IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case No: 40132/2013

20/12/17

In the matter between:

MATHEUS HERMANUS OOSTHUIZEN Plaintiff

and

HELANDIE CALAÇA 1st Defendant

ANTONIE SCHLEBUSCH 2nd Defendant

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

20/12/17
DATE

SIGNATURE

JUDGMENT

D S FOURIE, J:

[1] The plaintiff instituted action against the first and second defendant, jointly and severally, for payment of R1 million. When the trial commenced, the plaintiff had already obtained default judgment against the second defendant, and the trial proceeded between the plaintiff and the first defendant only.

[2] The plaintiff's case in a nutshell is that he entered into an agreement with the first defendant, an attorney, for the rendering of professional services and that the first defendant committed a breach of this agreement, alternatively committed a breach of her fiduciary duty to the plaintiff, further alternatively committed a breach of her legal duty to act as a reasonable attorney without negligence, thereby causing the plaintiff to suffer damages in the sum of R1 million. These allegations are denied by the first defendant, more particularly it is denied that the plaintiff and the first defendant entered into an agreement as alleged, that the first defendant owed the plaintiff a fiduciary duty as her trust creditor or that the first defendant owed the plaintiff any duty as alleged.

BACKGROUND

[3] During 2011 the plaintiff, who was then living and working in Germany, received a call from a friend in South Africa, Teuns Louw. He had a business proposal for the plaintiff. A petrol chemical product known as Naf-Tech had the potential of reducing fuel usage for motor vehicles, generators and other applications. The plaintiff was interested in purchasing an eco-friendly product and he started negotiating through Louw with the second defendant, Schlebusch, the apparent owner of the distribution rights for this product.

[4] The plaintiff discussed the details of the transaction with Louw who, in turn, discussed it with Schlebusch and, without meeting Louw or Schlebusch, it was agreed that a shelf company would be obtained, that the plaintiff would lend the shelf company R1 million, repayable after one year, together with interest at 40% in order for the shelf company to commence its business. The shelf

company would then employ Louw and Louw would have an interest, together with Schlebusch, in the company. The first defendant was then instructed by the second defendant to attend to the drafting of an agreement setting out the terms of the business transaction between the plaintiff and the second defendant. A copy of this agreement, entered into on 16 September 2011 between the plaintiff and Quickbuz 152 BK, duly represented by the second defendant, is attached to the particulars of claim.

THE PLEADINGS

[5] The following facts are not in dispute between the parties: the first defendant was at all material times a practising attorney and notary public; during September 2011 the first defendant was instructed by the second defendant to prepare a draft loan agreement; the plaintiff concluded a written loan agreement with Quickbuz, represented by the second defendant; the first defendant received payment of R1 million into her trust account on 26 September 2011; and the first defendant made payments totalling R972 000.00 directly to the second defendant from her trust account.

[6] In paragraph 6 of the amended particulars of claim it is alleged that during or about September 2011 the first defendant accepted (expressly, *alternatively* tacitly, *further alternatively* impliedly) instructions from the plaintiff to accept payment of R1 million into her trust account pending the finalisation of the business transaction described in the written loan agreement.

[7] It has also been pleaded that it was an implied, *alternatively* tacit term of the agreement between the plaintiff and the first defendant that the first defendant would only make payment to Quickbuz and then only once the business transaction had been completed and once written instruction had been received from both the plaintiff and Quickbuz.

[8] In paragraph 12 it is alleged that, when the agreement was concluded, it was within the contemplation of the parties that the plaintiff would suffer damages in the event of payments being made in breach of the agreement. According to the plaintiff the first defendant breached the agreement, *alternatively* breached her fiduciary duty to the plaintiff as her trust creditor, *alternatively* acted negligently by making various payments directly to the second defendant.

[9] It is finally alleged, also in the alternative, that the first defendant failed to exercise such care and skill as could reasonably be expected of an average and reasonable attorney and that she breached her legal duty to act as a reasonable attorney without negligence.

[10] It is denied by the first defendant in her plea that the plaintiff and the first defendant entered into an agreement as alleged, that the first defendant acted negligently, that the first defendant owed the plaintiff a fiduciary duty as her trust creditor or that the first defendant owed the plaintiff a legal duty as alleged.

THE EVIDENCE

[11] The plaintiff testified and he also called two witnesses to testify. They are Messrs Marx and Hansen. The first defendant also testified without calling any witnesses.

EVIDENCE FOR THE PLAINTIFF

[12] The plaintiff testified that during 2011 he was living and working in Germany. He then received a call from a friend in South Africa, Theuns Louw who had a business proposal for the plaintiff. It concerned a petro-chemical product known as Naf-Tech which had the potential of reducing fuel usage for motor vehicles, generators and other applications. A friend of Louw, Schlebusch who is also the second defendant, was the owner of the distribution rights for this product. The plaintiff was interested in pursuing a business venture with regard to this product. He wanted to secure the rights for distributing the product in Germany and elsewhere in Europe.

[13] The plaintiff discussed the details of the transaction further with Louw who, in turn, discussed it with Schlebusch. Without meeting Louw or Schlebusch it was agreed between the plaintiff and Louw that a shelf company or close corporation would be obtained. This entity would then be renamed with Louw and Schlebusch to become equal shareholders or to have a 50% member's interest in the close corporation. Schlebusch indicated that he needed R1 million to start the business. It was then agreed that the plaintiff would lend the shelf

company or close corporation R1 million, repayable after one year, together with interest at 40% in order for the shelf company to commence its business.

[14] The plaintiff was given to understand that the company would have the right to the product and that the plaintiff would have the right to distribute same in Germany and in Europe. The plaintiff, however, was not prepared to part with his money, the R1 million loan, unless the parties enter into a written agreement and the R1 million is paid into a trust account. The second defendant's attorney was nominated as the attorney who would attend to both the drafting of the agreement and whose trust account would be used for the aforementioned purpose. She is the first defendant. According to the plaintiff he did not want his money to be paid into a normal account. He wanted the money to be paid into a trust account because *"you can trust it"*.

[15] The agreement which was eventually signed by the parties is annexure "POC1" to the amended particulars of claim. The parties to this agreement are the plaintiff and a close corporation known as Quickbuz 152 BK duly represented by the second defendant. It was drafted by the first defendant and sent by her, on or about 15 September 2011, to the plaintiff in Germany. He initialled each page and signed, as the lender, on 15 September 2011. According to the plaintiff the second defendant would become a member and the Chief Executive Officer of Quickbuz. He accepted that the first defendant would take care to have the second defendant registered as such. On 20 September 2011 the amount of R1 million was transferred by the plaintiff into the trust account of the first defendant.

[16] During or about October 2011 the plaintiff visited Louw and Schlebusch, the second defendant in South Africa. They discussed how they would go about to set up and develop the Naf-Tech project in South Africa. They also put in place certain arrangements to get Quickbuz up and running and also to get Louw involved in the business. During November 2011 the plaintiff returned to Germany. It was only during December 2011 when he discovered that there had been problems with the running of this business.

[17] Louw informed the plaintiff that there was no money left. He tried to get hold of the first defendant, but she was not available. He also wanted to speak to the second defendant, but he was not answering his telephone. He then sent an email to the first defendant requesting her to make available a bank statement *"regarding the investment showing the debit lines for what the money was used for"*. He then received a reply from the first defendant informing him that *"I am not a party to the agreement"*. He was then requested to direct any future queries to the second defendant and to advise Louw to do the same. Later during January 2012 he received a statement from the first defendant indicating the deposit of R1 million as well as various payments which had been made to the second defendant *"on instructions"*. The plaintiff denied that he had ever given such instructions, or that the first defendant was entitled to make any trust payments directly to the second defendant.

[18] It was then pointed out that the plaintiff would only be entitled to sell the products as agreed upon in Germany as the national distributor thereof may agree. According to the plaintiff permission had to be obtained from Mr Hansen who was the representative of the national distributor. It then transpired that the

second defendant never had the authority, nor the permission to distribute the products concerned. He could therefore also not cede any of these rights to the plaintiff.

[19] In cross-examination the plaintiff explained that, whilst being in Germany, his contact with the second defendant had always been through Mr Louw. The first time that he had contact with the second defendant was during the same week when the agreement was prepared. It was then put to the plaintiff that the reference to a trust account was a requirement of the second defendant because of other business transactions. This was denied by the plaintiff who insisted that the trust account was his requirement. He had to concede that his further particulars does not support this version.

[20] The question for what purpose the money had to be paid into a trust account was then debated. The plaintiff, relying on the written agreement, was of the view that the money could only be paid out into an account of Quickbuz. This was disputed by counsel for the first defendant who pointed out that the written agreement does not stipulate to whom the money must be paid. The plaintiff then conceded that he never had any conversation with the first defendant prior to him transferring the money into her trust account. He nevertheless insisted that it was the first defendant's duty to honour the written agreement and to pay the money from her trust account into an account of Quickbuz.

[21] The plaintiff also suggested that the money was intended to be used in this joint venture business and that the first defendant had to keep the money

in her trust account until she was given written permission to pay it to someone else. When it was put to him that the borrower in the meantime had to pay interest on money that was not immediately made available, his reply was *"it was his idea"*, referring to the second defendant. He later conceded that the written agreement contains the full agreement between the parties.

[22] The next witness to testify was Mr Marx. He is a registered auditor and chartered accountant whose practice includes the auditing of attorneys' trust accounts. A summary of his opinion has been filed in terms of the Rules of Court. According to that he knows the rules and principles governing the administration of attorneys' trust accounts. He explained in his evidence the duties of an attorney with regard to trust accounts. An attorney should keep a separate business and trust account and should not allow the trust account to ever show a debit balance. He also referred to various rules of practice such as accounting to clients showing details of all amounts received and particulars of all disbursements made.

[23] It was his view (as also explained in the summary of his evidence) that the first defendant would be guilty of unprofessional conduct if it is established that she paid out certain amounts to the second defendant from her trust account in circumstances where she had no authority to do so or in circumstances where Quickbuz was not yet registered. This will also be his view if it is proved that the first defendant failed or neglected to inform the plaintiff of the fact that she did not hold the funds on his behalf. He also referred to the ledger account according to which it appears that R1 million was received whereafter various payments had been made to the benefit of the second

defendant. According to his investigation he was unable to find any correspondence indicating that the second defendant had been registered as a member of Quickbuz or that he was authorised to act on behalf of that entity.

[24] In cross-examination the witness conceded that the first defendant could have accepted that the second defendant would be registered as a member of the close corporation. He also conceded that a close corporation can be represented by a person who is not a registered member thereof.

[25] Later on the witness explained that the second defendant never was a trust creditor of the first defendant. According to him it was either the plaintiff or Quickbuz. He also referred to the plaintiff as the *"initial trust creditor"* (*"aanvanklike trustkrediteur"*) as he is the person who made the payment. Shortly thereafter he conceded that when the money was paid into the trust account, Quickbuz became the trust creditor. This is how it came about:

> *"Nou ek sê vir u, dit is wat hier gebeur het. Die geld word deur Oosthuizen betaal as deposant in daardie trustrekening maar hy betaal dit om die lening wat hy gaan maak aan Quickbuz uit te keer, dit is die 'advance' ... Van daardie oomblik af het Oosthuizen niks meer te sê oor daardie geld nie. Dit is nou Quickbuz wat hulle besluit wat gebeur daarmee, verteenwoordig deur Schlebusch (second defendant) en hulle gee vir die prokureur nou opdrag wat moet gebeur --- goed ... ek stem saam."*

[26] The last witness to testify for the plaintiff was Mr Hansen. He is the Chief Executive Officer of Naf-Tech. He confirmed that the second defendant was not authorised by Naf-Tech to cede or assign any of his rights and obligations to the plaintiff. The agreement which existed between Naf-Tech and the second defendant was later also cancelled by Naf-Tech. The reason for having cancelled the agreement is because the second defendant attempted to cede the exclusive right to market, sell and distribute the Naf-Tech product in Germany to the plaintiff.

EVIDENCE FOR THE FIRST DEFENDANT

[27] The first defendant testified that she has been practising as an attorney since 2003. During 2011 the second defendant was one of her clients. She acted for him in other matters as well. Later during 2011 the second defendant instructed her to prepare a loan agreement and to obtain a shelf company for purposes of this loan agreement. She instructed a correspondent, one De Boer, to acquire the entity. The shelf company which was identified and acquired for this purpose was in fact the close corporation, Quickbuz. De Boer was also required to effect the registration of the second defendant as a member of Quickbuz.

[28] The first defendant drafted the loan agreement according to instructions given to her by the second defendant. He informed her that the loan amount would be R1 million, to be paid into her trust account and repayable after one year together with interest at 40%. The agreement should also make provision for a cession of rights with regard to the distribution of the Naf-Tech

product in Germany. She then prepared the loan agreement which is attached to the particulars of claim as annexure "POC1". When preparing this document, she had no contact with the plaintiff or anybody else regarding the terms thereof. Upon finalising the agreement, it was sent to the plaintiff and the second defendant for their signatures.

[29] On 26 September 2011 she noticed that R1 million had been deposited into her trust account. There was no indication that these funds had to be administered on behalf of the plaintiff. She regarded the second defendant and/or Quickbuz to be her client. She used this trust account to make various payments from time to time on instructions of the second defendant. She also accepted that the second defendant was acting on behalf of Quickbuz. She explained it as follows:

> *"Wel, ek het dit gesien as ek het die instruksie gekry van Schlebusch namens Quickbuz, en die besonderhede wat hy hierso neergesit het was sy persoonlike rekening, maar op daardie stadium het Quickbuz nie 'n rekening gehad nie."*

[30] She further testified, with regard to the cession of rights, that nobody instructed her to investigate the validity of those rights. She was only requested by the second defendant to acquire a shelf company. Nobody else requested her to do so. She only received instructions from the second defendant, acting on behalf of Quickbuz, how to deal with the R1 million.

[31] In cross-examination she was referred to a distributor's agreement. She conceded that an unsigned copy thereof was on her file. All the other terms of the loan agreement were given to her by the second defendant. It was then put to her that if payments are made to another person the plaintiff would be entitled to rely on a breach of contract. Her response was that she did not have an agreement with the plaintiff. Later she accepted that if the money was paid into her trust account for a specific purpose, and it was paid out for another purpose, that the plaintiff would have a claim against her.

[32] It was then suggested that she was negligent to make payments directly to the second defendant under circumstances where the money was intended to be used by Quickbuz. She replied as follows:

> *"Ek het nie gedink daar is 'n plig op my om as hy 'n betalingsinstruksie vir my stuur te vra waarvoor hy dit gaan gebruik en te besluit of dit ... te doen het met die Naf-Tech produk, of projek nie, ... en hy as 'n verteenwoordiger van Quickbuz leen R1-miljoen vir 'n jaar teen 40% rente en hulle moet dit teen die einde van die jaar net terugbetaal."*

[33] It was then put to her that she had three clients, Quickbuz, the plaintiff and the second defendant. She conceded that the second defendant and Quickbuz were her clients, but not the plaintiff. According to her she *"het (nie) die geld vir hom bewaar nie".* She also disputed the allegation that the plaintiff was her client or that she rendered a service to him.

DISCUSSION

[34] Before considering the evidence, it is not only appropriate, but also necessary to say something about the credibility and reliability of the witnesses. An assessment in this regard has to take in account the general context, the witness's memory and the ability to express him- or herself properly. It is a well-known fact that sometimes witnesses do make mistakes and even contradict themselves. One should therefore distinguish between *bona fide* errors and an intentional untruth. I have had the opportunity to observe the demeanour of all the witnesses and to listen carefully to their evidence. I have no reason to conclude that any one of them was untruthful or that their evidence should be rejected for being unreliable. This is a matter that should be decided by taking into account all the evidence, the probabilities and ultimately the burden of proof.

[35] It was contended on behalf of the plaintiff that the plaintiff clearly mandated the first defendant to act as his attorney and as her trust client. She owed him the duties which accompanied an attorney and client relationship. This came about through conduct and was therefore a tacit agreement, *alternatively* one with a number of terms implied by law. In this regard one should take into account that the first defendant accepted payment from the plaintiff of R1 million, issued a receipt for the money and was supposed to thereafter use the money in accordance with the plaintiff's instructions. As a result the first defendant owed the plaintiff a contractual duty of care to render services with the same care and diligence a reasonable attorney would have shown to his or her own client. This agreement was breached by the first

defendant when she proceeded to make various payments directly to the second defendant.

[36] It was contended on behalf of the first defendant that the plaintiff failed to prove any contractual relationship between the plaintiff and the first defendant. Furthermore, so it was argued, the plaintiff was not even a trust client and therefore the first defendant did not owe him any *"fiduciary duty"* as alleged. Although the plaintiff was the depositor of R1 million into the first defendant's trust account, the beneficiary was Schlebusch, representing Quickbuz, who was the trust client. When the plaintiff deposited the money, so it was argued, he discharged his contractual obligation to advance the loan and therefore he did not entrust the money to the first defendant.

THE LOAN AGREEMENT

[37] The parties to the loan agreement are the plaintiff as the lender and Quickbuz as borrower, duly represented by the second defendant. The agreement was entered into on 16 September 2011. In clause 2 thereof it is stipulated that the *"date of commencement"* shall mean date of payment of the loan amount, i.e. R1 million. Clause 4 provides that the lender lends to the borrower an amount of R1 million. It also provides that the borrower cedes to the lender the exclusive right to market, sell and distribute the Naf-Tech product in Germany and the remainder of Europe from the date of commencement.

[38] In terms of clause 5 the loan amount shall bear interest from the date of commencement to the date of payment of the last instalment on the loan,

calculated as simple interest at a rate of 40% annually. Clause 7 deals with the repayment of the loan amount. It provides that the loan as well as the calculated simple interest shall be paid by the borrower to the lender over a period of twelve months from date of commencement, monthly or in a lump sum on the last day of the twelfth month as the borrower is able to make payments.

[39] The obligations of the lender are set out in clause 8. It provides as follows:

> *"8.1 The lender shall make payment of the loan amount on date of commencement directly into the trust account of Helandie Calaça Attorneys,...account 4074331184, Ref: HS48/11.*
>
> *8.2 The lender hereby admits that he will be responsible for any costs of marketing, distribution and sale of the Naf-Tech product in Europe."*

[40] Clause 9 contains a stipulation with regard to breach of contract. It provides that if the borrower defaults on any payment or with regard to any term of the agreement and does not rectify the breach within seven days of receipt of a written demand by the lender, then the full outstanding loan amount plus simple interest shall immediately become payable. In clause 12 it is recorded that this agreement constitutes the entire agreement between the parties and any amendment thereto shall only be effective if in writing and signed by both parties.

THE CONTRACTUAL CLAIM

[41] It appears to be common cause that the plaintiff never had any conversation with the first defendant prior to him transferring the money into her trust account. The plaintiff also conceded in cross-examination that, whilst being in Germany, his contact with the second defendant had always been through Mr Louw. It is therefore clear that the plaintiff cannot rely on an express agreement concluded between him and the first defendant. It was however contended that the parties are bound by a tacit agreement. This should be inferred from *inter alia*, so it was argued, the fact that the first defendant drafted the written loan agreement, she accepted payment from the plaintiff of R1 million and she held herself out as a practising attorney with a trust account.

[42] Generally speaking, a tacit offer which has been tacitly accepted will result in a tacit contract which may also be referred to as an implied contract or a contract by conduct (*Christie's Law of Contract in South Africa*, 7th Ed, p 98). After having considered various case law the same author concludes as follows (pp 100-102) with regard to the test for a tacit contract:

> *"In a reasoning by inference in the normal civil case the first stage is to decide, on the preponderance of probabilities, what facts have been established. The second, and final, stage is to decide, also on the preponderance of probabilities, what conclusion consistent with those facts is most likely to be*

> *correct. When deciding whether a tacit contract has been proved a third stage has to be interposed between these two. This is to decide how the proved facts, that is, the conduct of each party and the relevant circumstances, must have been interpreted by the other. The word 'must' is used advisedly, because at this intermediate stage of the inquiry the Court is not concerned with the resolution of an issue of fact, but with the effect of the parties' conduct and the surrounding circumstances on the mind of each party."*

[43] The difficulty of establishing a tacit contract between the plaintiff and the first defendant is the fact that they were not negotiating with each other. The first defendant received instructions from her client, the second defendant. In cross-examination the plaintiff explained that, whilst being in Germany, his contact with the second defendant had always been through Mr Louw. The first time he had contact with the second defendant was during the same week when the agreement was prepared. The first defendant testified that she prepared the loan agreement according to instructions which she had received from the second defendant.

[44] If one takes into account the terms of the loan agreement it appears that the *"date of commencement"* is the date of payment of the R1 million. Payment into the first defendant's trust account took place on 26 September 2011. The loan amount shall bear interest at 40% per annum calculated from this date. The R1 million had to be repaid within a period of twelve months, also calculated from this date. Clause 8 specifically provides that *"the lender shall*

make payment of the loan amount on date of commencement" directly into the trust account of the first defendant. The formulation of this clause suggests that the obligation to make payment of the loan amount would be discharged on the day when payment has been made into the trust account of the first defendant. Put differently, payment into the trust account constituted the actual advance or delivery of the loan amount to the borrower. This conclusion was also supported by the plaintiff's witness, Mr Marx when he conceded in cross-examination that when the money was paid into the trust account, Quickbuz became the trust creditor and not the plaintiff.

[45] It should now be considered how the proved facts and the circumstances referred to above, must have been interpreted by the plaintiff and the first defendant. The plaintiff insisted that it was the first defendant's duty to honour the written agreement and to pay the money from her trust account into an account of Quickbuz. He also suggested that the money was intended to be used in this joint venture business and that the first defendant had to keep the money in her trust account until she was given written permission to pay it to someone else. The problem with this approach is twofold: the loan agreement does not contain such a provision, neither can it be inferred from the agreement itself. Second, the rights and obligations referred to in this agreement pertains to the parties thereto, i.e. the plaintiff and Quickbuz. The first defendant is not a party thereto. She testified that she regarded the second defendant and Quickbuz to be her clients, but not the plaintiff. According to her she had no agreement with the plaintiff, neither did she render him a service in her capacity as an attorney. These facts and circumstances already raise a serious doubt

whether there ever was a meeting of minds between the plaintiff and the first defendant from which one can infer the intention to enter into a binding agreement.

[46] Furthermore, the fact that the loan agreement would have taken full effect from the moment the loan amount is deposited into the trust account, left no part of the agreement in suspense. This also excludes the possibility of a tacit or implied term as contended for, as such a term will stand in conflict with the express wording of the loan agreement. One should also take into account that not every payment into an attorney's trust account, will render the person making that payment a trust client to whom the attorney owes a fiduciary duty. As was stated by Grosskopf JA in *Industrial and Commercial Factors (Pty) Ltd v Attorneys' Fidelity Board of Control* 1997 (1) SA 136 (A) at 143I-144A:

> *"Where money is paid into the trust account of an attorney it does not follow that such money is in fact trust money ... If money is simply handed over to an attorney by a debtor who thereby wishes to discharge a debt, and the attorney has a mandate to receive it on behalf of the creditor, it may be difficult to establish an entrustment."*

[47] Having regard to the wording of the loan agreement, more particularly clause 8 thereof, it appears to me that the plaintiff undertook to advance the amount of R1 million to another party, Quickbuz. Put differently, the plaintiff had in terms of this agreement an obligation to make payment of the loan amount to the other party, Quickbuz. It is in this sense that the plaintiff should be regarded

as the debtor (to make payment) and Quickbuz the creditor (to receive payment) as far as the initial payment of the loan amount is concerned. Taking into account all the above considerations, I am of the view that the plaintiff has failed to prove, on a preponderance of probabilities, that an agreement was concluded between him and the first defendant or that the plaintiff was a trust client of the first defendant to whom the first defendant owed a fiduciary duty.

THE DELICTUAL CLAIM

[48] It was also pointed out that the plaintiff is relying on a claim in delict, pleaded in the alternative. The argument can be summarised as follows: the first defendant, as a practising attorney, was under a legal duty not to pay out monies to the second defendant in a negligent manner. She had a legal duty to look after the plaintiff's financial interests as her trust client which she negligently omitted to do by making payments directly to the second defendant. Therefore, so it was argued, the plaintiff should be entitled to payment of R1 million with interest.

[49] It was contended on behalf of the first defendant that the plaintiff failed to prove that the first defendant owed him a legal duty to prevent him suffering pure economic loss or any other loss. It was also pointed out that the plaintiff could not even begin to establish or even argue such a legal duty as it had not been properly pleaded and the Court had already made a ruling in this regard. Therefore, so it was argued, the plaintiff is non-suited and cannot rely on a legal duty as a cause of action.

[50] As far as this alternative claim is concerned, it should be pointed out that counsel for the first defendant raised objections from the start with regard to the plaintiff's pleadings. One of these objections relates to an allegation contained in paragraph 14 of the particulars of claim, pleaded in the alternative, that the first defendant *"breached her legal duty to act as a reasonable attorney without negligence"*. According to counsel for the first defendant a legal duty has not been properly pleaded and this objection was again raised during the cross-examination of the first defendant. The objection was then upheld and it was also ruled that a legal duty had not been properly pleaded.

[51] If wrongfulness cannot be inferred from the nature of the loss suffered, a legal duty towards the plaintiff must be pleaded (*Lillicrap, Wassenaar & Partners v Pilkington Bros* 1985 (1) SA 475 (A) 496-498). A bald allegation that the defendant was under such a duty is insufficient because the existence of a duty to prevent loss is a conclusion of law depending on all the circumstances (*Knop v Johannesburg City Councili* 1995 (2) SA 1 (A) 27). In this regard it is important to bear in mind that the requirement of a legal duty in respect of wrongfulness is probably because impairment is not *prima facie* wrongful in these circumstances, but rather *prima facie* lawful, because according to the *boni mores* criterion there is neither a general duty to prevent loss to others by positive conduct, nor a general duty to prevent pure economic loss (Neethling, Potgieter & Visser, *Law of Delict*, 7th Ed, p 56). Furthermore, it was pointed out in *Country Cloud Trading v MEC* 2015 (1) SA 1 (CC) par 23 that our law is generally reluctant to recognise pure economic loss claims especially where it would constitute an extension of the law of delict. Wrongfulness must therefore

be positively established to provide the necessary check on liability in these circumstances.

[52] No doubt, the plaintiff's alternative claim, referred to as a claim in delict, is a pure economic loss claim. No particulars have been pleaded from which a legal duty can be inferred. The mere reference to a legal duty is insufficient. What is more, counsel for the first defendant raised this objection at the commencement of the trial before any evidence was led. This means that the plaintiff failed to disclose a delictual cause of action and for this reason alone the claim should be dismissed.

[53] If, however, I have misdirected myself in this regard, one should still consider whether wrongfulness, in the sense of a legal duty which has been breached, has been established. The existence of a legal duty to prevent loss is a conclusion of law depending on a consideration of all the circumstances of the case. 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 (*Knop v Johannesburg City Council, supra*, at 27F-I).

[54] Can it be said that the first defendant had a legal duty to prevent economic loss to the plaintiff? When considering this question one has to take into account that the plaintiff was not a client of the first defendant. The facts and circumstances surrounding the conclusion of the loan agreement suggest that the first defendant carried out instructions, not received from the plaintiff, but from the second defendant. Furthermore, the plaintiff did not become a trust creditor of the first defendant when the R1 million was paid into her trust

account. I have already concluded (par 44 above) that payment into the trust account constituted the actual advance or delivery of the loan amount to the borrower (Quickbuz). Therefore, Quickbuz became the trust creditor and not the plaintiff. These facts do not suggest the existence of a legal duty towards the plaintiff. On the contrary, they imply the opposite. Taking into account all these considerations and by applying the general criterion of reasonableness, it will be wrong to conclude that the first defendant had a legal duty to avoid economic loss to the plaintiff. For this reason also the alternative claim cannot succeed.

ORDER

In the result I make the following order:

The plaintiff's main and alternative claims are dismissed with costs.

D S FOURIE
JUDGE OF THE HIGH COURT
PRETORIA

Date: 20 December 2017