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**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH**

Case no. 3518/16

Date heard: 22/11/16

Date delivered: 24/1/17

Not reportable

In the matter between:

JOHAN ANDRE LOCHNER

Plaintiff

and

SCHAëFER INCORPORATED

First Defendant

MORNé SCHAëFER

Second Defendant

TANIA SCHAëFER

Third Defendant

JUDGMENT

PLASKET, J:

[1] This is an application for summary judgment in which the only issue to be decided is whether the defendants have raised a bona fide defence to the plaintiff's claim.

The facts

[2] The plaintiff, Dr JA Lochner, instructed the first defendant, Schaëfer Incorporated, a firm of attorneys and conveyancers, to 'procure the registration of the transfer of the Plaintiff's property, Erf [...] H. to its purchaser, one Jaco Van Rooyen'. Those instructions were accepted and a contract of mandate duly came into existence. The second and third defendants, Mr Morné Schaëfer and Ms Tania Schaëfer, are directors of Schaëfer Inc and, it is alleged, jointly and severally liable with it for its debts and liabilities incurred during their tenure as directors.

[3] The contract of mandate contained the following material terms: (a) Schaëfer Inc would do whatever was necessary to procure the registration of transfer of the property from Dr Lochner to the purchaser; and (b) the proceeds of the sale would be paid by Schaëfer Inc into Dr Lochner's bank account, as specified in clause 5 of the contract.

[4] A tacit term was also pleaded: that the attorney or attorneys who executed the mandate 'would act without negligence and with the necessary care, skill and diligence which would be expected from them in the circumstances'.

[5] Schaëfer Inc proceeded to register the transfer, to receive payment from the purchaser and deposit an amount of R512 720.13 into an account which it believed was the account of Dr Lochner. As it transpired, a fraud had been perpetrated on Dr Lochner and Schaëfer Inc. An amount of R244 372.21 was 'saved' from the predations of the perpetrators of the fraud and paid to Dr Lochner with the result that, it was alleged, he suffered damages in the amount of the difference between this amount and the amount that was due to him. He accordingly claimed R268 347.92 as damages for the breach of contract on the part of Schaëfer Inc.

[6] In an affidavit in opposition to the application for summary judgment, Ms Tania Schaëfer, the attorney who dealt with the registration of transfer of the property, set out the events that led to the unfortunate situation that gave rise to Dr Lochner's claim.

[7] She stated that, having received the instruction from Dr Lochner, his wife's e-mail address – [w.....@gmail.com] – was stipulated in the deed of sale for communication purposes. During the process of registration of transfer of the property, she communicated with Dr Lochner regularly by way of this e-mail address and by way of cell phone calls. She also received communications from Ms Lochner by way of e-mail from time to time.

[8] During the course of the transaction, Ms Lochner provided Ms Schaëfer with the details of an Investec account number into which the proceeds of the sale were to be paid.

[9] On 5 August 2016, the transfer documents were lodged in the Deeds Office and Ms Lochner was informed of this by sms. On 10 August 2016, Schaëfer Inc received an e-mail from Ms Lochner requesting a progress report. She was informed that transfer should be registered on the following day.

[10] On 16 August 2016, Schaëfer Inc received an e-mail, ostensibly from Ms Lochner requesting a progress report and, on the following day, received another e-mail requesting that the banking details be changed. The e-mail stated:

'Thank you very much for your kind assistance in the sale of our property.

We would like the full proceeds of the sale to be paid into our FNB account as against the Investec bank account that was provided earlier.

Find banking details below:

Bank Name: FNB

Account Name: Dr JA Lochner

Branch Code: 251345

Account Number: [6...]

Kindly confirm receipt and send me a proof of payment as soon as payment has been made. I anticipate your usual prompt response.'

[11] A blank document headed 'Authority by seller and power of attorney to effect transfer' was sent by reply for signature. It reflected the FNB account as the account

into which the balance of the proceeds of the sale would be paid. It was returned with what appeared to be Dr Lochner's signature appended to it.

[12] The transfer was registered on 17 August 2016 and the parties were informed by sms that payments in respect of the transaction would be made within two to three business days. On 18 August 2016 at 12h49 an amount of R512 720.13 was transferred from Schaëfer Inc's trust account into the FNB account and an sms was sent to Ms Lochner to report on this. On the same day proof of payment with the final account was e-mailed to Ms Lochner.

[13] On 19 August 2016 Ms Lochner telephoned Schaëfer Inc to enquire whether the balance of the purchase price had been paid. She was informed that it had, indeed, been paid into the FNB account. Ms Lochner said that Dr Lochner did not have an FNB account. It appears that an unknown person had intervened and, using a false e-mail address, had purported to be Ms Lochner when giving instructions to deposit the proceeds of the sale into the FNB account. The only difference between Ms Lochner's e-mail address and that of the perpetrator of the fraud was in the spelling of her surname: a second 'n' was inserted in Lochner by the fraudster.

[14] The Fraud Division of FNB was contacted immediately and a request was made to block the account into which the funds had been paid. Schaëfer Inc's bank, ABSA, was also informed and it contacted FNB to ensure that the FNB account was blocked. Ms Lochner too contacted FNB for the same purpose. It was confirmed by an official employed by FNB that the account would be blocked immediately. When, later on 19 August 2016, Ms Schaëfer contacted FNB, she was informed that the account had been blocked.

[15] It was later ascertained that four small withdrawals totalling R12 000 were made from the account between 18 and 22 August 2016 and a large withdrawal was made on 23 August 2016, after FNB had been requested to block the account.

[16] The defendants state that they have a bona fide defence to the claim: they were not negligent in the performance of the mandate in the circumstances outlined in Ms Schaëfer's affidavit.

The issue

[17] Although Dr Lochner pleaded that the contract of mandate contained a tacit term to the effect that the mandate would be executed without 'negligence and with the necessary care, skill and diligence', Mr Scott, who appeared for Dr Lochner, argued that proof of negligence was not necessary: all that had to be established in order to succeed in the claim was that the mandate had not been executed. Mr van der Linde, who appeared for the defendants, argued, on the other hand, that fault was indeed a requirement of a claim founded on the contract of mandate, certainly in respect of an attorney and client relationship.

[18] It is trite that 'attorneys are mandatories of their clients'.¹ Authority for this proposition may be found in both the judgment of the court below (per O'Donovan J) and on appeal (per Muller JA and Kotze JA) in *Slomowitz v Kok*.² The matter involved a damages claim brought by a client against an attorney who had allowed the client's claim to prescribe. The claim, O' Donovan J held, was based on the attorney's 'failure to carry out a mandate that he had accepted from the plaintiff'.³ On appeal, Muller JA had stated that the attorney had been prepared to act on the client's behalf and 'het die mandaat aanvaar'.⁴

[19] Professor Midgley states that it has long been recognised by the courts, in South Africa and elsewhere, that an attorney who agrees to perform work for a client in effect undertakes to do so with a reasonable degree of skill, care and diligence. He concludes that this duty is a 'duty not to be negligent'.⁵

[20] Professor Midgley's view is supported by (inter alia) *Slomowitz v Kok*.⁶ O'Donovan J, in the court below, held that '[i]n carrying out his mandate the defendant was obliged, personally or through others, to exercise the knowledge, skill

¹ JR Midgley *Lawyers' Professional Liability* at 5.

² *Symington v Kok* 1983 (1) SA 130 (A). Unusually, the judgment in the court below is reported with the judgments on appeal.

³ At 130H.

⁴ At 134D. See too *Benson & another v Walters & others* 1984 (1) SA 73 (A) at 83A-B.

⁵ Midgley (note 1) at 84-85.

⁶ Note 2.

and diligence to be expected of an average practising attorney'.⁷ On appeal, Kotze JA held:⁸

'In the absence of testimony by the appellant and a direct and satisfactory explanation why the instructions to effect service were delayed to the Thursday before the Sunday on which the right to institute action became prescribed it is, in my view, impossible to fault the finding of the learned trial Judge that the appellant ran a needless risk and executed his mandate in a negligent manner.'

[21] Mr Scott referred me to two cases, *Scoin Trading (Pty) Ltd v Bernstein NO*⁹ and *Legogote Development Co (Pty) Ltd v Delta Trust & Finance Co*.¹⁰ Both of these matters concern contracts of sale and are essentially concerned with whether liability to pay mora interest requires fault on the part of the debtor. As they are not concerned with the contract of mandate, they are not relevant to this case.

[22] My conclusion is that fault on the part of the defendants is a necessary element of liability in terms of the contract of mandate that had been entered into between Dr Lochner and Schaëfer Inc. Mr Scott's argument to the effect that the defendants are liable simply on the basis that they did not execute the mandate is therefore not correct.

[23] Mr Scott also argued that, in any event, on the version put up in the answering affidavit, the defendants were negligent. I am not prepared to make that finding on the papers. That is a matter that can only properly be determined after evidence has been led and tested by cross-examination. I am satisfied, however, that the defendants have raised a bona fide defence – that despite not having executed the mandate, their failure was not due to their negligence

The order

[24] I make the following order.

(a) The application for summary judgment is dismissed.

⁷ At 132E.

⁸ At 137B.

⁹ *Scoin Trading (Pty) Ltd v Bernstein NO* 2011 (2) SA 118 (SCA).

¹⁰ *Legogote Development Co (Pty) Ltd v Delta Trust & Finance Co* 1970 (1) SA 584 (T).

- (b) The defendants are granted leave to defend.
- (c) The costs of this application shall be costs in the cause.

C Plasket

Judge of the High Court

APPEARANCES

For the plaintiff: P Scott SC instructed by BLC Attorneys, Port Elizabeth

For the defendants: H van der Linde SC instructed by Schaëfer Inc