IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

REPORTABLE

CASE NO 546/04

In the matter between

HIRSCHOWITZ FLIONIS
Appellant

and

JULIAN RICHARD NAPIER BARTLETT **First Respondent**
BARTLETTS INCORPORATED **Second Respondent**

CORAM: **HOWIE P, ZULMAN, NAVSA, BRAND et VAN HEERDEN JJA**

Date Heard: 3 March 2006

Delivered: 22 March 2006

Summary: **Delict – Aquilian action – legal duty to act without negligence – Practising attorney under such duty when dealing with money in trust account and insufficiently informed as to the identity of the depositor or the purpose of the deposit.**

Neutral citation: This judgment may be referred to as *Hirschowitz Flionis v Bartlett and Another* [2006] SCA 24 (RSA).

J U D G M E N T

HOWIE P

HOWIE P

[1] The primary question in this appeal is whether the appellant firm of attorneys, in whose trust account the first respondent caused to be deposited the sum of R3,1 million, owed the latter a legal duty to deal with the money without negligence. The appeal is against an order made on trial in the Johannesburg High Court by Schwartzman J who answered that question in the affirmative. The learned Judge went on to find that the appellant had dealt with the money negligently and was therefore liable to pay the first respondent damages in the sum concerned plus interest from the date of judgment. It was ordered accordingly. With the necessary leave the appellant appeals. There is a cross-appeal, also with leave, against the interest order, the contention being that interest should have been ordered to run from a much earlier date. The judgment of the High Court is reported.[1] **I shall call it 'the reported judgment'.**

[2] The litigating parties are practising Johannesburg attorneys. The first respondent, Mr JRN Bartlett, cited his professional company, of which he is sole director and shareholder, as co-plaintiff. The appellant is a two person partnership. Only one of the partners, Mr A Flionis, was involved in the events with which the case is concerned. The second respondent had no significant role in those events and the damages were awarded to Mr Bartlett only. Therefore, I shall, for convenience, refer to the protagonists as 'Bartlett' and 'Flionis' respectively.

[3] Bartlett testified at the trial. Flionis did not. The facts pertaining to the

[1] *Bartlett and Another v Hirschowitz Flionis* [2005] 2 All SA 567 (W).

material events are established, directly or inferentially, by Bartlett's evidence and the contents of various items of documentary evidence. The truth or authenticity of some of the documents or their contents was proved or admitted. However, certain documents discovered by Flionis were admitted in evidence on the restricted basis that they were no more than what they purported to be. In relation to the documents last mentioned, Bartlett called the evidence of a handwriting expert to question their authenticity and, as regards Flionis's obligation as attorney with regard to money in his trust account, Bartlett led the evidence of a forensic accountant, Mr V Faris. A full summary of the facts is contained in the reported judgment in paras [12] to [39]. I shall refer only to such evidence as is pertinent to the issues on appeal.

[4] Bartlett met a woman named Karen Hardaker in 1998. She lived then in Durban. Early in 1999 Hardaker mentioned to him a pending offshore gold bullion transaction involving the sale of 10 tonnes of gold from an unnamed seller to a European company that would on-sell to the Swiss Government. Implementation involved a spectrum of agents and intermediaries. She claimed to be an intermediary between the seller's agent and the buyer's agent and entitled as such to a commission on the eventual sale price. She went on to say that if Bartlett put up what was referred to in evidence as a 'goodwill' deposit of US$500 000 an even greater commission – between US$5 million and US$8 million - would be payable to him offshore which the two of them could share. The 'goodwill' deposit, she explained, was required to demonstrate the seriousness and capability of the buyer and enable it to initiate the transaction. The necessary amount or its Rand equivalent had to be paid into a South African attorney's trust account. As Bartlett understood it, the deposit would remain in the trust account until the gold was paid for, after which it would be disbursed on his instructions; if the transaction failed the deposit would be returned to him.

[5] Bartlett, a commercial attorney with about 19 years' experience, had limited financial means and could not put up US$500 000 himself. He therefore

borrowed it from a client, one Loewen, and undertook repayment within 60 days of receipt into his own trust account. Loewen was due shortly to emigrate and Bartlett said he would arrange that repayment was effected offshore, which was attractive to Loewen.

[6] In further discussion Hardaker told Bartlett she had a business connection with a man whose broking company in Helsinki, Allied Global Securities (AGS), represented a Liechtenstein company, Amaxa. The latter would take delivery of the bullion and in turn deliver it to the Swiss entity.

[7] On 29 January 1999 Bartlett received a draft agreement faxed from a Helsinki number. It purported to be a commission agreement between AGS and Bartlett relating to what was referred to as 'Transaction No 90129'. The draft stated that it involved 'commodities to be delivered to Amaxa ... for import and reverification of delivered quantity and quality with subsequent payments to Supplier and the parties herein involved'. Those 'parties' included Bartlett, Hardaker, AGS and Amaxa. It was Bartlett's obligation to 'obtain the funds of USD 1 million, or equivalent in another currency to be placed in a Trust Account of a South African Law Firm.' For their respective acts of participation, 2,5% of the total value of the goods would be due to 'KAREN's, Mrs Karen D Fairbairn-Hardaker and Mr H Cotter'; 2,5% to AGS; 5% to Amaxa in respect of the first 10 tonnes and 10% for subsequent quantities; and to Bartlett 15% for the first 10 tonnes and 10% thereafter. The supplier was not identified. The draft was signed on behalf of AGS.

[8] The draft was silent as to the purpose of the money that would be put up by Bartlett. It would seem to have been unnecessary for the efficacy of any bullion sale that money be paid into a South African attorney's trust account, particularly by someone not a party to the sale. Moreover it is unfathomable why Bartlett, a complete stranger to the trade, should have been earmarked for more commission than AGS or Amaxa which were, supposedly, regular participants in

the trade.

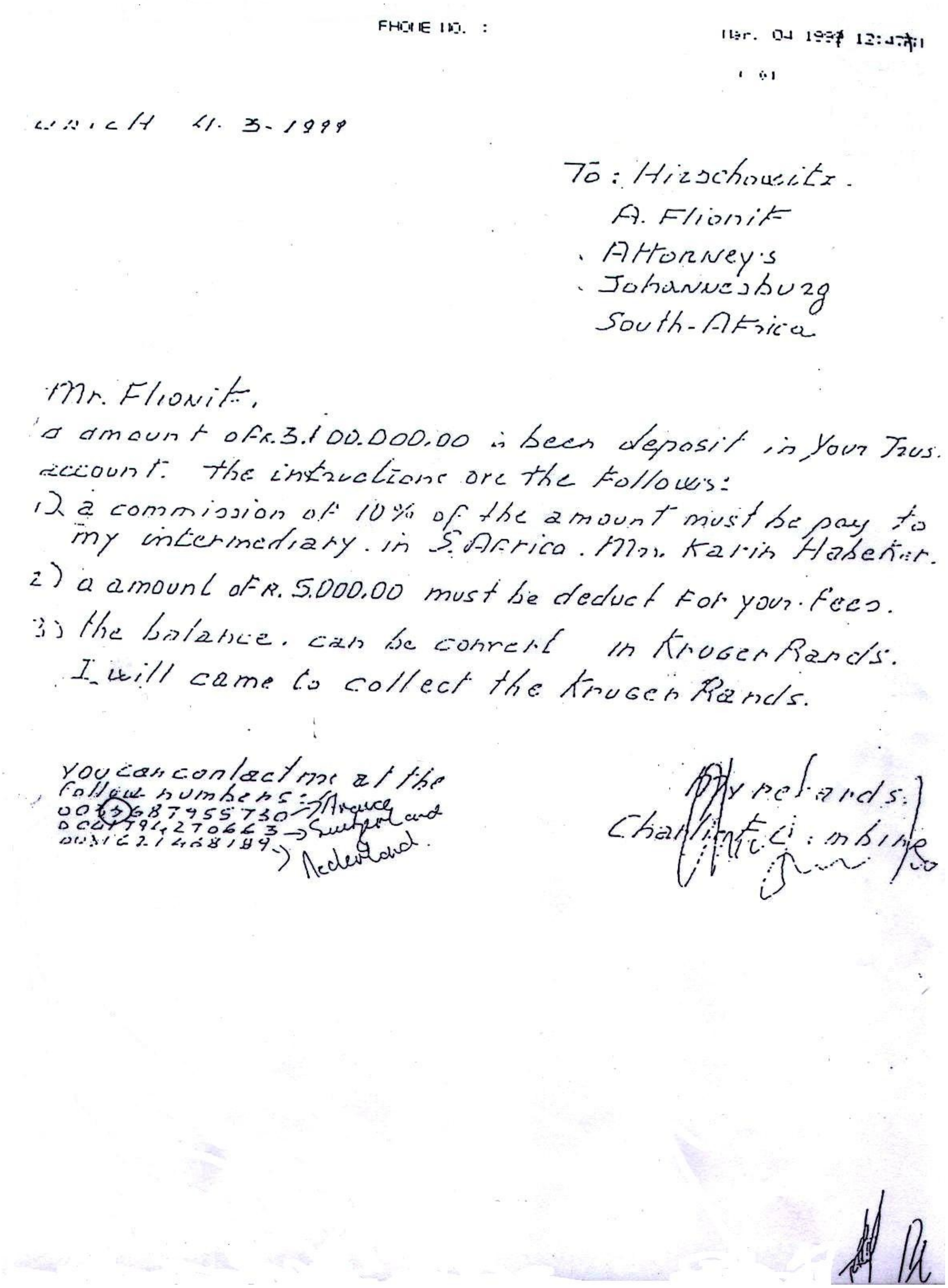
[9] Bartlett did not sign the draft. Instead, in a letter to AGS dated 3 March 1999 he drew his own version of what he thought an appropriate agreement should contain. In his draft, although there was reference to an ‘actual supplier’ (again unidentified), he described himself as ‘seller’ and Hardaker as ‘seller’s mandate’. Why he referred to himself as seller he could not satisfactorily explain in evidence. Patently it was nonsense. He also made provision for signature by Hardaker and Amaxa. He stipulated an offshore banking account into which his and Hardaker’s commissions had to be paid, as also another offshore account to receive repayment of Loewen’s loan. Hardaker’s commission was made payable not to her and H Cotter as before, but simply to her. Having received faxed copies for signature and refaxing to Bartlett, Hardaker signed (as KD Hardaker) on 3 March and signatures purportedly on behalf of Amaxa and AGS were appended on 4 March, all without comment on any of Bartlett’s changes. From Bartlett’s own trust account the required ‘goodwill’ deposit, in the Rand equivalent (R3,1 million), was paid at Hardaker’s direction into Flionis’s trust account on 3 March 1999.

[10] Bartlett did not tell Flionis of the deposit or its purpose. That was because Hardaker told him not to communicate with Flionis. She said that she had herself conveyed to Flionis what the purpose of the deposit was. She urged Bartlett to trust her. He said he did. However, he went on to testify that he had nevertheless written and handed to Hardaker a letter stating the purpose for which Flionis was to hold the money. She was supposed to send the letter to Flionis and told Bartlett she had done so. However, at the time he gave evidence he accepted she had not done so. Significantly, he was able to produce copies of all his other important letters relative to the case but not this one. He was unable to explain why.

[11] On 4 March 1999 Bartlett received an anxious telephone call from

Hardaker from Durban to say that the money was not in Flionis's account. He faxed her a sheet of paper on which was pasted a copy of the relevant bank deposit slip. She faxed a copy of his document back to him. On it she had written 'Urgent Attention: Alex Flionis' and, underneath, Flionis's fax number and a message stating that the funds referred to in the deposit slip had been cleared. This document was discovered by Bartlett, not Flionis. Whether Hardaker sent Flionis an identical fax the latter did not establish. As already mentioned, he did not give evidence. Nor did anyone else on his firm's behalf. Transmission details printed on this document show that Bartlett transmitted at 12:48 and that the return fax – from 'HARDAKER'S RESIDENCE' – was at '01:04 PM'.

[12] Also bearing the printed transmission date 4 March 1999, is a document purporting to be a fax sent from Zurich by one Charlie F Gambino to Flionis's firm. The transmission printout gives no indication where it was sent from but the transmission time was 12:47 PM. (Assuming it was sent from Zurich at 12:47 the time in South Africa would have been 13:47.) It contains a handwritten message in broken English with sundry grammatical and spelling errors. The writer clearly was at pains to guide the flow of the manuscript with an object such as a ruler. The writing appears thus:



PHONE NO. : Mar. 04 1999 12:47PM

P01

Zurich 11. 3-1999

To: Hirschowitz.
A. Flionik
Attorney's
Johannesburg
South-Africa

Mr. Flionik,

a amount of R.3.100.000.00 is been deposit in Your Trus. account. the intructions are the follows:

1) a commission of 10% of the amount must be pay to my intermediary. in S.Africa. Mrs. Karin Habeker.

2) a amount of R.5.000.00 must be deduct for your. fees.

3) the balance. can be convert in Kruger Rands. I will came to collect the Kruger Rands.

You can contact me at the follow numbers:
0033687955730 → France
004179142706623 → Switzerland and
0031621468184 → Nederland.

My regards:
Charles Ci mbine

[13] A typed transcript is as follows:

Zurich 4-3-1999

To: Hirschowitz
A Flionif
Attorney's
Johannesburg
South Africa

Mr Flionif,
a amount of R.3.100.000,00 is been deposit in Your Trust account. the instructions are the follows:

1) a commission of 10% of the amount must be pay to my intermediary, in S.Africa. Mrs Karin Habekar.
2) a amount of R5.000,00 must be deduct for your fees.
3) the balance can be convert in Kruger Rands. I will came to collect the Kruger Rands.

My regards
Charlie F Gambino

you can contact me at the
following numbers:
0035687955730 – France
0041794270663 – Switzerland
0031621468169 - Nederland

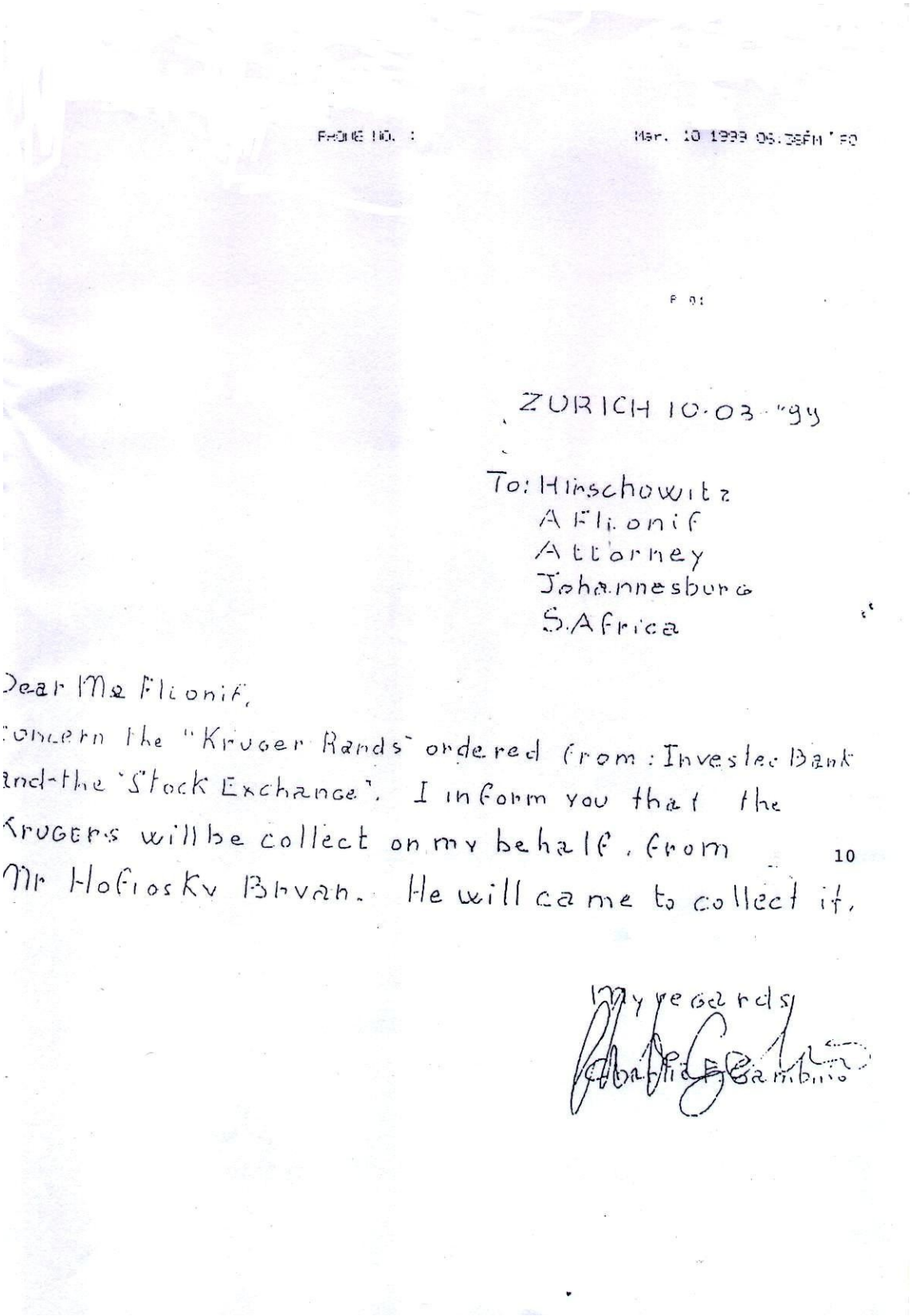
[14] In apparent compliance with the 'Gambino instructions' Flionis caused one of his firms' printed receipt forms to be completed. It is dated 4 March 1999 and records the receipt of R3,1 million from C Gambino, who is allocated a file or client number G109/99. According to the file's ledger entries Flionis thereafter apparently drew the following cheques on his trust account which were debited against the sum deposited by Bartlett:

5.03.99 R310 000 to BR Hardaker

9.03.99 R1 000 930 to Investec
10.03.99 R827 465 to SP Reid
12.03.99 R934 725 To Investec
12.03.99 R13 549.59 to SP Reid
7.04.99 R8 342,46 to SP Reid.
In addition, a fee to the firm of R5 000 was debited on 5 March 1999.

[15] Discovered by Flionis is a printed Investec 'KRUGERRAND TRANSACTION ADVICE' dated 10 March 1999 confirming the sale to his firm on 10 March 1999 of 553 coins at R1810 each at a total price of R1 000 930. (This

accords with the cheque drawn on 9 March referred to above.) Who SP Reid was is not established but an inference may be drawn from the content of a further apparent fax message from Gambino which was transmitted on 10 March at 06:36PM. It was also in printed letters but despite some similarities of letter formation there are many differences from the earlier one. It appears thus:



FROM NO. : Mar. 10 1999 05:38PM P2

P 01

ZURICH 10.03 '99

To: Hinschowitz
A Fli.onif
Attorney
Johannesburg
S.Africa

Dear Mr Flionif,
Concern the "Kruger Rands" ordered from: Investec Bank
and the 'Stock Exchange'. I inform you that the
Krugers will be collect on my behalf, from 10
Mr Hofioskv Bhvan. He will came to collect it.

My regards
Abdulla Gambino

[16] A typed transcript reads as follows:

Zurich 10.03.'99
To: Hirschowitz
A Flionif
Attorney
Johannesburg
S. Africa

Dear Mr Flionif,

concern the "Kruger Rands" ordered from: Investec Bank and the "Stock Exchange". I inform you that the Krugers will be collect on my behalf from Mr Hofiosky Bryan. He will came to collect it.

My regards
Charlie F Gambino

(If coins were bought from the Johannesburg Stock Exchange SP Reid was presumably a broker.)

[17] While Flionis was conducting these transactions Bartlett awaited progress reports concerning the bullion transaction. The bombshell came on about 2 April 1999. Hardaker telephoned him from London and said that she had been told there would be no gold transaction. On 3 April Bartlett wrote to Flionis advising that the R3.1 million deposit had been made by him and what the reason for it was. In the letter he described the money as 'client funds' and said that unless the gold was delivered by 6 April repayment of the deposit was required on 7 April. In evidence he said he meant by 'client funds' that they were his own.

[18] Flionis answered by letter dated 6 April denying knowledge of Bartlett's allegations save that 'the monies were deposited into our trust account and have been paid out'. He went on to refer Bartlett to 'our client Mr C Gambino' and gave details of three overseas telephone numbers at which Gambino could be contacted. (In fact the account was still in credit in the sum of about R9 400 and the next day, despite Bartlett's intimations, R8 342.46. was paid over to SP Reid.)

[19] On 7 April Bartlett wrote to Flionis and in the course of the letter said

‘Kindly call on your client to refund the monies today together with interest ...’

[20] There was no repayment to Bartlett by anyone. As a result Bartlett was unable to repay Loewen who sued him the following year. That matter went to trial. Bartlett raised a false defence as to why he did not owe the money, in which defence he persisted in evidence. Under cross-examination by Loewen’s counsel his lies were exposed. He was compelled to consent to judgment in the amount of the loan with interest, and costs on the scale as between attorney and client. In the present case his counsel conceded, as he had to, that Bartlett’s general credibility was compromised by the Loewen trial.

[21] Faris’s over 40 years in practice have given him a wealth of experience in forensic audits of attorneys’ trust accounts and a comprehensive knowledge of the conduct and management of such accounts. In stating the principles applicable to an attorney’s duties in so far as they are material to this case, he drew, inter alia, on the provisions of the Attorneys Act 53 of 1979, the Rules of the Law Society of the Northern Provinces and the purpose of a trust account. By statute, he said, money in a trust account is not the attorney’s property. A particularly high standard of care is expected of an attorney in managing the account. Such money may belong to a client or a third party. It commonly happens that, without notice to the attorney, a non-client pays into the account, for example, a deposit by a buyer of land pending transfer. It also often occurs that the name of the depositor is not disclosed as, for example, where the payment is made electronically or by bank cheque or (as in this case) by interbank clearance voucher. Faris went on to state that when the identity of the depositor or the purpose of the deposit is unknown the money must be credited to a trust suspense account until such identity and purpose have been established. The money must then be dealt with according to the trust creditor’s instructions.

[22] Faris testified that in the present instance the clearance voucher and the

deposit slip would not have revealed the identity of the depositor but the learned Judge found on the evidence[2] **that reasonably directed enquiry by Flionis would have established that the money came from the trust account of Bartlett's company. In turn, any ensuing enquiry made of Bartlett would have elicited the latter's instructions to retain the money in the trust account. Appellant's counsel submitted that Bartlett, faced with such enquiry, would have adhered to his alleged undertaking not to communicate with Flionis. However, in all likelihood, in my view, Flionis would have had to say that he had instructions from Gambino. It is most unlikely that Bartlett would then have kept silent. He would have realised Hardaker's duplicity and spoken out.**

[23] This broad factual outline is sufficient preamble to stating the issues on appeal. As will have become apparent, the suit is a delictual one for Aquilian damages. It is not in dispute that Flionis was negligent in disbursing the money deposited by Bartlett; that Bartlett suffered damages in the sum of R3,1 million as a result; and that the necessary factual and legal causative links existed between the negligence and the damages. The issues on appeal are fourfold:-

(1) whether Bartlett entrusted the money to Flionis;
(2) whether there was a legal duty on Flionis to deal with the money without negligence;
(3) whether Bartlett was contributorily negligent and, if so, what apportionment is appropriate; and
(4) whether interest should have been ordered to run from a date earlier than the date of judgment in the court below.

[24] As to (1), counsel for the appellant argued that the legal duty in (2) could not be held to have existed unless there had been 'entrustment'. First, said counsel, that necessitated Bartlett's having informed Flionis of his identity as depositor and the purpose of the deposit. Without proof of Bartlett's alleged letter to Hardaker or proof that her return fax of 4 March to him was copied to Flionis, the necessary communication, so it was said, was never established. Second,

[2] Para [53] of the reported judgment.

given the purpose of the deposit as alleged by Bartlett in this case, it was improbable he intended to entrust it. On this point his credibility was crucial and, his having given untruthful evidence in the Loewen case, nobody could be satisfied he was telling the truth now. Furthermore, so it was argued, not all money that finds its way into a trust account is trust money and in the instant matter a correct analysis of the contractual context in which the deposit was made (assuming the gold transaction to have been genuine) showed that it was intended to be part payment, on behalf of the buyer, of the price of the bullion. It was made to Flionis, in effect, as seller's agent.

[25] Manifestly counsel's first contention is good. Bartlett's identity and purpose as depositor were never conveyed to Flionis in any manner until Bartlet's letter of 3 April 1999. However, there is no basis for the second contention. If there really was a genuine gold transaction pending, in which Bartlett was to be involved (as he contemplated), it is a more than extraordinary coincidence that within an hour of Bartlett's fax to Hardaker confirming clearance of the money the first Gambino fax arrived, purporting to give instructions in respect of the very money deposited by Bartlett. That fact renders it impossible to accept that there was ever a genuine bullion transaction or at least one in which Bartlett was intended by the contracting parties to participate as some sort of guarantor or intermediary. There can be no doubt that an elaborate fraud was perpetrated on Bartlett. Nevertheless there can also be no doubt that despite the cloud that hung over his credibility he believed that a bullion transaction was in the offing and that the deposit would enable him to receive a huge commission as intermediary in respect of this transaction. The confusion of replies he gave in cross-examination in this case and in the Loewen trial as to the nature and effect of the deposit cannot serve to have transformed Flionis into the unknown seller's agent or the deposit into a down payment. What Bartlett remained steadfast about was that the money was to receive the benefit of treatment as trust money and to remain in Flionis's trust account until the gold transaction was complete, at which stage he would have given Flionis instructions as to disposal or disbursement.

Moreover, counsel put it to Bartlett that the appellant's case was that Flionis believed the money to have emanated from Gambino. It is not open to the appellant to enlist in aid a construction that was neither Bartlett's case nor its own.

[26] Does it matter that the origin and purpose of the deposit were not communicated to Flionis until, in effect, it was too late? The court below thought not. Relying on authority that 'entrust' does not have a technical legal meaning,[3] **the learned Judge considered that Bartlett's deposit was entrusted because, in the light of Faris's uncontested evidence, Flionis could not properly deal with the money until the true depositor's purpose and instructions had been ascertained. It was, therefore, in accordance with the ordinary dictionary meaning of 'entrust',[4] in Flionis's care in the interim.**[5]

[27] There is much to be said for that conclusion. However, for purposes of this case (and whatever might be the correct interpretation of 'entrust', say, in proceedings against the Attorneys Fidelity Fund where theft occurs of money 'entrusted' to an attorney) the issue of legal duty for delictual liability (the element of wrongfulness) can, in my view, be decided in this matter without the antecedent finding that there was entrustment. True, Bartlett's case on wrongfulness as pleaded was founded on there having been entrustment but the evidence led, particularly that of Faris, ranged widely enough to allow for a full canvassing of the relevant questions even if wrongfulness were to be determined solely by reason of the fact that the money was deposited in the trust account. The enquiry remains whether there was a legal duty on Flionis, even then, to deal with the money without negligence. Put another way: if he was negligent should the law impose on him liability for such negligence?

[3] *Industrial and Commercial Factors v Attorneys Fidelity Fund* 1997 (1) SA 136 (SCA) at 144D-I.

[4] Of the Oxford English Dictionary's various definitions the most apposite is '(t)o confide the care or disposal of (a thing ...)'.

[5] Paras [45] to [48] of the reported judgment.

[28] This being an instance of mere economic loss resulting from omission (Flionis's negligent omission to query Gambino's patently suspicious 'instructions' or to trace the true depositor was, as I have indicated, not in dispute on appeal) the incidence of the legal duty to act without negligence is a matter of legal policy. The decision whether the duty exists depends on various factors including prevailing ideas of justice and where the loss should fall.[6] **This enquiry involves applying the general criterion of reasonableness having regard to the legal convictions of the community as assessed by the court.**[7]

[29] For the appellant it was contended that a good reason for denying delictual liability in this case was the consideration that Bartlett could have protected himself by way of an appropriate contractual stipulation. I disagree. The situation is not comparable with or analogous to that, for example, in *Lillicrap Wassenaar and Partners v Pilkington Brothers SA (Pty) Ltd*[8] **where the parties were involved in a contractual relationship from the outset and could therefore have readily amplified their contract by adding suitable provisions to fashion their contractual remedies. According to Faris it is commonplace that non-clients make deposits into an attorney's trust account in the course of fulfilling their contractual obligations to third parties. It is not suggested that there is any need or reason for the depositor to form a contractual relationship with the attorney. Moreover, these payments occur without the attorney being aware until after the deposits that they have in fact been made. Consequently I do not think that contractual protection is commercially feasible.**

[30] On the contrary, there are a number of considerations which, in my opinion, compel the conclusion that Flionis was indeed subject to the legal duty

6 *Knop v Johannesburg City Council* 1995 (2) SA 1 (A) 27G-H; *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) at 441F-442E.

7 *Knop* supra 27I; *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) at 596H-597F.

8 1985 (1) SA 475 (A); see too, the as yet unreported judgment in this court in *Trustees for the time being of Two Oceans Aquarium Trust v Kantey and Templer (Pty) Ltd* delivered on 25 November 2005, Case 545/04, at para 21.

under discussion. First and foremost, the appellant, as recipient, was a firm of practising attorneys. As such it proclaimed to the public that it possessed the expertise and trustworthiness to deal with trust money reasonably and responsibly. Second, Bartlett relied on that and particularly on the fact that the money would be in the appellant's trust account until he instructed otherwise. Faris's exposition of an attorney's obligations in properly managing a trust account demonstrate that Bartlett's reliance on the money being safe in a trust account was reasonable even if, as I shall point out, his failure to communicate with Flionis was not. Third, even where an attorney discovers an anonymous and unexplained deposit it requires minimal management to transfer the money to a trust suspense account. It is then a task of no difficulty to trace the depositor with the aid of the firm's own bank. After that one need merely leave the money where it is until receipt of instructions by or on behalf of the depositor or the person for whose benefit the deposit was made. Fourth, unreasonable conduct that might put the money at risk would, as a reasonable foreseeablility, cause loss to the depositor or beneficiary. The legal convictions of the community would undoubtedly clamour for liability to exist in these circumstances.

[31] I accordingly find, as regards the second issue on appeal, that Flionis was under a legal duty to deal with the money without negligence. (I should emphasise that it was never Bartlett's case that Flionis was a party in any respect to the fraud.)

[32] The third issue on appeal is whether Bartlett was contributorily negligent. Contributory negligence was pleaded as an alternative defence coupled with reliance on the Apportionment of Damages Act 34 of 1956. The learned Judge did not deal with this defence and awarded Bartlett the full amount of his damages. As I understood the parties' counsel (their respective leading counsel both appeared at the trial, as did Bartlett's junior counsel) this aspect of the case was simply not argued in the court below.

[33] The crux of the appellant's allegations of negligence against Bartlett is that he failed to inform the appellant of the fact of the deposit or to provide instructions concerning it.

[34] It is not surprising that Bartlett was unable to call Hardaker as a witness so as to attempt to demonstrate to the learned Judge the qualities of honesty and reliability which he ventured to suggest impressed themselves upon him to the extent that he left it to her to convey the necessary explanations to Flionis. Hardaker got away with 10% of Bartlett's money and was probably more instrumental than anyone else in causing his overall loss. If she did not orchestrate the fraud she was a major player in its commission. She was unlikely to be available as a witness and even if available was unlikely to support Bartlett in the present respect.

[35] Bartlett was obviously susceptible to her persuasion, particularly given his modest financial situation. He was nevertheless profoundly remiss in falling for her story of the bullion transaction and the extraordinary commission that was said to be due to come to him, a complete unknown in the international bullion trade, for minimal effort. And that it was for him, through the 'goodwill' deposit, to demonstrate the buyer's ability to perform financially, given who the supposed buyer was, borders on the ridiculous. Of course the question now is not whether he was negligent in putting up the deposit but negligent in not telling Flionis what it was all about, given the size of the amount and its importance to his personal financial position.

[36] Bartlett said in evidence, as I have mentioned, that Hardaker told him not to communicate with the appellant and that she had arranged everything. He said he had been dealing with her on a fairly frequent basis for the best part of a year beforehand. She was well spoken, he got on with her and he had no reason to distrust her. He therefore believed her assurances. Asked by the learned Judge whether he had ever met her, he revealed that he had met her only once.

[37] Bartlett's evidence reveals that he fully realised the importance of telling Flionis of the fact and reason for the deposit. That he believed the bullion sale story – which clearly he did – supports his assertion that he believed Hardaker when she said she had told Flionis all about the deposit. But just as he erred to an absurd degree in believing he would earn (at then exchange rates) about R48 million for putting up a R3.1 million deposit, so he erred in trusting Hardaker's assurance about her alleged communications with Flionis. A reasonable person in his position would not have accepted those assurances on such an important issue from someone he really only knew over the telephone. Such person would have put Flionis in the picture so as to avoid any risk. That was especially so bearing in mind how big a sum he was depositing and the fact that he would not have been able to repay his loan to Loewen if the money was not securely dealt with while in Flionis's trust account. In the result, in my view, the appellant established contributory negligence on the part of Bartlett.

[38] As to the related issue of apportionment, it is trite that there is no accurate measure by which departure from the standard of conduct of a reasonable person can be expressed. The conduct of Flionis and Bartlett both fell below that standard to a substantial degree. Flionis should not have accepted the Gambino instructions at face value. It could possibly be inferred that Hardaker was in touch with Flionis before 5 March 1999 because somebody must have told him to make her commission cheque payable to BR Hardaker not KD Hardaker. However, there is no evidence from Flionis that Hardaker somehow introduced Gambino or that Gambino was an existing client of the firm. On the proved facts the Gambino 'instructions' could just as well have come out of the blue. And they purported to request a transaction that would more appropriately have been implemented by a bank or broker than an attorney. As against that, the depositor's identity and instructions could have been obtained relatively easily.

[39] It seems to me that Flionis and Bartlett were about equally at fault in so far

as the deposit and its receipt into the trust account were concerned. Nothing occurred after that (until 2 April) which should have caused Bartlett to rethink the matter. However something more did occur in so far as Flionis was concerned. On 10 March 1999 the second Gambino letter was faxed. Although the formation of some of the letters is similar in both that fax and the one of 3 March, there are obvious differences when it comes to other letters and some numerals. In addition, the general appearance of the writing clearly differs in the later fax. One does not need expert evidence to discern these features. And the issue is not whether the writer was in fact the same but whether the mere appearance of the writing should have put Flionis on his guard. Flionis nevertheless proceeded to pay out nearly R1 million more after 10 March. Finally, having been told by Bartlett in his letter of 3 April who the true depositor was and having answered Bartlett by letter dated 6 April, Flionis nonetheless proceeded on 7 April to make a final payment out of the trust account. And overarching all of this is the fact that while Bartlett, like any individual, was bound to take reasonable steps to safeguard his own interests, Flionis was burdened with the obligation to exercise special care, responsible, as he was, for the safeguarding of others' money in his trust account.

[40] Quantifying the parties' respective degrees of fault as best one can, I conclude that Flionis's conduct departed more from the reasonable person standard than did Bartlett's. I assess that Flionis was 60% at fault in relation to Bartlett's loss and the latter 40%. The award of damages made by the Court below must therefore be reduced from R3,1 million to R1,86 million.

[41] Turning to the fourth issue, the *mora* date which is the subject of the cross-appeal, there are two possible dates earlier than the date of judgment from which interest could, under s 2A of the Prescribed Rate of Interest Act 55 of 1975, have been ordered to run. One was 7 April 1999 when Bartlett wrote to Flionis in response to the latter's disclosure that the money had been disbursed in accordance with the instructions of his client, Gambino. The salient part of the

letter quoted above, called upon Flionis to call upon Gambino to repay. It was not a demand on Flionis to repay. The section requires the *mora* date to be 'the date on which payment of the debt is claimed by service on the debtor of a demand', plainly meaning that the demand must be directed to the debtor. The letter of 7 April 1999 was not a demand within the meaning of the section. Accordingly the only earlier date which could have been employed was the date of the service of the summons. That was 15 February 2002. On the basis that that was the *mora* date the cross appeal was conceded. It was not in dispute that the applicable interest rate in the absence of proof of any other appropriate rate, was 15,5%. As indicated, Bartlett's award of damages must be reduced to R1.86 million. Interest on that sum at 15,5% from 15 February 2002 until 29 July 2004 (the date of judgment in the court below) amounts to R696 725. The recovery of additional interest in that amount represents substantial success. The costs of the cross-appeal must therefore be paid by the appellant.

[42] Reverting to the appeal, the remaining question concerns the costs of appeal and costs in the court below. Reduction of the trial court's award to R1,86 million constitutes substantial success for the appellant entitling it to the costs of appeal. However, there is no reason to alter the costs order in the court below. The parties were agreed that the case warranted the costs of two counsel and no reason suggests itself why such costs should not be ordered.

[43] The appeal succeeds with costs and the cross-appeal succeeds with costs. In each instance the costs will include the costs of two counsel.

Paragraph 1 of the order of the court below is altered to read as follows:

'1. R1 860 000 plus *mora* interest at 15,5% from the date of service of the summons until the date of payment.'

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CT HOWIE
PRESIDENT SCA

CONCUR:

Zulman JA
Navsa JA
Brand JA
Van Heerden JA