had decided that the proceeds of the loans would be shared equally between them personally as well as Roux. This is exactly what occurred, although in the financial statements of AFS for the year ended 28 February 2011 the loans are reflected as payable by AFS.

[24] On 13 October 2011, Roux purchased the short term insurance arm from AFS for R2.4 million. The sale agreement provided that the purchase price was to be paid into De Klerk's trust account, which payment was effected by Roux on 17 October 2011.

[25] When asked if there was a discussion between the directors as to how the proceeds would be appropriated, Smit replied that all agreed Kompf and the Kappelhoffs would be repaid in full, and the balance divided between the four directors personally. A calculation was made as to how much would be needed

to settle the sums then due to Kompf and the Kappelhoffs (Smit could not recall who made the calculation) and the directors were told that R1.4 million would be required.

[26] Smit's evidence was further that because Thiart was *'the man in the middle of the arrangement'* with Kompf and the Kappelhoffs, Thiart asked that he attend to the actual payments himself. De Klerk was instructed to pay R1.4 million to Thiart for him to discharge AFS's loans to them. In Smit's words, Thiart *'will pay the clients. And the contract* [sic] *is to be cancelled immediately'.* Thiart raised no objection to this.

[27] Smit was adamant that the so-called delegation agreement pleaded by AFS was never discussed: *'He was told to pay the two clients and we agreed on that. If he should have plans like that, I would never suggest that the money should be paid out to him. The plan was that the clients should be paid in full, and the contracts should be cancelled immediately'.*

[28] As far as Smit could recall De Klerk was aware of the arrangement. He also confirmed, with reference to the financial statements of AFS for the year ended 29 February 2012, that both loans were reflected as having been repaid during that year. Campher signed those financial statements on behalf of AFS.

[29] It was only much later, in 2015, that Smit learned from Kurz that Thiart had in fact not repaid Kompf and the Kappelhoffs. He was asked whether there was any question of Thiart being authorised, instead of paying back the loans, to

substitute himself as debtor, and unequivocally replied *'No, never'.* Smit was unshaken in cross-examination.

[30] Despite a contradictory version having been put to Smit on Campher's behalf that it was agreed De Klerk would be instructed to make payment, as previously stated Campher ultimately did not testify although he was present in court during the trial. Moreover, the version put on Thiart's behalf was merely that he and Kompf came to a different arrangement once he received the R1.4 million. No suggestion was made at that stage of the directors of AFS being party to that arrangement, let alone having authorised it, despite AFS pleading actual authority.

[31] Kurz (an attorney) testified that he represented the trustees of Smit and Thiart's insolvent estates, and in this capacity interrogated them (as well as Brand and De Klerk) at the insolvency inquiries. Prior to Smit's sequestration, Old Mutual had appointed Kurz to conduct a joint investigation with its forensic team into Smit's professional conduct in relation to various of his Old Mutual clients. It was Old Mutual who subsequently brought the application for Smit's sequestration.

[32] At a point during 2014 the investigation turned towards Thiart, who as previously stated was also subsequently sequestrated. Kurz gave detailed evidence about the nature, extent and complexity of those matters but, in a nutshell, his evidence was that Smit ended up having creditors in excess of R60 million and Thiart in excess of R25 million.

[33] In the case of Thiart, and based on the available information at that stage, these creditors included Kompf's estate and the Kappelhoffs. Kurz was subsequently appointed by Kompf's beneficiaries to advise and represent De Klerk in his capacity as executor of her estate. After initially advising De Klerk to pursue Thiart for repayment, counsel's opinion was obtained and the current action was instituted against AFS.

[34] Both Kurz, and later De Klerk, were cross-examined at length on this change of course, seemingly in an attempt to demonstrate their lack of *bona fides* and what AFS considered to be a previously known meritless claim against it. To my mind this was ultimately all irrelevant to the issue of whether AFS had conferred on Thiart actual authority to conclude the so-called delegation agreement, and I accordingly do not deal with it, save to state that I am entirely unpersuaded, on the evidence on this score, that there is any merit in these accusations against either Kurz or De Klerk.

[35] Kurz's evidence was further that at meetings held with Brand and Campher in November/December 2014, both were very clear that the decision of the directors of AFS was that Kompf and the Kappelhoffs were to be repaid in full from the sale proceeds received from Roux: *'The company wanted to pay them back and the contract comes to an end, that Mr Thiart's instruction was to go and pay them both, they thought he had done so, they only found out when I told them that he had not done so and they were shocked to find out that he had not…'*.

[36] De Klerk testified that, as part of his administrative duties for AFS, he had authority to transact on its bank account. He also interacted with AFS's auditors for purposes of preparation of *'books of account, journals* [and] *financial statements'.* He confirmed Smit's evidence about Roux, the decision taken by the directors to conclude the agreements with Kompf and the Kappelhoffs, and that he had drafted those agreements.

[37] His evidence was further that, in his capacity as executor of Kompf's estate, he appropriated the proceeds of the Old Mutual investment towards reduction of the capital of the balance of the loan of R1 million. Apart from this, he had been unable to find any evidence that, prior to his appointment as executor, other payment(s) had been made in reduction of such capital balance.

[38] De Klerk confirmed that he drafted the sale agreement in respect of the short term insurance arm of the business,[2] and that Roux paid the purchase price of R2.4 million into his trust account on 17 October 2011. His evidence was further that two tranches totalling R1.4 million were paid over to Thiart on the same day. He could not recall whether it was Smit or Thiart who gave him the instruction to do so (it was one of them) but he clearly recalled having been informed at the same time that the purpose was for Thiart to repay Kompf and the Kappelhoffs.

[39] He had accepted that Thiart acted in accordance with the arrangement. De Klerk was referred to an email dated 2 July 2014 addressed by Ms Minette

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[2] And subsequent addendum, which is not relevant for present purposes.

Louw of AFS's external auditors to Ms Eileen Fey of Planet Administrators (who were attending to the administration of Smit's insolvent estate). This records *inter alia* that:

> *'5. According to Andre De Klerk it was the responsibility of Andre Thiart to pay Kappelhoff and Kompf what the company still owed them. Andre De Klerk therefore paid R1 400 000... over to Andre Thiart to pay it over to Kappelhoff and Kompf. At that date (6 November* [2012] *when I phoned him in this regard) Andre De Klerk was of the opinion that the money was paid over by Andre Thiart to Kappelhoff and Kompf...'*

[40] His evidence was further that he only discovered during 2013 or 2014 that the loans had in fact not been repaid. He was told this by Thiart and/or Kurz during one of the interrogations in the insolvency inquiries. De Klerk had no personal knowledge of any delegation agreement having been concluded in 2011 as pleaded by AFS and he was also never informed of one. He categorically denied ever having drafted such an agreement (which formed part of Thiart's version). He confirmed the evidence of Kurz that the decision was taken to institute action against AFS after obtaining counsel's opinion.

[41] It emerged from the evidence that, as part of their internal arrangements, each director of AFS would receive the income generated by his own clients after deduction of common operating expenses. De Klerk confirmed that he was responsible for making the necessary calculations for this purpose.

[42] He was cross-examined about *'the relationship and power dynamics'* within AFS. He agreed with Smit's evidence that the latter was the senior person in

the company, and accepted that, given this senior role as well as that of Thiart's, either of these two directors may have taken decisions individually about the business without consulting the others. He was asked whether he agreed that Smit and Thiart had *'more decision making power'* in the business, and replied:

> *'I do not know what the agreement between the directors* [was], *what decisions they could or could not make but it would not be, it is not too far-fetched to think that Mr Smit and Mr Thiart thought that they could make decisions on their own. I accept that.'*

[43] De Klerk conceded that on occasion Smit would, for instance, give him instructions about payments without first consulting the other directors. These included payments to Smit himself. De Klerk also accepted as possible Brand's version that he had not even seen the Kompf loan agreement until later.

[44] De Klerk did not recall having been present at the meeting when the directors agreed that Kompf and the Kappelhoffs were to be repaid immediately from the proceeds of the sale to Roux, although he was told that Brand would say otherwise. In response to Brand's version that when the latter left that meeting he understood that De Klerk, and no-one else, would repay Kompf directly, De Klerk could not comment given his recollection that he was not present, but stated that if Brand and Campher testified to that effect he would not gainsay this.

[45] He was told of Thiart's version that, after Campher and Brand left the meeting, Thiart and Smit had a discussion at which it was agreed that De Klerk would

instead be instructed to pay over the R1.4 million to Thiart for payment in turn to Kompf and the Kappelhoffs. This had not been put to Smit, and De Klerk could not comment (it was also not contended that De Klerk himself was a party to that discussion).

[46] De Klerk was cross-examined about his encashment of the Old Mutual investment after his appointment as executor, and a concession was extracted from him that, in so doing, he had in any event made it impossible for AFS to comply with the repayment terms of the Kompf loan agreement. This concession was then used by counsel for AFS in an attempt to springboard a new defence of impossibility of performance, purportedly based on the allegation of such encashment in the amended particulars of claim, to which AFS had pleaded no knowledge and that the plaintiff was required to prove this. Accordingly impossibility of performance was not pleaded as a defence, even in the alternative, and counsel for the plaintiff understandably objected to any reliance thereon. To have permitted AFS to rely on it for the first time right at the end of the plaintiff's case would undoubtedly have caused the plaintiff grave prejudice and I shall accordingly not deal with either the concession in question or the belated reliance on it.

[47] The same applies to a contrived defence, raised for the first time in heads of argument filed on behalf of AFS, of subsequent "ratification" by the board of Thiart's conduct in taking it upon himself, upon receipt of the sum of R1.4 million, to enter into a new arrangement with Kompf to her great financial detriment. When I questioned counsel for AFS about when this "ratification" had

taken place, he responded that it was in November 2020 when the "delegation agreement" reared its head for the first time in the amended plea. That this was patently self-serving is borne out by the fact that actual authority was nonetheless still relied upon and accordingly, on the defence pleaded, it could only have been conferred on Thiart way back in December 2011. To the extent that cross-examination of De Klerk was directed at laying a basis for this "defence" I similarly do not deal with it.

[48] Brand testified that although the directors of AFS held regular meetings, most decisions were in fact made by Smit and Thiart in discussions between them alone. When asked to give examples of these, he replied however that they pertained to issues such as purchasing furniture and the like for the business. In meetings at which all four directors were present, matters such as new staff appointments and salary increases would be discussed. It therefore seemed that the more important decisions took place when all four directors were present.

[49] His evidence was further that De Klerk attended most of these formal meetings, but generally not for the full duration since his attendance was limited to matters that required his implementation thereof. This was in line with De Klerk's testimony on this score.

[50] Brand confirmed the evidence of Smit and De Klerk about what led to the conclusion of the loan agreements with Kompf and the Kappelhoffs. He explained that the purpose of the loans was to obtain "an advance" against the

contemplated future sale of the short term insurance arm to Roux, and thus make funds available to the directors personally, even though at the time there was no objective financial need for this.

[51] Brand further confirmed that the purpose of the Old Mutual investment for Kompf was to repay the capital of the loan of R1 million to her within 5 years (the other monthly payments of R12 000 pertained only to the interest component). He was present at the directors meeting when the decision was taken to conclude the loan agreement with Kompf. That he might only have seen the actual written agreement later is neither here nor there, since he did not suggest it incorrectly reflected the terms agreed by the board.

[52] He also confirmed the testimony of Smit and De Klerk about the subsequent sale to Roux, and that at the meeting about which Smit testified all four directors agreed that Kompf and the Kappelhoffs were to be repaid from the proceeds of the sale. Although not put to Smit, it was Brand's evidence that he and Campher were basically "informed" by Smit at the meeting that such repayment was to be made, but even on his own version Brand had no objection thereto. He agreed with Smit's testimony that the balance of the proceeds (of R1 million) were split equally between the four directors personally.

[53] A few days after receiving his share Brand had a brief discussion with Thiart, who told him that he had procured the R1.4 million from De Klerk's trust account to repay Kompf and the Kappelhoffs, but was thinking of doing some other deal with them. Brand did not consider it necessary to query this and simply

accepted it. It was only much later in 2014 that Kurz told him and Campher that Thiart had in fact not repaid them.

[54] Brand revealed his ignorance of, or disregard for, his fiduciary duties as a director of AFS when he glibly testified that, because Thiart had been authorised by AFS to conclude the initial loan agreement with Kompf, he had not found it strange, and was not at all concerned, that Thiart had taken the money and indicated that he planned to do something else with it. He subsequently contradicted himself by claiming that Thiart told him that he and Smit had agreed to this.

[55] Also significant for present purposes is that Brand gave no evidence that he conveyed this information to either of the other affected directors at the time or thereafter. Moreover it was only in 2015, after having been interrogated by Kurz at one of the insolvency inquiries, that Brand took this up with Thiart who told him that he had entered into new agreements with Kompf and the Kappelhoffs.

[56] According to Brand this was the first time that he came to learn of Thiart's view that he had somehow been "delegated" by AFS to deal with the funds. Accordingly, even on Brand's version, the pleaded "delegation agreement" had never come into existence, and to the extent that Smit and Thiart might have agreed to such an arrangement (something that was also not put to Smit) then they were certainly not authorised by the board to do so.

[57] Contrary to the version put on his behalf to De Klerk, Brand's evidence was further that he did not even know at the time Roux paid the proceeds of the sale of R2.4 million whether payment was made to one of AFS's bank accounts or De Klerk's trust account. He only noted that it was to be paid into De Klerk's trust account when he saw a copy of the sale agreement much later. This calls into question the truth of his evidence about it being agreed at the meeting that the sum of R1.4 million was to be paid by De Klerk directly to Kompf and the Kappelhoffs, particularly given that the sale agreement was also signed by Brand himself on 13 October 2011, prior to receipt of Roux's payment.

[58] During cross-examination Brand's ignorance or disregard for his fiduciary duties was demonstrated further. He appeared to see no difficulty in having abdicated these duties when the occasion required. He contradicted his earlier evidence, maintaining that even "big" decisions were taken only by Smit and Thiart, but in the same breath conceded that the proper procedure had been followed by the board in relation to the Kompf and Kappelhoff loans.

[59] He also conceded having been an active participant along with the other directors when Thiart was authorised by the board (unanimously) to conclude those loan agreements; and that the same applied to his involvement in the sale of the short term arm to Roux (the sale agreement itself having been signed by all four directors).

[60] Brand made two further material concessions, namely that none of the directors, irrespective of their seniority, could do as they pleased *vis-à-vis* third

parties; and simply because Thiart had been properly authorised by the board to conclude the loan agreements, it did not follow that such authorisation extended beyond that particular transaction.

[61] In his testimony Thiart confirmed the evidence of Smit and Brand about the rationale for concluding the loan agreements with Kompf and the Kappelhoffs, as well as the allocation of the monthly repayments to Kompf as to capital and interest respectively.

[62] According to Thiart it was not prior to the directors each receiving their 25% of the R1 million from the proceeds of the Roux sale, but only thereafter, that he had the discussion with Smit about the R1.4 million balance in De Klerk's trust account. This contradicted the objective evidence of the Nedbank statement pertaining to De Klerk's trust account which reflects that the R1.4 million was paid to Thiart in two tranches, one of R1.2 million on 17 October 2011 (the same date upon which De Klerk received the funds and the four directors were also paid their 25% shares) and one of R200 000 the following day, 18 October 2011. This was also a different version put on his behalf to Smit, and it was not raised at all with De Klerk.

[63] Thiart, who the record will show was a most evasive and patently dishonest witness, eventually conceded it was agreed at the meeting attended by all four directors (he too could not recall whether De Klerk was present) that the Kompf and Kappelhoff loans would be repaid in full from the proceeds of the sale to Roux.

[64] His evidence was further that because he "needed" to make another plan, at least for Kompf, he instructed De Klerk to pay over the R1.4 million to him, allegedly with only Smit's prior consent. He confirmed that neither Brand nor Campher had any knowledge thereof. Accordingly, on Thiart's own version, he was not authorised by the board to (a) receive the R1.4 million and (b) arrange some other deal with Kompf instead of repaying her in full.

[65] Given the above concessions, and although not relevant to anything other than his credibility, a few notable examples of his false and evasive testimony bear mention. Thiart maintained that De Klerk was aware of his "delegation" resulting in the new deal with Kompf, which the evidence demonstrated involved fleecing her financially for Thiart's personal benefit, even while on her deathbed and thereafter. He maintained this to be the case since De Klerk had allegedly drawn up the so-called delegation agreement. Not only had De Klerk vehemently denied this, but (a) this document had since vanished into thin air; (b) De Klerk was not one of AFS's directors and (c) the pleaded defence was that it was a written, *alternatively* oral agreement.

[66] Thiart also suddenly claimed that he had been outvoted at the directors meeting when the decision was taken to sell the short term arm to Roux. This was never put to Smit, De Klerk or Brand, and one of the aspects upon which Smit and Brand were in complete agreement was that the decision had been unanimous.

[67] Contrary to the testimony of Smit, De Klerk and Brand, Thiart also claimed, out of the blue, that of the R1.4 million an amount of R1.2 million was due – only –

to Kompf and the other payment received by him of R200 000 was a "sweetener" because of the sale to Roux. This was followed by his evidence the next morning that, upon reflection, he recalled that despite misgivings before the meeting, he agreed thereat to the sale to Roux. If this were the case then it makes no sense whatsoever why the board would nonetheless have given Thiart a "sweetener".

[68] After initially maintaining that Smit agreed to him receiving the R1.4 million to make a new deal with Kompf (and the Kappelhoffs), Thiart contradicted himself by claiming that it was only *after* he received these funds (conceding that he had express instructions to act in accordance with what the directors had agreed) that he made his "deals" and thereafter *'eventually'* informed Smit thereof. He saw no problem with this however since Kompf (and the Kappelhoffs) were *'happy'*. In his words: *'Look, the directors – I was supposed to pay it back but I renegotiated with the clients'.* He also conceded never having informed Brand or Campher of this.

Summary and conclusion

[69] As previously stated Thiart was an extremely poor witness, but the significant concessions he ultimately made did not even get AFS out of the starting blocks in discharging the onus resting upon it to prove that Thiart was duly authorised to conclude any "delegation" agreement, and certainly not in the terms pleaded, and whether express or implied. Brand's evidence raised certain questions

about the truth of his version, but his own material concessions did not assist the defendant's case either.

[70] Smit, Kurz and De Klerk impressed as honest witnesses, whose evidence was both credible and reliable. On the essential aspects the evidence of Smit and De Klerk aligned with the concessions ultimately made by Brand and Thiart. In addition, Smit is Brand's maternal uncle and, if anything (and as an unrehabilitated insolvent who thus could not expose himself to further financial risk) he had nothing to gain by testifying adversely to Brand and Thiart. On the contrary he had reason to testify favourably to AFS if he could. Brand himself testified that Smit had always been good to him.

[71] In his testimony De Klerk mentioned that he still regarded Brand and Campher as friends, and Brand made no suggestion to the contrary. De Klerk was litigating in a representative capacity only, and frankly acknowledged that he would prefer not to be suing AFS but regarded it as his duty to the beneficiaries of Kompf's estate to do so. Where the evidence of Smit, Kurz and De Klerk differed from that of Brand and Thiart, I thus accept their versions and reject those of Brand and Thiart.

[72] On the evidence before me AFS has failed to discharge the onus of proving that Thiart had actual authority, whether express or implied, to conclude any so-called delegation agreement on its behalf and it follows that the plaintiff is entitled to judgment in his favour. However I am not persuaded that the punitive costs order sought is warranted, given that extensive evidence was adduced

on the plaintiff's behalf on peripheral issues which caused unnecessary costs to be incurred. By obtaining an order for party and party costs this will in itself thus have a punitive element. For purposes of the order that follows, I adopt the same formulation as that contained in the amended particulars of claim, since I was not provided by counsel for the plaintiff with a specific, quantified balance due on the Kompf loan.

[73] **The following order is made:**

1. **The defendant shall pay to the plaintiff a sum equivalent to the following: R1 000 000 plus interest thereon at the rate of R12 000 per month from 1 October 2010, reducing to R8 180 per month from 14 May 2013, less the total of the monthly amounts of R12 000 paid into the bank account of the late Ursula Kompf for the period 1 October 2010 to 31 December 2012 inclusive plus R371 314.18, applied in each instance first to interest and thereafter to capital; and**
2. **The defendant shall pay the plaintiff's costs on the scale as between party and party as taxed or agreed, including those of one senior junior counsel as well as any reserved costs orders.**

J I CLOETE