



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO. 1374/17P

In the matter between:

ALEXANDER NIKOLAEVITCH SCHWARTZ

PLAINTIFF

and

STRAUSS DALY INCORPORATED

DEFENDANT

ORDER

The plaintiff's claim is dismissed with costs, such costs to include those occasioned by the employment of two counsel.

JUDGMENT

Henriques J

Introduction

[1] 'Neither a borrower nor a lender be' are prophetic words that should resonate with the parties in the current action. The plaintiff is a Russian national and a businessman who instituted action against the defendant, a firm of attorneys practising under the name and style of Strauss Daly Incorporated, carrying on business at 9th Floor, Strauss Daly Place, 41 Richefond Circle, Ridgeside Office Park, Umhlanga, KwaZulu-Natal.

The cause of action and the pleadings

[2] The particulars of claim alleges that on or about 25 February 2015, the plaintiff personally concluded an agreement of mandate with the defendant, represented by its director Mr Andile Z Khoza (Mr Khoza) which was partly oral and confirmed in writing by emails exchanged between the plaintiff and Mr Khoza, through his secretary, Ms Charlene Budhoo (Ms Budhoo).

[3] The plaintiff pleads that the express, *alternatively* implied, *alternatively* tacit terms of the agreement were that he would make payment of the sum of R1 million into the defendant's trust account, under file reference Khoza/CB/ZUM248.1. The defendant would use these funds to make a payment to Mr K Zuma (Mr Zuma) as a short term loan, provided that the defendant complied with the following requirements:

- (a) the defendant arranged for Mr Zuma to execute a written document acknowledging the said loan and undertaking to repay the said sum, together with interest thereon at 2% above prime by no later than 31 March 2015;
- (b) the defendant was to arrange for a surety undertaking executed by Kapital Mindz (Pty) Ltd ('Kapital') under the authority of a resolution by Kapital, standing as surety for the loan to Mr Zuma;
- (c) an authority by Kapital in writing authorising the defendant to repay the debt out of funds held on behalf of Kapital;
- (d) the defendant would not release the funds paid by the plaintiff into its trust account until the requirements in paragraphs (a) to (c) had been complied with;
- (e) the defendant would exercise a duty of care and competence towards the plaintiff and;
- (f) the defendant would deal with the plaintiff with the utmost good faith.

[4] Pursuant to the agreement, the plaintiff deposited the amount of R1 million into the defendant's trust account, held by Absa Bank, on 27 February 2015. In breach of the agreement, the defendant, represented by Mr Khoza, paid the funds out to a person or persons unknown to the plaintiff, without complying with the requirements set out in paragraph 3 above, and has not arranged for repayment of the money on the due date.

[5] The plaintiff gave no authority for the funds to be paid out at any time. The defendant now denies receiving any mandate from the plaintiff, and despite demand for the return of the funds deposited, which repayment date the plaintiff pleads was 31 March 2015, the defendant has failed to effect payment.

[6] In the alternative, the plaintiff pleads that as a consequence of the defendant's breach, he has suffered damages in the said sum of R1 million, plus interest, and does not know who the monies were paid to, or if it was paid to a third party, and he is unable to recover the monies from any other person.

[7] The defendant has denied having a mandate from plaintiff in respect of the said money. The plaintiff pleads that the damages which he suffered is a natural and direct consequence of the defendant's breach of the agreement alternatively were, or are presumed to have been, within the contemplation of the parties at the time of the conclusion of the agreement, as being the probable result of the breach.

[8] In the further alternative, the plaintiff pleads that in the event of the court finding that no mandate or contract existed between himself and the defendant, then the deposit of the R1 million into the defendant's trust account on 27 February 2015 created a duty of care on the part of the defendant, owed to him for the protection and proper use of the deposit and the plaintiff's rights thereto. The defendant breached its duty of care in that it failed to protect the deposit, failed to attend to the proper use thereof and failed to protect the plaintiff's rights thereto and the defendant appropriated the amount without the plaintiff's consent or authority. In doing so, the defendant's conduct was unlawful or negligent and was a breach of its duty of care.

The defendant's plea

[9] The defendant in its plea admits that R1 million was paid into its trust account, but avers that this was pursuant to an agreement between Mr Zuma, represented by Mr Vuyo Babalo Mkhize (Mr Mkhize) and the plaintiff. The defendant pleads further that it acted on the instructions of Mr Mkhize in dealing with the money. It denies that a contract of mandate came into existence between the plaintiff and itself, and it further denies that it owed the plaintiff a duty of care.

[10] The defendant in its plea relies on a series of emails exchanged between the parties, setting out the sequence of events and written exchanges between the defendant, the plaintiff, Mr Mkhize and the plaintiff's attorneys of record. It avers that the documents were annexed to demonstrate that it did not ignore any responsibility which attached to it as a firm of attorneys in responding to queries, and such documents are to be read in the context of all the documents and circumstances of the dispute.

Replication

[11] The plaintiff filed a replication to the defendant's plea. In response to the defendant's denial that there was any agreement or instructions which emanated from him, the plaintiff pleads that the exchange of emails between himself and Mr Khoza, through Mr Khoza's secretary, Ms Bhudoo, which are annexed as annexure 'A' to the particulars of claim, and annexure 'B' to the plea, constituted a representation by the defendant, expressly or impliedly, that there was an agreement of mandate and that the conditions as set out by the plaintiff were accepted.

[12] The plaintiff pleads that this is a representation by silence or by the defendant not responding to an email which had been sent by him and received by Ms Budhoo. The plaintiff acted on this email exchange and consequently paid money over as directed, to his detriment. In addition, the plaintiff pleads that the defendant is estopped from denying that the parties had an agreement in relation to the payment of the money which he made and its disposal by the defendant, and further that he gave an instruction to the defendant which the defendant had agreed to abide by.

Issues

[13] The issues to be determined are the following:

- (a) Was an agreement of mandate concluded between the parties?
- (b) If no agreement of mandate came into existence, has the plaintiff proved a claim in delict, alternatively that the defendant owed him a duty of care and was negligent in discharging such duty?
- (c) Is the defendant estopped from denying that an agreement of mandate was concluded?

[14] Of relevance to the issues for determination and central to an understanding of the evidence, are the emails exchanged between the plaintiff, Mr Khoza's secretary Ms Budhoo on behalf of the defendant, and Mr Mkhize. These emails formed part of a core bundle,¹ which was handed in during the course of the trial.

[15] It warrants mentioning at this stage that the main protagonists in the dispute are the plaintiff, Mr Mkhize, Mr Zuma, and Mr Khoza who interacted with the plaintiff in his capacity as a director of the defendant. It is common cause that the defendant was the attorney of record for Mr Zuma in a number of matters and legal fees were owing by Mr Zuma to the defendant, hence Mr Mkhize procuring the loan for Mr Zuma from the plaintiff.

[16] It is also common cause between the parties that the plaintiff paid R1 million into the defendant's trust account on 27 February 2015, which payment was acknowledged by the defendant, and the money was appropriated as follows:

- (a) R900 000 was retained by the defendant in respect of legal fees owing to the defendant by Mr Zuma;
- (b) R100 000 was paid to Mr Mkhize for brokering the deal;
- (c) The plaintiff's conditions as set out in the email of 25 February 2015 were not complied with;
- (d) R1 million has not been repaid to the plaintiff.

¹ Exhibit 'C'.

Emails exchanged between the parties

[17] The defendant relies on an email sent to it by Mr Mkhize on 24 February 2015 at 8h13 pm.² It is common cause that this email was sent to Mr Khoza's email address and copied to the plaintiff.

[18] This email dated 24 February 2015 from Mr Mkhize to Mr Khoza and the plaintiff reads as follows:

'Subject: R1 Million Loan From Alexander Schwartz To Cover Khulubuse Zuma's Legal Fees!
Dear Mr Khoza,

This serves to confirm that Mr Alexander Schwartz has agreed to advance Mr Khulubuse Zuma an amount of R1million to cover his legal fees on the Aurora Empowerment Systems matter.

The terms of this loan agreement are that:

1. Mr Schwartz will pay the amount of R1 million into trust account (Strauss Daly Trust, Absa Current Account Number 4043442457, Reference Number ZUMA 248.1) within the next 24 (twenty four-) hours;;
2. The loan will earn interest at a rate of Prime plus 2 per annum;
3. The loan will be repaid before 31 March 2015, failing which you are to repay it out of the funds to be deposited into your trust account by Mr Barend Petersen of Macrovest 147 (Pty) Ltd, which funds will be the commission payment due to Kapital Mindz (Pty) Ltd under its mandate agreement with Macrovest (the mandate to help Macrovest raise funding in the financial market to purchase a 51% equity stake in Evraz Highveld Steel and Vanadium Ltd as well as secure a working capital facility for the company);
4. You will not disburse any monies from the Macrovest payment before ensuring that Mr Schwartz's loan has been repaid in full.

Please confirm acceptance of the above terms as they relate to you at your earliest convenience.

Kind Regards,

Vuyo Mkhize'

[19] The response to Mr Mkhize's email was sent by Ms Charlene Budhoo to the plaintiff as well as Mr Mkhize on 25 February 2015 at 06h56,³ ⁴electronically signed by Mr Khoza. It read as follows:

² Exhibit 'C', pages 246-247.

³ Exhibit 'C', pages 245-246.

⁴ Exhibit C, page 244 reflects time as being 08:56am.

'Subject: R1 Million Loan From Alexander Schwartz To Cover Khulubuse Zuma's Legal Fees!

Dear Sirs,

We refer to your email dated 24th February 2015 and confirm that we shall abide by the terms thereof.

Please note that the payment must be made into our Trust Account bearing the following details:

Account Name	Strauss Daly Trust Account
Bank	ABSA
Account Number	404 344 2457
Branch	ABSA Business Centre
Branch Code	632005
File Reference	Khoza/cb/ZUM248.1

We would appreciate proof of EFT payment by close of business today (25th February 2015). Would you kindly provide us with Mr Alexander's banking details into which the refund must be paid.'

[20] The significant email is the one sent by the plaintiff on 25 February 2015 at 01h26 pm to Ms Budhoo and copied to Mr Mkhize. It reads as follows:

'Subject: R1 Million Loan From Alexander Schwartz To Cover Khulubuse Zuma's Legal Fees!

Dear Mr Khoza ,

Due that Mr Zuma is not noted for their prompt payment of debts due. I suggest you ensure Kapital Mindz (if the money seemingly paid into Strauss Daly is there and belongs to Kapital) to sign a written surety to underwrite Zuma's debt as well as obtain a resolution of Kapital Mindz to sign the surety and authorise Strauss Daly to discharge the debt in the event of non-payment. Basically the same kind of confirmation Mr Vuyo have requested on his initiative email.

I would hesitate to accept an e-mail from Mr. Vuyo not on the Company letterhead and not accompanied by proper Company resolution. Could you kindly help to draft the require and I will be in position to release the funds within next 24 hours prompt.

Best Regards,

Alex Schwartz'

[21] The plaintiff indicated that his email was premised on the advice from his attorney, Mr Roy Wolfson, received earlier on that day⁵ which was recorded in an email that read as follows:

'Subject: R1 Million Loan From Alexander Schwartz To Cover Khulubuse Zuma's Legal Fees!
Alex

Some of the Zuma family are not noted for their prompt payment of debts due.

I suggest you ensure Kapital Mindz (if the money seemingly paid into Strauss Daly is there and belongs to Kapital) to sign a written surety to underwrite Zuma's debt as well as obtain a resolution of Kapital Mindz to sign the surety and authorise Strauss Daly to discharge the debt in the event of non-payment by Zuma.

I would hesitate to accept an e-mail from the chairman not on the Company letterhead and not accompanied by a proper Company resolution.'

Evidence

[22] It is against the background of these correspondences that the evidence presented at trial must be analysed. I propose to summarise the salient features thereof.

[23] The plaintiff who has permanently resided in South Africa since 1998, is a businessman involved in oil logistics and the manufacturing of lubricants and is a director of Lukoil, the largest private oil company in the world. He knew Mr Zuma, who was introduced to him by Mr Mkhize, as they were involved in a number of commercial ventures. He testified that Lukoil had a need for a storage facility near Maydon Wharf and required the co-operation of Transnet to do so. Mr Mkhize had indicated to him that Mr Zuma could assist in this regard.

[24] Discussions had taken place between him and Mr Mkhize before he arrived at the offices of the defendant, as Mr Mkhize wanted him to provide a short term loan to Mr Zuma for the payment of his legal fees. He confirmed that at no stage did he meet with Mr Zuma to discuss the loan, and all his discussions relating to the loan occurred between himself and Mr Mkhize. He wanted the monies to be paid into a reputable

⁵ Exhibit 'C', page 245.

attorney's firm's trust account, as he was uncomfortable with Mr Mkhize's suggestion that the monies be paid into his account.

[25] Mr Mkhize informed him that he knew an attorney at Strauss Daly, Mr Khoza, and would make the necessary arrangements for them to meet. He testified that prior to sending the email of 25 February 2015, he had attended at the offices of the defendant with Mr Mkhize for a meeting with Mr Khoza, which Mr Mkhize had arranged. Such meeting took place in the boardroom at the defendant's offices prior to his email of 25 February, although he was not certain of the exact date. At the meeting in the defendant's boardroom, Mr Khoza was in possession of a large file, and Mr Khoza confirmed with him that he, the plaintiff, agreed to advance the loan to Mr Zuma.

[26] The plaintiff testified that at such meeting, he indicated to Mr Khoza and Mr Mkhize that he had agreed to provide the loan, and would revert regarding his conditions for providing the loan, although it had been agreed that this was a short term loan to be repaid by 31 March 2015.

[27] The plaintiff further testified that he had a discussion with his attorney, Mr Roy Wulfson, subsequent to the meeting at the defendant's boardroom, and was advised in relation to the conditions that he should request in relation to the loan. Such conditions were set out in an email from his attorney to him which was not discovered, and was only made available to the defendant on the first day of trial. The defendant agreed to this email being used during the course of the plaintiff's evidence. The plaintiff confirmed that the contents of Mr Wulfson's email⁶ were cut and pasted in the email which he had sent to the defendant.

[28] The plaintiff testified that he required an acknowledgement of debt or an admission of liability and suretyship documents to be drafted by Strauss Daly which would then be checked by him before he gave authority for the funds to be released. It is common cause that the defendant did not respond to this email received from the plaintiff with his alleged conditions.

⁶ Exhibit 'C', page 246.

[29] Pursuant to such email, the plaintiff paid the monies into the defendant's account, which the defendant admitted to receiving via email on 27 February 2015 and the monies were subsequently appropriated. The plaintiff testified that he did not give authority to Mr Khoza or to anyone at the defendant to release the monies and that despite his email of 25 February 2015, no documents were prepared by Mr Khoza or anyone at the defendant.

[30] The plaintiff testified that the purpose of the meeting, apart from discussing the loan with Mr Khoza, was also for him and Mr Mkhize to discuss a commercial venture. The events precipitating the discussions of the short term loan was that Mr Mkhize had invited the plaintiff to a business launch to discuss the plaintiff investing money in a business called Evraz Highveld Steel and Vanadium Corporation. The plaintiff testified that he regarded the loan as conditional upon him participating in the Evraz deal, although this is not recorded in his email correspondence to the defendant or to Mr Mkhize.

[31] The plaintiff confirmed that when he dispatched the email his expectation was that the documents would be prepared and sent to him by Mr Khoza, which he would approve before he would authorise the monies in trust being appropriated. He confirmed that there was no response to his email of 25 February 2015. He also indicated that the first time that he learnt that the legal fees due by Mr Zuma related to the Aurora Empowerment Mines matter, was after he had seen the email, and although he knew the loan was for legal fees, he did not know the particulars of the matter to which it related, and this was never discussed between him, Mr Mkhize and Mr Khoza.

[32] He testified that what was discussed at the meeting between himself and Mr Mkhize was that they, together with Mr Zuma, would involve themselves in the commercial matter and form a new company which would purchase Evraz Highveld Steel's company shares. He was shown correspondence to the effect that monies were due to Kapital (Mr Mkhize's company) from a business deal involving Macrovest. The letter mentioned Mr Barend Peterson, and although he had never met him in the

past, he was aware of the discussions between Mr Mkhize and Mr Peterson for a company to be formed in order for preferential shares to be purchased therein.

[33] Evraz was experiencing financial difficulties and it was a good time to snatch up a bargain and invest and rearrange the finances of Evraz. The loan which he was providing to Mr Zuma was to facilitate his involvement in the new company to be formed, and would be payable from his own personal funds. He confirmed that paragraph 3 of Exhibit C,⁷ related to the Macrovest matter, and whilst at Mr Khoza's office, although they did not discuss this deal or the formation of a new company, Mr Khoza was in possession of the Macrovest file which he observed, although he did not have an opportunity to see the contents of the file. The purpose of the meeting at Mr Khoza's office was to facilitate the short term loan being granted.

[34] He confirmed that he did not authorise Mr Khoza to give Mr Mkhize R100 000 for brokering the deal nor was he aware that Mr Mkhize was to receive such money. He assumed that if the documents which he had requested, setting out his conditions, were not provided, the money would be paid back into his personal account.

[35] During cross-examination, the plaintiff was interrogated as to whether or not the meeting occurred in February 2015 as alleged by him. It was suggested to him that the defendant had no record of such meeting, and denied that the meeting took place in February 2015. The defendant's version was that Mr Khoza had several meetings in 2014, and that a meeting had occurred in December 2014 which was not in relation to the short term loan, but in relation to certain commercial ventures.

[36] In support of this, the defendant led the evidence of Ms Charlene Bhudoo, Mr Khoza's secretary who confirmed that all appointments or meetings which Mr Khoza had were arranged by her and that there would be a note thereof either in the diary or in a file note. She testified that as Mr Khoza's personal assistant for in excess of 23 years, she would have been aware of such a meeting had it been arranged. Prior to testifying, she checked the records to see if a meeting had taken place. There was nothing in the diaries for the year or the time sheets and no file note in relation to the

⁷ Exhibit 'C', page 246.

meeting between the plaintiff, Mr Mkhize and Mr Khoza during February 2015 at the defendant's offices.

[37] She testified however that if Mr Mkhize arrived at their offices unannounced with the plaintiff to meet with Mr Khoza, and the meeting was a short one, there may not have been a record of it, and she would not know of the meeting and whom accompanied Mr Mkhize to such meeting.

[38] She confirmed that at the time all emails which were exchanged between the plaintiff, Mr Mkhize and Mr Khoza arrived in her email inbox. Her practice was to print the emails and leave it on Mr Khoza's desk, alternatively Mr Khoza would stand at her desk and dictate the responses. At that point in time, he did not have his own PC on his desk, and would work from her desk in her presence.

[39] During the course of the cross-examination of the plaintiff, he confirmed that the discussions and the meetings in December 2014 between Mr Mkhize and Mr Khoza related to securing a lease with Transnet for the property at the Maydon Wharf. However, he clearly recalls the meeting in February 2015. He disputed that no mandate was given and that the defendant was not his attorney. However, during the course of cross-examination, he confirmed that there were no discussions regarding fees which would be charged by the defendant for the documents to be prepared and he further confirmed that he did not follow up in relation to his requirements as set out in the email of 25 February 2015.

[40] He was of the view that it was not necessary to follow up as he perceived that as the defendant's client, the defendant would act in his best interests and that monies would not be paid out until his authority had been obtained. The plaintiff assumed that in the absence of the documents being executed, the monies would be repaid to him. He testified that he only became aware that monies had been disbursed in October 2016, although this part of his evidence was not borne out by the documents and the emails exchanged which he was referred to during the course of cross-examination.

[41] He confirmed that in the email exchanges and correspondence between the relevant parties, including his attorney Mr Roy Wulfson, Mr Mkhize had undertaken to

repay the monies to him. He also confirmed that although he was advised that no monies had been received from Macrovest, he was not personally aware of this. He testified that when the loan was not repaid, he had several interactions both via email and in person with Mr Mkhize who assumed responsibility to repay the monies, as he had brokered the loan between the plaintiff and Mr Zuma.

[42] He further confirmed that emails had been exchanged between himself, Mr Mkhize and Mr Khoza in relation to the manner of repayment by Mr Mkhize but nothing materialised. When questioned as to why, if Mr Mkhize was offering to repay the monies, he did not insist on the documents being signed in order to secure the repayment of the loan by Mr Mkhize, he testified that as far as he was concerned, the loan aspect ended on 31 March 2015, and Mr Mkhize was not making any tangible offers to repay the loan made to Mr Zuma.

[43] He confirmed, although disputed by the defendant, that when Mr Mkhize had met him at a social function and undertaken to repay the monies, Mr Mkhize indicated he would pay it back at the dollar exchange rate equivalent as he, Mr Mkhize, was aware that the plaintiff had utilised his personal monies for the loan to Mr Zuma. The totality of the evidence as summarised above is the conspectus against which the issues must be decided.

Analysis

Contract of mandate

[44] The relationship between an attorney and client is based on a contract of mandate, and such contract imposes fiduciary obligations on an attorney. An attorney owes a duty of care towards the client, the court, and third parties although the nature of this duty has not been clearly defined.⁸ The scope of a mandate depends on its express, tacit or implied terms. Attorneys are mandated to keep a separate trust banking account in which ownership of the money in the account vests in the bank, and the attorney operates the account. An attorney into whose trust account money is paid for an intended payment to a third party or who receives money, bears a legal duty to deal with the money with great circumspection.

⁸ LTC Harms *Amler's Precedents of Pleadings* 8 ed (2018) at 242.

[45] In circumstances where a party alleges negligence on the part of an attorney, the liability of an attorney to a client for damages claimed resulting from such attorney's negligence is based on a breach of the contract between the parties. An implied term of a given mandate is that such attorney will exercise the skill, knowledge and diligence expected of a reasonable practising attorney. Negligence may be found in circumstances where an attorney committed an error of judgment by failing to exercise the required skill, knowledge and diligence. To succeed in a claim for negligence, the plaintiff must allege and prove the existence of a mandate, the breach of the mandate, negligence, proof of damages and that the damages were within the contemplation of the parties at the time the contract was concluded.⁹

[46] *Lawsa* describes a mandate as

'A consensual contract between one party, the mandator, and another, the mandatary, in terms of which the mandatary undertakes to perform a mandate or commission for the mandator . . . There must hence be an agreement between the parties brought about by an identifiable offer, in the form of a request that the mandate in question be performed, and an acceptance of that offer, in the sense of acceding to that request, together with an undertaking to carry out the mandate and to perform the various duties imposed by it.'¹⁰

[47] It is trite that an attorney is required to exercise reasonable care and not absolute care, and consequently an attorney is not absolutely liable.¹¹

The alleged mandate

[48] The defendant's defence is essentially that no contract of mandate or agreement came into existence between itself and the plaintiff. In my view, the plaintiff has not shown that an agreement existed between himself and the defendant. It is patently clear that the plaintiff agreed to advance a loan to Mr Zuma, who at all material times was represented by Mr Mkhize. At all times, the plaintiff was aware that Mr Mkhize was acting for a disclosed principal, Mr Zuma. It is not relevant in my view whether Mr Mkhize was acting for a disclosed principal or not.

⁹ Ibid at 245.

¹⁰ 28(1) *Lawsa* 3 ed para 55.

¹¹ *Tjaard du Plessis Ingelyf v Joubert* [2010] ZAGPPHC 250; [2011] JOL 26791 (GNP) para 6.

[49] He acted on the instructions and advice of his own attorney, Mr Wulfson when despatching the email of 25 February 2015 with his conditions, and could not for a moment have thought that the defendant was acting on his behalf.

[50] He came to be at the defendant's offices, not to peruse documents or discuss the Evraz deal or Macrovest monies, but rather as he was uncomfortable with Mr Mkhize's suggestions that he should pay over the monies into Mr Mkhize's account. It was his insistence that the monies be paid into an attorney's trust account that led to him being taken to the defendant's offices by Mr Mkhize. The three of them, being the plaintiff, Mr Mkhize and Mr Khoza, knew monies were due shortly in relation to the Macrovest transaction, and it was anticipated that such monies would be paid prior to the repayment date of the loan to Mr Zuma.

[51] In my view, the sequence of these emails is of crucial significance.¹² The first in the series of emails is the email on 24 February 2015 (sent at 8h13 pm) from Mr Mkhize to Mr Khoza and the plaintiff. Such email records in unambiguous terms the subject matter of the loan, and the terms of the loan agreement between Mr Zuma and the plaintiff. It is instructive to note the concluding paragraph wherein Mr Mkhize seeks acceptance from the defendant of the terms relating to the loan agreement. The second email was that of 25 February 2015 (06h56 am) from Ms Bhudhoo to the plaintiff and Mr Mkhize. The defendant records in such email that it will abide by the terms set out in Mr Mkhize's email.

[52] Subsequent to this, is the email of 25 February 2015 (11h30 am) from the plaintiff's attorney, Mr Wulfson to the plaintiff, wherein the plaintiff was advised to obtain a written surety to underwrite Mr Zuma's debt and a resolution from Kapital to sign as surety, and to authorise the defendant to discharge the debt in the event of non-payment by Mr Zuma. Based on such legal advice, the plaintiff despatched the email of 25 February 2015 at (01h26 pm) to Ms Bhudhoo and Mr Mkhize.

¹² *Earles v Barclays Bank Plc* [2009] EWHC 2500 (Mercantile) paras 19, 20 and 21.

[53] The express terms of the emails are unambiguous and clear in its import. Affording them their literal commercial businesslike¹³ meaning leads one to the natural conclusion that the defendant undertook in express terms to abide by their client's instructions namely, that of Mr Mkhize. It is common cause that the email despatched by the plaintiff on 25 February 2015 was not responded to, and simply ignored by the defendant. It is on this basis that the defendant contends that it accepted the terms as set out in Mr Mkhize's email of 24 February 2015, and no agreement of mandate came into existence between it and the plaintiff.

[54] The plaintiff's reliance on his email to Ms Bhudoo and her email to Mr Mkhize and himself, as constituting a written confirmation of the agreement of mandate as pleaded in paragraph 3 of the particulars of claim, is misdirected as the chronology and content of the emails clearly indicates the defendant's election to abide by the terms of the loan agreement as stipulated by Mr Mkhize, and not those by the plaintiff.

[55] The plaintiff could not advance any reasonable explanation as to the reasons for effecting payment into the defendant's trust account on 27 February 2015, notwithstanding no response from the defendant in relation to the plaintiff's preconditions for advancing the loan. The unconvincing response was an expectation that the monies would be repaid to him if the preconditions of the loan were not complied with. The probabilities in relation to this aspect do not favour the plaintiff, as the sole purpose for paying the monies into the defendant's trust account was as a result of the plaintiff's alleged discomfort in paying the monies into Mr Mkhize's account.

[56] However, the defendant indicates that it is evident from the email exchange that it had agreed to act in terms of the email sent by Mr Mkhize, and that the monies were to be used on behalf of Mr Zuma for his fees. In addition, in the event of Mr Zuma not repaying the short term loan to the plaintiff, then the defendant would repay the loan from funds which were to be paid to the defendant to the credit of Kapital. Such funds were expected prior to the date upon which the short term loan to Mr Zuma became due. This, the defendant submits, were the terms of the agreement.

¹³ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.

[57] The probable inference gleaned from the plaintiff's evidence was that the terms of the loan agreed to with Mr Mkhize did not include the plaintiff's preconditions as set out in his email, which was akin to an afterthought based on his attorney, Mr Wulfson's advices. It is simply irreconcilable that the plaintiff, having the benefit of his own attorney, would not have paid the monies into his own attorney's trust account to satisfy the discomfort he expressed.

[58] The plaintiff, as a further arrow in his quiver, suggested that the defendant's non-response to his email of 25 February 2015 must be construed as an act of acquiescence, capable of forming the basis of a mandate. The court therefore has to consider whether the silence by the defendant to the email of 25 February 2015 amounted to an acceptance?

[59] The author of *Christie's Law of Contract in South Africa* deals with silence as acceptance, and states as follows:¹⁴

'Outside of this legislation, silence may amount to acceptance of an offer in circumstances that give rise to a 'duty to speak', if the offeree is not prepared to accept the offer. Wessels has been taken by the courts as authoritative:

'But if there is a legal duty upon me to speak and I refrain from doing so, the Court will presume that I assented. It is to these cases that the maxim applies – "*Qui tacet consentire videtur*". Thus, if a merchant writes to his constant correspondent that he will forward to him certain goods at a certain price unless he hears from him to the contrary, and the addressee receives the letter but neglects to reply, the Court may well consider that silence in such a case gives consent . . . The course of dealing between such merchants will legitimately lead the offeror to conclude that his correspondent would reply in case he rejected the offer, and the Court will infer that if the offeree had not intended to accept he would have answered that he did not want the goods.

If, therefore, from the business relationship between the offeror and the offeree the Court finds that the circumstances are such that the offeree could reasonably and fairly be expected to reply, then it may infer that by remaining silent the offeree did in fact intend to accept. The silence of the offeree does not act as an estoppel for there is no legal duty to reply to an offer: no action for damages can be brought for not replying. The silence in such a case is regarded as circumstantial evidence of an intention to

¹⁴ GB Bradfield *Christie's Law of Contract in South Africa* 7 ed (2016) at 80-81.

accept and the mere denial of the offeree that he had any such intention will not be accepted in the face of the facts.' (My emphasis.)

[60] Our courts have had cause to consider whether a party's silence amounts to an acceptance of an agreement and the conclusion of a contract. In *McWilliams v First Consolidated Holdings (Pty) Ltd*¹⁵ the court had to consider whether a party's failure to respond to a letter asserting the existence of an obligation justified the inference that the assertion was accepted as the truth. The court held

'... But in general, when according to ordinary commercial practice and human expectation firm repudiation of such an assertion would be the norm if it was not accepted as correct, such party's silence and inaction, unless satisfactorily explained, may be taken to constitute an admission by him of the truth of the assertion, or at least will be an important factor telling against him in the assessment of the probabilities and in the final determination of the dispute. And an adverse inference will the more readily be drawn when the unchallenged assertion had been preceded by correspondence or negotiations between the parties relative to the subject-matter of the assertion... I have no doubt that appellant's silence and inaction after receipt of the letter justify an inference adverse to him. It appears from the evidence of Mrs McKenzie that Schneider and the appellant were on friendly terms; they sometimes played golf together and as will be seen from the letter Schneider addressed him by his first name, Verne. It is almost inconceivable that had the appellant not regarded the letter of 21 April as being substantially correct he would not have communicated with Schneider, whether by telephone or letter or in any other way. There is nothing to show that he responded to the letter, nor did he claim to have done so or give any explanation worthy of consideration for not doing so. Moreover, despite what is contained in para 3 of the letter of 21 April, the appellant did not show the letter to his attorney, Mr Edelson.'

[61] Watermeyer CJ considered whether correspondence exchanged between parties constituted an offer and an acceptance of terms resulting in a contract of purchase and sale in *Collen v Rietfontein Engineering Works*:¹⁶ He concluded

'... because conduct to constitute an acceptance must be an unequivocal indication to the other party of such acceptance and it is not clear to me that plaintiff's conduct in retaining the money satisfied those requirements. Quiescence is not necessarily acquiescence and one

¹⁵ *McWilliams v First Consolidated Holdings (Pty) Ltd* [1982] 1 All SA 245 (A) at 250.

¹⁶ *Collen v Rietfontein Engineering Works* 1948 (1) SA 413 (A) at 421-422.

party cannot, without the assent of the other, impose upon such other a condition to that effect ...'

[62] *Seeff Commercial and Industrial Properties (Pty) Ltd v Silberman*¹⁷ concerned whether silence on the part of the plaintiff and its failure to object to a proposal and its conduct in proceeding to carry out a project constituted an acceptance of the terms of a contract in which plaintiff had agreed to project manage a development. The court held as follows

'In my view, the defendant did not require or expect acceptance of its proposal as regards paragraph 1 of A1. The comment, however, clearly placed a duty on the plaintiff to object to the proposal if he did not agree to it. The plaintiff's silence and his conduct in proceeding with the project constituted acceptance of the said proposal and it was so understood by the defendant.'

[63] *Straus Daly Incorporated v Goqwana, In re: Meeg Bank Ltd v Goqwana*:¹⁸ concerned a rescission application, one of the issues in dispute related to whether there had been an agreement concerning costs in correspondence exchanged. The court held

'Reverting to the instant case I am not persuaded that the above-quoted passage of the last letter from the applicant's attorneys contained an assertion such that the silence of the respondent's attorneys to it may be taken to constitute an admission by them of the truth of such assertion. In fact, in my view, the said passage contains no assertion at all but a proposal. In my view, therefore, such proposal without acceptance by the respondent's attorneys did not result to an agreement, a settlement agreement in the words of the applicant.'

[64] The following case is illustrative that an acceptance of an offer is not inferred from silence save in exceptional circumstances. In *The MV Prosperous; Cobam NV v Aegean Petroleum (UK) Ltd and another*:¹⁹ which concerned an offer to purchase bunkers the court held

'In English law, as in our law, acceptance of an offer will not normally be inferred from silence, save in the most exceptional circumstances (see *Chitty on Contracts* 26th ed vol 1 at para 81).

¹⁷ *Seeff Commercial and Industrial Properties (Pty) Ltd v Silberman* [2001] 3 All SA 133 (A) para 19.

¹⁸ *Straus Daly Incorporated v Goqwana, In re: Meeg Bank Ltd v Goqwana* [2013] ZAECHMC 31 para 11.

¹⁹ *The MV Prosperous; Cobam NV v Aegean Petroleum (UK) Ltd and another* 1996 (2) SA 155 (A) at 166A-C.

There is a further difficulty with the argument. The papers are silent on the question as to whether or not there was any response from the charterers after 23 October 1992. Counsel for Cobam accordingly found himself obliged to contend that on the probabilities there was no response. In my view there is insufficient evidence on the papers to establish an acceptance by the charterers prior to the attachment on 24 October 1992. It follows that the third ground relied upon by Cobam must also fail.'

[65] In consideration, I am not persuaded that the defendant's silence can be construed to be an acceptance. The factual matrix coupled with the fact that the plaintiff was copied in on both emails sent by Mr Mkhize and Ms Budhoo, further corroborated by the plaintiff's own evidence, leads to the unassailable conclusion that an agreement of mandate was never concluded between the plaintiff and defendant.

The alternate delictual claim

[66] Akin to the issue of a contract of mandate, the onus is on the plaintiff to prove that the defendant owed him a duty of care. Given the fact that the plaintiff has not established or proved a contract of mandate, the submission by Mr Kemp SC, who appeared for the defendant, is sound that it is not of significant interest whether the plaintiff's case lies in contract or delict. The onus rests on the plaintiff to discharge.²⁰ In finding that a contract of mandate did not exist, the defendant cannot be mulcted in discharging a non-existent duty of care to the plaintiff in circumstances where the plaintiff was clearly not the defendant's client.

[67] The defendant, having expressly agreed to abide by the terms as set out in Mr Mkhize's email of 24 February 2015, cannot be legally burdened with a non-existent obligation to discharge in favour of the plaintiff. I hasten to add that the defendant's conduct does however warrant criticism, however such criticism cannot be elevated to imposing a legal obligation.

²⁰ *M obo M v Member of the Executive Council for Health of the Gauteng Provincial Government* [2018] ZAGPJHC 77 at para 29, *Ramonyai v LP Molohe Attorneys* [2014] ZAGPJHC 65 at para 19-20, *Van As v Kotze* [2019] 3 All SA 284 (NCK) at para 9.

Estoppel

[68] The plaintiff filed a replication in answer to the defendant's denial that an agreement of mandate existed between the parties. The essentials to plead estoppel are set out in *Amler's Precedents of Pleadings*²¹ and I do not intend repeating them for purposes of this judgment. The defendant did not agree to the plaintiff's preconditions at all, and having concluded that no agreement of mandate or otherwise existed, the principle of estoppel does not arise. The emails which were exchanged do not support the submission that the defendant represented that an agreement had been concluded, and in my view illustrate quite the contrary.

Concluding remarks

[69] The parties filed written heads of argument and submitted oral argument for which I express my indebtedness to the parties. The court records that it was cognisant of the fact that the plaintiff was a foreign national and whose grasp of the English language was somewhat tenuous. Alive to the plaintiff's constraints, the court nevertheless noted his evasiveness and nonresponsive nature in responding to direct questions, and generally his lack of recollection, specifically relating to the alleged meeting in February 2015. The plaintiff was generally unpersuasive as a witness. His portrayal of himself as a victim in a financial transaction is not consistent with the fact that he is an astute businessman who had previous dealings with businessmen of the ilk of Mr Mkhize.

[70] Whilst not expressing any finding as same was not canvassed during the trial, the court was somewhat surprised at the conspicuous absence of the joinder of Mr Zuma and Mr Mkhize as co-defendants. The court nevertheless did not base its findings nor draw any inferences (adverse or not) from such party's non-participation. As further corroboration in relation to the probabilities, the court considered that on the plaintiff's own evidence, supported by the correspondence, revealed Mr Mkhize's undertaking to pay the debt owed by Mr Zuma.

[71] The emails indicated that he offered to pay the loan amount and interest albeit over a period of time. The emails further indicated that the defendant held monies in

²¹ LTC Harms *Amler's Precedents of Pleadings* 8 ed (2018) at 188.

trust due to Mr Mkhize from which some of the monies owed could be repaid. Yet the plaintiff does not take Mr Mkhize up on the offer nor does he ensure that the documents securing the repayment of the loan by Mr Mkhize are drawn up and signed. It is worth mentioning that at this stage, the plaintiff is being assisted by his attorney, Mr Wulfson, who is in communication with Mr Khoza.

[72] The plaintiff's criticism that Mr Khoza was not called as a witness for the defendant, should be viewed in a similar standing to the position adopted by the plaintiff. The court holds the adopted view that adverse inferences are not drawn as a rule of thumb and depend primarily on the facts peculiar to a specific case.²² The fact that the onus rested solely on the plaintiff, in my view renders a determination or the drawing of an adverse inference against the defendant immaterial. It is doubtful whether Mr Khoza's evidence could have contributed to the determination of the dispute, given the nature and content of the emails which colloquially spoke for themselves.

[73] In his heads of argument, Mr *Dickson* SC submitted that a contract of agency can be created by the acceptance of money into trust by the payee, whose instructions must be obeyed, and relied on the decision in *Basson v Remini*²³ as authority for this submission. Such decision by Magid J dealt with the appointment of a conveyancer in a transaction involving the sale of immovable property, who became the agent of both the seller and the buyer. He found that a contract of agency had been concluded based on the facts. This matter in my view is distinguishable from the current matter on the facts and the question of agency does not arise as no contract of mandate existed between the plaintiff and the defendant. If anything, the defendant was Mr Mkhize's agent. In addition, absent a mandate, no fiduciary duty can arise.

Conclusion

[74] After a detailed analysis of the evidence, and consideration of the legal position, the irresistible conclusion is that the plaintiff has not discharged the onus of proof on a balance of probabilities.

²² *Titus v Shield Insurance Co Ltd* 1980 (3) SA 119 (A) at 133E-G.

²³ *Basson v Remini and another* 1992 (2) SA 322 (N) at 328.

Costs

[75] It is trite that the usual order is that the successful party is entitled to its costs. The plaintiff employed the services of senior counsel and the defendant both senior and junior counsel. I have carefully considered the submissions made in respect of the reasons for the engagement of two counsel by the defendant. Given the nature of the dispute and the legal issues involved, I am of the view that the costs resulting from the employment of two counsel are justified.

Delay in delivery of the judgment

[76] There has been a delay in the delivery of this judgment. The issues relating to the registrar previously assigned to me and the fact that I have no permanent registrar are a matter of record with the Office of the Chief Justice and have been brought to the attention of the Judge President and Deputy Judge President of this division. In addition, the Covid-19 pandemic has also contributed to the delay in that no permanent registrar has been assigned to assist me.

Order

[77] In the result the following order is issued:
The plaintiff's claim is dismissed with costs, such costs to include those occasioned by the employment of two counsel.


HENRIQUES J

CASE INFORMATION

APPEARANCES

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Date of Hearing	:	28 August 2019
Date of Judgment	:	3 May 2021

This judgment was handed down electronically by circulation to the parties' representatives by email and release to SAFLII. The date and time for hand down is deemed to be 09h30 on 3 May 2021.