



Reportable:	<u>YES</u> / NO
Circulate to Judges:	<u>YES</u> / NO
Circulate to Magistrates:	YES / <u>NO</u>
Circulate to Regional Magistrates:	YES / <u>NO</u>

**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division, Kimberley)**

CASE NO: **1646/2015**
DATE HEARD: **28-31 JANUARY, 26 MARCH 2019**
DATE DELIVERED: **5 APRIL 2019**

In the matter between:

VAN AS, JACQUES

Plaintiff

and

KOTZE, NICOLAAS JOHANNES

Defendant

Coram: Olivier J

JUDGMENT

Olivier J:

INTRODUCTION

[1.] The farm Mamaghodi near Postmasburg was in the possession of the Van As family for 78 years. This case is about the tragic loss of the farm by the Van As family. More recently the farm belonged to the late Mr GC Van As¹, who farmed and lived there since 1962, with his wife, Mrs JEW Van As, to whom he was married in community of property. Mr and Mrs Van As had four sons, Mr Jacques Van As, who is the plaintiff in the present matter, Mr Theo Van As, Mr Christo Van As and Mr Werner Van As.

¹ Mr GC Van As passed away during the course of the present litigation.

[2.] During and about the year 2009 negotiations took place between Mr and Mrs Van As on the one hand, and Sishen Iron Ore Company (“*Sishen*”), on the other. Sishen wanted to purchase the farm, as well as other farms in the area, in order to erect a railway line over the properties. The negotiations resulted in the conclusion, on 23 June 2009, of a sale agreement of which the salient terms, for present purposes, were as follows:

2.1 The farm was sold to Sishen.

2.2 The sellers, in other words Mr & Mrs Van As, could carry on occupying the farm for a period of five years in terms of a lease.

2.3 The sellers had the right to buy back the farm at a fixed price (for the sake of convenience this right will hereinafter where necessary be referred to as “*the option*”)².

2.3.1 It was agreed that the farm could be bought back after the completion of the railway line, but within a period of five years of the conclusion of the sale agreement, and that notice of the intention to exercise the option would have to be given to Sishen at least three months prior to the expiry of the five year period from the date of the conclusion of the contract.

2.3.2 Within 60 days of such notice the purchaser would have to furnish Sishen with a bank guarantee for the full amount of the purchase price and the value added tax thereon.

2.4 The sellers were entitled to cede the option, and in such event they would have to notify Sishen in writing of their intention to cede.

[3.] By that time the late Mr Van As was already of an advanced age, and he felt that he was no longer physically able to carry on the farming business alone. Of the four sons only the

² Compare **Brandt v Spies** 1960 (4) SA 14 (OK) at 16F-17C

plaintiff was interested in taking over the farm. At the time he lived in Johannesburg, with his wife and two children, where he was permanently employed. He resigned from his position and he and his family relocated to the farm. The children were placed in a boarding school and the plaintiff's parents moved to an old age home in Postmasburg.

- [4.] The plaintiff then effected significant improvements on the farm at his own expense. It is undisputed that the plan was for the option to be ceded to the plaintiff and for him to eventually exercise it, and to become the owner of the family farm. It is also undisputed that the intention of the plaintiff's parents was that the proceeds of a particular policy or investment would be made available to the plaintiff to enable him to pay the purchase price.
- [5.] As will appear from what follows the defendant, Mr Nicolaas Johannes Kotze, who practises as an attorney for his own account under the name and style of Johan Kotze Attorneys in Postmasburg, drew up a cession agreement, which provided for the cession of the option to the plaintiff. There is a dispute about where and when the cession agreement was signed, to which I will revert.
- [6.] The option lapsed late in March 2014, without having been exercised. The plaintiff's parents were notified of this in July 2014, and in August 2014 they were notified that the lease had also expired. The plaintiff eventually vacated the farm, and all movable assets were sold on auction. He moved to Postmasburg, where he now lives in a house that belonged to his parents, and where he has a shop. He and his wife got divorced; he believes as a result of these events. The loss of the farm has affected the plaintiff emotionally, and he has difficulty to sleep and has to take sedatives.
- [7.] In August 2015 the plaintiff issued summons against the defendant, claiming damages in an amount of R5 618 545.90. The plaintiff's main cause of action is that the defendant failed to execute an instruction to take steps to ensure the exercise the option. In the alternative the plaintiff relies on a breach of an alleged duty of care on the part of the defendant. The quantum of the damages was settled, and only the liability of the defendant remained in dispute.

- [8.] The evidence of the plaintiff was presented, as well as the evidence of his mother and of Mr M Coetzee on his behalf. For the defence the defendant testified, and the evidence of Mrs Brits was presented on his behalf.
- [9.] The plaintiff bore the onus to prove the mandate agreement³. The same applies to the plaintiff's allegations of the breach of a legal duty⁴.
- [10.] In considering the conflicting versions that will be dealt with in due course, regard will be had to, *inter alia*, the probabilities⁵.

BACKGROUND

- [11.] In order to understand the relationship between the plaintiff and the defendant it is necessary to deal with the sequence of certain events that preceded the lapse of the option.

The consultation of 1 February 2012 and the debt collection

- [12.] The plaintiff made an appointment to consult the defendant on 1 February 2012. This appointment is reflected in the office diary of the defendant, which was kept by his receptionist. The consultation was attended by the plaintiff and his father. The plaintiff completed a standard form, that is completed by clients who consult the defendant and the contents of which would then, once the defendant accepts the instructions given to him (presumably in the form), constitute an agreement between the client and the defendant. The plaintiff neglected to describe the defendant's instruction or mandate in the designated space in the form ("*mandate form*"). He did, however, record his identity number in it.

³ Compare **Mc Williams v First Consolidated Holdings (Pty) Ltd** 1982 (2) SA 1 (A) at 6C; **Africa Solar (Pty) Ltd v Divwatt (Pty) Ltd** 2002 (4) SA 681 (SCA) para [33]; **Du Preez & another v NWK Ltd & another** [2005] JOL 14824 (B) para [93]

⁴ Compare **Cape Town Municipality v Bakkerud** 2000 (3) SA 1049 (SCA) para's [7] to [17]

⁵ Compare **Stellenbosch Farmers' Winery Group Limited and Another v Martell et Cie and Others** 2003 (1) SA 11 (SCA) para [5]

- [13.] During that consultation the defendant made certain notes, the contents whereof are not really relevant for present purposes. Suffice to say that they concerned instructions by both the plaintiff and his father about debts owed to them by Mr Theo Van As. There is a dispute about whether the defendant was on that occasion given an address for Mr Theo Van As, and for what purpose he was given the contact details of an employee of Absa Bank. This too is irrelevant for purposes of the issues to be decided in this matter. The same applies to whether the plaintiff asked the defendant, at that stage, not to take any steps whatsoever on his behalf yet, while he awaited payment of an amount that had apparently been agreed upon in settlement talks between the plaintiff and Mr Theo Van As, or whether the defendant was instructed to demand payment of that particular debt, but not to issue summons in respect of it yet.
- [14.] A file was then opened in the defendant's office in the name of the plaintiff, but cross-references to the name and telephone number of his father were recorded on the cover of the file. The defendant's undisputed evidence was that this was done because the plaintiff's father lived in the town of Postmasburg and would be easier to reach than the plaintiff, who lived on the farm.
- [15.] On 10 April 2012 the plaintiff called the defendant and told him not to take any action against Mr Theo Van As in respect of the debt owing to him, pending further instructions, as Mr Theo Van As had paid part of the debt owing to him. A note on the plaintiff's file confirms this call.
- [16.] On the defendant's version he and the plaintiff did not, in the period between this telephone call and the expiry of the option, have any further contact at all, while on the plaintiff's version they did indeed have contact again, according to the plaintiff:
- 16.1 when the defendant was instructed to not only see to the cession of the option, but also its exercise; and, shortly thereafter,
- 16.2 when the cession was according to the plaintiff signed in the defendant's presence and in his office.

These issues will be reverted to.

- [17.] On 20 April 2012 the defendant sent a letter of demand to Mr Theo Van As, claiming payment of the money owing by him to his parents. The letter was sent to an address which turned out not to be the address of Mr Theo Van As.

- [18.] At some time between 15 and 18 May 2012 notes, in the handwriting of the plaintiff's father, were left at the reception of the defendant's offices. One of the notes was dated 15 May 2012 and was addressed to the defendant, and the other to the plaintiff. The defendant was instructed to immediately proceed with legal steps against Mr Theo Van As for the recovery of the amount owing by him to his parents, and the defendant was furnished with an address for Mr Theo Van As⁶. In the note to the plaintiff he was requested to drop off the notes at the offices of the defendant and to remind the defendant of the money owing to the plaintiff himself. The plaintiff was requested to give the defendant a telephone number for Mr Theo Van As. For the sake of convenience these notes will be referred to as the "*15 May notes*".

- [19.] On 21 May 2012, and clearly on the strength of the 15 May notes, letters of demand (dated 18 May 2012) were sent to Mr Theo Van As in respect of the debt owing to his parents and the balance still owing to the plaintiff. The defendant's evidence was that he demanded payment of the balance owing to the plaintiff despite the plaintiff's call of 10 April 2012, because he saw the 15 May notes as an instruction not only in respect of the debt owing to the parents, but also in respect of the balance owing to the plaintiff. Whether the defendant was correct in this assumption, is also not relevant.

- [20.] On 20 June 2012 the plaintiff's father called the defendant and instructed him not to take any further steps against Mr Theo Van As. The plaintiff's file at the offices of the defendant was eventually closed and archived in September 2012.

The consultation of 10 April 2012 and the cession

⁶ Which address differed from the one to which the initial letter of demand had been sent.

- [21.] Meanwhile an appointment with the defendant had been made in the name of the plaintiff's father, for 10 April 2012. An entry in the defendant's office diary once again reflects the appointment⁷. This appointment was attended by both the plaintiff's parents, but not by the plaintiff. The plaintiff's father completed a mandate form, and also did not indicate a specific mandate in the designated space. He too, like the plaintiff in respect of the previous consultation, paid a consultation fee of R250.00. A file was then opened in the name of the plaintiff's father. This file was eventually closed and archived on 12 June 2013, according to the defendant when he was satisfied that he had carried out all instructions given to him during the consultation of 10 April 2012.
- [22.] According to the defendant he was at this consultation handed notes, which were also in the handwriting of the plaintiff's father. The notes consist of two pages that are headed "*Investments as at 6 April 2012*"⁸ and a third page headed "*Joint Will*"⁹. For the sake of convenience these notes will be referred to as the "*6 April notes*".
- [23.] In the second paragraph on the second page of these notes reference was made to the guaranteed maturity value of a policy, which would reach maturity in October 2014. It was recorded in the notes that the proceeds of the policy would be used to assist the plaintiff to buy back the farm. The second paragraph on the page headed "*Joint Will*" referred to the re-purchase of the farm by the plaintiff. It contains the identity number of the plaintiff, and refers to a policy in the amount of R4 000 000.00, which would mature in October 2014. It is safe to say that this was a reference to the same policy mentioned on the second page, and that the intention was clearly expressed, in the 6 April notes, that the proceeds of that policy were to be used to assist the plaintiff to buy back the farm.
- [24.] Note 7 on the fourth and last page of the 6 April notes referred to the appointment of, *inter alia*, Mr Christo Van As as a trustee of the GC & JE Trust.

⁷ It appears that the consultation referred to in the plaintiff's further particulars, as having occurred "*during April*" and as being the consultation where the plaintiff's parents had instructed the defendant to see to the cession, is in fact this consultation.

⁸ "*Beleggings soos op 6 April 2012*".

⁹ "*Gesamentlike Testament*".

[25.] Note 9.1 referred to the outstanding balance of the debt owing to the plaintiff by Mr Theo Van As, and incorrectly stated it as being R89 000.00¹⁰. Note 9.2 were about Mr Theo Van As' debt to his parents.

[26.] There is dispute about what instructions were given to the defendant at the consultation of 10 April 2012. The defendant's case in this regard is as follows:

26.1 He was provided with three different instructions, namely:

26.1.1 to draw up a new will;

26.1.2 to get Mr Christo Van As appointed as an additional trustee of the Trust; and

26.1.3 to effect the cession of the option to the plaintiff, and to notify Sishen accordingly.

26.2 For such purposes he was furnished with the existing joint will, the 6 April notes and a copy of the sale agreement.

26.3 The defendant advised the plaintiff's parents that, because the right to be ceded concerned immovable property, a written cession agreement would be required. They instructed him to draw up one.

26.4 The expiry date for the exercise of the option was not calculated by the defendant at that stage, according to him because he did not have instructions in respect of the exercise of the option. He calculated this date for the first time in the course of this litigation, in a consultation with his legal team on 14 November 2016.

¹⁰ Which would explain the erroneous amount of this outstanding balance stated in the letter of demand of 18 May 2012, and about which the defendant was taken to task in cross-examination.

[27.] The plaintiff's case in this regard is as follows:

- 27.1 He does not dispute that the first two instructions had been given to the defendant at that consultation, but according to him it is a blatant lie of the defendant to say that he was on that occasion also instructed to see that the option was ceded to the plaintiff.
- 27.2 According to the plaintiff the instruction regarding the cession could not have been given to the defendant at that consultation, because the defendant would according to him have needed to have insight into the sale agreement in order to prepare the cession agreement, and according to the plaintiff the defendant would not at that stage have had a copy of the contract yet. When asked whether he was just assuming that the defendant did not on 10 April 2012 have a copy of the sale agreement, he went on to say that he only took a copy of it with him when he and his father, according to him, went to the defendant at a later stage, when they consulted the defendant regarding the cession of the option and its exercise. I will revert to this issue, and the alleged later consultation (*"the disputed consultation"*), too in due course.

[28.] The cession agreement was drawn up on 16 April 2012. As already mentioned, there is a dispute regarding when and where the cession agreement was signed, but on either of the versions of the plaintiff and the defendant it would have happened at some time between the 18th and the 20th April 2012.

[29.] In a letter dated 18 April 2012 the defendant notified Sishen of the intended cession. His evidence was that he wrote this letter on behalf of the plaintiff's parents. The letter refers to only the plaintiff's parents, and the reference number contained in the letter is that of the file of the plaintiff's father. The evidence of the defendant was that he did so because he had been instructed to do so, by the plaintiff's parents, at the consultation of 10 April 2012. The plaintiff agreed, in cross-examination, that the letter appeared to have been addressed to Sishen on behalf of his parents, as clients of the defendant, and not on his behalf. In fact, it

was also required by the sale agreement that notice of the intended cession be given by the sellers, in other words the parents of the plaintiff.

[30.] On 24 April 2012 the defendant sent a letter (dated 20 April 2012) to Mr Christo Van As regarding his appointment as a trustee, which would be consistent with the defendant's version of having at the 10 April 2012 consultation received instructions to get Mr Christo Van As appointed as a trustee. The letter made reference to the father's instructions to have Mr Christo Van As appointed as a trustee, and requested certain information from Mr Christo Van As.

[31.] Mr Christo Van As was indeed later appointed as an additional trustee, and the defendant then forwarded the letter of appointment to the plaintiff's father under cover of a letter dated 30 November 2012. It was never suggested, by or on behalf of the plaintiff, that there could be any other reason for this than the instructions that the defendant says were given to him at the consultation of 10 April 2012.

The disputed consultation

[32.] According to the defendant it was only at the consultation of 10 April 2012 that he was given instructions regarding the option, and never on any other occasion, and in any event never by the plaintiff. He denies, as already mentioned, any contact whatsoever with the plaintiff after the telephone call from him on 10 April 2012.

[33.] The plaintiff, on the other hand, says that instructions regarding the option, including its cession, were given to the defendant at a later consultation, attended by him and his father. In the plaintiff's further particulars this consultation was referred to as having taken place "*prior to 20 April 2012*". In cross-examination of the plaintiff the possible date upon which such a consultation could have taken place, was narrowed down to somewhere between 10 April 2012, when he called the defendant about the outstanding balance of the debt of Mr Theo Van As, and 16 April 2012, when the cession agreement was prepared.

[34.] The defendant denies that such a consultation ever took place. For the sake of convenience and as already indicated, this alleged consultation will be referred to as the “*disputed consultation*”.

[35.] In his evidence in chief the plaintiff described in surprising detail how it had come about that he and his father attended the disputed consultation.

35.1 According to him he and his father had a heated discussion before they went there, because he (the plaintiff) wanted them to consult another attorney, in Kimberley, and not the defendant. He testified that his father did not wish to make the journey to Kimberley and back. Eventually he and his father drove to the defendant’s offices in his bakkie. There he assisted his father up the stairs, his father according to him holding on to the left rail. He himself held onto a copy of the sale agreement, in his right hand.

35.2 While he stood in the door to the defendant’s office his father told the defendant that “*they*” were leasing the farm for a period of 5 years “*and then*”¹¹ they would have to buy back the farm, that they had to buy the farm in 2014 and that a letter or letters had to be written to Sishen about that. According to the plaintiff he did not know what his father meant by his reference to a letter or letters. His father also told the defendant that he was too old to carry on farming and that the plaintiff was farming there. His father also informed the defendant that the proceeds of the sale of the farm had been invested for purposes of buying back the farm.

35.3 According to the plaintiff he himself then only said to the defendant that he must make sure that the farm was bought back by him (the plaintiff), and not by his father.

35.4 From his evidence in cross-examination it appeared that the plaintiff actually regarded these utterances as tacit or implied instructions to the defendant to exercise the option on his behalf. He testified that nothing more was said, but that if

¹¹ “en dan”

the defendant had regard to what had been said to him by the plaintiff and his father, he would have known that they wanted him to do whatever was necessary to buy back the farm on behalf of the plaintiff. According to the plaintiff the defendant responded with words to the effect that they should leave it to him.

The consultation of 18 April 2012

- [36.] The defendant's office diary for the date of 18 April 2012 reflects an appointment for a Mr Van As in the following terms: "*Mr Van As – Trust*"¹².
- [37.] There is no dispute that this was a reference to the plaintiff's father, that he and the plaintiff's mother were indeed at the defendant's office on that day and that they signed their amended joint will (which had by then, and since the consultation of 10 April 2012, been drawn up by the defendant) on that occasion.

The cession agreement and the lapse of the option

- [38.] On 2 May 2012 the defendant sent a letter (dated 26 April 2012) to Sishen, under cover of which he furnished Sishen with a copy of the cession agreement.
- [39.] This obviously led to a letter (dated 31 May 2012) which Weavind & Weavind, the attorneys of Sishen, addressed to the defendant. In the letter receipt of the copy of the cession agreement by their client, Sishen, was acknowledged, but it was pointed out that the option would still have to be exercised in accordance with the sale agreement, and a request was made that, in such event, a copy (presumably of the notice to exercise the option) be furnished to them.
- [40.] On 7 June 2012 the defendant replied, acknowledging receipt of this letter, again referring to the plaintiff's parents as his clients and again using the number of the father's file as a reference.

¹² "*Mnr Van As – Trust*"

- [41.] On the same date the defendant forwarded a copy of the Weavind & Weavind letter to the plaintiff's father for his records, once again with the number of the father's file as reference.
- [42.] On 20 June 2012, and once again under the same reference number, the defendant forwarded copies of the defendant's letters (to Sishen) dated 18 and 26 April 2012 to the plaintiff's father, after it had been telephonically requested by the latter.
- [43.] Nothing further happened, as far as the exercise of the option is concerned, until the plaintiff's parents were notified, as already mentioned, that the option had not been exercised and had consequently lapsed.

THE SIGNING OF THE CESSION AGREEMENT

Plaintiff's case

- [44.] Here too the plaintiff's evidence contained an amazing amount of detail, especially having regard to the effluxion of time since April 2012.

44.1 According to the plaintiff his father phoned him one evening and said that he should come to town, because they had to go to the defendant. He testified that his father told him that the defendant had said that he should bring along his identity document, and that all of them had to go to the defendant's offices to sign. There was no objection to this evidence. He described how he drove from the farm to the old age home in Postmasburg the next morning in a blue Toyota Corolla motor vehicle.

44.2 He once again found it necessary to explain, in his evidence in chief, in great detail how his father had to be assisted up the stairs to the offices of the defendant. He even explained the exact positions of his father, his mother and himself, as they sat at the desk in the defendant's office.

- 44.3 The defendant requested his identity document, and then left with it. He assumed that the defendant wanted to make a copy.
- 44.4 He explained how the defendant gave them a document that they had to sign, which he identified in court as having been the cession agreement. He explained how, after the defendant had showed them where they had to sign, the document was first given to his father, and he explained painstakingly how his father then removed a pen from his cheque book and signed the second page of the document. According to the plaintiff his mother then also signed that page, and after her he signed it.
- 44.5 He went on to explain, again in great detail, how his father then replaced his pen in his cheque book, and replaced an elastic band that held it in position, and how the defendant then said that they should also initial the first page of the document, which caused his father to again remove the elastic band and then his pen, whereafter all of them applied their initials to the first page, according to him in exactly the same sequence as they had appended their signatures to the second page.
- 44.6 The plaintiff's evidence was that the defendant then signed and initialled the document in front of them, as first witness. Nobody else was present in the office and he did not know when the second witness signed and initialled the cession agreement.
- 44.7 According to the plaintiff the option was not discussed on that occasion.

Defendant's case

- [45.] The defendant's version of the circumstances under which the cession agreement was signed, was completely different:

- 45.1 According to him he handed the document to the plaintiff's parents on 18 April 2012, during the consultation when they signed their amended will. He showed them where they and the plaintiff, and the witnesses, had to sign and append their initials.
- 45.2 The cession agreement was later left at his reception by somebody. It had been signed and initialled by the plaintiff and his parents, but not by any witnesses, and was also not dated.
- 45.3 He then took it upon himself to date the document with the date of that day, 20 April 2012, and he signed and initialled the document as a witness, even though he had never witnessed the signing thereof. Thereafter he took it to his conveyancing secretary, Mrs Brits, and at his request she too signed and initialled it as a witness.

Amendment

- [46.] In the particulars of claim it was alleged that the cession agreement was signed by the plaintiff, his parents and the defendant (as a witness) in the defendant's office on 20 April 2012, and in the initial plea, dated 29 September 2015, this allegation was included in a general denial.
- [47.] When the defendant's insurers became involved in the litigation, he had to complete a questionnaire. An amended plea (dated 29 June 2016) was then filed. In this plea it was alleged that the cession was signed "*by all the parties thereto at the offices of the Defendant on 20 April 2012*", and that not only the parents, but also the plaintiff, did on that date attend the offices of the defendant. This amendment effectively withdrew the denial in the original plea and brought the defendant's plea in line with the allegations in the particulars of claim, and it effectively amounted to an admission that the cession agreement had indeed been signed in the defendant's presence, at his offices, on 20 April 2012.
- [48.] However, in December 2016 a notice of amendment was filed on behalf of the defendant, in terms of which it was effectively sought to withdraw the admission, and to plead the version

of the defendant as set out above. The amendment was objected to, but the defendant was successful in a subsequent application for such an amendment.

[49.] In cross-examination the defendant offered the following as an explanation for the second amendment:

49.1 It was a misinterpretation of his answers in the questionnaire that caused the erroneous allegations and admissions in the first amended plea. He explained that the questionnaire had contained two questions about the cession. The one was when he had received the signed document, to which he had responded that it was on 20 April 2012. The second question was who had signed the document as witnesses, to which he had responded that it was he and Mrs Brits. He testified that, when the first amended plea was drafted, these questions and answers were misunderstood to mean that the documents had actually been signed at his offices on that date.

49.2 The defendant furthermore testified that, although he did see the first amended plea before it was filed, and he did then notice these erroneous allegations, he did not take steps to prevent the filing of the plea, as he thought that he would take it up with his legal representatives when he consulted with them.

49.3 The defendant explained that it was only after the consultation with his legal representatives on 14 November 2016, when he brought the correct position to their attention, that the further notice of amendment was filed.

Evaluation

[50.] The first question that inevitably arises, is why the plaintiff would remember such an event in so much detail after all this time, down to the kind of vehicle used, who sat in the middle, on the left and on the right in the office, where exactly his father had kept his pen, how many

times he had to remove it from there, and in what sequence the second page was signed and the first page initialled.

[51.] This while the plaintiff could obviously not even recall the date of the disputed consultation, which one would have thought would have been of much more importance to him. The date of 20 April 2012, which appears on the cession agreement, would of course have made it easy for the plaintiff to put a date to his version of the signing of the cession agreement. The plaintiff did not, however, commit to a time of day that they had allegedly gone to the office of the defendant on that day, not even when he was in cross-examination confronted with the absence of any entry reflecting such an appointment in the diary for that day, and with the fact that, according to the diary, the defendant was supposed to be in court that morning and in consultations that afternoon, the last of which was scheduled for 15:30. The plaintiff was not prepared to go further than to suggest that they could theoretically have gone there after 15:30. The defendant's concession that the diary would not necessarily reflect it if a case was postponed (and if the defendant was therefore not in court for the period reflected in the diary) does not assist the plaintiff, because his version is not that they had gone there during that morning.

[52.] It is true that the mother of the plaintiff confirmed literally each and every one of the details in the plaintiff's evidence alluded to above. Once again one wonders how she would after all this time remember all of that. This while she initially wanted to refresh her memory from notes, according to her because there were two dates before the 18th of April that she could not remember. When she was made aware of the fact that, in such an event, she would have to disclose the notes to counsel for the defendant, she abandoned the idea of refreshing her memory, quite obviously because she did not want counsel for the defendant to see those notes. What is significant, however, is that it was common cause that she had in fact not been to the defendant's office twice before 18 April 2012, but indeed only once, on 10 April 2012. One can just surmise what other date (before 18 April 2012) she could have been trying to remember, and that was according to her recorded in her notes. She would obviously not have been present on the occasion of the disputed consultation, even on the version of the plaintiff.

[53.] In the case of both the plaintiff and his mother these details were tendered in their evidence in chief. Viewed against the background that neither the plaintiff nor his mother could apparently put a time to the alleged visit to the defendant's office, as well as the mother's inability to remember other and much more material detail (as will also appear from what follows), the question inevitably arises whether this is not a rehearsed version. When I raised this with Mr Smit (plaintiff's counsel) in argument, his response was that they may very well have discussed it.

[54.] There were also other inconsistencies and improbabilities in the evidence of the plaintiff's mother on this issue:

54.1 She testified that the defendant had called her husband on 19 April 2012 and had requested that they come to his office to sign a document, and that the plaintiff bring his identity document with him. It is common cause that she and Mr Van As were in the defendant's office just the day before, and it is undisputed that the cession agreement had by the 18th of April 2012 already been prepared. If the defendant had wished the parties to sign the agreement at his office, why would he not on the 18th of April 2012 have made arrangements with the parents about when they should come to his office to sign it? It makes no sense that he would, instead, the day thereafter have phoned the late Mr Van As to make these arrangements. In fact, he could have requested that the plaintiff accompanied his parents when they were in any event going to him to sign their amended will.

54.2 It is clear that Mrs Van As did not, on the occasion of the alleged telephone call of 19 April 2012, speak to the defendant herself and she could not therefore have had any first-hand knowledge of a request by the defendant that the plaintiff should bring his identity document.

54.3 Mrs Van As was clearly confused about dates, and at one stage, during cross-examination, she clearly confused the date of the consultation about the joint will (10 April 2012) with the date that the will was signed (18 April 2012).

[55.] That Mrs Van As did not have a clear recollection of the events of April 2012, also became clear when she was cross-examined about the consultation of 10 April 2012.

55.1 She was completely unsure of what documents had been taken to that consultation and what had been discussed there. At first she said that only the issue of the joint will was discussed, but later she conceded that the issue of the appointment of an additional trustee had probably also been discussed. She insisted, however, that the defendant was not instructed on the cession of the option during that consultation. Why she was so adamant about this is not clear, but such a denial would obviously have supported the plaintiff in his version that the issue of the cession was discussed at a later stage, during the disputed consultation.

55.2 Mrs Van As at first conceded that the “*documents of the farm*”, as she described them and which in all probability referred to a copy of the sale agreement, had been taken to the defendant on the occasion of the consultation of 10 April 2012. Later she denied that any such documentation was taken to that consultation; a version which would coincidentally also be consistent with that of the plaintiff regarding when a copy of the sale agreement was given to the defendant¹³.

55.3 The denial of Mrs Van As, at one stage, that the 6 April notes were given to the defendant at the consultation of 10 April 2012, is very difficult to believe. There is no evidence that those notes were given to the defendant on any other date, and it is not disputed that they were in the particular file. Even if only the will was discussed at the consultation of 10 April 2012, it would have made perfect sense to have had those notes there for the defendant, because they, *inter alia*, dealt with the issue of the estate and the joint will. To put it another way, it would not have made any sense to go to the defendant to discuss the issue of the joint estate and the joint will, and not have the notes, containing *inter alia* an exposition of the assets in the estate and on all indications drawn up before then, there for the defendant

¹³ See paragraph 27.2 above.

- [56.] The question is also whether it is not completely improbable that the defendant would have gone to the trouble of making the call to summon all of them there for the purpose of signing the cession agreement, especially against the background that the plaintiff would have had to come into town from the farm, and then not make an appointment or agree on a specific time for such purposes? The plaintiff conceded that his parents would probably not normally have gone to the defendant without having made an appointment and one can understand this if regard is had to his evidence about his father's physical condition at that stage.
- [57.] In his heads of argument Mr Smit has now adopted the attitude that the best evidence of the diary entries would have been that of the receptionist who had been responsible for making entries, and that her evidence should have been presented. The diary entries were canvassed with the plaintiff in cross-examination and those questions were never objected to. The plaintiff in fact admitted the existence of all the entries that he was questioned about, and it was only when he was cross-examined about the absence of any entry for the disputed consultation, that he questioned the accuracy of the diary and its entries. The defendant's evidence on the diary entries, and about how his receptionist went about making those entries, was never objected to. It is also important to keep in mind that, as far as the consultations that are common cause are concerned, all the relevant entries proved to be accurate.
- [58.] Why would the defendant admit to having falsely witnessed such an important document, if this was not true? Mr Smit suggested that his motive may be to avoid any suggestion of contact between him and the plaintiff as far as the issue of the option is concerned and that this issue would therefore also be relevant to the nature of the relationship between the plaintiff and the defendant. I think it is very unlikely, if not far-fetched, that the defendant would have concocted such a false version for this reason, not only in view of the ethical implications of his version for himself, but also in view of the fact that, on the plaintiff's own version, there had not been any discussion about the option, and more particularly its exercise, on that occasion.

[59.] This brings me back to the issue of the amendment of the defendant's plea as regards when and where the cession agreement was signed.

59.1 I cannot on face value reject the defendant's explanation for the inclusion of the implied admissions in the first amended plea. I will however disregard the fact that Mr Heyns (defendant's counsel), in argument, in effect accepted responsibility for the misinterpretation of the defendant's answers to the questionnaire when he drew up the first amended plea.

59.2 The defendant's explanation of having delayed pointing out the mistaken admission until the first consultation with his legal representatives may sound strange on the face of it, coming from an experienced attorney, but on the other hand the fact that the notice of the final amendment was filed less than a month after that consultation, would be consistent with this explanation, and with him having indeed pointed this out during that first consultation.

59.3 That the version in the second amended plea is effectively the same as that in the original plea, namely a denial that the cession was signed in the office of the defendant and that he was present when it was signed, militates against the eventual version being an afterthought and fabrication, as suggested to him in cross-examination.

59.4 If the defendant's explanation of how it came about that the first amended plea effectively admitted the plaintiff's version is rejected, it would imply that the version in first amended plea had in fact been the result of a conscious decision to admit the truth. Why would he then, when consulting with his legal representatives for the first time, have decided to revert to the false denial? It simply does not make sense, all the more so where the about-turn would require that he conjure up a version that would implicate him in the unethical conduct of falsely "*witnessing*" a very important document, and that he convince an employee to falsely admit to the same unethical

conduct and to commit perjury by corroborating in her evidence his false version of when he signed the document.

- [60.] Much was made of the evidence of Mr Martin Coetzee, the accountant of the plaintiff, that a copy of the plaintiff's identity document was found among the contents of the two files at a later stage, and it was suggested that this would fit in with the evidence that the plaintiff's father had told him that the defendant required him to take his identity document with him on 20 April 2012. The question is, however, why the defendant would have needed a copy of the plaintiff's identity document for the purposes of having the cession agreement signed? As already mentioned, the cession agreement had already been drawn up on 16 April 2012, and it would already then have contained the plaintiff's identity number. Also, and once again as already mentioned, the plaintiff's identity number was clear from the mandate form that he had completed and signed, and it appeared in the 6 April notes. The defendant would therefore not have needed the identity document for the purposes of the cession agreement and it unlikely that he would have requested it for those purposes.
- [61.] The plaintiff's evidence that he never read the document at the time when they signed it, and that he was not made aware of its contents at the time, is also difficult to understand. He had no hesitation, in his evidence, to identify the cession agreement as the document that they had according to him signed on 20 April 2012. The contents of the cession agreement, and in particular its heading (in bold and capital letters)¹⁴, made it abundantly clear that it concerned the cession of the option to the plaintiff, and the plaintiff applied his signature in the designated space immediately above the word "*SESSIONARIS*"¹⁵.
- [62.] The defendant's version of how and when the cession agreement was signed by him and by Mrs Brits, and on whether the plaintiff or his parents were present at the time, was corroborated by the evidence of Mrs Brits.

¹⁴ "*SESSIE VAN REGTE INGEVOLGE KOOPPOOREENKOMS*" ("CESSION OF RIGHTS IN TERMS OF PURCHASE AGREEMENT").

¹⁵ "CESSIONARY".

[63.] It follows that I am not prepared to find, on a balance of probabilities, that the cession agreement was signed by all parties concerned on 20 April 2012, at the offices of the defendant.

THE MANDATE

Pleadings

[64.] The plaintiff's main cause of action is based on the breach of a mandate allegedly given to the defendant expressly. In the particulars of claim it is pleaded that, at a consultation "*in and during April 2012*", the plaintiff and his parents "*instructed and mandated*" the defendant to:

64.1 "*draft agreements/documents necessary to effect a waiver of the repurchase right of the parents in favour of the plaintiff, alternatively a cession of that right by the parents to the plaintiff*"¹⁶; and

64.2 "*do all things necessary to ensure that the farm is legally and effectively bought back by the Plaintiff by ensuring that the right to buy back the farm is timeously and effectively exercised in accordance with the terms of the Agreement*"¹⁷.

[65.] In response to a request by the defendant for further particulars, it was stated:

65.1 That the plaintiff's parents¹⁸ had consulted the defendant "*during April 2012*", on which occasion they had given the defendant the instructions set out in paragraph 64.1 above¹⁹; and

¹⁶ Particulars of claim: para 10.1

¹⁷ Particulars of claim: para 10.2

¹⁸ In other words both of them.

¹⁹ In other words the instructions regarding the waiver/cession.

65.2 That the plaintiff and his father had consulted the defendant “*prior to 20 April 2012*”²⁰, and that on that occasion the plaintiff had given the defendant instructions a set out in both paragraphs 64.1 and 64.2 above²¹.

[66.] The defendant’s version, on the pleadings, is as follows:

66.1 He pleaded that the plaintiff’s parents had, during the consultation of 10 April 2012, instructed him to draw up a cession agreement to provide for the cession of the option by the parents to the plaintiff.

66.2 He denied that a mandate and instructions as described in paragraph 64.2 above were given to him at any stage.

66.3 In the alternative, and in the event that it should be found that such instructions had in fact been given to him, he denied that he had accepted such instructions.

66.4 In the further alternative, and should it be found that such instructions had been given to and accepted by him, the defendant denied that the plaintiff had enabled him to exercise the right, by providing him with instructions about the exercise of the right, including instructions about the “*manner and means in which Plaintiff intended to make payment of the ... purchase price ...*”, and the defendant pleaded that the plaintiff’s damages had been caused by his “*failure and/or neglect ... to enable Defendant to exercise and execute the alleged mandate/instruction, alternatively the inability of the Plaintiff to buy back the farm*”.

²⁰ The date 20 April 2012 presumably being a reference to the date on which the plaintiff and his parents had, on the plaintiff’s version, also been at the defendant’s office to sign the cession agreement.

²¹ In other words instructions in respect of not only the waiver/cession of the option, but also the timeous and effective exercising of the right to buy back the farm.

The disputed consultation

- [67.] The plaintiff testified that the disputed consultation was attended by **only** him and his father and that they **both** on that occasion gave the defendant **all** the instructions alleged in the particulars of claim. This in itself is impossible to reconcile with the further particulars, in terms of which only the plaintiff gave instructions to the defendant at the disputed consultation, and in terms of which the plaintiff's father had, at the consultation of 10 April 2012²² (and together with the plaintiff's mother), only given instructions to the defendant regarding the waiver or the cession of the right (and had never given the defendant an instruction to ensure the exercise of the option).
- [68.] Be that as it may, the question that must be considered is whether it has on a balance of probabilities been shown that there was another consultation about the issue of the option and the buying back of the farm in April 2012 (apart from the consultation of 10 April 2012), which the plaintiff and his father attended, but not his mother. This is obviously a crucial issue, as the plaintiff's case is that the instruction to the defendant to ensure that the option was exercised (as opposed to the instruction regarding its cession), was given at the disputed consultation, and at no other time. If it is found that no such consultation has been proven, it would in effect be the end of the plaintiff's case as far as it is based on that specific instruction.
- [69.] The defendant's case is clear. According to him he received instructions regarding the option during the consultation of 10 April 2012, and when only the plaintiff's parents were present, and not the plaintiff himself. Those instructions concerned only the cession of the cession, and not its exercise. On his version he therefore never received any instructions from the plaintiff regarding the option, and the disputed consultation never took place.

²² It became clear in the course of the trial - and there does not seem to be a dispute about this - that the consultation referred to in the plaintiff's further particulars as the one where his parents instructed the defendant to effect the waiver or the cession, is in fact the consultation of 10 April 2012, to which I have already alluded.

[70.] During the cross-examination of the plaintiff the possible dates of the disputed consultation was to an extent narrowed down to somewhere between 10 April 2012 (when the plaintiff had the telephonic discussion with the defendant about the debt of Mr Theo Van As to him) and 16 April 2012 (being the date on which the cession agreement was drawn up); but not on 14 or 15 April 2012, having been respectively a Saturday and a Sunday. In any event, the disputed consultation must on the plaintiff's version have taken place before 20 April 2012.

[71.] When considering the plaintiff's evidence that there was such a further consultation, where not only the plaintiff but also his father had given the defendant instructions regarding the option and the buying back of the farm, it is necessary to first of all go back to the consultation of 10 April 2012. If the plaintiff's father had already at that consultation:

71.1 Given the defendant a copy of the sale agreement, with the section regarding the option highlighted;

71.2 Discussed with the defendant the option, and the intention for it to be ceded to the plaintiff and to be exercised by him; and

71.3 Instructed the defendant to draw up a cession agreement,

there would not have been any need for the plaintiff's father to do so again, a mere day or two later.

[72.] The plaintiff was of course not present at the consultation of 10 April 2012. His denials that the defendant had in that consultation been given a copy of the sale agreement, as well as instructions to prepare a cession agreement, are therefore strange, to say the least. The latter denial is also inconsistent with the plaintiff's own pleadings²³, as is the similar denial of his mother, Mrs JEW Van As.

²³ See paragraphs [64] and [65] above.

- [73.] I have already alluded to the unsatisfactory aspects of the mother's evidence regarding the consultation of 10 April 2012, in particular also as regards the instructions for a cession to be effected, which is a vital part of the plaintiff's case, at least on the pleadings.
- [74.] The probabilities are in my view overwhelming that the issue of a cession of the right to the plaintiff was discussed at the 10 April 2012 consultation, as testified by the defendant, and as effectively alleged in the plaintiff's own further particulars.
- [75.] The 6 April notes were clearly drawn up by the plaintiff's father for the purposes of discussing not only the joint estate and will, but also other issues intricately linked to that, like the appointment of trustees and, indeed, the repurchase of the farm, not by the parents but by the plaintiff. Those notes were in all probability handed to the defendant at the 10 April 2012 consultation, like the defendant said. As already pointed out it would not have made sense to have those notes, which dealt with investments in the joint estate and with the issue of the joint will, available and then not to give them to the attorney who is being instructed to draw up an amended joint will. Why would the plaintiff's father and the defendant on 10 April 2012 have decided to leave the discussion of a part of the notes for a later consultation? There is no suggestion that this is what happened.
- [76.] There is no evidence that the 6 April notes were given to, or discussed with, the defendant on any other date than 10 April 2012. That it must have been given to the defendant and discussed with him at that stage, is as already mentioned borne out by the fact, *inter alia*, that the defendant did then in the period from April 2012 take several steps towards having Mr Christo Van As appointed as a trustee; something that was a subject of those notes. There is no evidence that the defendant had on any other occasion been instructed to have Mr Christo Van As appointed as trustee. In fact, Mrs Van As conceded that the issue of the Trust had been discussed at the 10 April 2012 consultation, which would be consistent with the 6 April notes having been discussed on that occasion, and with the defendant's evidence that more than just the amendment of the joint will was discussed on that occasion.

- [77.] Although it was not clear whether Mrs Van As had in her evidence actually denied that those notes had been given to and discussed with the defendant at the consultation of 10 April 2012, but if she did I would reject her evidence in this regard on the probabilities. The evidence of Mrs Van As regarding the 10 April consultation was not satisfactory, as already pointed out, and it was clear that she could not really recall in detail what had been said by the plaintiff's father on that occasion and what had transpired during that consultation.
- [78.] Mrs Van As seemed to concede that the need for a cession of the right may have been discussed, and it would not have made sense to discuss it, but then not to come to a decision to have a cession agreement prepared and to not instruct the defendant accordingly. I therefore find that the defendant was indeed at the consultation of 10 April 2012 instructed to draw up the cession agreement.
- [79.] If the plaintiff's father had at the 10 April 2012 consultation discussed with the defendant the option and had then instructed the defendant to prepare a cession agreement, why would he have felt the need to return, with the plaintiff, for yet another consultation about the very same option and then, on the plaintiff's evidence, talk to the defendant about the option as if he had never discussed it and its cession with the defendant at any time before?
- [80.] Was the denial by not only the plaintiff, but also by his mother, of an instruction, on 10 April 2012 already, to see to the cession of the option, not an attempt to avoid this improbability?
- [81.] In any event, the plaintiff's father knew that he and the plaintiff's mother were going to return to sign the joint will and he could, if he had wished the plaintiff to attend a consultation with him at the office of the defendant, have made such arrangements for the day that the joint will was going to be signed; All the more so if regard is had to the plaintiff's detailed and repeated description of the physical effort that it required for his father to get to the defendant's offices and to scale those stairs.
- [82.] No appointment in either of their names appears in the defendant's office diary for the period during which the disputed consultation allegedly took place. As already mentioned, the

plaintiff conceded that his father would probably not have gone to the defendant's offices without an appointment.

[83.] I have therefore concluded that the plaintiff did not prove, on a balance of probabilities, that the disputed consultation in fact took place. As already pointed out, this really ends the plaintiff's case as far as it is based on a mandate as set out in the plaintiff's further particulars, because on that version any other instructions about the option than those regarding the cession, could only have been given at the disputed consultation.

Contents of alleged mandate

[84.] I will nevertheless consider whether, on the plaintiff's version of what had transpired at the disputed consultation, it could be said that he has proved, on a balance of probabilities, that the defendant had been instructed to ensure that the re-purchase took place, in the terms set out in paragraph 10.2 of the particulars of claim²⁴.

[85.] As a starting point it is important to bear in mind that, on the plaintiff's pleadings and as already mentioned, the instructions had been given expressly. Express instructions in the terms pleaded in the particulars of claim can by no stretch of the imagination be said to appear from what had on the plaintiff's evidence been conveyed to the defendant at the disputed consultation. As already mentioned, the plaintiff's evidence was rather to the effect that the alleged instructions were tacitly or impliedly given to the defendant. No attempt was made to have the particulars of claim amended accordingly, and the plaintiff's evidence in this regard was thus inconsistent with his pleadings²⁵.

[86.] At what stage was the defendant supposed to fulfil the alleged mandate, in other words when should he have taken the steps to ensure the buying back of the farm? Should the defendant have understood the alleged utterances of the plaintiff and his father to mean that he should

²⁴ "10 The Defendant was instructed and mandated to:

10.1

10.2 do all things necessary to ensure that the farm is legally and effectively bought back by the Plaintiff by ensuring that the right to buy back the farm is timeously and effectively exercised in accordance with the terms of the Agreement"

²⁵ Compare **Stellenbosch Farmers' Winery Group Limited and Another v Martell et Cie and Others** *supra*

already at that stage not only effect the cession of the option, but also take steps to ensure its exercise? Or should he have understood them to mean that he had to do so at some future time, but before the expiry of the option? In my view this is an important aspect in the consideration of the probability that the defendant had been given such an instruction.

- [87.] The answer to this question does not appear from the plaintiff's particulars of claim or further particulars. The plaintiff's evidence in this regard was ambivalent. On the one hand he said that he had, after having signed what according to him in retrospect appeared to have been the cession agreement, been satisfied that all that was required for the timeous exercise of the option had been done there and then, which could be said to be indicative of an understanding, on his part at least, that the instructions regarding the exercise of the option had been supposed to be (and were) executed at that stage already.
- [88.] On the other hand the evidence of the plaintiff that the defendant was told that the farm was only to be bought back in 2014, and by implication at or towards the end of the lease period, militates against an understanding that everything required for the timeous exercise of the ceded option would be done there and then. This must also be seen against the background of the fact that the proceeds of the policy would only become available in October 2014.
- [89.] When I debated this with Mr Smit his response was that the plaintiff's case is the steps were supposed to be taken at that stage already, at not at some future time.
- [90.] A further uncertainty, both on the plaintiff's pleadings and his evidence, is who it was that was supposed to actually exercise the option and buy back the farm. If the instruction to "*do all things necessary to ensure that the right to buy back is timeously and effectively exercised in accordance with the Agreement*" was intended to mean that the defendant would buy back the farm on behalf of the plaintiff, the problem would be that an oral mandate to do so would not have complied with the requirements of section 2(1) of the

Alienation of Land Act²⁶, in terms of which such a mandate would have had to be in writing. This much was conceded by Mr Smit.

[91.] The other possibility is that the plaintiff's case is that the understanding was that he would himself give the notice and buy back the farm. The plaintiff's evidence that he never read the cession agreement before signing it, but that he regarded that act as the last thing that he had to do in order for the option to be exercised, suggested that he had been under the impression that, by signing that document, he himself was exercising the option and buying back the farm right there and then. On his version he had not expected to have to sign anything else at a later stage.

[92.] On this version, however, the question would then be what the defendant had been supposed to do to "*ensure*" the exercise of the option and the buying back of the farm by the defendant himself. If I understood Mr Smit's argument correctly, the defendant's instructions would on this scenario have included to advise the plaintiff on what he needed to do to exercise the option and to buy back the farm. The plaintiff's evidence was not, however, that he had not known that the option had to be exercised by way of written notice. In fact, his father had highlighted the relevant provisions of the sale agreement and the two of them had discussed those provisions long before the disputed consultation. As already indicated, I am also of the view that it is unlikely that the plaintiff had not known that he was signing a cession agreement, and that he would have needed advice about that. It must be remembered that, on the plaintiff's version, the defendant had received his instructions before the cession agreement was signed, and it would border on the ridiculous to say that the defendant had already then somehow been made aware that documents would not be read and that he would have to explain their contents.

[93.] Reverting to the fact that the proceeds of the policy would only become available late in 2014, and the requirement that a bank guarantee be furnished within 60 days after the exercising of

²⁶ 68 of 1981; Compare **De Ujfalussy v De Ujfalussy** 1989 (3) SA 18 (A); **Le Roux and another v Nel and another** [2016] JOL 37322 (SCA); **Exis Eiendomme (Edms) Bpk v Bezuidenhout** [1972] 1 All SA 598 (T), 1972 (1) SA 559 (T); **Admin Estate Agents (Pty) Ltd t/a Larry Lambrou v Brennan** 1997 (2) SA 922 (E)

the option, Mr Smit argued that that it often happens that parties do not furnish bank guarantees within the agreed time, and that they then agree on an extension of time within which to do so. It was, however, never the plaintiff's evidence that, when instructing the defendant to see to the immediate exercise of the option, he foresaw this complication and intended to deal with it by requesting an indulgence from Sishen, and to argue that it may have been his thinking, amounts to mere conjecture. There is no evidence that the plaintiff or his father was unaware of the requirement of a bank guarantee at the time of the disputed consultation. They must therefore be taken to have been fully aware of it, and such awareness would, against the background of the plan to finance the purchase with the proceeds of a policy which would only mature much later, militate against the inference of an intention to instruct the immediate exercise of the option.

[94.] No evidence was presented about the progress of the railway line and on the plaintiff's version this issue was not even discussed during the disputed consultation. Once again the plaintiff and his father must be taken to have been aware of the fact that the farm could not be bought back before the completion of the railway line and, unless the railway line had already been completed by the time of the disputed consultation, they would have known that the farm could not yet be bought back at that stage. Confronted with the question whether the consensus was that the option should be exercised and the farm bought back immediately, the "*officious bystander*", being aware of the requirement regarding the railway line but having no information on its progress, would not in my view have responded: "*we did not trouble to say that; it is too clear*"²⁷.

[95.] Mr Smit sought to get by these improbabilities by arguing that the giving of the notice required in terms of the sale agreement would not yet have constituted the buying back of the farm, which could then have taken place at a later stage, and that the bank guarantee would only be required then. There is no merit in this argument. The provisions of clause 23.1.5 of the sale agreement are that the bank guarantee would have to be furnished within 60 days after the exercise of the option by written notice; not within 60 days of the conclusion

²⁷ **Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd** 2011 (5) SA 19 (SCA); [2011] 3 All SA 535 (SCA) para 17

of a new contract of sale²⁸. In any event the provisions of the sale agreement, also as regards the issue of the railway line, are very clearly to the effect that not only the notice of the exercise of the right to buy back, but also the actual buying back of the farm, could only take place once the railway line had been completed, and within 5 years of the conclusion of the sale agreement.

- [96.] An interpretation of the alleged instructions concerning the exercise of the option (as opposed to its cession) to have been that the defendant would at some future time have taken steps to “*ensure*” the exercise of the option also presents problems, on the probabilities and on the plaintiff’s own evidence.
- [97.] What steps should the defendant, on the understanding of both he had the plaintiff, have taken to “*ensure*” the exercise of the option? On the evidence of the plaintiff he had not expected to hear from the defendant again after the signing of the “*document*”. The next thing that he expected to happen, was to be contacted by Sishen about payment. The defendant could therefore on the plaintiff’s own version and understanding for example not have been instructed, even tacitly or impliedly, to timeously remind the plaintiff of the expiry date, or to advise him (at a later stage) of the requirement of written notice of the exercise of the option.
- [98.] In my view it is in any event simply not possible to read a request or an instruction to advise “*between the lines*”²⁹ of the plaintiff’s evidence about what was said to the defendant at the disputed consultation, as suggested by the plaintiff in cross-examination.
- [99.] It follows that, on both the plaintiff’s pleadings and his evidence, there is in my view, at best for the plaintiff uncertainty about what the defendant had according to him been instructed to do, and at worst no proof on a preponderance of probabilities that he himself had given any instructions whatsoever in respect of the option. What the plaintiff himself had according to his evidence actually said to the defendant at the disputed consultation, could in my view

²⁸ Insofar as this may have been required in terms of the sale agreement, which is unnecessary to decide; Compare **Jacobs NO v Malan** 1998 JDR 0657 (O).

²⁹ Which would in any event not have been an express instruction.

in any event not be interpreted to have been anything more than, at best, an instruction to see to the cession of the option to the plaintiff. I cannot see that one can in any manner read into the plaintiff's words a tacit or implied instruction, let alone an express instruction (as pleaded), to exercise the option, or to ensure the exercise thereof by the plaintiff.

[100.] If the plaintiff himself did not know, at that time and on his own evidence, what his father had meant by saying that a letter or letters had to be written to Sishen, he could not possibly have understood those words to have been a tacit or implied instruction to the defendant to exercise the option on behalf of the plaintiff, or to ensure that the plaintiff exercised the option. It is, as already mentioned, in any event not the plaintiff's case, on the pleadings, that his father gave any such instruction. His claim is based on a mandate agreement between him and the defendant.

[101.] Even if it is assumed that the plaintiff had after the disputed consultation been under the *bona fide* impression that he himself was not required to do anything more in order for the option to be exercised and for the farm to be bought back, the fact would remain that he had in cross-examination made the concession that there would then have been a misunderstanding about what the defendant was supposed to do and what he himself had to do. The required consensus and meeting of the minds on the contents of the mandate would have been absent and no enforceable mandate agreement would have come into existence.

DUTY OF CARE

[102.] As already mentioned, the defendant is an attorney, as he was at all times material hereto. He commenced private practise as an attorney in 1997, after having worked as a prosecutor and a magistrate from 1981.

[103.] Before considering what could reasonably have been expected of the defendant and whether any omission on his part was wrongful, I need to deal with two points made by Mr Heyns.

Evidence of reasonableness

[104.] Mr Heyns argued that, in the absence of evidence on what a reasonable attorney would in the circumstances have done, it was not open to Mr Smit to argue that any omission on the part of the defendant was not what could be expected from a reasonable attorney. For this proposition Mr Heyns relied on the following passage in the judgment in **Steyn NO v Ronald Bobroff & Partners**³⁰:

“In the absence of clear evidence to prove what a reasonable attorney in the position of the respondent, faced with a similar case under similar circumstances, would have done, I am unable to conclude that the respondent failed to act with the necessary care, skill and diligence which would ordinarily be expected from a reasonable attorney. It is axiomatic that the conduct of a reasonable attorney concerning a case that he/she handles will primarily be determined, amongst others, by the facts and circumstances of the case, the investigations which had to be done, the nature and extent of the injuries suffered and the complexity of the matter. It would in my view be unwise to attempt to determine the conduct of a reasonable attorney in vacuo. As Van Zyl eloquently stated in his work The Judicial Practice of South Africa — ‘the degree of negligence or want of prudence, or useless work, must depend upon the nature of each case.’”

[105.] The facts in the **Steyn** case are clearly distinguishable from those in the present matter. The case of the appellant (plaintiff) in that matter was that the conduct of the respondent (defendant attorney) had to be *“measured not against that of an ordinary reasonable attorney but that of a ‘pre-eminent specialist personal injury attorney’”*, because *“the respondent had widely advertised itself as ‘specialists in major personal injury law’ ”*, and that therefore the respondent *“should be held to the standard which it professed to possess”*³¹ The judgment referred to the case as *“not one of the run-of-the-mill cases”* and as *“complex”*³².

[106.] Mr Heyns did not explain why expert evidence would have been necessary to prove that a failure of the nature relied upon by the plaintiff in this matter was unreasonable, and in my view this court would be able and entitled to consider whether the omissions relied upon in this matter, would have been unreasonable.

³⁰ 2013 (2) SA 311 (SCA) para [27]

³¹ *Ibid*, para [20]

³² *Ibid*, para [26]

Sustainability of the alternative cause of action

- [107.] Mr Heyns urged me to decide, on an *in limine* basis, not to entertain the delictual alternative cause of action at all, and argued that a plaintiff who alleges and relies upon a contract of mandate with a defendant attorney, cannot also rely on a breach of a duty of care by that attorney, as such a delictual claim would be irreconcilable with the allegation, and evidence, of an existing mandate. In this regard Mr Heyns sought to find support, particularly, in the statement in the **Steyn** judgment³³ that it is “*incongruous to allege a breach of written agreements as the basis of claims (which is clearly contractual) and in the same breadth to rely on an alleged breach 'of the duty of care owed by the Defendant to the Plaintiff' which is plainly a delictual claim.*” (My emphasis)
- [108.] In the present matter the plaintiff’s allegations of a delictual cause of action are clearly pleaded in the alternative, to be considered in the event that the contractual cause of action does not succeed. They are clearly not relied upon “*in the same breadth*” as the allegations of a contract of mandate. It is not as if the alleged breach of a duty of care is based on a breach of the alleged contract of mandate, or that the delictual relief is claimed against the background of a “*contractual nexus*”, between the plaintiff and the defendant, which in terms of the allegations of the alternative claim “*persisted*” at the time of the existence of the duty of care³⁴. The recognition of the alternative cause of action in the present matter would not “*have the effect of eliminating provisions in the agreement*”³⁵ between the parties, because it is conditional upon a finding that there in fact was no such contract.
- [109.] Mr Heyns argued that a finding that no contract of mandate has been proved would “*not result in the erasure of the Plaintiff’s evidence that he in fact provided an instruction*”. Not surprisingly Mr Heyns did not refer to any authority for this approach. Alternative causes of action of which the factual basis would be different from that required to support the main cause of action, is an everyday occurrence. That is precisely the purpose of such an

³³ *Ibid*, para [12]

³⁴ **Lillicrap, Wassenaar & Partners v Pilkington Brothers (SA) (Pty) Ltd** 1985 (1) SA 475(AD) at 500F-G

³⁵ **Nortje v Fakie** [2011] JOL 27101 (KZP) para [13]

alternative cause of action, *viz* to cater for the possibility that the evidence in support of the main cause of action is not accepted. The rejection of such a plaintiff's evidence on the main cause of action cannot non-suit him or her for purposes of an alternative cause of action based on a different factual basis. It is also not as if the plaintiff in the present matter would, for the purposes of his alternative cause of action, have had to present evidence which would contradict his evidence in support of the main cause of action. There is also no merit in this argument of Mr Heyns.

Pleadings

[110.] In his particulars of claim the plaintiff based the allegation of a duty of care on, *inter alia*, allegations that the defendant had been aware of the facts:

110.1 That the plaintiff and his parents were lay persons as far as the law was concerned;

110.2 That the plaintiff and his parents relied on the defendant "*to ensure that the right to buy back was secured for the Plaintiff and exercised in accordance with the provisions of the Agreement*";

110.3 That he had been instructed to prepare an amended joint will which would contain clear references to the repurchase by the plaintiff, and the intended manner of payment of the purchase price;

110.4 That the plaintiff had farmed there at the time and had intended to continue "*after the 5 year period recorded in the Agreement*"; and

110.5 That the plaintiff would suffer damages if the right was not exercised timeously.

[111.] It was alleged that the defendant should have exercised reasonable care, and therefore had a duty of care towards the plaintiff, to:

111.1 “*ensure*” that the option was exercised timeously and the farm bought back in accordance with the sale agreement; and/or

111.2 Timeously and properly advise/inform the plaintiff³⁶ on what steps to take in order to exercise the right to buy back the farm, so that plaintiff could exercise the option before the expiry date.

[112.] It was furthermore alleged that the defendant had wrongfully and negligently:

112.1 Failed to “*ensure*” that the option was exercised timeously and in accordance with the sale agreement, by failing to provide Sishen or its attorneys with timeous written notice of the exercise of the right;

112.2 Failed to inform and/or advise the plaintiff on the obligation to provide written notice of the exercise of the option to Sishen.

[113.] The defendant denied all allegations of a duty of care and of the negligent breach thereof. In the alternative, and in the event of a finding that he did in fact have a duty of care and that he did breach it, and that the plaintiff did suffer damages as a result of such breach, the defendant pleaded that there had been contributory negligence on the part of the plaintiff, on the basis that the plaintiff had failed to contact or provide the defendant with instructions in respect of the timeous exercise of the option, which the plaintiff could and should have done in the prevailing circumstances³⁷.

³⁶ In paragraph 22 of the particulars of claim it was alleged that the defendant should also have advised the parents on this. This could obviously not be correct. By then the parents had ceded the option to the plaintiff, and they would therefore not have been able to exercise it. Any remaining duty of care in this regard towards them would in any event not assist the plaintiff in proving a duty of care towards him. The same applies to the reference to the plaintiff’s parents in paragraph 21.3 of the particulars of claim.

³⁷ The issue of contributory negligence was not, however, really pursued in evidence or in argument.

Conditional basis of the alternative cause of action

- [114.] When paragraphs 20 and 21 of the particulars of claim are read together, it would seem that the alternative cause of action would come into play when it is found that the mandate relied upon as the main cause of action had not been given to the defendant, but that the plaintiff had nevertheless indeed, with his parents, sought the defendant's advice "*during April 2012*" (presumably on the issue of the option).
- [115.] This would mean that, if it is found that the plaintiff did not seek the defendant's advice on the option in April 2012, the basis for the delictual alternative cause of action would fall away (at least partly); also because it is on the allegations in the particulars of claim apparently dependent upon knowledge that the defendant is alleged to have acquired in such a consultation. If the plaintiff had never consulted the defendant about the option, and had never been present when his parents consulted the defendant about it, on what other conceivable basis could the defendant have known or suspected that the plaintiff himself was actually relying on him to "*ensure*" that the option was "*secured*" and "*exercised*"³⁸?
- [116.] When I took this up with Mr Smit in argument, he submitted that the knowledge that the defendant had gained at the consultation of 10 April 2012, the receipt of the Weavind & Weavind letter and the plaintiff's alleged presence, in the defendant's office, when the cession agreement was signed would in any event have led to the alleged duty of care on the part of the defendant.
- [117.] The Weavind & Weavind letter and the plaintiff's alleged presence in the office of the defendant on the occasion of the signing of the cession were not pleaded, in the particulars of claim, as grounds for the coming into existence of the duty of care³⁹. In fact, when the defendant requested further particulars regarding "*all the facts and/or circumstances on which Plaintiff intends to rely in support of the alleged coming into existence of (the) duty of care*", the plaintiff's response was that "*The particularity provided in the particulars of claim*

³⁸ See paragraph 21.3 of the particulars of claim.

³⁹ Compare **Hawker v Prudential Assurance Co of South Africa Ltd** 1987 (4) SA 442 (C) at 449E-451A; **Knop v Johannesburg City Council** 1995 (2) SA 1 (A) at 27

(was) sufficient for purposes of preparation for trial". I will nevertheless proceed to consider whether the defendant could, in the absence of both the mandate and the disputed consultation, have had a duty of care as alleged by the plaintiff.

Proximity of relationship between defendant and plaintiff

- [118.] The defendant says that he never had a consultation with the plaintiff as far as the option was concerned, and that he did not regard him as his client for the purposes of the option.
- [119.] The only file that was opened for purposes of the option, was opened in his father's name, at the consultation of 10 April 2012. The plaintiff was not even present on that day. The plaintiff's father paid for that consultation, and the letters which the defendant thereafter addressed to Sishen concerning the issue of the option, were addressed to and/or on behalf of the plaintiff's father or his parents, and not one on behalf of the plaintiff.
- [120.] I have already found that the disputed consultation has not been proven on a balance of probabilities. It must therefore be accepted, for present purposes, that the plaintiff had never been present at a consultation where the option, its cession and its exercise were discussed with the defendant. Even if the disputed consultation had taken place, and even if the plaintiff was correct as regards what he had said there, the fact would remain that he would have been there as a son of the defendant's clients (as far as the option was concerned), and as a client, and that he had on his own version played a secondary role there and had mainly let his father do the talking.
- [121.] All of this is consistent with the plaintiff and the defendant never having been in a client/attorney relationship for the purposes of the option. The fact that the plaintiff was, until September 2012, a client of the defendant in respect of the debt owed to him by Mr Theo Van As, makes no difference to this.
- [122.] However, Mr Smit referred to, *inter alia*, **Aucamp and Others v University of Stellenbosch**, where a duty of care was found to exist towards a disappointed beneficiary, even when there

was “no privity of contract or any other direct legal relationship between” the disappointed beneficiary and the person who had caused the damage, and in which reference was made to the following description of the relevant criteria in **Caparo Industries plc v Dickman and Others** [1990] 1 All ER 568 (HL):

*“What emerges is that, **in addition to the foreseeability of damage**, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a **relationship characterised by the law as one of "proximity" or "neighbourhood"** and that the situation should be one in which the court considers it **fair, just and reasonable that the law should impose a duty of a given scope** on the one party for the benefit of the other. But it is implicit in the passages referred to that the concepts of proximity and fairness embodied in these additional ingredients are not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope.”⁴⁰ (My emphasis).*

- [123.] The existence of such a duty of care on the part of an attorney has not only been recognised where the third party was a disappointed beneficiary⁴¹, but also where it was not and where the third party was not even an existing client of the attorney⁴².
- [124.] The question is whether there was a proximity of relationship between the plaintiff and the defendant as far as the option is concerned, considered on the basis that the plaintiff had never given the defendant any instruction regarding the option, that he had not even been present when his father gave such instructions to the defendant and that, in any event, those instructions were limited to the preparation of a cession agreement and the notifying of Sishen of the intention to cede the option?
- [125.] When the cession agreement had been drawn up and signed, and Sishen had been notified accordingly, the defendant’s instructions (from the plaintiff’s father) were finalised as far as the option was concerned, and any duty of care that he may have had towards the father or

⁴⁰ 2002 (4) SA 544 (C) para’s [81] and [88]

⁴¹ See **Pretorius en Andere v McCallum** 2002 (2) SA 423 (C); **Jowell v Bramwell-Jones and Others** 1998 (1) SA 836 (W)

⁴² See **Du Preez and Others v Zwieggers** 2008 (4) SA 627 (SCA); Compare also **Hirschowitz Flionis v Bartlett and Another** 2006 (3) SA 575 (SCA)

both parents as regards the option, came to an end then. At the very latest this would have been the position after the defendant had brought the Weavind & Weavind letter to the attention of the plaintiff's father, an issue to which I will revert. By the time that the option was supposed to be exercised, towards the end of the lease period, there existed no attorney/client or fiduciary relationship between the defendant and the plaintiff's father/parents, as regards the issue of the option that could be "*extended*" to any relationship between the defendant and the plaintiff⁴³. A period of almost two years had by then expired since the defendant last had any form of contact with the plaintiff. The fact that the plaintiff had earlier been a client of his in respect of an unrelated issue, and that the defendant knew that his erstwhile client was the cessionary and desired to exercise the option, could not have created a duty of care of the nature and scope alleged by the plaintiff, on the part of the defendant.

[126.] I have already found that it has not been proved on a balance of probabilities that the plaintiff signed the cession agreement in the defendant's office and presence, but even if he had, this would not in my view have created any proximity of relationship between him and the defendant as far as the exercise of the option (as opposed to its cession) was concerned.

[127.] The defendant had obviously been aware of the intention of the parents, his clients, that their son, the plaintiff should become the owner of the farm, but I fail to see how that knowledge could have created or contributed to the coming into existence of a duty of care towards the plaintiff, or a proximity of relationship with him.

[128.] Mr Smit repeatedly referred to the Weavind & Weavind letter as having been a "*red flag*" to the defendant, and potentially to the plaintiff, had it come to his attention.

128.1 If the defendant had not been mandated to ensure the exercise of the option (but only to see to the cession of the option) and had never received any instructions from the cessionary (the scenario upon which the alternative claim must be considered), why should a statement that the option had not yet been exercised have caused the

⁴³ **Aucamp and Others v University of Stellenbosch**, *supra*, para [92]

defendant any alarm, or have caused him to bring this fact to the attention of the cessionary himself?

128.2 I have already alluded to the plaintiff's conflicting evidence on when exactly he had expected the defendant to take steps to ensure the exercise of the option. If the intention was for the option to be exercised towards the end of the lease period, and in 2014, a statement in June 2012 that the option had not yet been exercised would not have come as any surprise to him.

128.3 It was common cause that the plaintiff's father had received the copy of the Weavind & Weavind letter which the defendant had sent him in June 2012. His subsequent request for copies of the defendant's two letters to Sishen was in all probability prompted by him having become aware of the contents of the Weavind & Weavind letter. On the plaintiff's version his father had never brought the letter to his attention. It could be argued that the letter, and the statement therein to the effect that the option had not yet been exercised, could not have come to the plaintiff's father as a shock or a surprise, because otherwise he would in all probability immediately have informed the plaintiff of it. Had he too been under the impression that the defendant had already done what was necessary, and that the document that they had already signed had constituted the exercise of the option, he would in all probability also have taken it up with the defendant without delay.

128.4 It follows that I am of the view that the Weavind & Weavind letter also could not be said to have caused or contributed to the alleged duty of care, or any proximity of relationship between the plaintiff and the defendant.

[129.] I will nevertheless proceed to consider the scope and fairness of the duty alleged by the plaintiff and the reasonable foreseeability of damages in the circumstances of this case, issues which are similar to those that are relevant when considering whether pure economic loss should in a particular case be held to have been caused wrongfully.

Scope and fairness of legal duty alleged by plaintiff

[130.] As regards the scope and fairness of a legal duty to avoid damages, in cases of pure economic loss, the following was stated in the **Aucamp**⁴⁴ case referred to above:

“There is no numerus clausus of factors to be taken into consideration in assessing whether or not the defendant was able to avoid reasonably foreseeable damage by taking reasonable steps to avoid it. Neethling at 290 - 302 suggests, inter alia:

- (a) whether the defendant knew or subjectively foresaw that his negligent conduct would cause damage to the plaintiff;*
- (b) whether reasonably practical steps could have been taken by the defendant to prevent such damage;*
- (c) whether the defendant possessed, or professed to possess, special skill, competence and knowledge;*
- (d) whether special protection against economic loss was required;*
- (e) whether a finding in favour of the plaintiff would open the floodgates and lead to a multiplicity of actions or indeterminate liability which would have severe social consequences;*
- (f) whether a statutory provision requires the prevention of economic loss;*
- (g) whether the plaintiff is able to protect himself against potential economic loss;*
- (h) whether the defendant can protect himself against such loss, for example by acquiring adequate insurance cover.”*

[131.] The court in the **Aucamp** case had the following to say about the “*value judgment*” that a court has make in considering whether conduct was wrongful:

“In doing so it must weigh up the interests of the parties and of the community at large against the background of the relevant facts and circumstances. In addition it must strive, impartially and objectively, to apply the values of justice, fairness and reasonableness, while taking into account considerations of good faith (bona

⁴⁴ *Ibid*, para [69]

fides) and good morals (boni mores), otherwise known as public policy reflecting the legal convictions of the community.”⁴⁵

- [132.] Against this background the plaintiff’s allegation of a duty of care on the part of the defendant, and the breach thereof, as set out in paragraphs [111] and [112] above can now be considered.
- [133.] Here too it would in my view be important exactly when the defendant should reasonably have taken the steps pleaded by the plaintiff. I have already dealt with the plaintiff’s pleadings and evidence regarding when the defendant was supposed to have acted in terms of the alleged mandate. It is telling that, when the defendant requested further particulars about when the defendant should have taken steps to ensure that the option was exercised and when the defendant should have taken steps to buy back the farm, the questions were met with the response “*On or before 22 March 2014*”, which according to the plaintiff was the expiry date for the exercise of the option.
- [134.] When I attempted to clear this up with Mr Smit in argument, his response was that it is the plaintiff’s case that there was a misunderstanding about what it was that he had signed, that this misunderstanding had resulted from the defendant’s failure to explain the contents of the document to the plaintiff when he signed it, that the defendant should also then have explained to the plaintiff that his written authorisation would be required for the defendant to exercise the option and, as already mentioned, that the plaintiff’s delictual claim is accordingly not premised on something that the defendant should have done after the signing of the cession agreement.
- [135.] Needless to say this is not how the plaintiff’s delictual claim was pleaded. If this had been intended to be the plaintiff’s case, one would have expected pertinent allegations to this effect in the particulars of claim. I will nevertheless consider the issue of a duty of care from this angle too.

⁴⁵ *Ibid*, para [68]

[136.] Furthermore it is very difficult to understand how his signing of a document of which the contents were unknown to him, would have caused the plaintiff to believe that all that was necessary for purposes of the option, had by signing that document been done.

Failure to provide written notice of the exercise of the option

[137.] On both the plaintiff's pleadings and his evidence it appeared that according to him the manner in which the defendant should have "*ensured*" that the option was exercised, was to have "*provided Sishen, alternatively Sishen's attorneys with written notice of the Plaintiff's exercise of the right to buy back the farm in accordance with the terms of the Agreement*"⁴⁶, in other words to have exercised the option on the plaintiff's behalf.

[138.] In as much as such a notice would have amounted to the acceptance of an offer to sell, and was intended to lead to the conclusion of an agreement to buy back the farm at the fixed price offered in the sale agreement, the defendant would, as already pointed out, have needed the written authorisation of the plaintiff, and an oral mandate would not have sufficed.

[139.] I have already dealt with the fact that the defendant would not have known when the plaintiff would be able to furnish the bank guarantee, whether the railway line had been completed or when it was expected to be completed and, accordingly, when exactly the option could be exercised and the farm bought back. Even if the plaintiff's case was not that the defendant should have exercised the option and bought back the farm on his behalf, the question would remain what more the reasonable attorney, with only the information that had been made available to the defendant, would and should have done in the circumstances to ensure the re-purchase of the farm.

[140.] What remains to be considered is the alleged duty and failure to advise and inform the plaintiff, as set out above⁴⁷.

⁴⁶ Paragraph 24.1 of the particulars of claim.

⁴⁷ In paragraphs 111.2 and 112.2.

Failure to advise/inform

- [141.] In my view it did not require knowledge of the law, “*special skill, competence and knowledge*” or “*special protection*”⁴⁸ to understand that, for the option to be exercised in accordance with the provisions of the sale agreement, it would have to be exercised by way of written notice to Sishen, within the period stipulated in the sale agreement.
- [142.] The relevant provisions in the sale agreement are very clear on these requirements. When the copy of the sale agreement was made available to the defendant, those provisions had already been marked, underlined and highlighted by the late Mr Van As. The plaintiff had, on his own version and as already mentioned, discussed those provisions with his father at length. It was in any event not the evidence of the plaintiff that either he or his father had not understood the requirements of the sale agreement in this regard.
- [143.] The defendant had no reason to suspect that the parents, or for that matter the plaintiff as cessionary, might not be aware of or understand those provisions, and that any of them would need his assistance or advice in giving such notice in writing and timeously.
- [144.] If the parents or the plaintiff had in actual fact not understood those provisions, or had needed advice or information about them, nothing had prevented them from seeking the defendant’s assistance and advice. It is not really relevant to the plaintiff’s claim, but it is clear that his parents had not, when they consulted the defendant on 10 April 2012 and when the issue of the option was discussed in the context of the need for it to be ceded to the plaintiff, sought the defendant’s advice on how or when the option could be exercised. Even on the plaintiff’s evidence about what was said at the disputed consultation, he could not be said to have sought the defendant’s advice regarding how and when the option could be exercised in that consultation.
- [145.] I have already dealt with the suggestion by the plaintiff that he had signed the cession agreement without knowing what it was that he was signing, and that he had believed that it

⁴⁸ **Aucamp and Others v University of Stellenbosch**, *supra*, para [69] (c) and (d)

somehow constituted whatever he needed to sign for the exercise of the option, but the fact of the matter is that, on the plaintiff's own description of the circumstances under which that document had been signed, nothing had prevented him from studying its contents and/or seeking the defendant's advice thereon, either before or after having signed it. He did not even, on his own evidence, request a copy of it at any time relevant to the present enquiry. It is not clear on the evidence whether the copy of the defendant's letter of 26 April 2012 (to Sishen) that had been sent to the plaintiff's father had included a copy of the cession agreement, but if it did, he could not have been taken aback to see that the document that they had signed was only the cession agreement, otherwise he would have immediately taken it up with the defendant and/or the plaintiff.

[146.] Mr Smit posed the rhetorical question whether a layman would know the difference between a cession agreement and a document or notice exercising an option, but it was never the plaintiff's evidence that he had read the document, at any time relevant to this issue, and that he had not understood its contents, let alone had understood its contents to have constituted the exercise of the option.

[147.] If advice was not required or sought on when or how to exercise the option, what is it then that the plaintiff needed to be advised on or informed about? Is it suggested that the defendant should have reminded the plaintiff or his parents at some time, towards the end of the lease period, that the expiry date for the exercise of the option was drawing closer and that it was time to exercise the option? Surely this could not reasonably have been expected of the defendant. Was he supposed to foresee that the plaintiff or his parents may lose track of time and forget about the expiry date, and to set a reminder for him to contact them in this regard at some future point? Such a finding would in my view impose an unfair and unreasonable burden on the defendant, given the facts of this case. In **S v Bochriss Investments (Pty) Ltd and Another**⁴⁹ it was reiterated that "*The diligens paterfamilias does not have 'prophetic foresight'*" and the following words in *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound)* 1961 AC 388 (PC) ([1961] 1 All ER 404) at 414G-H were quoted with approval: "*After the event, even a fool is wise. But it is not the*

⁴⁹ 1988 (1) SA 861 (A)

hindsight of a fool; it is the foresight of the reasonable man which alone can determine responsibility.” In any event, according to Mr Smit the plaintiff’s case is, as already pointed out, not that the defendant should have taken steps at some future time.

Was plaintiff vulnerable to such damages or could he have protected himself?

- [148.] How could the plaintiff have relied on the defendant to exercise the option on his behalf, or to advise him on when to exercise it himself, if he had not provided the defendant with instructions regarding when a bank guarantee could be ready (so that care could be taken that the bank guarantee could be furnished within 60 days after the exercise of the option, as required by the sale agreement), or about the completion of the railway line? The only conceivable way that there could be any talk of such reliance would be where the defendant would have known when to exercise the option or when the plaintiff could exercise the option, having regard to the availability of a bank guarantee and the question whether the railway line had been completed.
- [149.] It would therefore not have been reasonable of the plaintiff, even if he and his father had conveyed to the defendant what he described in his evidence at the disputed consultation, to sit back and do nothing further as the expiry date for the exercise of the option drew closer. Those “*instructions*” would not by any stretch of the imagination have been sufficiently detailed for the plaintiff to have reasonably believed that nothing further was required from him in the course of the next approximately 23 months to the expiry date.
- [150.] This would obviously even more so be the case if the disputed consultation and those “*instructions*” are thought away. Even if the plaintiff had in such circumstances for some reason laboured under the impression that the defendant was somehow going to see to the exercise of the option, it would not have been the doing of the defendant. The defendant, having completed the only instructions he had ever held in respect of the option (the cession agreement), had absolutely no reason to suspect that the plaintiff may be under the impression that the defendant would exercise the option on his behalf, or that the defendant would initiate contact with him in that regard. On the evidence the only communication that

the plaintiff had with anybody about the option and its exercise was with the plaintiff's parents, and more specifically with his father.

[151.] On the plaintiff's own evidence, and once again even if it was to be assumed that the disputed consultation had taken place as described by the plaintiff, he could not have been under the impression that the defendant was going to advise or inform him about the option, because he says that he did not expect to hear from the defendant again. Even if he did, however, expect the defendant to take further steps towards the exercising of the option or to contact him in that regard, it could reasonably have been expected of the plaintiff, at the very least, to have made enquiries at some time before the expiry of the option; even if only to establish when he had to furnish the bank guarantee. If he had, the error of his belief (or at the very best for him the misunderstanding) would have been discovered in time for the option to be exercised and for him to avoid the damages.

[152.] The plaintiff can therefore not on any version reasonably be considered to have been "vulnerable" to the risk that the option could expire without being exercised. The "vulnerability to risk" consideration, as a consideration relevant to the enquiry into the question of wrongfulness (as opposed to the question of negligence) was discussed in **Cape Empowerment Trust Ltd v Fisher Hoffman Sithole**⁵⁰:

"But the consideration which, in my view, weighs most heavily against the imposition of legal liability on FHS in the circumstances of this case is the one that has become known, in the context of wrongfulness, as the plaintiff's 'vulnerability to risk'. As developed in our law,, vulnerability to risk signifies that the plaintiff could not reasonably have avoided the risk of harm by other means. What is now well established in our law is that a finding of non-vulnerability on the part of the plaintiff is an important indicator against the imposition of delictual liability on the defendant The role of this consideration is best illustrated, I think, by McHugh J in Perre v Apand Pty Ltd (1999) 198 CLR 180 (HC of A) supra para 118:

'Cases where a plaintiff will fail to establish a duty of care [or, wrongfulness in the parlance of our law] in cases of pure economic loss are not limited to cases where imposing a duty of care would expose the defendant to indeterminate liability or interfere with legitimate acts of trade. In many cases there will be no sound reason for imposing a duty on the defendant to protect the plaintiff from

⁵⁰ 2013 (5) SA 183 (SCA) para [28]

economic loss where it was reasonably open to the plaintiff to take steps to protect itself. The vulnerability of the plaintiff to harm from the defendant's conduct is therefore ordinarily a prerequisite to imposing a duty. If the plaintiff has taken or could have taken steps to protect itself from the defendant's conduct and was not induced by the defendant's conduct from taking such steps, there is no reason why the law should step in and impose a duty on the defendant to protect the plaintiff from the risk of pure economic loss.' "

- [153.] It has not been proved on a balance of probabilities that the defendant should reasonably have foreseen that the plaintiff may fail to exercise the option timeously and that he would suffer damages, or that the plaintiff's complete inaction was somehow induced by the defendant.

The Weavind & Weavind letter

- [154.] Mr Smit, both in cross-examination and in argument, made much of the fact that the defendant had not taken steps to have the Weavind & Weavind letter brought to the attention of the plaintiff, either by furnishing a copy thereof to him or by prompting and enabling Weavind & Weavind to do so. It was put to the defendant that this is what a prudent and reasonable attorney would have done and that his failure to do so was negligent. As I have already pointed out, the plaintiff was not a client of the defendant in respect of the option, and the defendant would in any event not have had any reason to have believed or suspected that the contents of that letter would have come to the plaintiff as a surprise or that it would have prompted him to take action that he would not otherwise have done. It must be borne in mind that "*Ex post facto knowledge is irrelevant*" for present purposes and that the court "*cannot approach the case as an armchair critic with the benefit of hindsight*"⁵¹. However, even if it could be said to have been negligent of the defendant not to have done so, that would not have been decisive in the enquiry into wrongfulness, and a duty of care, on the part of the defendant. The enquiries into wrongfulness and negligence must not be confused, and the existence of negligence would not be decisive in the enquiry into the existence of wrongfulness. In cases where pure economic loss was caused by an omission,

⁵¹ **Imvula Quality Protection v Loureiro** 2013 (3) SA 407 (SCA) para [28]

wrongfulness is not presumed and “*Considerations of public and legal policy (would) dictate*” whether the omission should attract legal liability⁵².

[155.] Imposing on the defendant a duty such as that claimed by the plaintiff would in my view in the circumstances not be reasonable and fair, and I do not believe that the “*legal convictions of the community would undoubtedly clamour for liability to exist in these circumstances*”⁵³.

COSTS

[156.] It follows that I have concluded that the plaintiff’s claim on the alternative delictual cause of action can also not succeed.

[157.] I can conceive of no reason, and none has been suggested, why costs should not follow this result.

ORDER

[158.] In the premises the following order is made:

BOTH THE PLAINTIFF’S CLAIMS ARE DISMISSED WITH COSTS.

C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION

For the plaintiff:	ADV. J G SMIT (oio Cliffe Dekker Hofmeyr Inc. c/o Duncan & Rothman Inc.)
For the defendant:	ADV. G F HEYNS (oio Gildenhuis Malatji Inc. c/o Engelsman Magabane Inc.)

⁵² *Ibid*, para [21]

⁵³ **Hirschowitz Flionis v Bartlett and Another**, *supra*, para [30]