IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

Case No: 4067/18

In the matter between:

BEN ADRIAN JURGENS First Applicant

WENDY JURGENS . Second Applicant

and

LYNETTE VOLSCHENK Respondent

JUDGMENT

TOKOTA J:

[1] The applicants seek an order for the payment of damages in the amount of R967 510.53 from the respondent, an attorney and a conveyancer who was mandated to sell their property. The amount claimed is the net amount resulting from the sale of their property. At the time the mandate was given they were in the Republic of South Africa. They subsequently emigrated to the United States of America. The claim is resisted by the respondent on the basis that she was not negligent in any manner.

Factual background:

[2] The applicants have since relocated to the United States of America. The material facts are largely common cause or not seriously disputed. Prior to their emigration and during April 2017 the applicants instructed the respondent, a conveyancer, to effect transfer of one of the applicants' properties situated at Bogonia Street, Uitenhage. The transfer was successful and the applicants were duly paid the proceeds of the sale using their Standard Bank account which they had furnished to the respondent.

[3] The applicants were the joint owners of Erf 6496 situated at 11 Couldridge Crescent, Jansedal, Uitenhage. During October 2017 they appointed the respondent to act as their conveyancer in the sale of the said property. As the applicants were intending to relocate to the United States of America they expected the sate transaction to be finalised before their departure.

[4] On 13 December 2017 the first applicant (hereinafter referred to as Jurgens) received an email from one Natasha Viviers (Natasha), the respondent's secretary, advising him that the transfer papers of the property had been lodged with the Deeds Office the previous day. On the same day Jurgens advised Natasha that the proceeds of the property should be transferred into his Standard Bank account, which was previously used in the Bogonia property. He assumed that since there was a previous transfer of money into that account the respondent was in possession thereof.

[5] On 14 December 2017 Jurgens received an email purporting to be from Natasha requesting proof of the account number in Standard Bank. Unbeknown to Jurgens that this was a hacked email address he responded thereto by furnishing his bank account number. Since this email address was different from the one he knew as that of Natasha, he also forwarded the details to the legitimate email address of Natasha. At all times, when dealing with Natasha, Jurgens always copied the respondent all the correspondence between him and Natasha.

[6] On 15 December 2017, using both the hacked and legitimate addresses, Jurgens enquired as to when he could expect payment of the proceeds of the sale. On 18 December 2017, Natasha responded and informed Jurgens via email that the transaction had yet to come for registration. Natasha's hacked address, together with that of the respondent, was included in the correspondence. On 21 December 2017, Jurgens received an email from Natasha's hacked email address to which a registration letter, final account and proof of payment were enclosed. Jurgens was requested to direct any further correspondence to the hacked email address since the offices were to be closed for holiday.

[7] Proof of payment aforesaid reflected transfer of the proceeds from respondent's Nedbank account to Jurgens' Standard Bank account.

[8] On 26 December 2017 Jurgens addressed an email to the respondent advising her that he had not yet received the money notwithstanding the purported proof of payment dated 21 December 2017.

[9] On 27 December 2017 Jurgens sought clarification from Nedbank and copied such email to both the respondent and Natasha. Following that the respondent advised Jurgens that the emails between his and that of Natasha had been hacked. Apparently, his email address had been hacked and was used to furnish the Absa bank account to Natasha. The applicants did not have any account with Absa Bank.

[10] The respondent alleges that she was not aware that Jurgens' address had been hacked. On a Friday the 15th of December 2017 Natasha received an email purporting to be from Jurgens advising her that the money should be deposited in "his" interest bearing account with Absa Bank details which would be furnished on the following Monday.

[11] On Monday 18 December 2017 Natasha received two documents purporting to be from Jurgens. These were a letter confirming that Jurgens had an account with Absa Bank and a "statement" purporting to have been drawn from the account.

[12] On Friday 20 December 2017 the purchaser's bond attorneys paid into the trust account of the respondent a sum of R850 000 being the balance of the purchase price of the property. On 21 December 2017, the respondent went to the office to effect transfer of the money to the applicants. The bank account of Jurgens appeared to have been amended to be that of Absa Bank. After payment was effected proof of payment was forwarded to the hackers. The hackers then amended proof of payment into the legitimate Standard Bank account of Jurgens and forwarded the same to him together with legitimate registration letter and final statement of account.

[13] Jurgens did not receive any money as expected. He then made enquiries with NedBank, where the account of the respondent was kept, as to why the money had not been paid. It was then that it was discovered that fraud had been perpetrated. By that time it was too late because the balance left at Absa Bank was R65 584.21 of the R967 510.53 amount paid.

[14] In view of the above the applicants did not receive the money of the proceeds of the sale of their property. They hold the respondent liable for the loss in that they allege that after an agreement was concluded that she would act on their behalf she owed them a duty of care and that she was negligent in paying the amount to the hackers and that such negligence caused the loss.

[15] The respondent denies that she was negligent in any manner. She admits that she owed the applicants a duty of care to ensure that her mandate was carried out with due care, skill, and diligence but avers that she indeed carried out the mandate with due care, skill and diligence expected of a reasonable attorney and a conveyancer in the circumstances.

[16] Attorney's profession is an honourable profession which demands complete reliability and integrity from the members thereof. It is, therefore, the duty of an individual attorney to ensure, as far as she/he is able to do so, that he/she measures up to the high standards demanded of him/her. A client who entrusts his affairs to an attorney must be able to be rest assured that the attorney concerned is an honourable man who can be trusted to manage his affairs meticulously in the

interests of the client. When money comes to an attorney to be held in trust, the general public is entitled to expect that that money will not be distributed for any other purpose than that for which it is being held, and that it will be available to be paid to the persons on whose behalf it is held whenever it is required.

[17] Van Zyl in his work **Judicial Practice of South Africa 4th ed:**says

> *"The law extracts from an attorney uberrima fides — that is, the highest possible degree of good faith. He must manifest in all business matters an inflexible regard for truth; there must be a vigorous accuracy in minutiae, a high sense of honour and incorruptible integrity; he must serve his client faithfully and diligently."*

[18] If regard is had to paragraphs 15 and 16 of the applicants' founding affidavit the claim by the applicants is based purely on contract of mandate which they had entered into with the respondent.

[19] In **Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd 1985 (1) SA 475 (A),** Grosskopf AJA stated the following at 499D – E.

> *"In the present case we do not have an infringement of any of the respondent's rights of property or person. The only infringement of which the respondent complains is the infringement of the appellant's contractual duty to perform specific professional work with due diligence; and the damages which the respondent claims, are those which would place it in the position it would have occupied if the contract had been properly performed."*

The learned Judge of Appeal concluded at 499A-501H that he considered that policy considerations militated strongly against delictual liability being imposed for the negligent breach of a contract. He stated: *'In applying the test of reasonableness to the facts of the present case, the first consideration to be borne in mind is that the*

respondent does not contend that the appellant would have been under a duty to the respondent to exercise diligence if no contract had been concluded requiring it to perform professional services.'

The applicants' main contention is that the respondent, being a conveyancer, failed to execute the necessary diligence, skill and care required of a reasonable attorney as contemplated in their agreement.[1]

[20] In **Margalit v Standard Bank of SA Ltd 2013 (2) SA 466 (SCA) para.23** Leach JA said:

"[23] *A conveyancer is of course 'an attorney who has specialized in the preparation of deeds and documents which by law or custom are registerable in a deeds office and who is permitted to do so after practical examination and admission . . .'.Like any other professional, a conveyancer may make mistakes. But not every mistake is to be equated with negligence, and in a claim against a conveyancer based on negligence it must be shown that the conveyancer's mistake resulted from a failure to exercise that degree of skill and care that would have been exercised by a reasonable conveyancer in the same position. As was remarked many years ago by De Villiers CJ, in a dictum recently followed by this court:*

> *'I do not dispute the doctrine that an attorney is liable for negligence and want of skill. Every attorney is supposed to be reasonably proficient in his calling, and if he does not bestow sufficient care and attention, in the conduct of business entrusted to him, he is liable; and where this is proved the Court will give damages against him.'"*

[21] The court has to determine in the light of the facts of this case whether or not the respondent was negligent in the performance of her mandate resulting in the loss sustained by the applicants.

[1] **See also Holtzhausen v Absa Bank Ltd 2008 (5) SA 630 (SCA) para.6**

[22] An attorney will be liable to his/her client for damages suffered as a result of his negligence in the performance of his mandate. This liability is based on the breach of contract between the parties. It is a term of the mandate that the attorney concerned will execute the mandate by exercising his skill, adequate knowledge and diligence expected of an average practising attorney. He may be held liable even when he committed an error of judgment on matters of discretion if the attorney failed to exercise the skill, knowledge and diligence.[2]

[23] It has been held that expert evidence needs to be led which would prove what a conveyancer in the position of the respondent, faced with a similar case under similar circumstances, would have done but failed to so act with the necessary care, skill and diligence which would ordinarily be expected from a reasonable attorney.[3] However, this rule is not inflexible. It depends on the facts and nature of the case.

[24] In **Margalit** supra[4] the learned Judge of Appeal put it aptly as follows:

> *"[24] Although at times a court may need expert evidence on a particular professional practice to determine whether a professional person acted negligently, that is not a fixed and inflexible rule and the views of a professional, while often helpful, are not necessarily decisive. The nature of the conduct complained of may well be such that a court, even without the benefit of professional opinion, may determine that the conduct complained of was of such a nature that it clearly falls below the mark of what can be regarded as reasonable. This, in my view, is such a case (I should mention*

[2] **Bruce NO v Berman 1963 (3) SA 21 (T) at 23G; Mouton v Die Mynwerkersunie 1977 (1) SA 119 (A) at142H; Thoroughbred Breeders' Assoc v Price Waterhouse 2001 (4) SA 551 (SCA)**
[3] **Steyn NO v Ronald Bobroff & Partners 2013 (2) SA 311 (SCA) para.27**
[4] **Para 24.**

that the expert evidence called by the parties in this case, while extremely helpful in explaining the mysteries of certain procedures in the deeds office, did not deal pertinently with all the issues relevant to the second respondent's negligence).”

[25] The applicants entrusted their affairs to the respondent. She was furnished with the Standard Bank account in the previous dealings with her and in this matter. It was, therefore, encumbent upon the respondent to verify the sudden change of the bank account. The account was furnished within a short space of time. On 14 December 2017 Jurgens furnished his Standard Bank account and on 15 December 2017, the following day, another account different from the first one was furnished by the hackers.

[26] The furnishing of different banking institution within such short space of time should have raised eyebrows to the respondent. First, the statement which purported to be from Absa Bank did not have names and addresses of the account holder. Second, most of the transactions in the statement were made in Gauteng in places such as Cresta, Centurion, Randburg and Fourways and cash deposits made in respect of Sotho speaking people. Third, the sudden change of banking institution was made a day after the Standard Bank account was given. A diligent, reasonable attorney would have taken steps to verify the information from Jurgens. The respondent failed to do so. It is no defence to pass the buck to her secretary and state that the account was dictated to her by her secretary. She owed a duty to her clients to act in their interests and safeguard their money. In my view, a reasonable attorney in her position would have exercised more care under the circumstances

outlined above. She failed to do so and the applicants suffered loss as a result of her negligence.

[27] When the respondent entrusted the management of the applicants' affairs to her secretary she had a duty to ensure proper supervision and control in order to safeguard her clients' money. When a client instructs and an attorney accepts instructions to perform certain services for that client, there arises an implied term in the agreement between attorney and client, that the attorney will perform the services required in a professional, non-negligent manner. This duty arises as a matter of law.

[28] The amount claimed is not in dispute. It follows therefore that if I find in favour of the applicants the respondent must be ordered to pay the amount claimed. There was a faint argument on behalf of the respondent that the claim should have been brought by an action. This point was not pertinently raised in the papers, correctly so in my view. The facts of the case are common cause. The issue was whether the respondent acted negligently when she paid the amount to a wrong person. The amount claimed is not disputed.

[29] The applicants have claimed interest on the amount from the 20th of December 2017 to date of payment. In the circumstances of this case I do not think it will be fair to the respondent to pay interest from that date. I am of the opinion that since she has only been found to be liable by this Court justice will be served if she is ordered to pay interest from the date of the order.

[30] In the premises the application should succeed. The usual rule is that costs should follow the event unless there are exceptional circumstances justifying a departure from the rule. I can see none.

[31] In the result the following order is made.

1. The respondent is declared liable to the applicants for the payment of R967 510.53 and is ordered to pay to the applicant the said amount;
2. The respondent is ordered to pay interest on the amount stated above to be calculated at the rate of 10.25% from the date of this judgment to date of payment.
3. The respondent is ordered to pay costs of this application.

B R TOKOTA
JUDGE OF THE HIGH COURT

Appearances:

For the applicant: B Dyke SC

instructed by: Goldberg & devilliers Inc.

For the respondent: A C Barnet

Instructed by: Lynette @law

Date of hearing: 13 June 2019.

Date judgment delivered: 27 June 2019.