IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, PORT ELIZABETH)

CASE NO: 515/2009
Dates Heard: 1 – 3 February 2011, 18 July 2011 & 19 August 2011
Date Delivered: 6 September 2011

In the matter between:

BRENT RODGER HEANEY First Plaintiff

SHAUN SMITH Second Plaintiff

and

JANICE PETERSEN Defendant

JUDGMENT

KROON, J:

Introduction

1] The two plaintiffs (Mr Heaney and Mr Smith) instituted action against the defendant for the recovery of damages arising from the latter's alleged breach of contractual obligations in respect of her duty to perform conveyancing services in a proper and professional manner, without negligence and in accordance with the instructions of Heaney and Smith.

2] Heaney and Smith were at all material times, and are, members of a close corporation carrying on business in Port Elizabeth as estate agents under the style of Jack Allers Group. The third member of the business was, and is, Mr Engelbrecht. The relationship between Heaney, Smith and Engelbrecht was described as that of partners.

They will at times be referred to as the partnership or the firm.

3] The defendant is an attorney and conveyancer. At all times material to this matter she practised in Port Elizabeth on her own account under the style of Janice D Petersen. She remarried on 28 November 2009, and is now Mrs Storer. It will however be convenient to refer to her in this judgment as Mrs Petersen, the name under which she was cited, and referred to during the evidence. She subsequently ceased practising on her own account and is now employed by another firm of attorneys.

Background

4] During November 2007 a Mr Njamela approached the partnership with a request that he be engaged by the firm with a view to his being active as an estate agent in the Port Elizabeth townships. The proposal made sense to the partners and Njamela was taken on board.

5] Thereafter, further agreement was reached that a joint venture be commenced in which Njamela would identify properties in the townships for purchase and, after renovations had been effected thereto, the properties would be resold at a profit. The three partners of the firm would advance the purchase price of the properties and the cost of the renovations, which would be overseen by Njamela, and Njamela would thereafter negotiate the sale of the properties. The *net profits* of each transaction (after deduction of the purchase price and the cost of renovations, which would be reimbursed to the partners, and other necessary deductions) would then be divided as to two-thirds to the partnership and one-third to Njamela (and his wife, to whom he was married in community of property).

6] However, when the first such transaction was in the offing Engelbrecht was 'unavailable', and it was then decided that only Heaney and Smith would be parties to the transaction with Njamela (and to further such transactions thereafter that were envisaged), with two-thirds of the *net profits* accruing to the former and one-third to Njamela. (The two thirds share would however as between the three partners of the business be shared equally by them). In due course, subject to what follows below, a number of such transactions were carried out.

7] Initially, the *modus operandi* adopted by the participants in the joint venture was the ploughing back of the proceeds of a transaction towards the financing of the next transaction.

8] However, when the transaction was concluded which was the origin of the dispute with which this judgment is concerned (as to which, see below), a different arrangement was in place: the *net proceeds* of the sale of the property (the deductions not to include any amounts advanced in respect of the purchase price or the costs of renovations) were to be divided as to two-thirds for Heaney/Smith and one-third for Njamela. Other than the statements that there was to be no ploughing back of monies received for the purpose of financing any further transaction, and that the transaction in question would be the first in which the participants would reap the rewards of the joint venture in the sense of actually being paid out what accrued to them from a transaction, there was no elucidation of the *raison d'etre* of this different arrangement. Be that as it may.

9] Towards the end of 2007 Njamela attended at the offices of Mrs Petersen and introduced himself to her. He was already acquainted with Mrs Kolesky, the conveyancing clerk in Mrs Petersen's office, who had advised him that she was employed by Mrs Petersen and had also

asked him to bring work to Mrs Petersen. Adverting to the fact that Mrs Petersen was a woman of colour and observing that purchasers/sellers of properties in the townships would be more comfortable dealing with a professional person of colour, Njamela enquired whether Mrs Petersen would be interested in undertaking the conveyancing work in respect of the transfers of properties in the townships. Mrs Petersen indicated that she was willing to do so. When the joint venture was commenced Heaney and Smith agreed to continue making use of the services of Mrs Petersen. She thus became the conveyancer who attended to the transfers in respect of the transactions entered into by the joint venture (as well as other transactions concluded by Njamela on his own account).

10] After the commencement of Njamela's association with the partnership, the partners loaned and advanced to him various sums of money (which were said to be for private purposes). The evidence indicated that the total sum involved was substantial. (According to Heaney the amount could have been as much as R98,000.00).

11] At a stage the association between Njamela and the partnership came to an end, but when, and the circumstances under which this occurred, were not elucidated in evidence (save that Engelbrecht stated that it was consequent upon the transaction in question that relations between Njamela and the partnership soured, although Heaney stated that in June 2008 relations between the partnership and Njamela were still fine). The loans in question were never recovered by the firm from Njamela, and, indeed, the particulars of claim filed in the present proceedings embraced the allegation that Njamela was a man of straw and unable to repay what he owed to the partnership. During the evidence reference was made to the service on the partnership on 11 September 2008 of a garnishee order issued by the magistrate of Port

Elizabeth on that date (exhibit D), which reflected that Njamela, the debtor in question, only had assets of R5,000.00 and was hopelessly insolvent. The partnership in fact issued summons against Njamela for the recovery of his indebtedness to it, but no attachment of assets belonging to Njamela was possible. (It was not clear whether the sum claimed from Mrs Petersen in the present proceedings was included in the summons issued against Njamela).

12] The evidence of Engelbrecht, Heaney and Smith was to the effect that initially the partnership perceived the association with Njamela as holding prospects of being a financially rewarding one for the partnership.

The transaction in question

13] On 27 April 2008 the joint venture sold erf 3488 Ibhayi to a Mr and Mrs Lings (who were married in community of property) for the sum of R215,000.00. Transfer of the property into the name of the Lings's was effected on 24 June 2008, Mrs Petersen having attended to same.

14] On 10 July 2008 Mrs Petersen submitted a statement of account to Heaney and Smith in respect of the transaction (exhibit B20). It read as follows:

‘	DEBIT	CREDIT
By Bond proceeds		R205,000.00
By amount received from Mr Lings		7,500.00
To outstanding rates	255.13	
To amount paid to Prestige Auto Sales	195,000.00	
To amount paid to Boqwana (Johnson Undertaking)	5,000.00	
To available for payment	12,244.87	

TOTAL	212,500.00	215,500.00'

The plaintiffs' cause of action and the defence thereto

15] As the statement of account reflected it embraced an accounting in respect of a total sum of R212,500.00, and not the sum of R215,000.00 for which the property in question was in fact sold. The evidence for Heaney and Smith did not explain the difference between the two figures. Mrs Petersen ventured alternative possible explanations therefor (because of the passage of time she was uncertain on the issue). It is however unnecessary to consider this aspect further. It was not suggested that the issue affected the claim Heaney and Smith sought to enforce.

16] Similarly, it was not suggested that the amount of R5,000.00 paid to Boqwana (ie the attorneys firm of Boqwana Loon & Connellan) in respect of the Johnson undertaking, did not constitute a valid debit.

17] What was in issue was the legitimacy of the payment of R195,000.00 to Prestige Auto Sales. Before I consider the evidence and counter evidence on this score I should record that in their particulars of claim Heaney and Smith claimed payment of the sum of R130,000.00 (2 x R65,000.00), being two-thirds of the sum of R195,000.00. At the hearing Mr *Beyleveld*, for Heaney and Smith, advised me however that the claim was in fact limited to the sum of R125,918.38 (the figure reflected in a letter addressed by Engelbrecht to Mrs Petersen on 12 September 2008, which will be referred to in detail later). This figure was arrived at as follows: R212,500.00 – (R255.13 and R5,000.00) = 207,244.87 x ⅔ = R138,163.25 – R12,244.87 = R125,918.38.

18] It was common cause between the parties that on 13 May 2008 Mrs

Kolesky telephoned Heaney and a conversation between them took place. It was not in dispute that it was Heaney who, on behalf of himself and Smith, liaised with the office of Mrs Petersen and held Smith's mandate to make decisions binding on both of them. (Smith did, however, also attend at the office of Mrs Petersen when powers of attorney in respect for the transactions of the joint venture required to be signed).

19] Heaney's evidence of the conversation between himself and Mrs Kolesky was to the effect that the latter advised him that Njamela wished to purchase a motor vehicle from a motor dealer styled Continental Cars, and she enquired whether Heaney would give authorisation for Mrs Petersen to furnish Continental Cars with an undertaking of payment of money out of the proceeds of the transaction in question. No amount was mentioned, however. He, Heaney, advised Mrs Kolesky that she could give an undertaking to Continental Cars as long as it did not involve an amount that exceeded Njamela's one third share of the net proceeds.

20] Mrs Kolesky's evidence on the other hand was that she mentioned a specific amount to Heaney, namely R174,000.00, and it was for an undertaking to Continental Cars to pay that amount out of the proceeds in question that she sought Heaney's authorisation. That authorisation was forthcoming, with Heaney jokingly making the comment: 'I suppose we must allow the boss his privileges'.

21] Mrs Kolesky's further evidence proceeded as follows. She advised Mrs Petersen that Heaney had authorised an undertaking to Continental Cars for payment of the sum of R174,000.00 out of the proceeds in question. She overheard Mrs Petersen thereafter speaking to Heaney on the telephone to obtain confirmation of the

mandate. She then typed a letter to Continental Cars which, after signature by Mrs Petersen, was sent by hand to Continental Cars. The letter (exhibit B17), dated 13 May 2008, read as follows:

'OUR TRANSFER NJAMELA & OTHERS TO S & N LINGS
ERF 3488 IBHAYI

With reference to the above and further to previous correspondence herein we hereby undertake to pay to yourselves the sum of R174,000.00 (ONE HUNDRED AND SEVENTY FOUR THOUSAND RAND) on date of registration of the above transaction.

Thanking you for your kind co-operation.'

22] Mrs Petersen testified that she did not have a clear recollection of the events in question (explaining that the mandate given by Heaney on 13 May 2008 did not become the subject of the claim of Heaney and Smith against her). She confirmed, however, that she would have secured Heaney's confirmation of the mandate prior to furnishing Continental Cars with the undertaking, either by telephone or in a conversation face to face, as it was her invariable practice to obtain confirmation herself from the client in question before she issued any undertaking to a third party in respect of a payment out of the proceeds of any transaction where the conveyancing work was done by her.

23] Heaney denied that there was any telephone or other conversation between himself and Mrs Petersen in respect of the undertaking to be furnished to Continental Cars.

24] Heaney further denied that there was any subsequent telephone conversation between himself and Mrs Kolesky or between himself and Mrs Petersen regarding a replacement undertaking to be furnished to another motor dealership styled Prestige Auto Sales.

25] Mrs Kolesky testified however that on 4 June 2008, and at Njamela's request, she again telephoned Heaney, this time to secure a replacement mandate. She advised Heaney that Njamela was not proceeding with the purchase of a vehicle from Continental Cars, but instead wished to purchase a different vehicle from Prestige Auto Sales. An undertaking for payment of the sum of R195,000.00 was, however, required, and she sought Heaney's authorisation for such undertaking to be furnished, payment to be made out of the proceeds of the transaction in question. Heaney gave the authorisation sought, this time commenting: 'The bastard is driving a better car than what I am driving'.

26] Again, she advised Mrs Petersen of the mandate given by Heaney and, again, she overheard Mrs Petersen speaking on the telephone to Heaney to obtain confirmation of the authorisation. Thereafter, a letter (exhibit B19) signed by Mrs Petersen was addressed to Continental Cars withdrawing the earlier undertaking, and on the same date a further letter (exhibit B19A), signed by Mrs Petersen, was addressed to Prestige Auto Sales, which read as follows:

'OUR TRANSFER SMITH HEANEY & NJAMELA TO S & N LINGS
ERF 3488 IBHAYI

With reference to the above we hereby irrevocably undertake to pay to yourselves the sum of R195 000,00 (ONE HUNDRED AND NINETY FIVE THOUSAND RAND) on date of registration of the above transaction.

We confirm that all conditions have been met and our documentation has been forwarded to our Cape Town correspondents for lodgement. We anticipate registration to take place on or about the 13th June 2008.

Thanking you.'

27] Mrs Petersen confirmed the evidence set out in the preceding paragraph and added that when Heaney confirmed the authorisation to her he made the comment 'I suppose (or guess) we don't have a choice.' Hence, in due course, the payment by her to Prestige Auto Sales of R195,000.00 as reflected on the statement of account she rendered to Heaney and Smith.

28] The essence of the dispute between the parties is accordingly whether or not Heaney (on behalf of himself and Smith) gave the authorisation to Mrs Petersen alleged by the latter and Mrs Kolesky. Only if this question is answered in the negative can Heaney and Smith succeed in the action.

Onus and credibility

29] Counsel were agreed, and correctly so, that Heaney and Smith bore the onus of proving the terms of the contract on which they sued. This included proof of the negative that no authorisation was given for the undertaking furnished by Mrs Petersen to Prestige Auto Sales and the implementation thereof.

30] Reference may be had to two decisions relating to the approach to be adopted in assessing the credibility of a witness and whether the onus has been discharged. The headnote in *National Employers' General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E) reads as follows:

> 'In deciding whether the plaintiff has discharged the *onus* of proof, the estimate of the credibility of a witness will be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nonetheless believes

him and is satisfied that his evidence is true and that the defendant's version is false. It is not desirable for a Court first to consider the question of the credibility of the witness and then, having concluded that enquiry, to consider the probabilities of the case, as though the two aspects constitute separate fields of enquiry.'

31] In *Stellenbosch Farmers' Winery Group Ltd and Another v Martell Et Cie and Others* 2003 (1) SA 11 (SCA), paragraph 5, the following was stated:

'[5] On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on *(a)* the credibility of the various factual witnesses; *(b)* their reliability; *(c)* the probabilities. As to *(a)*, the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to *(b)*, a witness' reliability will depend, apart from the factors mentioned under *(a)*(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to *(c)*, this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of *(a)*, *(b)* and *(c)* the court will then, as a final step, determine whether the party burdened with the *onus* of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities will prevail.'

Assessment

32] The preliminary observation should be made that much of Engelbrecht's evidence was of a hearsay nature, having been based on what Heaney or Smith had conveyed to him. To that extent his testimony could not be invoked for the purpose of establishing the truth of what was conveyed to him.

33] I am aware of the oft-quoted dictum that demeanour in the witness box is a tricky horse to ride as an indicator of the credibility of the witness. As reflected in *SWF Group* it nevertheless remains a factor. I accordingly record the following. Engelbrecht and Heaney made a neutral impression on me. The same comment applies to Smith save that it may be added that at times he was somewhat nervous (a factor however which does not merit emphasis) and that on occasion his evidence was contradictory and confusing. A further witness called on behalf of Heaney and Smith was attorney de Lange. As will appear later however no issue depends on de Lange's credibility.

34] Mrs Petersen impressed me favourably as regards her candour and general demeanour in the witness box. The fact that she testified that her recollection of certain *alleged* events was either vague or non-existent was not, in my view, any derogation from her credibility. On the contrary, the fact that she did not resort to denials in respect of certain of these events, where same would have advanced her case, enhanced her credibility.

35] Mrs Kolesky (who attended a pre-trial consultation during a lunch break after the case for Heaney and Smith had been closed and immediately prior to her entry into the witness box, which preceded Mrs Petersen's testimony) also impressed me favourably with her general demeanour in the witness box, and, a factor that should not be

overstated, the confidence with which she gave her testimony (although, as will appear below, her evidence was not without blemish). As will be recorded later, Mrs Kolesky stands accused of having embezzled substantial sums of money from Mrs Petersen during her employment with the latter. Mr *Beyleveld* submitted that this accusation was a factor that I should take into account as bearing on Mrs Kolesky's credibility. I am not persuaded, however, as to how Mrs Kolesky's credibility is affected by the accusation.

36] It would be convenient at this stage to set out certain correspondence that passed between the parties.

(a) Exhibit A14, dated 12 August 2008, addressed by Engelbrecht to Mrs Petersen, read as follows:

> 'Re – MOFFAT NJAMELA
>
> Please confirm in writing that at this stage you will hold any and all funds pertaining to all deals that you have where Mr Moffat Njamela is involved including distributions, sales commissions and third party guarantees. We have requested an urgent meeting with Mr. Njamela for tomorrow morning where after we will be in a position to advise you further.'

(b) On 12 September 2008 Engelbrecht addressed exhibit A9 to Mrs Petersen, which read as follows:

> 'TRANSFER SMITH, HEANEY & NJAMELA TO LINGS: ERF 3488 IBHAYI
>
> We refer to the above matter and advise as follows:
>
> We allege that you had incorrectly given an undertaking to Prestige Auto Sales on behalf of one M Njamela for the amount of R195 000. Your offices were advised telephonically that an undertaking may be issued based only on Moffat Njamela's share of the proceeds of the above mentioned deal. From your

statement dated 10 July 2008, it is clear that the amount paid over far in exceeds Mr Njamela's share of the proceeds.

The total amount available for distribution was R207 244.87. Of this Mr Njamela was entitled to one third (being a one third owner) amounting to R69 081.62. We allege that you have thus paid over an amount of R125 918.38 with no authority from the two remaining parties/recipients to the proceeds. Smith and Heaney hereby demand that you settle the amount that is due to them forthwith.

Should they not receive settlement of this amount, then they will have no further alternative but to proceed with the matter and if need be approach the Law Society with the evidence that they possess. We trust that this will not be necessary and that you will honour the amount due. You are hereby required to make good the amount by no later than the close of business on Monday 15th September 2008. The money can be deposited into the Jack Allers bank account, which details you have on file. Kindly fax through proof of payment to our offices.

Further to that we request the title deeds for erf 55950 and erf 12931 Ibhayi. The same can be delivered to our offices or we can collect. Please advise.'

(c) On 15 September 2008 Mrs Petersen addressed a letter to the Jack Allers Group in which it was stated that Mrs Petersen was away and would respond shortly to the letter referred to in (b).

(d) On 15 September 2008 Engelbrecht addressed exhibit A10 to Mrs Petersen, which read as follows:

'TRANSFER SMITH, HEANEY & NJAMELA TO LINGS: ERF 3488 IBHAYI

With reference to the above and further to your letter dated 15 September 2008, we remind you that that during a telecon that took place at 11h56 on 12 September 2008 between Gary Engelbrecht and yourself, you agreed to pay the amount of R125 918.38 over to us by close of business today.

We hereby advise that we grant an extension of such payment deadline until

12h00 on the 17th of September 2008. Kindly fax proof of payment to our offices.'

(e) Mrs Petersen responded on 22 September 2008 via exhibit A11, reading as follows:

'TRANSFER SMITH HEANEY & NJAMELA TO LINGS
ERF 3488 IBHAYI

With reference to the above and further to previous correspondence herein we confirm that your Mr Heaney authorised our firm on 13 May 2008 to issue an undertaking in favour of Continental Cars in the sum of R174 000,00 on behalf of Mr Njamela and the amount was clearly stated to him.

Furthermore we confirm that our offices again contacted your Mr Heaney on 4 June 2008 advising him that Mr Njamela requested us to withdraw from the abovementioned undertaking as he cancelled the transaction and that he requested us to issue an undertaking in favour of Prestige Auto Sales in the sum of R195 000,00. Your Mr Heaney authorised this undertaking to the writer hereof and one of our employees without any mention of any restrictions in respect of shareholding.

In view of the above we are of the opinion that your Mr Heaney, who was acting on behalf of the joint venture, authorised issuing of the undertaking in the amount of R195 000,00 without setting any limitations.'

(f) Exhibit C20 was a letter dated 26 August 2008 addressed by Heaney to Mrs Petersen. It read as follows:

'MATTERS PERTAINING TO MOFFAT NJAMELA DEALS

With reference to our telecon today, we confirm that the R42000.00 held by yourselves as a guarantee to Jack Allers, will be paid over to us by close of banking hours today. We further request proof of deposit of said amount to be faxed to us.

With reference to the Stoffel transfer, kindly deduct the R2500.00 outstanding

against the R5000.00 I.P.Johnson money and effect payment to Mr Stoffel. We request that the balance, being R2500.00, be refunded to us together with the above-mentioned R42000.00.'

37] It may also be recorded that the undertaking to Boqwana Loon & Connellan in respect of the Johnson transaction (paragraph 16 above) was furnished by Mrs Petersen by way of exhibit B18, a letter dated 16 May 2008 reading as follows:

'OUR TRANSFER NJAMELA & OTHERS TO S & N LINGS
OUR BOND S & N LINGS / STANDARD BANK
ERF 3488 IBHAYI

With reference to the above and further to previous correspondence herein we hereby undertake to pay to yourselves the sum of R5 000,00 (FIVE THOUSAND RAND) on date of registration of the above transaction.

We confirm that the clients have signed the transfer and bond documents, all conditions have been met and as soon as we are in receipt of the transfer duty receipt we shall proceed with lodgement.

Thanking you for your kind co-operation.'

38] Exhibit G was a record *inter alia* of telephone calls made from Mrs Petersen's office during part of June 2008, the correctness of which was formally admitted by Mr *Beyleveld* on behalf of Heaney and Smith. Included among the calls recorded were three calls made to the office of the Jack Allers Group on 4 June 2008, namely at 10h16 (duration: 2 minutes 3 seconds), 10h20 (duration: 1 minute 18 seconds) and 10h22 (duration: 51 seconds). A further call was made to the cellphone of Heaney at 10h24, which lasted 52 seconds.

39] In elucidation of the statement in exhibit A10 that Mrs Petersen had

agreed during a telephone conversation with Engelbrecht on 12 September 2008 to pay the sum of R125,918.38 to the Jack Allers Group (paragraph 36(d) above) it may be recorded that it was common cause that after receipt of Engelbrecht's letter of 12 September 2008, exhibit A9 (paragraph 36(b) above), Mrs Petersen telephoned Engelbrecht and said to him that she would effect payment of the said sum.

40] Mrs Petersen furnished the following explanation of the circumstances under which she made the statement. She was at the time under very severe emotional stress. She had shortly before, approximately at the end of August 2008, received information that her five year old son had been diagnosed with an incurable disease which would very seriously disable him or even cause his death. As a divorcee she was a single mother and the news 'totally shattered her' and she felt that 'her life was busy crumbling'. The situation was exacerbated by a further contributory factor. There was, as she put it, a financial drain on her legal practice, financially her practice was failing and she did not know the reason therefor. It was only later that she was advised by her auditors that Mrs Kolesky had been defrauding her and had embezzled in excess of a million rand. During September 2008 she 'did not want to carry on anymore' and confirmed in answer to a question by me that her emotional condition was such that she could not make a decision that was valid in law. At no stage had she entertained the thought that she had done anything wrong and the statement made to Engelbrecht was dictated by her emotional condition, simply to make something that she was in no condition to deal with, go away.

41] She thereafter consulted her parents who advised her not to pay something she did not owe. She also sought legal advice from her attorney. Exhibit A11, her letter to the Jack Allers Group on 22

September 2008 (paragraph 36(e) above) followed.

42] The particulars of claim filed on behalf of Heaney and Smith did not make out any cause of action based on an alleged acknowledgement of debt and Mr *Beyleveld* acted responsibly in adopting the stance during argument that he was not seeking to suggest that Mrs Petersen was bound by the statement in question. He pitched his argument no higher than the submission that the statement was a factor to be considered. I am not so persuaded. There was no challenge offered to Mrs Petersen's evidence as to the emotional state in which she was at the relevant time. I accept same. In the circumstances no adverse inference is to be drawn against her based on the statement in question.

43] In respect of the telephone records counsel made two submissions. First, he pointed out that exhibit G went no further than recording that the four telephone calls in question were in fact made, and he argued that they did not disprove Heaney's denial that he had any conversation on 4 June 2008 with either Mrs Kolesky or Mrs Petersen concerning a replacement undertaking to be furnished to Prestige Auto Sales, to which he added the query whether, specifically the call to Heaney's cellphone, was of sufficient duration for confirmation of an alleged authorisation for an undertaking to be secured.

44] Of course, telephone records do not canvass the content of telephone calls, but it is not to be gainsaid that exhibit G is consistent with the defence evidence that there were two telephone conversations with Heaney on 4 June 2008, one by Mrs Kolesky and the other by Mrs Petersen, concerning authorisation by the former for an undertaking, and to that extent offers support for the defence evidence. I am also not persuaded there is any merit in counsel's query whether a

telephone conversation of 52 seconds duration was long enough for confirmation of authorisation to be secured by Mrs Petersen from Heaney.

45] The second submission, if I understood it correctly, was that while exhibit G was incorporated into the defence case, conspicuous by its absence was any record of telephone calls made from Mrs Petersen's office on 13 May 2008, which could have served the purpose of establishing that there was more than one call to Heaney, and hence a possible second call, one from Mrs Petersen, to obtain confirmation of the alleged authorisation for the undertaking furnished to Continental Cars. The failure by the defence to produce telephone records relating to 13 May 2008 required to be seen in the light of the proposition put to Mrs Kolesky (which was confirmed by her) that the phone records would establish whether or not there was a second call to Heaney on the day in question. Developing his argument counsel submitted that the inference to be drawn from the failure of the defence to produce the phone records in question was that Mrs Kolesky and Mrs Petersen had lied about the events on that day; and if they lied about that they could easily also have lied about the alleged events on 4 June 2008.

46] I cannot uphold the argument. Apart from the fact that the quantum leap from a failure to produce phone records to a finding of mendacity is one that, in my view, would not be justified, the argument loses sight of the incidence of the onus. As already recorded Heaney and Smith bore the onus of establishing the terms of the relevant contractual arrangement including disproving terms that the defence averred were there but which Heaney denied. It was open to Heaney and Smith to adduce evidence of telephone records, either those relating to the telephones of the Jack Allers Group/Heaney's cellphone or alternatively those relating to the telephones of the office of Mrs

Petersen. If anything, an adverse inference would be drawn against Heaney and Smith, as the onus bearing parties, for their failure to adduce evidence of relevant telephone records. For the purposes of the present judgment I will restrict my approach to a finding that Heaney and Smith took the risk that the evidence they did adduce would in the result prove to be insufficient to carry the day in their favour.

47] Similar comments apply to Mr *Beyleveld's* attempt to make capital out of the fact that the defence had not tendered the evidence of the then receptionist in Mrs Petersen's office who, on the defence evidence, put through the telephone call which Mrs Petersen alleges she made to Heaney. Counsel pointed out that there was no evidence that the receptionist was not available. On the other hand there was no evidence that she was available. She would in any event have been requested to testify about events that happened some years ago and what weight her evidence could have carried is a matter for speculation. At worse for the defence case, a risk was taken that the defence evidence adduced might prove to be insufficient to carry the day for the defence.

48] Play was sought to be made of the fact that although transfer of the property in question into the names of the Lings's was effected on 24 June 2008 the relevant statement of account was only submitted on 10 July 2008 (paragraphs 13 and 14 above). It was pointed out that the usual practice of conveyancers was to advise the client as soon as transfer had been effected and to render an account expeditiously thereafter. The defence evidence was that Heaney had requested that the rendering of accounts be held back until all 'linked' transactions had been completed and the various statements of account could then be rendered together. It appears that the word 'linked' was used

loosely, not in the sense that the transactions were interrelated, but merely in the sense that they were roughly contemporaneous. This explanation was challenged. I find it unnecessary to resolve the dispute. I am unable to draw any inference from the alleged delay in submitting the account that bears on the issue of which side was telling the truth as to whether or not Heaney gave the authorisation for the undertaking to be given to Prestige Auto Sales. The rendering of an account was not avoidable, it would inevitably have followed and an accounting which disclosed a payment of R195,000.00 to Prestige Auto Sales was likewise inevitable.

49] An aspect that was strongly stressed by counsel in argument was the fact that Mrs Petersen had not sought written confirmation from Heaney of his authorisation for the undertaking to be given, or at least addressed a written communication to Heaney placing on record that he had given the authorisation. It was in this regard that the witness de Lange referred to guidelines issued by the Law Society that reflected that such written confirmation should be secured. In de Lange's view the obtaining of written confirmation of an authorisation to pay out proceeds of a property transaction to a third party was not only a prudent course to adopt; failure to do so would in fact constitute negligence on the part of the conveyancer. The witness went so far as to state that even where there was no dispute at all as to whether authorisation had been given, and the client in fact subsequently confirmed that authorisation for an undertaking to be given and implemented had been granted and no issue arose on that score, the conveyancer would still be painted with the brush of negligence if he/she had not secured written confirmation of authorisation in respect of an undertaking to a third party prior to implementing the undertaking. (It would seem that he was propounding 'negligence in the air').

50] Mrs Petersen conceded that it was prudent practice to secure written confirmation of authorisation for an undertaking to a third party, and that was in fact her usual practice. (Mrs Kolesky gave evidence of a similar ilk, and I will return later in another context to consider related aspects of her evidence on this score). Mrs Petersen testified, however, that consequent upon the course of dealings between herself and Heaney/Smith a position of trust had developed and she was accordingly persuaded that she could act on the oral authorisation that Heaney had given her. There had in fact been other oral authorisations given and no disputes had arisen in respect of the implementation of the undertakings in question.

51] While not disputing that there had been other oral authorisations given by him Heaney sought to suggest that there had also been authorisations given in writing. Afforded an opportunity to produce the relevant documentation, he was only able to produce exhibit C20 (paragraph 36(f) above). This letter, however, dealt with other matters and was dated 26 August 2008, after the events with which this judgment is concerned.

52] Mr *Beyleveld*, correctly, did not seek to argue that the mere fact that Mrs Petersen had not seen to it that written confirmation of the alleged authorisation attributed to Heaney had come into existence constituted negligence entitling Smith and Heaney to the judgment they sought. The issue remained whether the authorisation in question was in fact given. His submission was, however, that in the light thereof, first, that the obtaining of written confirmation was admittedly a prudent practice; second, that obtaining such confirmation was the practice usually followed by Mrs Petersen; third, that the amount of the undertaking was in a substantial figure, I should have regard to the fact of an absence of written confirmation as having a bearing on the question

whether Mrs Petersen truthfully testified that she personally had secured Heaney's oral confirmation that he had authorised the undertaking to Prestige Auto Sales.

53] The validity of the submission is not to be gainsaid. The omission by Mrs Petersen to secure written confirmation of the alleged authorisation conveyed orally to her by Heaney is clearly a factor to be thrown into the melting pot and be weighed together with the other evidence and counter evidence on the issue in question.

54] I turn to deal with a particular aspect of Mrs Kolesky's evidence. She painted a picture of Njamela having made what can only be described as a terrible nuisance of himself during the period preceding the obtaining of Heaney's authorisation for the undertaking to be given to Prestige Auto Sales. He, as it were, camped out in the office for some days while he waited for the undertaking, which he was personally to take to Prestige Auto Sales. His pestering of her 'het my mal gemaak'. On 4 June 2008, the day on which authorisation was in fact sought and obtained and the undertaking was given, Njamela had sat himself down in the offices and intimated that he would not budge until he had received the undertaking. She therefore eventually picked up the telephone to speak to Heaney and request the authorisation. Her evidence continued as follows. After securing Heaney's authorisation she advised Mrs Petersen thereof and thereafter prepared a letter of undertaking to Prestige Auto Sales for signature by Mrs Petersen. The latter was however busy consulting with clients and Njamela had perforce to wait for some hours before Mrs Petersen could attend to the matter. After Mrs Petersen signed the undertaking, it was handed to Njamela who left with it. He was in such a hurry that there was no time to prepare a written letter of confirmation.

55] Mr *Beyleveld* roundly criticised portions of this evidence, with justification. Whatever other pressures of work Mrs Kolesky laboured under, and in the light of the alleged substantial nuisance that Njamela was making of himself, one fails to understand why she did not earlier simply pick up the telephone to contact Heaney, a very simple procedure. It is clear that Mrs Kolesky was guilty of gross exaggeration as to what pressures Njamela subjected her to. Her comment about a written letter of confirmation could at best only have referred to the period before Njamela left the office – nothing prevented a letter of confirmation being prepared subsequently.

56] However, after giving this aspect anxious consideration, I am not clear as to how far it assists Heaney and Smith in the prosecution of their case. It seems to me that it can only be in respect of the argument that on the first occasion when Heaney's authorisation was sought on 13 May 2008 Kolesky had planned a fraudulent scheme *vìs-a-vìs* Heaney/Smith as well as Mrs Petersen, and that on the second occasion she planned a similar fraud, but was hesitant to implement it until Njamela wore her resistance down. (I return later to consider in more detail the imputation of fraud, in and about her contact with Heaney, levelled against Mrs Kolesky in argument).

57] Part of one aspect of the dispute between Heaney and Mrs Petersen as to alleged relevant telephonic communications between them may at this stage be dealt with shortly. Apropos Mrs Petersen's statement that when she telephoned Heaney to seek his confirmation of the authority for an undertaking to be furnished to Prestige Auto Sales, he made a comment to the effect that 'they' had no choice in the matter, Heaney stamped the evidence as being ridiculous, pointing out that it was 'their' money and that 'they' were entitled to deal therewith as they wished.

58] Heaney misinterpreted Mrs Petersen's statement. It was not intended to convey that in law Heaney and Smith were obligated to assist Njamela and had no alternative, but rather that, for reasons Heaney did not disclose, he felt that Njamela should be given assistance. The statement was accordingly not ridiculous, and in the light of the discussion which follows below, it in fact had the ring of truth.

59] Heaney testified that having gleaned from Njamela that transfer of the property in question into the names of the Lings's had been effected, he contacted Mrs Kolesky and enquired 'when we can expect our payment because obviously we're anxious for it, and she advised me that she would send the statement of account'. He further explained that the partnership had 'run a schedule on each property' setting out the expenses incurred and he wanted to know what amount would be paid out so that same could be cross-referenced with the schedule (his expectation being a sum of approximately R125,000.00). On his enquiry on that score Mrs Kolesky mentioned a figure of R12,000.00 odd. He testified that this shocked him and he queried how that was possible. Mrs Kolesky responded that there had been an undertaking to a dealership in the sum of R195,000.00. He asked whence the authority for the undertaking to which Mrs Kolesky replied that he, Heaney, had given the authorisation. His rejoinder was that that was impossible. He directed Mrs Kolesky to forward the statement of account as soon as possible.

60] Mrs Kolesky's evidence confirmed that Heaney telephoned her, but stated that it was after she had submitted the statement of account to Heaney and Smith. He expressed dissatisfaction with the amount that was to be paid out. She responded by expressly saying: 'Brent, can't you see the amount of the undertaking has been taken off because that is what we paid

over on behalf of Mr Njamela which you consented to'. She later indicated that Heaney disputed her statement. She further advised him that if he was dissatisfied he should take the matter up with Mrs Petersen.

61] Adverting to the letter exhibit A14 addressed by Engelbrecht to Mrs Petersen on 12 August 2008 (paragraph 36(a) above) Mr *Beyleveld* argued that there must have been a background thereto which served as the context in which the letter was written. That submission was acceptable, so far as it went. It was the context that counsel contended for that was the subject of debate during argument.

62] Ms *Potgieter*, for Mrs Petersen, argued that the context of the letter was the attempts envisaged by the partnership to seek from Njamela payment of what he owed it, including that portion of the proceeds of the transaction in question that had accrued to Heaney and Smith but which had formed part of the amount paid to Prestige Auto Sales for the benefit of Njamela.

63] The argument on behalf of Smith and Heaney was that the context was not restricted to envisaged endeavours to recover monies from Njamela, but also embraced the claim made by the partnership that Mrs Petersen was liable to it based on the averment that she had implemented an undertaking in favour of Prestige Auto Sales which had not been authorised by Heaney.

64] Heaney's evidence was that after receipt of the statement of account sent to him by Mrs Kolesky pursuant to their earlier telephone conversation, he discussed the matter with Smith and it was decided that contact should be made with Mrs Petersen to find out how it was possible that 'an undertaking relating to our money could be paid out to somebody without our permission.' He telephoned Mrs Petersen and raised the issue

with her. Her response was that Mrs Kolesky had advised her that he, Heaney, had given consent for the undertaking. His rejoinder was that Mrs Kolesky was lying.

65] A meeting was thereupon arranged at which Heaney, Smith and Engelbrecht met with Mrs Petersen. The date was during the first week or one and a half weeks of August 2008. The discussion centred round the issue how it happened that the partners' money could be paid out to a third party without their authority, and how reimbursement could be achieved.

66] During the meeting Mrs Petersen left the room saying that she would check with Mrs Kolesky and on her return stated that Mrs Kolesky averred that Heaney had authorised the undertaking (which Heaney testified was being disputed by him).

67] Asked what was the outcome of the meeting Heaney stated that the partnership was owed money that had been 'paid to Njamela', so the obvious first reaction was that it should be recovered from him. Mrs Petersen intimated that she would assist them in recovering monies from Njamela. Engelbrecht discussed with her the possibility of withholding monies from Njamela out of the proceeds of a separate deal that Mrs Petersen was handling on his behalf. Hence, the letter, exhibit A14.

68] At no stage during the meeting did Mrs Petersen acknowledge that she had not been authorised to give the undertaking.

69] Matters did not take a satisfactory turn and a request was made for a further meeting at which Njamela was to be present. Such a meeting was held on 21 August 2008. Present were Heaney, Smith, Njamela

and Mrs Petersen. Njamela was supposed to explain how he would repay the partnership. Mrs Petersen asked him how he could place her in such a difficult position as she was now involved in the matter. Njamela however was what Heaney described as 'unremorseful'. There was no direction indicated as to how the monies owing were going to be recovered from Njamela. The letter of 12 September 2008, exhibit D (paragraph 36(b) above) then followed.

70] Engelbrecht also spoke of a meeting between the three partners and Mrs Petersen, but he was uncertain as to when it took place, and conceded the possibility that it occurred only after the correspondence referred to above had passed between him and Mrs Petersen. (In this regard I should record that a transcript of the evidence that was made available recorded that Ms *Potgieter* put to Engelbrecht that Mrs Petersen would testify that the meeting was definitely after the exchange of the correspondence on 12 and 15 September and Engelbrecht was asked if he could dispute that. The transcript records that the response was: 'No, it was not'. However, my own note of the evidence, which I am satisfied was correct, is that Engelbrecht's response was that he could not dispute the proposition. On this aspect it is also relevant to record that Engelbrecht's evidence included the statement that the first contact he had directly with Mrs Petersen was when she telephoned him on 12 September 2008 after receipt of the letter exhibit A9). As to the course the meeting took his evidence largely accorded with that of Heaney.

71] It was in respect of the alleged meetings that Smith's evidence was contradictory and confusing. He confirmed that there were two meetings. However, it was his initial evidence that at the first meeting the discussions centred around the question of how the money could be recovered from Njamela. Asked whether there was any discussion

by anyone relating to an undertaking to pay a garage or more than one undertaking to pay motor dealers, his first response was: 'No'. He did however add that at a stage Mrs Petersen left the meeting to consult with Mrs Kolesky about the conversation the latter had had with Heaney. Prior to Mrs Petersen doing so 'it had been reiterated that Mr Heaney had said that an undertaking could take place as long as it did not affect the proceeds of our shares of the sales'. Asked whether Mrs Petersen said anything on her return to the room, he stated that the conversation again revolved around the question of how the partners would get the funds from Njamela, but he added that Mrs Petersen made the comment that Njamela had put pressure on her office before and that she had personally helped him out of difficult circumstances before, something which had not featured in the evidence of either Heaney or Engelbrecht. Prompted specifically with the proposition that Mrs Petersen had left the room in order to consult with Mrs Kolesky and the question whether Mrs Petersen said anything in that regard on her return, Smith answered: 'Ja, she did not at any stage confirm that [Mrs Kolesky] had received permission to pay out proceeds'. Probed further as to what Mrs Petersen had said, he replied that he did not recall. He further answered in the negative the question whether at any stage at the meeting Mrs Petersen indicated that she had spoken to Heaney in regard to the furnishing of any undertakings on behalf of Njamela. According to Smith the upshot of the meeting was no more than it was agreed that the defendant would try to arrange another meeting with Njamela present.

72] In respect of the alleged second meeting Smith confirmed that it took place on 21 August 2008, with he, Heaney and Njamela meeting with Mrs Petersen. It had been hoped that Njamela would agree 'to repay the funds incorrectly paid on his behalf'. Njamela however proved to be uncooperative. A comment made by Heaney at the meeting was

that by his actions Njamela would cause the defendant to face a fraud charge. This too was something Heaney had not mentioned. It was then that Mrs Petersen asked Njamela how he could have placed her 'in the situation'. At this meeting Mrs Petersen had not claimed that she personally had received authority from Heaney to issue undertakings for the benefit of Njamela. She was told that if the steps against Njamela proved to be unsuccessful action would be taken against her company, also an aspect that neither Engelbrecht nor Heaney had mentioned.

73] It was put to Engelbrecht in cross-examination that at the meeting at which he was present there was an attempt to prevail on Mrs Petersen (or to threaten her) to hold back monies due to Njamela from other transactions. Engelbrecht's reply was that there was merely a discussion concerning whether Mrs Petersen could hold such monies back, to enable the partnership to seek an attachment order. Engelbrech conceded however that it was correct that Mrs Petersen replied that in the absence of an interdict or court order it would be unprofessional for her to hold any monies back.

74] It was further put in cross-examination of Engelbrecht, Heaney and Smith:

(a) that Mrs Petersen had no recollection of any meeting(s) that occurred during August 2008;

(b) that she recalled only the one meeting, ie the one at which Engelbrecht was present, which took place after the correspondence, referred to earlier, had passed between the parties;

(c) that Heaney was not present at that meeting, only Engelbrecht and

Smith;

(d) that Njamela also was not present;

(e) that at the meeting Mrs Petersen was told that the relationship with Njamela had soured, and that if she did not assist the partnership to recover the monies owed to it by Njamela, they would 'come after her';

(f) that at the meeting Mrs Petersen stated that she personally had a conversation with Heaney during which he authorised the undertaking for R195,000.00;

(g) that at a stage Mrs Kolesky came into the room where the meeting was held and in reply to a question put to her stated that Heaney had given her authority for the undertaking in the sum of R195,000.00.

(It would appear that it was this incident that was referred to when it was later put that Mrs Kolesky was present at the meeting).

(h) that the letter of 12 September 2008, exhibit A9, was the first intimation she received that the partnership was seeking to hold her personally liable;

(i) that at the meeting she specifically stated that Heaney should be told that he should come and say to her to her face that he had not given her authorisation for the undertaking (in other words, she issued a challenge);

(j) that Smith commented to her that Heaney was an old school friend whom he and Engelbrecht were assisting by going into business with him.

75] In her evidence Mrs Petersen confirmed the propositions referred to in

the preceding paragraph. In particularly she affirmed that the letter of 12 September 2008, exhibit A9, was the first intimation that she received of the averment that she had had no authority to furnish the undertaking for the sum of R195,000.00 and that it was the attitude of the partnership that *she* was liable to Heaney and Smith in respect of that portion of the said sum that represented part of their share of the proceeds of the transaction in question. She had earlier come to learn that the partners were seeking to recover monies from Njamela.

76] Mrs Kolesky testified that she bore knowledge that there was a meeting between Mrs Petersen and members of the partnership. She was unable to say whether it took place before or after receipt of the letter of 12 September 2008, exhibit A9. Initially, during examination in chief she stated that Heaney, Smith and Engelbrecht attended the meeting. However, under cross-examination (without there having been any intervening adjournment) her evidence proceeded as follows:

'Daar was getuienis gewees dat daar 'n gesprek was in die kantore van die verweerderes waar, soos u getuig het, Mnr Heaney teenwoordig was, Mnr Engelbrecht en Mnr Smith en die verweerderes. --- As ek nou daaraan dink is ek nie seker of Mnr Heaney daar was nie. Ek het Mnr Smith gesien en ek het Mnr Engelbrecht gesien. Ek is nie doodseker of Mnr Heaney daar was nie.
Mnr Heaney sê hy was daar gewees. --- Dit mag wees maar ek kan dit nie bevestig dat hy daar was nie.'

77] She stated that she did not attend the meeting. It was put to her that during the course of the meeting Mrs Petersen excused herself, saying that she was going to get confirmation from the witness whether there had in fact been a telephonic mandate given by Heaney for the undertaking to be furnished. Her response was that she could not recall that, but she added that on occasion Mrs Petersen, during a consultation with a client, would come to her with an inquiry or an

instruction.

78] Mrs Kolesky further testified that she knew of no further meeting at which Njamela was also present.

79] I have little difficulty in accepting the defence version that the context in which exhibit A14, dated 12 August 2008 (paragraph 36(a) above), was written did not embrace any intimation by the partnership that they would seek to hold Mrs Petersen liable for the amount allegedly paid out on behalf of Njamela or even that their stance was that Heaney had not given authorisation for the undertaking in question. Similarly, I accept the evidence of Mrs Petersen that there was only one meeting, the details of which were those deposed to by her. Certainly, I am unpersuaded that Heaney and Smith discharged the onus of proving the contrary, on either score. My reasons for so concluding follow.

80] As indicated earlier, both Mrs Petersen and Mrs Kolesky impressed me as being more credible witnesses than were Engelbrecht, Heaney and Smith. The contradiction between Mrs Petersen's evidence (that Mrs Kolesky at a stage came into the room where the meeting was being held) and the proposition put on her behalf during cross-examination (that Mrs Kolesky was present during the meeting) was more apparent than real. The two statements are quite capable of being reconciled. The fact that Mrs Kolesky did not confirm that she went into the meeting room at a stage and confirmed that Heaney had telephonically authorise her to give the undertaking in question, is neither here nor there. It could well be something that she no longer remembered, and she was not pertinently questioned on the aspect. The fact that Mrs Kolesky initially stated that Heaney was at the meeting referred to by her is of no assistance to Heaney and Smith. Her subsequent qualification of that evidence, as set out in paragraph 76 above was

spontaneous and in my view correctly reflected her true evidence.

81] I have not lost sight of the fact that in an earlier telephonic conversation Heaney, in response to Mrs Kolesky's averment that he had given authorisation for the undertaking, had said that that was impossible, and that Mrs Kolesky had then told him that he should take the matter up with Mrs Petersen. If indeed it was taken up with Mrs Petersen it would, on the case presented by Heaney and Smith, have been made unambiguously clear to her both that the undertaking had not been authorised *and* that she would be held personally liable. However, although the three partners testified that at the first meeting it was stated that the undertaking had not been authorised, there was no suggestion it was in any manner conveyed to Mrs Petersen that they would look to her to reimburse the moneys allegedly wrongly paid out. Smith specifically excluded that this happened and said that the discussion instead revolved around steps to be taken to obtain reimbursement from Njamela. The contradictions between Smith's evidence and that of his colleagues place a question mark on the credibility of their version of the first meeting.

82] Had the letter, exhibit A14, been written in the context contended for by counsel, it is inexplicable that the letter did not advert to both the allegation that the undertaking had not been authorised and to the partners' intention to hold Mrs Petersen liable. On the other hand the letter is completely in keeping with the context argued on behalf of Mrs Petersen, that the partners were merely pursing avenues to recover money from Njamela.

83] It is only Smith who averred that at the alleged second meeting (after exhibit A14 had been written) it was said to Mrs Petersen that if the partners failed in their endeavours against Njamela they would seek to

hold her personally liable. One questions then why a formal written demand was only addressed to Mrs Petersen some three weeks later (to which may be added that the letter of demand was only written some two months after the partners had become aware of the implementation of an undertaking to Auto Prestige Sales which was allegedly unauthorised).

84] It is not in any way improbable that a meeting with Mrs Petersen would be held with only Engelbrecht and Smith present, ie in the absence of Heaney. The dispute that had arisen revolved precisely around his alleged conduct. Mrs Petersen's evidence, which was not pertinently challenged, that she conveyed to Engelbrecht and Smith that, as it were, she dared Heaney to come to tell her to her face that he denied that he had given her authorisation, had the ring of truth.

85] I turn now to consider the probabilities. In the paragraphs that follow I set out my reasons for concluding that the probabilities favour the acceptance of Mrs Petersen's version.

86] Two aspects may be given short shrift. It was suggested, first, that there was some sort of personal relationship between Mrs Petersen and Njamela that would have moved her to assist him by way of furnishing an unauthorised undertaking, and, second, that she did so as a result of succumbing to pressure applied by Njamela who made the nuisance of himself that Mrs Kolesky deposed to. Neither suggestion had any merit. Mrs Petersen denied that there was a personal relationship between her and Njamela of any nature whatsoever. There is no reason to question the acceptability of her denial. She also testified that Njamela did not seek to place her under any pressure at all, and firmly added that she would not have countenanced same. Again, there is no reason to question the

acceptability of this evidence.

87] No benefit would have accrued to her from giving Njamela an unauthorised undertaking. On the contrary, it would have been abundantly and unambiguously clear to her that in doing so she was placing herself in a position where she would inevitably have to face serious consequences. As was emphasised by Ms *Potgieter*, it was inevitable that the allegedly unauthorised undertaking and the payment in terms thereof would come to light. Accounting in respect of the transaction in question would have to be given and the fact of the undertaking could not have been concealed. The consequences for Mrs Petersen could have included criminal charges as well as disciplinary measures by the Law Society, probably resulting in her being struck off the roll of attorneys. In the light of this scenario the improbability of her having done what was attributed to her (on two occasions) is manifest.

88] To meet this point Mr *Beyleveld* raised the argument that Mrs Petersen had not wittingly issued an unauthorised undertaking. Instead, she had merely acted on the say-so of Mrs Kolesky and simply signed the undertaking placed before her. In doing so without herself confirming with Heaney that he had in fact authorised the undertaking, as behoved her in the circumstances, she had acted negligently. Hence, her liability in respect of the claim made by Heaney and Smith. The argument faces two insurmountable hurdles: First, the testimony of Mrs Petersen, and for that matter that of Mrs Kolesky as well. Second, despite counsel's contention to the contrary, the point was not put to Mrs Petersen under cross-examination, certainly not sufficiently. After Mrs Petersen had affirmed that she never issued any undertakings without confirming that they were duly authorised it was merely put to her, first, that she was simply making an assumption and saying she

would not have done so, and, second, that Njamela had put pressure on Mrs Kolesky and that she, Mrs Petersen, signed the undertaking without obtaining authority. Both of these propositions were firmly rejected by Mrs Petersen and they do not constitute a basis for the argument raised by counsel. It may also be pointed out that there could be no real talk of Mrs Petersen having *unwittingly* failed, after signing the undertaking, to take steps to secure confirmation in writing of Heaney's authorisation, having regard thereto that on counsel's argument she herself had not personally spoken to Heaney.

89] In respect of Mrs Kolesky Mr *Beyleveld* conceded, correctly, that on Heaney's version she had on two occasions committed fraud *vìs-a-vìs* Heaney and Smith and *vìs-a-vìs* Mrs Petersen as well, by facilitating and securing the furnishing of undertakings that she knew were not authorised. In terms of Heaney's evidence it had been made unambiguously clear to her precisely what authorisation was being granted and what was not being authorised. There are however a number of considerations militating against this scenario. First, the evidence does not suggest that there was any relationship between her and Njamela that rendered it likely that she would assist him in the manner suggested. (The fact that Mrs Kolesky had previously worked for some years for another attorney and become acquainted with Njamela as a result of his bringing conveyancing work to her then employer, did not establish that a special relationship between the two of them existed). Second, even if Njamela had made a pest of himself on the second occasion, that would hardly have been sufficient to persuade Mrs Kolesky to commit the fraud in question. Third, Mrs Kolesky was an experienced conveyancing clerk and she would have been fully aware, on the same basis as discussed earlier, that the allegedly unauthorised undertakings would inevitably come to light and her fraud be exposed. Fourth, she also ran the risk that Mrs Petersen,

as behoved her and as was her practice, would adopt the stance that she would not sign any undertaking without herself establishing by enquiry of the client that it was in fact authorised.

90] On the other hand there is, in my judgment, no cognizable improbability in Heaney having conducted himself as Mrs Petersen and Mrs Kolesky testified. As to the suggestion that there was no benefit for the partnership in its assisting Njamela in the manner claimed, I have already recorded that the partners perceived that their association with Njamela would reap financial benefits for them. This would have constituted sufficient motivation for assistance to Njamela. The fact that Njamela was already heavily in debt to the partners and that they initially anticipated, when the transaction in question was commenced, that they would, for the first time, receive a substantial cash payment from the proceeds, does not eliminate the motivation referred to.

91] There was no necessity for Mrs Kolesky, on behalf of Mrs Petersen, to seek Heaney's authorisation for an undertaking in an amount not exceeding Njamela's one third share of the net proceeds. The necessity to contact Heaney would only have arisen if authority was being sought for an undertaking in an amount that exceeded that one third share. In those circumstances it is improbable that, as Heaney claimed, Mrs Kolesky would not have mentioned an amount and merely asked for authority for an undertaking.

92] The probability that the evidence of Mrs Petersen and Mrs Kolesky is true and that subsequently a false claim was made that the undertaking furnished to Prestige Auto Sales had not been authorised, is enhanced by the fact that initially the partners only pursued avenues

to recover their money from Njamela (which could have been prompted by the fact that the relationship between them and Njamela had soured), and the fact that the formal letter of demand was addressed to Mrs Petersen the day after the partners were served with the garnishee order which disclosed Njamela's parlous financial situation.

Finding

93] I accordingly conclude that the plaintiffs have failed to establish their cause of action. It was not argued that the present matter was a proper case for an order of absolution from the instance to be issued.

Costs

94] Subject to what follows, the general rule that costs follow the event is to be applied.

95] On the morning of the fourth day of trial, 4 February 2011, the matter was postponed to a date to be arranged because the defendant was ill and her evidence could not be commenced. A medical certificate recorded that she was suffering from a major depressive episode with psychotic features and acute anxiety. On the day fixed for the resumption of the trial, 6 May 2011, the defendant was still ill and the matter was accordingly postponed to 18 July 2011. Ms *Potgieter* submitted that the costs occasioned by the postponements should be costs in the cause, alternatively, that the costs lie where they fell. She argued that no fault could be ascribed to the defendant. Mr *Beyleveld* stressed that the reason for the postponements arose in the defendant's camp and submitted that it would be proper that the defendant pay the costs occasioned by the postponements. There are authorities for each of the three courses mooted. I have a wide discretion in the matter of costs. I am persuaded that it would be fair to

both parties if the costs lie where they fell.

Order

96] The following order is issued:

(a) Subject to (b) the plaintiffs' claims are dismissed and judgment is given in the defendant's favour with costs;

(b) No order is made in respect of the costs occasioned by the postponements on 4 February 2011 and 6 July 2011.

_____

F KROON
JUDGE OF THE HIGH COURT

APPEARANCES:

FOR PLAINTIFFS:	A Beyleveld SC, instructed by Pierre Kitching Attorneys
FOR DEFENDANT:	S Potgieter, instructed by Anthony Inc.