IN THE HIGH COURT OF SOUTH AFRICA
(NORTH WEST DIVISION, MAHIKENG)

CASE NO: 718/12

In the matter between:

GERHARDUS STEPHANUS BOTHA	**Plaintiff**
And	
EDWARD LEONARD NZABANDSABA INC. ELN number: 2005/022127/21)	**1st Defendant (Registration**
EDWARD JOHANNES LEONARD	**2nd Defendant**
MARETHA SCHOLTZ	**3rd Defendant**
MADELEIN BRAZELLE (Now Greyling)	**4th Defendant**
SARAH JEANETTE ESTERHUYSE	**5th Defendant**

CIVIL MATTER

KGOELE J

DATE OF HEARING	**:**	**9-11/10/17; 12-14/03/18 and 11-12/06/18**
DATE OF JUDGMENT	**:**	**4 OCTOBER 2018**
COUNSEL FOR THE PLAINTIFF	**:**	**Adv. Van Heerden**

COUNSEL FOR THE DEFENDANT : Adv. Griesel

JUDGMENT

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[1] The plaintiff (**Botha**) instituted an action against the defendants claiming damages that he suffered as a result of the defendants' failure to perform or properly perform the mandate he gave to them, and thereby acting negligent in their duty as his attorneys.

[2] The first defendant (**ELN**) is a firm of attorneys practicing in Rustenburg, with the second to fifth defendants (**Leonard, Scholtz, Greyling and Esterhuyse**) being its Directors who represented the first defendant at the time the cause of action arose. The plaintiff alleges that they are jointly liable to him in terms of Section 23 of the Attorney's Act 53 of 1979 (**the Attorneys Act**) read with Section 53 of the Companies Act 61 of 1973 (as amended) and Section 15 and 77 of the Companies Act, 71 of 2008 (**the Companies Act**). Plaintiff furthermore claims that second defendant (**Leonard**) is also liable to him in her personal capacity due to his failure to act and perform his mandate in a manner to be expected from a reasonable attorney in his position.

[3] At the commencement of the trial plaintiff sought an amendment of the capital amount of its claim from R2 500 000-00 in prayer 1 to read R1 900 000-00. The amendment was granted by this Court. Furthermore, the plaintiff withdrew his claim against Greyling and Esterhuyse, by agreement on the 10 October 2017. The only defendants remaining are therefore the first (ELN), the second (Leonard) and the third (Scholtz). For the sake of convenience they will hereafter be referred to as "**the defendants**".

[4] Plaintiff testified and indicated that Leonard in particular, has been his friend and attorney for several years prior to the cause of action arising. He further testified that Leonard facilitated short term bridging finance and loans between the plaintiff and his (Leonard) other clients. The plaintiff further alleges that during 2006 an oral agreement of mandate was concluded between the plaintiff and Leonard. This was after Leonard introduced him to one Mr Van Niekerk (**Van Niekerk**), a successful property developer, requiring short term bridging finance from time to time.

[5] According to him the defendants agreed to act as attorneys to advise him in respect of the loan agreement and to draw documents or agreements on his behalf to give effect to the terms of the loan agreement. In particular, according to him, Leonard undertook to ensure that these transactions were safe and without risk. The plaintiff testified that he throughout understood this to mean that Leonard shall ensure that all the necessary securities and warrantees are in place, sound and properly executed. Plaintiff maintained that he always, with each loan agreement entered into with Van Niekerk thereafter, repeatedly told Leonard that he must ensure that the transactions are secure, save and sound as he cannot afford to lose money at his age. Furthermore that, the agreements should be in writing, should be correct and it should be valid, enforceable and properly executed. This, according to him was a continuous instruction to the defendants in all the agreements he concluded, especially to Leonard.

[6] The plaintiff further testified that Leonard, in his representative capacity of the first defendant, was the person responsible for the drafting of all his contracts. Whether Leonard delegated the drafting of the contracts to Greyling or not, was not specifically conveyed to him and plaintiff accepted that Leonard oversaw the process. Plaintiff testified that he further accepted that all the attorneys that were involved in his agreements acted in their cause of employment with ELN and they would also act on the instructions of Leonard.

[7] With regards to the negotiations between the parties as to the terms of the contracts between him and Van Niekerk, the plaintiff testified that Leonard and Van

Niekerk would discuss the requirements of Van Niekerk and also which securities would be offered to him by Van Niekerk, further that Leonard would then inform the plaintiff of such. Once the plaintiff is in agreement with such proposed terms and upon receipt of Leonard's confirmation that the necessary securities are available, the plaintiff will give Leonard the instructions to draft the relevant contracts. According to him he did not consult any other attorney regarding these contracts, seeing that Leonard has been his attorney for years and therefore a relationship of trust existed between them. The plaintiff testified further that he has put all his confidence in Leonard. He further testified that at no point in time did he and Van Niekerk discuss these transactions and/or the terms thereof directly with each other and/or without Leonard being present.

[8] His testimony is to the effect that he was at all the times under the impression that Leonard acted on behalf of both himself and Van Niekerk during these negotiations and transactions. The plaintiff testified, which evidence was corroborated by Van Niekerk, that none of the defendants ever informed them that the execution of the contracts, including the registration the first mortgage bond in favour of the plaintiff over the Safari Gardens property as stipulated in the September 2008 agreement was not done as agreed. The plaintiff maintained throughout his cross examination that he was never informed about this and that he only found out that the bond was not registered in his favour during the insolvency enquiry in late 2011, when he consulted with his present attorneys of record.

[9] The plaintiff accepted that when ELN's office sent him the contract to sign, that Leonard had gone through the contract and that he was satisfied with the contents thereof. After signing the contract, he was satisfied that he had adequate security for the loan and therefore paid the loan amount of R1, 900, 000.00 (ONE MILLION NINE HUNDRED THOUSAND RAND) to Van Niekerk. He further testified that he expected Leonard as his attorney, to inform him if any problems arose with his securities so that they can come up with a plan for an alternative one.

[10] The plaintiff also testified that he specifically asked Leonard what the risks involved

in the loan were if Van Niekerk's businesses encountered problems, to which Leonard responded by saying to him that all his "…*securities and guarantees are in place"* and that "…*he thinks that this whole thing would be safe…"*

[11] Plaintiff testified that the terms of the September 2008 agreement between him and Van Niekerk were that he would borrow R2, 500, 000.00 (TWO MILLION FIVE HUNDRED THOUSAND RAND) to van Niekerk in his personal capacity, as well as to his company known as VNP Projects (Pty) Ltd (**VNP Projects**). As security for this loan, the defendants would cancel the current first mortgage bond in favour of ABSA and simultaneously to such cancellation, would register a first mortgage bond in favour of the plaintiff over Van Niekerk's Safari Gardens property. Furthermore, Van Niekerk's right, title and interest in the Company known as Union Square Properties 47 (Pty) Ltd would be ceded to the plaintiff and ELN were to pay R200, 000.00 (TWO HUNDRED THOUSAND RAND) to the plaintiff upon registration of the first five units in the Stoffberg scheme as partial repayment of this loan. The agreement is a bone of contention in this matter and the main cause of the plaintiff's claims against the defendants.

[12] The plaintiff testified that if the first mortgage bond was registered and the shares were ceded as stipulated in the September 2008 agreement, he would not have lost all his money. He repeatedly testified that he is not a lawyer and does not understand the legal technicalities of the agreement. For that reason he put all his faith in Leonard to protect his interests.

[13] Mr Sarel Johannes Van Niekerk (**Van Niekerk**) testified after being subpoenaed by the plaintiff to speak about the negotiations between the parties. He testified that he was a developer and all of his legal work was being handled by ELN, represented by Leonard. Van Niekerk confirmed the plaintiff's evidence that Leonard introduced him and the plaintiff to each other as potential borrower and lender.

[14] Van Niekerk also confirmed the plaintiff's evidence that he and the plaintiff never

met alone to negotiate the terms of the contracts between themselves. He testified that seeing that Leonard was their attorney, he knew when there was a shortfall on a project and that Van Niekerk, or one of his companies, needed funding. He would discuss his need for funding with him, and Leonard would then discuss this with the plaintiff. Thereafter they would all have lunch and discuss the overall project and terms of the agreements. Leonard would then facilitate the transaction between the parties, including the securities, payment terms and interest rate. Once the parties agreed on the terms, Leonard would draft the relevant contracts.

[15] Van Niekerk testified further that Leonard knew what the total proceeds of all the units in a scheme would be due to him being their attorney and conveyancer. He knew the selling price of the units and he also dealt with the commercial banks with regards to funding. Accordingly, it was easy for Leonard to calculate the shortfall on a project. According to Van Niekerk's recollection, there was sufficient equity in the Stoffberg units at the time of transfer, but he also recalls Investec placing a moratorium on payments to third parties from the transfer of each transaction in that development.

[16] Van Niekerk testified that in early 2009, he had alternative properties registered in his name. He had a new house that was built in Cashan, Rustenburg. The bond on this house was to the value of +/- R2, 000, 000.00 (TWO MILLION RAND), whilst the house was worth +/- R6, 500, 000.00 (SIX MILLION FIVE HUNDRED THOUSAND RAND). He also had shares in a farm.

[17] It was also the evidence of Van Niekerk that it was never his idea to liquidate his company, Union Square Properties 47 (Pty) Ltd. It was on the advice of Leonard during early 2009 that he liquidated the company. Leonard advised him to liquidate the company after Investec Bank threatened to do so, confirming that by doing so, they could be in control of the liquidation process. He also testified that at no stage during the liquidation consultation did they discuss the amounts due to the plaintiff.

[18] Van Niekerk further testified that because of the fact that the defendants did all of

their conveyancing work, there would be funds in their trust account and ELN office would regularly make payments to their creditors on their behalf using these funds in trust. He was referred to the deposit slips on pages 268-270 of the trial bundles to confirm his assertion regarding payments from the trust fund.

[19] Ms. Niewenhuizen testified as the third witness for the plaintiff. She confirmed that she is the daughter of the plaintiff and is employed as his assistant. She testified that she rarely ever spoke to the offices of VNP Projects (Pty) Ltd directly. She mainly corresponded with the office of ELN regarding the transactions between the plaintiff and Van Niekerk or VNP Projects (Pty) Ltd. She further testified that she only acted on her father's instructions and made payments to whoever and on whichever date, in whichever amount her father instructed.

[20] She testified further that plaintiff always instructed her not to make payment in respect of any loan advanced to Van Niekerk prior to ELN and/or Leonard confirming that the securities are sound and in order and that the necessary contracts are duly executed.

[21] Two witnesses testified on behalf of the defendants. First, it was Madelein Greyling, who was previously the fourth defendant and was also a conveyancer in the employment of ELN from 2005 until March 2010.

[22] Ms Greyling testified that she was the person responsible for the drafting of some of the loan agreements and / or acknowledgements of debt between the plaintiff and Van Niekerk. She was also the conveyancer responsible for the registration of the property transactions. She testified that the instructions to draft these contracts or to attend to the registrations and transfer of the properties would come from Leonard. Leonard would mostly deal with the clients directly and then provide instructions to her as to what contracts must be drafted and what the contents of these contracts should be.

[23] Ms Greyling was ostensibly also the person who drafted this specific contentious agreement in question (the September 2008 agreement) on the instructions of Leonard. Ms Greyling further testified that at the time of the conclusion of the September 2008 agreement, a third party had already signed an offer to purchase the Safari Gardens property, however this person failed to fulfil the suspensive condition by providing the required bank guarantees and the offer to purchase became *null* and *void*. I interpose to mention that this version of the defendants was however never put to the plaintiff or Van Niekerk in order for them to answer thereto.

[24] According to Ms Greyling, the existing first mortgage bond registered on the Safari Gardens property in favour of ABSA Bank, was approximately R600, 000.00 (SIX HUNDRED THOUSAND RAND), which was the amount required to cancel the bond before the plaintiff's bond could be registered. She also testified that the bond amount was much less than what the property was worth. This evidence confirmed Van Niekerk's evidence, given the fact that he testified that the bond should have been less than R700, 000.00 (SEVEN HUNDRED THOUSAND RAND) and that the property was worth, to his mind, more than R1, 500, 000.00 (ONE MILLION FIVE HUNDRED THOUSAND RAND). Ms Greyling testified that the first mortgage bond in favour of ABSA Bank was never cancelled and for this reason the first mortgage bond in favour of the plaintiff was not registered as stipulated in clause 1.2. of the September 2008 agreement. According to her, ELN offices never received the required funds in order to settle ABSA Bank's bond so that it can be cancelled.

[25] Ms Greyling confirmed that the amount of R200 000.00 per unit was never paid to the plaintiff upon the registration of the first five units in the Stoffberg Scheme due to there being no profits payable to the seller on registration. This was due to Investec Bank insisting on the full proceeds of each unit, save for the VAT that needed to be paid to SARS. When asked during cross-examination whether one can accept that there was an office file for this September 2008 agreement, she confirmed that there was an office file, however she was not able to tell where the office file is. She indicated that the file was supposed to be at the ELN offices, but she did not know whether they still had the file or whether it has already been

destroyed.

[26] During cross-examination she was asked whether she agreed that this particular office file containing the documents and file notes to support the defendants' version, were extremely relevant, to which the witness responded by confirming that it was relevant. Ms Greyling told this Court that she did not communicate to the plaintiff that the suspensive condition was not fulfilled, but she informed Leonard about it and Leonard said that he will inform the plaintiff. Whether Leonard did this in writing or verbally she could not recall. She further testified that she never asked the plaintiff or Van Niekerk directly for the funds to cancel the existing ABSA Bank bond, she spoke only through Leonard.

[27] It is common cause that the September 2008 agreement is headed "*Skuldakte*", translated in English to "*Acknowledgment of Debt*", and it is further common cause that a past tense was used in the agreement creating the impression that the money was already loaned to Van Niekerk, whilst in actual fact the money was only paid to Van Niekerk after the agreement was signed. When asked why she headed the agreement "*Skuldakte*" and not "*Loan Agreement*", her only explanation was that there were similar transactions in the past between the parties and they referred to them as acknowledgments of debt. She could not recall why she used the past tense, instead of future tense. The witness was further asked whether one can accept that the parties required that an agreement be drafted and signed before the money would be paid, to which the witness answered in the affirmative.

[28] When asked what an attorney in her position would normally do in a situation when they needed funds to cancel the existing bond, Ms Greyling answered that Van Niekerk or the plaintiff should have been asked to provide them with the funds to cancel the bond. Another option would also be to register a second bond over the property seeing as there was equity in the property for such a second bond. She indicated that the banks are reluctant to grant consent for a second bond. She did not discuss these alternative options with the parties, but was told by Leonard that he discussed these three options with the plaintiff and Van Niekerk.

[29] She also testified that Leonard was responsible to obtain instructions from the clients when it became apparent to them that registering the first bond in favour of the plaintiff was impossible, but she cannot recall that Leonard ever reverted to her with regards to whether or not he obtained instructions. Further that, Leonard also never gave her instructions to draw up an alternative agreement for the parties. She could not recall whether she asked Van Niekerk to provide her with a resolution from Union Square Properties 47 (Pty) Ltd when she drafted the September 2008 agreement.

[30] The second witness who testified for the defendant's case was Mr Leonard, the second defendant in this matter. He confirmed that both the plaintiff and Van Niekerk were clients of his firm. He testified that the plaintiff had been his client since about 2000 and Van Niekerk had been his client since about 2004 or 2005. Leonard further confirmed the evidence of the plaintiff and Van Niekerk that he introduced the parties to each other in their capacities as potential lender and borrower.

[31] He testified that he was not instructed to advise the plaintiff regarding the risks and/or lack thereof pertaining to security provided in terms of the September 2008 agreement. He told the Court that he would not accept instructions like this simply because he does not have knowledge of this and the attorneys' indemnity insurance would not cover claims based on financial advice given to clients.

He testified that he had knowledge of litigation, liquidation, debt collecting and conveyancing only. He further testified that he informed the plaintiff and Van Niekerk verbally regarding the fact that the first mortgage bond could not be registered in favour of the plaintiff.

[32] He further testified that upon informing the plaintiff of the impossibility to register his first bond, the plaintiff allegedly responded to this news by telling him "*to wait*". He thought that by saying this the plaintiff meant that he was supposed to wait for the money. Leonard also testified that he was involved in an estate agency called

Rustenburg Estate Agents CC and some of the agents borrowed money from the plaintiff. His version is that he did not share in the interest that Van Niekerk paid to the plaintiff. According to him, when the plaintiff allegedly offered 2% of the interest to him, he declined, but indicated that the plaintiff can use that 2% as payment for the loans that some of the "girls" owed to the plaintiff. He further testified that he allegedly informed the plaintiff as soon as it became apparent that it would not be possible to pay the plaintiff R200, 000.00 upon the registration of the first five units in the Stoffberg scheme. He also testified that he thought the cession agreement was valid and that he advised the plaintiff to consult an alternative attorney.

[33] Leonard denied that he advised Van Niekerk to liquidate Union Square Properties 47 (Pty) Ltd. It is his version that after Van Niekerk received the letter of demand from Investec threatening them with liquidation, he allegedly advised Van Niekerk to discuss the letter with his partner and "*do something about it*". During his evidence in chief it was put to him that it is not in dispute that his firm attended to the transfers and acted as the conveyancers for the transfer of the units in the Stoffberg scheme, which he acknowledged.

[34] During cross-examination Leonard was asked why the bonds for the Buschrock properties (the previous loan) was only registered in 2010, approximately two and a half years after the agreement was signed. He testified that he cannot assist this Court by clarifying this issue, despite his name appearing on the letter which was sent to the correspondents with the instructions to register the bond.

[35] The above sums up the evidence that was before this Court on behalf of both the plaintiff and the defendants.

[36] For purposes of his claim for damages the plaintiff seeks to be placed in a position that he would have been, had Van Niekerk and VNP Projects duly performed their obligations in terms of the loan agreement. The plaintiff's case is thus that, had the defendants duly performed their mandate, the plaintiff would have been in a position to successfully enforce the provisions of the loan agreement against Van

Niekerk and VNP Projects, so as to claim payment from them of the amount loaned and advanced, plus interest thereon.

[37] The plaintiff alleges that he suffered damages in the sum of R1 900 000-00 plus interest of R43 660.00 per month from January 2011 to 17 March 2011, being the capital amount and interest that was allegedly not repaid to the plaintiff in terms of the loan agreement, due to the defendants' alleged failure to properly perform their mandate.

[38] The case of the defendant on the other hand summarized is that the plaintiff failed to prove on a balance of probabilities that the defendants breached the contract of mandate relating to the September 2008 loan agreement in that he:-

(a) failed to prove that he suffered any damages;

(b) the plaintiff did not perform his own obligations in terms of the loan agreement, nor is there any evidence that he tendered to do so; (This leg of defense was resorted to only with regard to the fact that this Court find that he would have been entitled to enforce his rights);

(c) failed to prove a breach of the contract of mandate relied upon;

(d) the alleged breaches of the contract of mandate are entirely without merit.

[39] The question which this Court must ultimately decide is whether the defendants acted in a manner to be expected from a reasonable attorney in their positions as such, and furthermore, whether the defendants should have foreseen the possibility of harm to the plaintiff and had taken the necessary steps to avoid such harm.

[40] It is trite law that the purpose of pleadings is to define the issues so as to enable the other party to the litigation to know what case he or she has to meet. Parties are therefore limited to their pleadings. A party cannot be allowed to direct the

attention of the other party to one issue and then at the trial attend to rely on another.

[41] The relationship between an attorney and its client is based on contract of mandate: See: **Mort N.O. v Henry Shields-Chiat 2001 (1) SA 464 (C).**

[42] The scope of an attorney's mandate depends on the express, tacit or implied terms of the contract of mandate, See: **Joubert Scholtz Inc and Others v Elandsfontein Beverage Marketing (Pty) Ltd [2012] 3 All SA 24 (SCA).**

[43] A party alleging a contract must allege and prove the terms (express or tacit) of the agreement on which he or she seeks to rely. See: **McWilliams v First Consolidated Holdings (Pty) Ltd 1982 (2) SA 1 (A).**

[44] The liability of an attorney to its clients for damages resulting from the attorney's negligence is based on a breach of the contract of mandate between the parties. It is an implied knowledge and diligence expected of an average practicing attorney in performing its mandate. See: **Mouton v Die Mynwerkersunie 1977 (1) SA 119 (A); Slomowitz v Kok 1983 (1) SA119 (A) 130 (A); Steyn NO v Ronald Bobroff & Partners 2013 (2) SA 311 (SCA)**

[45] The following was said in the book: **Amler's Precedents of Pleadings, 6th Edition p.48** by **LCT Harms:-**

> "The relationship between an attorney and a client is based on a contract of mandate which places fiduciary obligations on an attorney. An attorney has a duty of care towards his client, his opponent and towards the court."

[46] On **page 50** of the same book the following was said:-

> "The scope of the attorney's mandate depends on the terms of the mandate, whether such terms are express, implied or tacit."

See also: **Goosen v Van Zyl 1980 (1) SA 706 (O).**

[47] In **Wishart and Others v Blieden NO and Others 2013 (6) SA 59 (KZP)** the Court stated the following:-

> "An attorney-client contract, which of course includes that with an advocate if one is briefed, gives rise to a fiduciary duty towards the client. This fiduciary duty precludes a legal professional from acting for two clients with conflicting interests at the same time."

[48] If an attorney breaches his fiduciary duty toward his client, that attorney acts improperly and unprofessionally. See: **Incorporated Law Society, Transvaal v Meyer and Another 1981 (3) SA 962 (T) at 971 C**.

[49] In **Honey & Blanckenberg v Law 1966 (2) SA 43 (R)** at page 46 E-G the Court held as follows:-

> "An attorney's liability arises out of contract and his exact duty towards his client depends on what he is employed to do … In performance of his duty or mandate, an attorney holds himself out to his clients as possessing adequate skill, knowledge and learning for the purpose of conducting all business that he undertakes. If, therefore, he causes loss or damage to his client owing to a want of such knowledge as he ought to possess, or the want of such care he ought to exercise, he is guilty of negligence giving rise to an action for damages by his client…"

[50] The plaintiff's claim is based on the defendants acting negligently as Plaintiff's attorneys. As a result, the plaintiff has to prove the following:

58.1 The Mandate;
58.2 Breach of the mandate;
58.3 Negligence;
58.4 Damages; and
58.5 That the damages were within the contemplation of the parties when

the contract was concluded.

[51] Despite being cross-examined at length, and despite the plaintiff having difficulties in understanding all the questions, he gave consistent answers to the questions relevant for consideration in this matter. He never deviated from his version even though he was cross-examined for a period of three days.

[52] Van Niekerk can be regarded as a neutral witness to the issues before Court although he was subpoenaed by the plaintiff to testify on his behalf. The reasons are that he was not present when the plaintiff testified, yet he confirmed the plaintiff's version of how they negotiated the contracts with Leonard. He had nothing to gain and nothing to lose by not testifying truthfully in Court, as he was not even a party to this proceedings.

[53] Greyling was another neutral witness according to my view and/or observation. Although she was one of the defendants in this matter before, and the person who was responsible for drafting the agreements / contracts subject to the mandate in question, she appeared to me to be a person of impeccable character. I am saying this because although she could not recall most of the things that happened prior to the cause of the action arising, her evidence seemed to be reliable given the fact that she answered honestly even if the answer was damaging to her. She even acknowledged the fact that she failed to act in accordance with what an average attorney in her position would have done when she was asked amongst others, about the manner in which the contracts were drafted, the choice of words etc, which did not depict the actual intention of the parties contracting. This, she admitted despite the fact that she was called to testify by the defendant.

[54] I am of the view that she had no reason to be biased in favour of the plaintiff because the firm she was working for is the litigant in this matter. Her evidence did not reveal any tendency of favouring one of the parties before Court, especially when there were more reasons available to can favour the defendants. Her evidence dealt with what the securities that were agreed upon were, what more

securities were needed and importantly, what an average attorney faced with the situation that was prevailing at that time would have reacted. Her evidence was fair and balanced. I find it reliable and this Court accepts it as such.

[55] Gerda, the daughter of the plaintiff's evidence was also neutral. She was just talking about her paying after been given instructions by his father, the plaintiff. The evidence did not favour any person.

[56] From the evaluation of the whole evidence before Court, it is common cause between the parties that Leonard introduced the plaintiff and Van Niekerk to each other in their capacity as potential lender and borrower. Further that both of them were clients of his firm and from long time ago before the negotiations regarding the questioned oral mandate and the contract relating thereto were concluded between them started.

[57] Coming to the issue whether there was a mandate or not between plaintiff and Leonard is concerned, the plaintiff has pleaded in his summons and testified extensively regarding the fact that the second defendant, acting as attorney on behalf of whichever firm at the time, has been his attorney for a long period of time before the cause of action arose. In fact, the plaintiff testified that ELN, represented by Leonard, was at the time that the trial commenced, still his attorney acting in certain family matters seeing as Leonard knew his family and their history.

[58] It is also clear from his evidence that the plaintiff gave Leonard a continuous mandate and upon any new instruction given to Leonard, the plaintiff reiterated its previous instructions to him which were to draft the contracts and make sure the contracts and the securities contained in the contract are 100% correct and are executed properly. This also manifest itself from the fact that the relationship between plaintiff and Leonard in as far as the entering into agreements and the drawing of such agreements, inclusive of short term bridging finance and loans between plaintiff and Leonard's clients, has been ongoing from a long time, even before the 2008 agreement in question was concluded. This was also confirmed by

Greyling in her evidence that similar agreements to the one concluded in 2008 were also drafted by her for the same parties and in the same wording.

[59] Leonard testified that he was not instructed to advise the plaintiff regarding the risks and/or lack thereof pertaining to securities provided in terms of the September 2008 agreement. He told the Court that he would not accept instructions like this seeing that he does not have knowledge of this and the attorneys' indemnity insurance would not cover claims based on financial advice given to clients. In my view, Leonard's version is not probable. As correctly submitted by the plaintiff's Counsel, an attorney, especially an attorney with more than thirty years' experience such as Leonard and who is a conveyancer by profession, should know very well what constitutes proper security for a loan amount as it forms part of the law that attorneys should be familiar with. I fully agree with plaintiff's Counsel that advising clients as to the quality of the different forms of security falls within the knowledge of the average attorney in the position of the defendants. To this end, Greyling who is an attorney and a conveyancer demonstrated in her evidence that an average attorney in his position could be able to advice a client accordingly in this regard.

[60] Furthermore, having agreed to draft contracts such as the September 2008 agreement on a regular basis for the plaintiff and then being instructed to give effect to the terms of the contract by registering the bonds in favour of the plaintiff indicates on its own that Leonard was familiar with the law regarding contracts, loans and securities. Leonard also testified that he had knowledge of litigation, liquidation, debt collecting and conveyancing. It can therefore not be said or accepted, on any interpretation of the facts before this Court, that Leonard and/or the defendants were not given a mandate by the plaintiff. In my view the plaintiff managed to proof the mandate.

[61] The other leg regarding the argument of the defendant's Counsel is that the plaintiff furthermore relies on a case that it did not plead. This argument has no merit as well. In essence, the allegations of the plaintiff as encapsulated in the particulars of claim can be summarised as follows:

61.1 The first defendant is an incorporated firm of attorneys;

61.2 At all relevant stages the second, third, fourth and fifth defendants were practising attorneys and the first defendant was represented by the second and fourth defendants;

61.3 In 2006 the second defendant, in his capacity as a practising attorney with the first defendant, introduced the plaintiff to an investment opportunity in a company belonging to and in control of an individual by the name Sarel van Niekerk, who was an existing client of the first defendant at the time;

61.4 The investments opportunity entailed that the plaintiff would advance money to entities of which Mr Sarel van Niekerk was in control of and at an interest rate of 25% per annum;

61.5 The funds invested by the plaintiff in the aforementioned entities would be utilised by the entities in property developments;

61.6 In 2006 an oral agreement came into existence between the plaintiff and the first defendant, in terms whereof the first defendant accepted instructions from the plaintiff to perform a number of professional services to the plaintiff as the plaintiff's attorney, including:-

61.6.1 To evaluate and investigate whether the entities belonging to or in control of Van Niekerk was financially sound enough to lend money to;

61.6.2 To investigate and establish whether Van Niekerk was financially sound enough to sign as a surety for the loan made by the plaintiff to the entities belonging to Van Niekerk, alternatively the entities of which Van Niekerk had control of;

61.6.3 To advise the plaintiff as to the risks involved in entering into such loans, and ensuring that the plaintiff obtained sound, proper and safe security for all amounts lent by the plaintiff to the entities belonging to or in control of van Niekerk;

61.6.4 By informing the plaintiff of any risk that might develop as soon as reasonably possible;

61.6.5 Drafting sound and proper agreements and/or documents to ensure that the security provided by Van Niekerk and/or his companies is in place and duly registered in the Deeds Office;

61.6.6 By ensuring a repayment of the capital and interest to the plaintiff from the proceeds of transfers of immovable properties belonging to Van Niekerk's companies, or Van Niekerk himself. The third defendant, alternatively the fourth defendant as practising attorneys with the first defendant acted as the conveyancing attorneys;

61.7 It was an implied term of the agreement between the parties that the defendants would perform the services in a proper and professional manner and without negligence, and that the defendants would protect the interest of the plaintiff as good, and as far as possible;

61.8 The plaintiff in paragraph 15 of the particulars of claim alleges that in September 2008 the plaintiff and Van Niekerk, on the advice of the defendant (this is clearly a reference to the first defendant) entered into an agreement in terms of which the plaintiff advanced an amount of R2.5 million to a company under control of Van Niekerk, VNP Projects (Pty) Ltd;

61.9 The plaintiff further alleges that the first, alternatively the second, further alternatively the fourth defendants breached the agreement and was negligent in the performance of their mandate in one or more of the following respects:

61.9.1 Notwithstanding the fact that a power of attorney was signed empowering the relevant defendants to register a first mortgage bond over the property belonging to Van Niekerk, no such bond was registered;

61.9.2 There was a failure to inform the plaintiff of existing bonds over the immovable property;

61.9.3 There was a failure to register any mortgage bond over the immovable property in favour of the plaintiff;

61.9.4 The plaintiff was falsely advised that the loan had no risks and that it was properly secured;

61.9.5 There was a failure to register and/or endorse a cession of Van Niekerk's shares in another company, notwithstanding the fact that a cession agreement to that effect was drafted;

61.9.6 The plaintiff was falsely advised that the cession of Van Niekerk's shares in the other company had been affected and was in fact duly registered, whereas no such registration and/or endorsement occurred;

61.9.7 There was a failure to pay an amount of R200 000.00 per unit sold and transferred from another company;

61.9.8 There was a failure to inform the plaintiff of the impossibility of the transfer of an amount of R200 000.00 per unit sold as the units were encumbered in favour of another party, Investec;

61.9.9 By advising the shareholders and directors of another company to liquidate the entity, without informing the plaintiff of the said advice;

61.9.10 By the failure to exercise such care and skill that could reasonably be expected of an average competent attorney.

[62] The plaintiff also testified at length as to what his instructions and or the terms of the oral mandate were. He is in law entitled to proceed against an attorney in delict notwithstanding that the duty arose by reason of a contractual relationship between him and Van Niekerk. The particulars of claim are clear enough to sustain his case

as pleaded. In my view, the plaintiff succeeded in proving a continuous mandate he gave to the defendant especially Leonard.

[63] Coming to the breach of the mandate, the defendants argued that the alleged breaches of the mandate are entirely without merit. Further that, the plaintiff failed to prove on a balance of probabilities, that the defendants breached the contract of mandate. The reasons given can be summarized as follows:-

- The existing bond in favour of Absa Bank is expressly referred to in paragraph 1.2 or the loan agreement and there was no need for Leonard to ascertain this as claimed;
- The failure of the defendants to register a first bond over the aforesaid property in favour of the plaintiff was not negligent. It was impossible. The evidence of Ms Greyling, on behalf of the defendant that the bond in favour of the plaintiff could not have been registered without the bond in favour of Absa Bank having first been cancelled, is undisputed. Her evidence that the defendants have not been placed in funds by either Van Niekerk or the plaintiff to cancel the existing bond over the property, is also undisputed.
- In paragraph 16.4 of the particulars of claim the plaintiff alleges that the defendant “falsely advised” the plaintiff that the loan in terms of the loan agreement was without risk and was properly secured. It was submitted that it is inherently improbable that an attorney would advise a client that a loan agreement of this nature “had no risks”. The evidence of Mr Leonard, on behalf of the defendants, was that he would never have given such advice to the plaintiff, as there are always risks in loan agreements of this nature. It was argued that the evidence of Mr Leonard in this regard should be accepted.
- In paragraph 16.5 and 16.6 of the particulars of claim the plaintiff alleges that the defendants negligently failed “to register and/or endorse the cession of Van Niekerk’s shares in Union Square Properties 47 (Pty) Ltd and “falsely advised” the plaintiff that the cession has been effected and duly registered. These alleged breaches of the contract of mandate are according to the defendants equally without merit

- The written cession agreement, in terms whereof Van Niekerk ceded his right, title and interest in Union Square Properties 47 (Pty) Ltd (herein referred to as “Union Square” was duly concluded and a copy thereof is attached to the particulars of claim as annexure “E”.

- In paragraph 16.7 and 16.8 of the particulars of claim the plaintiff alleges that the defendants negligently failed to pay an amount of R200 000-00 in the Stoffberg Development to the plaintiff from the transfer of each of the first five units in a property development conducted by Union Square. The defendants did not pay the aforesaid amounts to the plaintiff, not due to their negligence so said the defendants, but because it was impossible. The evidence of Mr Van Niekerk on behalf of the plaintiff, and the evidence of Ms Greyling on behalf of the defendants confirmed that there were no funds available from the proceeds of the transfers of these units to pay to the plaintiff (or any third party), because Investec Bank, who was the holder of the bond over the entire development, placed a moratorium on such payments. Investec (as it was entitled to do as a bond holder) insisted that the entire proceeds of the sale of each unit must be paid to Investec in respect of the outstanding amount owed to it. This evidence is undisputed.

- Mr Leonard, on behalf of the defendant, testified that he did inform the plaintiff of the fact that the aforesaid amounts could not be paid to the plaintiff from the transfers in questions.

- It was submitted that it is inherently improbable that this aspect would not have been discussed with the plaintiff during the weekly meetings between Leonard and the plaintiff, in particular after Van Niekerk and VNP Projects started to default with their payments to the plaintiff.

- In paragraph 16.9 of the particulars of claim the plaintiff alleges that the defendants negligently performed their mandate in advising the shareholders and Directors of Union Square to liquidate the company, without informing the plaintiff thereof. This alleged conduct of the defendants does not constitute a breach of the mandate pleaded by the plaintiff in par 13 of the particulars of claim, and is accordingly not a cause of action that can be relied upon by the plaintiff. Moreover, Mr Eddie

Leonard, on behalf of the defendants, denied that he advised the shareholders and Directors of Union Square to liquidate the company. His evidence was that he, in fact, assisted them in opposing an application for liquidation. It is submitted that this evidence of Mr Leonard should be accepted.

[64] Counsel representing the plaintiff relied heavily on the case of **Rampal (Pty) Ltd and Another v Brett, Wills and Partners 1981 (4) SA 360 (D)** in support of his arguments for breach of the mandate. Although the facts of this case are not exactly similar to the ones in *casu*, but the principles dealt with in that matter are on point with the issues this Court is grappling with. The instructions given to the attorney in that matter by the client acting on the advice of his attorney when giving a loan to a third party have similarities as well. The issue there was also about the attorney failing to advise the client of the inadequacy of his securities as soon as it became apparent. The Court as per **Page J** held as follows:-

> "Clearly, the nature of the investment desired by the client must determine the degree of security which his attorney should require before advising him to proceed. A client desiring to invest money by way of loans against the security of first mortgage bonds is obviously contemplating a lesser risk than a client who wishes to participate in a joint venture, such as a business or a company. This does not mean, however, that an investing client who wishes to invest his money by way of a loan on a first mortgage should be advised to accept a lesser degree of security because he is also, by way of other funds, participating in a joint venture with the borrower. Where the lender is interested in the borrower not only as a lender but in respect of dividends which might accrue to it as a shareholder in the holding company of the borrower, there is no logical reason why this should lessen the duty of care resting upon an attorney asked by the investing client to determine the advisability of a loan. In addition, the fact that the attorney has an interest in the…….
>
> "Held, further, on the facts, that the security offered had not been adequate within any acceptable meaning of that term and that this would have been

apparent to anyone exercising that degree of skill and care which might reasonably be expected of the average attorney.

Held, accordingly, that the defendant, in so advising the plaintiffs, had acted in breach of the duty of care which rested upon it to ensure, by the exercise of that degree of skill and care which might reasonably be expected of the average attorney, that the security offered was adequate; the foreseeable result of the security being inadequate was that the C. plaintiffs would suffer loss to the extent that such inadequacy precluded them from recovering the amounts advanced." **[Quote from case summary]**

[65] I echo the same sentiments as expressed above. The plaintiff maintained throughout his cross examination that he was not informed about the problems that arose with his securities so that he can come up with a plan for alternative security. It is abundantly clear from the evidence that the plaintiff accepted that when ELN's office sent him the contracts to sign, that Leonard had gone through the contracts and that he was satisfied with the contents thereof and the securities provided therein. After signing the contract, he was satisfied that he has adequate security for the loan and paid the loan amount of R1, 900, 000.00 (ONE MILLION NINE HUNDRED THOUSAND RAND) to Van Niekerk. He further testified that he expected Leonard as his attorney, to inform him if any problems arose with his securities so that they can come up with a plan for alternative security. All of these are the ordinary normal expectations that are expected from a client and attorney relationship.

[66] The plaintiff also testified that he specifically asked Leonard what the risks involved in the loan were if Van Niekerk's businesses encountered problems, to which Leonard responded by saying to him that all his "…*securities and guarantees are in place*" and that *"…he thinks that this whole thing would be safe…"*

[67] The evidence of Greyling becomes relevant and important here. She testified that the instructions to draft these contracts or to attend to the registrations and transfer of the properties would come from Leonard. Leonard also mostly dealt with

the clients directly and then provided instructions to Ms. Greyling as to what contracts must be drafted and what the contents of these contracts should be.

[68] But of particular significance is the following evidence. When asked what an attorney in her position would normally do in a situation when they needed funds to cancel the existing bond, Ms. Greyling answered that Van Niekerk or the plaintiff should have been asked to provide them with the funds to cancel the bond. Another option would also be to register a second bond over the property seeing as there were equity in the property for such a second bond. She indicated that the banks are reluctant to grant consent for a second bond. She did not discuss these alternative options with the parties, but was told by Leonard that he discussed these three options with the plaintiff and Van Niekerk.

[69] What is of utmost importance is that the witness confirmed that an attorney has a duty to obtain instructions from a client, and that an attorney in the defendants' position should at least advise his clients about the risks involved if the bond is not registered. This is evidence of an expert, an attorney, about the reasonable standard expected from an attorney like her, who is a conveyancer. She also testified that Leonard was responsible to obtain instructions from the clients when it became apparent to them that registering the first bond in favour of the plaintiff was impossible, but she cannot recall that Leonard ever reverted to her with regards to whether or not he obtained instructions. According to her, Leonard also never gave her instructions to draw up an alternative agreement for the parties.

[70] The probabilities point to the fact that although Leonard testified that he did tell the plaintiff about the problems encountered, that in fact he did not. My reasons are that in addition to the fact that Greyling cannot remember whether Leonard did that or not, both the plaintiff and Van Niekerk testified that he did not. The fact that he indicated that he thought that the word uttered by plaintiff to wit *"wait"* meant that he must wait for the money is yet another indication of his negligent conduct. The average attorney in the position of Leonard would have enquired as to exactly what he must wait for and would have made a note of this in his office file, followed by a

confirmation letter to his client regarding what his instructions were, especially when a possibility arises that his client's rights might be jeopardised.

[71] Mr Leonard's evidence that the plaintiff expressed no concern when he was informed that his bond could not be registered, is highly improbable. From the evidence before Court it is clear that the plaintiff required proper securities to be in place with each loan he made. This was corroborated by the evidence of her daughter Ms Niewenhuisen. Leonard's evidence in this regard is highly improbable. It is obvious from the facts of this case that the plaintiff was a Director in several Companies and would have thought about salvaging the situation if told about the problems. Same applies to Van Niekerk. He indicated that he had an alternative property that he bought in 2009 that could have served as security. In my view, it is highly unlikely that both of them will have afforded to lose the money invested in particular, the plaintiff, by not offering alternatives when the need arose.

[72] The second defendant also testified that he was involved in an estate agency called Rustenburg Estate Agents CC and some of the agents borrowed money from the plaintiff. It is the second defendant's version that he did not share in the interest that Van Niekerk paid to the plaintiff. According to him, when the plaintiff allegedly offered 2% of the interest to him, he declined, but indicated that the plaintiff can use that 2% as payment for the loans that some of the "girls" owed to the plaintiff. This version of Leonard is also not probable. It makes no sense that Leonard would arrange payment of other people's loans due to the plaintiff, without instructions from such individuals.

[73] Leonard further testified that he allegedly informed the plaintiff as soon as it became apparent that it would not be possible to pay the plaintiff R200, 000.00 upon the registration of the first five units in the Stoffberg scheme. He also testified that he thought the cession agreement was valid and that he advised the plaintiff to consult an alternative attorney. This begs the question, if Leonard thought the cession was valid, did he in the first place not provide this cession agreement to Investec Bank? An average attorney in the position of Leonard would have done

this in order to protect his client's interests. The validity of cession will be dealt with in detail below.

[74] Leonard denied that he advised Van Niekerk to liquidate Union Square Properties 47 (Pty) Ltd. It is his version that after Van Niekerk received the letter of demand from Investec threatening them with liquidation, he allegedly advised Van Niekerk to discuss the letter with his partner and to "*do something about it*". Yet again, there is no evidence before Court such as file notes confirming this consultation with Van Niekerk. The average attorney in the position of Mr Leonard would most likely advise his client regarding the different options available to him instead of just saying "*do something about it*". Although this matter does not concern the mandate given by Van Niekerk, but this kind of advice and conduct from an experienced attorney in the position of Mr Leonard raises eyebrows.

[75] This is clearly an ill advice from Leonard to Van Niekerk and shows some tardiness on his part to say the least when Van Niekerk was threatened with liquidation, if indeed it is true. But of importance is that this Court has to decide which version between that of Van Niekerk or Leonard is more probable. Van Niekerk had nothing to gain or lose by lying under oath in his testimony. He answered truthfully to all the questions put to him. Leonard on the other hand has a lot to lose if the case is decided in favour of the plaintiff.

[76] During his evidence in chief it was put to Leonard that it is not in dispute that his firm attended to the transfers and acted as the conveyancers for the transfer of the units in the Stoffberg scheme, which Leonard acknowledged. Yet during the insolvency enquiry in November 2011, Leonard testified that as far as he knows, his firm was not involved in the transfers of these units. During cross-examination Leonard was asked why the bond for the Buschrock properties (the previous loan) was only registered in 2010, approximately two and a half years after the agreement was signed. Leonard testified that he cannot assist this Court by clarifying this issue, despite his name appearing on the letter which was sent to the correspondents with the instructions to register the bond.

[77] During cross-examination of the plaintiff it was put to him that Leonard will testify that "*he can only assume that you and Mr Van Niekerk discussed the agreement and the terms thereof and the securities and thereafter either you or Mr Van Niekerk would inform his office who would then draft the agreement accordingly.*" It was also put to the plaintiff that Leonard will testify that he was never involved in the negotiations relating to the terms of "…*any of those loan agreements.*" Despite the above-mentioned being put to the plaintiff, Leonard did not testify about this. To the contrary, Leonard testified / conceded that they would all meet for lunch and then discuss the terms, and that he can only recall one occurrence when he was on his annual leave that he was not part of the negotiations.

[78] The probabilities weigh heavily against the version of Leonard and his credibility is questionable. Clearly the credibility of Leonard has been tainted by the probabilities and the contradictions elaborated above. His evasive attitude during cross-examination speaks volumes about the reliability of his version.

[79] The crux of the matter is that Mr Van Niekerk also said that Leonard never asked him to provide for the money to pay, and further that he was not aware that the bond was not cancelled until liquidation proceedings. Therefore, the registration of the property was not impossible as he, Leonard claims, but what Leonard was supposed to have done correctly so as stated by the plaintiff, was to take the right actions of informing him and Van Niekerk about the problems that existed regarding the securities if there was any.

[80] From the facts of this case Leonard was in my view negligent. Firstly, he created an impression with both Van Niekerk and the plaintiff that during the negotiations for these loan agreements he was acting on both their behalf. The plaintiff alleged that Leonard knew very well from early 2009 that Van Niekerk and his companies started to default on their monthly payments to the plaintiff and to *inter alia* Investec Bank, however, despite this knowledge, he only advised the plaintiff during late 2010 to consult with an alternative attorney because according to the plaintiff he

said to him "*…things are now getting messed up…*". An average attorney in the position of Leonard and / or defendants, i.e. an attorney with more than 30 years' experience, should have foreseen the possibility of a conflict of interest arising between the plaintiff and Van Niekerk before he acted on their behalf in the same transaction between them, and at least, the moment he became aware that Van Niekerk defaulted in his monthly payments towards the plaintiff.

[81] Furthermore, Leonard and / or the defendants should have foreseen the possibility of a conflict of interest arising the moment they realised that the plaintiff's first mortgage bond over the Safari Gardens property could not be registered. In fact, one would go as far as saying that the defendants should have foresaw the possibility of a conflict of interest arising from the onset during the negotiations for the contract, in the event that one of the parties breached the terms of the contract.

[82] In my view, an average attorney in the position of the defendants should have immediately advised the plaintiff to consult another attorney to investigate the possibility of a claim not only against Van Niekerk, but also a claim against the defendants. The defendants' version that they did advise the plaintiff to consult an alternative attorney early on, is just not probable. From the evidence before Court, it is clear that plaintiff placed much value on his securities for the loans being in place, which fact does not need any rocket scientist to be gleaned from the facts of this matter.

[83] The plaintiff, his daughter, Ms Greyling, who was the defendants' witness, testified about the fact that the parties required the contracts to be signed before the plaintiff could pay the money to Van Niekerk. This clearly means that the plaintiff would not have paid the money if the securities were not in place. In addition, if one has regard to the trial bundle, specifically the contents of the previous loan agreements, one can conclude that the plaintiff always required proper securities such as mortgage bonds to be in place before he loaned money to someone. Lastly, from the contents of the September 2008 agreement, one can also conclude that proper and adequate securities were required by the plaintiff for the loans, despite the fact

that the agreement was poorly drafted.

[84] By neglecting to foresee the possibility of a conflict of interest arising and neglecting to advise the plaintiff to consult alternative attorneys earlier, the defendants acted negligently and failed to act in accordance with what one would expect from the average attorney. The defendants failed to exercise the necessary care, skill and expertise and thereby breached their mandate and the duty of care they had towards their client. I fully agree with the submission of the plaintiff's Counsel that there should have been an additional standard of duty of care (threshold), which was required from Mr Leonard in *casu* because he ought to have foreseen that there is a potential conflict of interest.

[85] In addition to the above conduct, the defendants failed to discover the office file pertaining to the September 2008 agreement, therefore there is no proper documentary evidence before Court to support their version. I fully agree with Counsel representing the plaintiff that the defendants could have easily accessed the accounting records of this file from their accounting system, Lexpro, but no such Lexpro statements were provided to this Court. Not only did the defendants fail to discover vital documents, but the plaintiff also testified that he struggled to get the necessary information from the defendants after he consulted his current attorneys of record.

[86] **Rule 35.8** of the **Rules for the Attorneys' Profession** states the following:

> "A firm shall retain its accounting records, and all files and documents relating to matters dealt with by the firm on behalf of client:
>
> 35.8.1. for at least five years from the date of the last entry recorded in each particular book or other document of record or file;
>
> 35.8.2. save with the prior written consent of the Council, or when removed therefrom under other lawful authority, at no place

other than its main office, a branch office, or in the case of electronic accounting records or files, the location at which such accounting records or files are ordinarily hosted; …"

[87] The defendants clearly did not adhere to this rule. The defendants have been unable to provide a satisfactory explanation as to where the office file is, and why it was lost, and have failed to take proper and adequate steps in locating this office file. The gravamen of this conduct of the defendants is based on the fact that at the time of the insolvency enquiry in 2011, it had only been approximately three years since the conclusion of the 2008 agreement, and less than three years since Van Niekerk started defaulting on his payments to the plaintiff, yet, at that time the file and/or documents necessary for this matter could not be provided. Leonard testified at the insolvency enquiry that he will have to look at his file because "*there will be notes as one always makes notes if you receive instruction"*. These notes were also not even produced in this Court.

[88] Another disturbing conduct of the defendants stems from the mistakes they did when drafting the 2008 agreement. During the evidence of Ms Greyling, several questions were put to her regarding the wording of the September 2008 agreement. It is common cause that the essence of the agreement between the parties was that of a loan agreement, but despite it being a loan agreement, the agreement was headed "*Skuldakte*", i.e. "*Acknowledgment of Debt*". The agreement was also drafted in the past tense, creating the impression that the debtor (Van Niekerk) was already indebted to the plaintiff, implying that the plaintiff had already performed by providing Van Niekerk with the loan. It is however undisputed that Van Niekerk was in fact not yet indebted to the plaintiff when signing the agreement because the plaintiff only paid the loan amount to him two days after signature of the agreement. A properly drafted loan agreement would have included a remedy for Van Niekerk in the event that the plaintiff did not perform his duties under the agreement. In addition to the language problem enumerated above, this September 2008 agreement did not have this essential term.

[89] When one has regard to all of these mistakes in the agreement, it should be clear that the defendants did not properly apply their mind when drafting this agreement between the parties. This in itself is a further indication that the defendants have not acted with the necessary care, skill, knowledge and expertise expected of the average attorney in the position of the defendants. At the least, Leonard, who was an attorney representing both parties, should have ensured or avoided that these mistakes are not done.

[90] The letter from Investec Bank regarding the proceeds of the units in the Stoffberg Development was only discovered by the defendants on 2 March 2018, after the plaintiff had already finished with his testimony. One of the fundamental rules of trial is that you have to put your version to the opposing witness so that the witness has the opportunity to answer thereto. The contents of this letter forms part of a crucial point in the defendants defence, however, this letter was never put to the plaintiff during cross-examination to afford the plaintiff an opportunity to answer thereto. There is also no explanation before Court as to why this letter was only discovered mid-trial, after the plaintiff had testified. Not only was this letter not put to the plaintiff, but Leonard didn't testify about this letter during his evidence in chief. The other problem with the letter from Investec Bank is that it does not relate to the first five units of the Stoffberg scheme, it only relates to some other units. There are no other letters from Investec, and no other evidence before Court indicating that Investec Bank placed this so-called moratorium on all the other units in the Stoffberg scheme as well. There is therefore no weight that I can attach to this belated document.

[91] Much was made by the defendants' Counsel about the cession agreement which the parties entered into in terms of which Van Niekerk ceded R3, 000, 000.00 (THREE MILLION RAND) of his *"reg, titel en belang" (*translated in English to *"right, title and interest")* in Union Square Properties 47 (Pty) Ltd to the plaintiff. Both Van Niekerk and the plaintiff testified that according to them, this cession agreement meant that it is Van Niekerk's shares in Union Square Properties 47 (Pty) Ltd which were ceded to the plaintiff. This was also the interpretation attributed to the construction of the agreement by the Honourable retired Judge Joffe during the

Insolvency inquiry.

[92] Mr Leonard testified that the words “right, title and interest” referred to Van Niekerk’s *loan account, profit and equity* in Union Square Properties 47 (Pty) Ltd. He testified that the shareholder’s agreement stipulated that Van Niekerk could not sell or encumber his shares without first providing it to his co-shareholder, and therefore he could not cede his shares. However, this shareholder’s agreement is not before Court in order to confirm Leonard’s version. During cross-examination of the plaintiff and Van Niekerk, the defendants’ Advocate put it to the witnesses that it was in fact not the shares that were ceded, but merely the “right, title and interest” which was ceded, therefore it is their version that this is more a pledge agreement than a cession of shares.

[93] This argument of the defendants, if we take it on face value as put by them, instead supports the plaintiff’s allegation that the defendants were negligent in the execution of their mandate as attorneys to the plaintiff. If both contracting parties are *ad idem* as to the nature of the contract, the attorney drafting the contract cannot testify as to the nature of the contract afterwards, which is also contrary to what the parties intended, in order for it to suit his case. But the defendants are facing an insurmountable mountain to climb with this submission. The contract is headed “*Sessie”* (“*Cession”* in English) and the parties are referred to as the cedent and cessionary. No mention is made of a pledge anywhere in the agreement. The purpose of the cession agreement was to ensure that Van Niekerk’s profit in the Union Square Properties 47 (Pty) Ltd, i.e. his profit on the sale of the first five units in the Stoffberg scheme be ceded to the plaintiff. The cession agreement specifically states in clause 2 that Van Niekerk’s profit in the amount of R200, 000.00 (TWO HUNDRED THOUSAND RAND) per unit of the first five units sold to third parties and that, it be paid to the plaintiff. I fully agree with the plaintiff’s Counsel that the advice was ill and a pledge would have protected Mr Botha’s interests.

[94] A pledge is defined as follows:

> "A right of pledge is a limited real security right over a movable corporeal thing which is established and continues to exist by the pledgee exercising physical control over the pledged object."

[95] According to this definition, the thing which the pledger pledges to the pledgee, must be delivered to the pledgee seeing as the pledgee needs to exercise physical control over the thing. No mention is made in the cession agreement concluded by plaintiff and Van Niekerk of any corporeal thing being delivered to the plaintiff in order for the plaintiff to exercise physical control over the thing. Not even in the reading of the cession agreement can it be said that it is in fact a pledge agreement and not a cession of shares.

[96] If the cession agreement is indeed interpreted as a pledge, the defendants on their own version were negligent in that they failed to properly apply their mind in drafting a pledge agreement which read like a cession agreement.

[97] Mr Leonard testified that he was on a sub-committee of the Law Society dealing with attorneys' indemnity insurance. At the time of the conclusion of the September 2008 agreement, Leonard, on his own version, had at least 32 years' experience as an attorney. In light of Leonard's years of experience and his experience on the Law Society's sub-committee, it is quite clear that he failed to act in a manner which can be expected from the average attorney in his position. An attorney with his experience would have taken steps to avoid the conflict of interest timeously by referring the parties to alternative attorneys. He would have safeguarded the fact that proper contracts are drafted. He should have timeously informed his clients of the fact that the agreement could not be executed, and advising his clients of the risks in the fact that the bond could not be registered. He would have also advised his clients to embark on proper alternatives and would have kept record of same.

[98] In the case of **Margalit v Standard Bank of South Africa and Another 2013 (2) SA 466 (SCA)** the Supreme Court remarked as follows:-

"In a claim against a conveyancer based on negligence it must be shown that the conveyancer's mistake resulted from failing to exercise that degree of skill and care that would have been exercised by a reasonable conveyancer in the same position. While the gravity and likelihood of potential harm will determine the steps which a reasonable person should take to prevent such harm occurring, in the case of a conveyancer it is necessary to remember that any mistake which may lead to a transaction in the deeds office being delayed will almost inevitably cause adverse financial consequences for one or other of the parties to the transaction. Conveyancer should be fustidious in the preparation of their documents so as to avoid such mistakes, and when lodging documents must ensure that they meet the requirements of the deeds office at that time. (Paragraphs [23], [25] – [26] and [31] at 473E-F, 474A-D and 476B-C).

[99] Mr Leonard should have foreseen the possibility of the plaintiff suffering damages when the bond could not be registered and when the R200, 000.00 (Two Hundred thousand rand) for the first five units could not be paid to the plaintiff. The average attorney in the position of the defendants would not only have foreseen the damages the plaintiff will suffer, but would have taken steps to avoid the damages, firstly, by timeously referring the plaintiff to alternative attorneys, and secondly, by putting his advice to the plaintiff in writing.

[100] In **Margalit v Standard Bank of South Africa Ltd and Another** the court held that:

"Of course the gravity and likelihood of potential harm will determine the steps, if any, which a reasonable person should take to prevent such harm occurring. Moreover, the more likely the harm, the greater is the obligation to take such steps. No hard and fast rules can be prescribed. Each case is to be determined in light of the particular facts and circumstances. But in the case of a conveyancer, it is necessary to remember that any mistakes which may lead to a transaction in the deeds office being delayed will almost inevitably cause adverse financial consequences for one or other of the parties to the transaction…To avoid causing such harm, conveyancers

should therefore be fastidious in their work and take great care in the preparation of their documents. Not only is that no more than common sense, bit it is also the inevitable consequence of the obligations imposed by s 15(A) of the Act as read with reg 44, both of which oblige conveyancers to accept responsibility for the correctness of the facts stated in the deeds or documents prepared by them in connection with any application they file in the deeds office."

[101] It was put to the plaintiff during cross-examination that he cannot expect everybody else to perform their duties in terms of the agreement if he himself his duties fully, referring to the fact that only R1, 900, 000.00 (ONE MILLION NINE HUNDRED THOUSAND RAND) was paid over to Van Niekerk. This argument misses the point. The plaintiff's cause of action is not based on a failure by another party to perform its' obligations in terms of the September 2008 agreement. The plaintiff's cause of action is based on the defendants acting negligently in the performance of their duties as attorneys in executing the mandate he gave to them as far as the conclusion of the September 2008 agreement is concerned.

[102] In attempting to amplify the submission above, Leonard testified that he only became aware that the plaintiff did not pay the full R2, 500, 000.00 (TWO MILLION FIVE HUNDRED THOUSAND RAND) to Van Niekerk approximately two weeks before this trial commenced. According to his version, he was informed of this by Mr. Esterhuyse, the attorney on behalf of the former fourth and fifth defendants. It is important to point out that in the plaintiff's answer to a request for further particulars, a pleading on which the plaintiff was extensively cross-examined on, the plaintiff indicated that only R1, 900, 000.00 (ONE MILLION NINE HUNDRED THOUSAND RAND) was actually paid to Van Niekerk. This is common cause between the parties. It can therefore not be said by the defendants that they did not perform because the plaintiff did not perform. This version makes no sense at all and furthermore, misses the crux of the matter.

[103] Lastly, in as far as damages are concerned, it is trite law that the plaintiff has to prove the causation and the amount of damages. Part of the trial bundle contains the agreements previously concluded between the parties. One such agreement is the agreement on paginated page 376-379 of the trial bundle. From the documents contained in the bundle, especially on page 363 it is clear that the security provided for this agreement was initially bonds registered over four erfs in Thabazimbi. It is clear from this documents that the agreement was amending the initial one concluded earlier by the parties by registering bonds in favour of the plaintiff over two units in the Bushrock scheme situated in Rustenburg.

[104] The inference that can be drawn from this is that it was at all the times the defendants' instructions that if there were any problems in the execution or validity of the securities, the parties should come up with a plan for alternative security. This supports the plaintiff's version of what his instructions to the defendants were. The plaintiff testified that if the defendants performed their duties by registering the bond in his favour over the Safari Gardens property, or informed him of the impossibility to do so, he would have come up with an alternative plan for his securities and he would not have suffered damages. Had the defendants complied with their mandate and the plaintiff not suffered damages, the plaintiff would not have lost his money, or at least not all of his money.

[105] Furthermore, the fact that the plaintiff will suffer damages if the securities are not in place or properly executed should have been foreseen by the defendants the moment the contract was concluded. On a proper interpretation of the evidence before Court, the only conclusion that this Court can come to is that the plaintiff's damages were caused by the Defendants' negligence and failure to perform their mandate.

[106] Much was said that the plaintiff failed to prove that he suffered any damages. The basis for this submission as put forward by the defendants' Counsel was as follows:-

- The plaintiff contends that because the R1 900 000-00 in terms of the loan agreement was not repaid to him by Van Niekerk and/or VNP Projects, he suffered damages in the sum of R1 900 000-00.

- However, the sum of R1 900 000-00 was not paid by the plaintiff. It was paid by Morning Tide Investments 17 (Pty) Ltd (herein referred to as "Morning Tide").

- Although the plaintiff testified that he had paid some of his personal funds into the bank account of Morning Tide, there is no evidence to show how this payment was reflected in the financial statements of Morning Tide, or what the status of the plaintiff's loan account in Morning Tide was at any specific time.

- There is accordingly no evidence that the plaintiff's estate decreased in value as a result of the payment of R1 900 000-00 that was made by Morning Tide to VNP Projects. As such, the plaintiff did not prove that he has suffered any damages.

[107] This argument was developed further to the fact that even if it is accepted that Van Niekerk and VNP Projects were unable to repay to the plaintiff the amount advanced in terms of the loan agreement plus interest thereon, then the amount of the damages allegedly suffered by the plaintiff (on the basis as alleged in par 21 of the particulars of claim), can only be the value of the alternative security that the plaintiff "would have enjoyed".

[108] The plaintiff's daughter testified about the loan accounts of his father and the calculations of the interests thereof which she continuously communicated to one "Bossie" who is a Bookkeeper at DVS Auditors, who does all the books regarding different loan accounts between all different bank accounts of his

father's Companies. She further testified that there were loan accounts paid to VNP Projects on instructions of his father.

[109] Of importance is that the plaintiff testified that one of his company in which he is the only Director and shareholder paid on his behalf and that the said company is Morning Tide. Whether Morning Tide paid or not does not take the matter any further. The fact that in the contract between him and Van Niekerk his name was stipulated, says it all because the agreement is not disputed. The name stipulated there-in and the time period to pay the amount of money loaned is the name of the plaintiff. It is also common cause between the parties that in fact he paid in R1,9 million two days after the contract was signed although the contract has been worded in another form as already alluded above. Whether Morning Tide has a claim against Botha is irrelevant at the moment.

[110] The contract furthermore in clause 4 stipulates the interest that was payable. A pro rata amount to the amount paid of R1,9 million can therefore be ascertainable.

[111] Consequently the following Order is made:-

111.1 Judgment in favour of the plaintiff in an amount of R1 900 000.00 is granted against the first, second and third defendants jointly and severally the one paying the other to be absolved;

111.2 Interest of R33 186,67 to be payable per month from 1 January 2011 to 17 March 2011;

111.3 Thereafter interest at a rate of 15,5% per annum a *temperae morae* until date of payment;

111.4 The first, second and third defendants are liable to pay the costs jointly and/or severally, the one paying the other to be absolved.

A M KGOELE

JUDGE OF THE HIGH COURT

ATTORNEYS

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