

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH AND SOUTH GAUTENG HIGH COURT, PRETORIA)

Date: 2009-04-16

Case Number: 36949/2008

In the matter between:

AEROQUIP SOUTH AFRICA (PTY) LTD

Applicant

and

ANDRE GROSS

First Respondent

ROUSSEAU NELL & LOMBARD ATTORNEYS

Second Respondent

JOHANNES JACOBUS ROUSSEAU

Third Respondent

JUDGMENT

SOUTHWOOD J

[1] The applicant applies on notice of motion for a final order that –

- (1) the first respondent pay to the applicant the sum of R234 723,28 together with interest thereon calculated at the rate of 15,5 % per annum from 3 July 2007 to date of payment;

- (2) the second and third respondents, jointly and severally, pay to the applicant the sum of R193 000 alternatively R143 000 together with interest thereon calculated at the rate of 15,5 % per annum from 20 July 2006 to date of payment;
- (3) the first, second and third respondents pay the costs of the application, jointly and severally, on the scale as between attorney and own client.

In each case the applicant seeks an order that the liability of the respondent or respondents be joint and several with that of the other respondents. The respondents oppose the application and have filed separate answering affidavits.

- [2] The applicant seeks final relief on notice of motion. Where there are disputes of fact on the affidavits final relief can be granted only in the circumstances set out in ***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd and Another 1984 (3) SA 620 (A)*** at 634E-635C. The general rule is that a final order may be granted if the facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent justify such an order. In argument the applicant's counsel argued that the court should reject the evidence of the third respondent. The applicant's counsel and the second and third respondent's counsel also argued, as a last resort, that the issue of what was discussed on 20

July 2006 between the applicant's attorney, Mr Alex Eliot, and the third respondent, be referred to oral evidence.

[3] The applicant's claim against the first respondent is based on a written acknowledgment of debt in terms of which the first respondent undertook to pay to the applicant an amount of R505 860,12. The first respondent would pay this amount in instalments and there was an acceleration clause in terms of which the full amount outstanding would become due and payable immediately in the event that the first respondent failed to pay any instalment in accordance with the terms of the acknowledgement of debt. The applicant claims the full balance outstanding because the first respondent failed to pay the instalments in accordance with the terms of the acknowledgement of debt. None of these facts is disputed by the first respondent which relies on a number of contentions as to why he should not be held liable.

[4] In the applicant's founding affidavit the applicant relies on three causes of action for the order it seeks against the second and third respondents. The applicant's primary cause of action ('main claim') is an oral undertaking given by the third respondent ('Rousseau') on 20 July 2006 to pay to the applicant's attorney, Knowles Husain Lindsay Inc ('KHL'), the funds held in trust by the second respondent to discharge the applicant's claim against East Auto Hydraulics CC ('East Auto' or the 'corporation') upon production of the court order obtained by the applicant against East Auto on 20 July 2006. The applicant's

first alternative cause of action is a written *stipulatio alteri* given on 26 April 2005 in terms of which Rousseau undertook to retain in his trust account as security an amount of R193 000 for the capital and costs of the applicant's claim against East Auto and to pay that amount to the applicant which the applicant accepted by conduct 'after the undertaking was given ... and at the latest on 20 July 2006'. The applicant's second alternative cause of action is that the applicant was the owner of the funds referred to in the written undertaking dated 26 April 2005 'or at the very least, had a claim to ownership of those funds' which were earmarked for payment to the applicant. In the applicant's founding affidavit there is no suggestion that the applicant's claim is delictual.

- [5] In the applicant's replying affidavit the applicant makes allegations pertinent to a delictual claim. In the applicant's practice note the applicant's counsel states that 'the applicant claims delictual damages on account of the fraudulent alternative negligent dissipation of trust funds earmarked as security for the applicant's claim'. In his heads of argument the applicant's counsel contends that the case against the second and third respondents is 'founded upon their breach of a duty of care owed to the applicant' and in the alternative that the second and third respondents have breached the oral agreement to transfer the security held in trust after receipt of the court order of 20 July 2006.

- [6] The general rule is that the applicant must make out its case in its founding affidavit and is not entitled to introduce new matter in its replying affidavit – see ***Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 635G-636B**. Where the applicant introduces new matter in its replying affidavit the court may either ignore or strike out the new matter which should have been in the founding affidavit – see ***Tittys Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd* 1974 (4) SA 362 (T) at 368G-H** and ***Shepherd v Mitchell Cotts Seafreight (SA) (Pty) Ltd* 1984 (3) SA 202 (T) at 205E-G**. As pointed out in the latter case the court has an overriding discretion to allow an applicant to introduce new matter in its replying affidavit where its omission from the founding affidavit is properly explained. The second and third respondents rely on the general rule and ask that the court ignore the allegations pertaining to the applicant's delictual action. It is clear that all the facts were known to the applicant before it launched this application and it obviously decided not to claim damages for delict. Such damages are usually claimed in action proceedings. Now the applicant is attempting to claim delictual damages after all the facts pertaining to its contractual claims have been canvassed in the founding and answering affidavits. The second and third respondents have clearly understood the case against them to be based on contract and have answered accordingly. In the circumstances it is ruled that the applicant may not rely on the delictual cause of action in the replying affidavit.

[7] The relevant facts which are admitted or are alleged by the respondents may be summarised as follows:

- (1) In about January 1989 the applicant and East Auto, which carried on business in the hydraulics industry, entered into a written distributor agreement in terms of which East Auto undertook to purchase all its hydraulic equipment requirements from the applicant;
- (2) In May 2001 East Auto purchased hydraulic equipment to the value of R185 473,19 from the applicant which the applicant duly delivered to East Auto;
- (3) East Auto failed to pay for this hydraulic equipment and eventually the applicant instituted an action against East Auto for payment of R185 473,19 alternatively R142 153,38. On 3 August 2004 the applicant obtained judgment by default against East Auto for payment of the sum of R142 153,38 and interest thereon calculated at the rate of 15,5 % per annum from 29 October 2003 to date of payment;
- (4) In October 2004 East Auto represented by Rousseau launched an application for the rescission of the default judgment granted on 3 August 2004. The corporation's sole member, Geoffrey Dereck Wingate-Pearse, deposed to the affidavit in support of

the application for rescission. On 15 April 2005 Claassen J granted the application for rescission;

- (5) On 13 April 2005, i.e. two days before the court rescinded the default judgment, Wingate-Pearse, who held the entire members interest in East Auto, entered into an agreement with the first respondent in terms of which he, Wingate-Pearse, sold the entire members interest to the first respondent. Clause 3 of the agreement reads as follows:

‘PURCHASE PRICE

3.1 The PURCHASE PRICE of the INTEREST is the sum of R1 000 000 (one million Rand) only.

3.2 The PURCHASE PRICE shall be paid by the PURCHASER as follows:

3.2.1 The full amount being advanced by the PURCHASER’S BANK shall be payable in trust to attorneys J.J. Rousseau on the date that the bank makes the amount available but not later than 15 April 2005, and;

3.2.2 The PURCHASE PRICE shall be kept in trust pending the transfer of possession of the BUSINESS to the PURCHASER on the Effective Date, and the signing of CK2 documents and cession of loan accounts by

the SELLER in favour of the PURCHASER or his nominee.

- 3.3. The Parties hereby authorise and instruct Attorney J.J. Rousseau to pay all creditors of the CLOSE CORPORATION and then pay the balance of the PURCHASE PRICE over to the SELLER upon fulfilment of clause 3.2.2. The SELLER warrants that he will prior to the Effective Date disclose all creditors to Attorney J.J. Rousseau.'

Clause 6.1.10 of the agreement reads as follows:

'WARRANTIES

- 6.1 The SELLER hereby warrants and represents to the PURCHASER that as at the effective date:

6.1.10 There are no litigation, arbitration, criminal or civil proceedings in which the CLOSE CORPORATION is engaged, nor is the SELLER aware of any facts likely to give rise to any such litigation, arbitration, civil or criminal proceedings.'

- (6) Rousseau was acting on behalf of East Auto in the action by the applicant against East Auto. When the agreement in respect of the members interest in East Auto was prepared and signed, Rousseau pointed out to Wingate-Pearse that he, Wingate-Pearse, must inform the first respondent about the applicant's action against East Auto. Wingate-Pearse replied that he would

not do this as the applicant's claim was without merit and would not succeed and he, Wingate-Pearse, intended to deal with the claim against East Auto.

- (7) On 22 April 2005, after receiving a copy of the agreement, the applicant's attorneys, KHL, informed the first respondent's attorneys, Brandmullers Attorneys ('Brandmuller') of the applicant's action against East Auto, which was still pending. On 25 April 2005 Brandmuller addressed a letter to Rousseau to inform him that his client, Wingate-Pearse, had breached the aforementioned warranty which, in any event, was a misrepresentation. On 26 April 2005 Rousseau replied to Brandmuller's letter and confirmed that the applicant's claim was for R142 153,38 and that –

‘Ons plaas ‘n bedrag van R193 000 op trust ten einde die kapitaal en koste te dek. Ons is van mening dat Aeroquip geen eis teen ons kliënt het nie en is van voorneme om die aksie te verdedig’

On the same day Rousseau addressed a letter to KHL in which he stated that East Auto had a *bona fide* defence to the applicant's claim, that the agreement between the first respondent and Wingate-Pearse was of no concern to the applicant and that he had given sufficient security to the first respondent.

On 4 May 2005 Brandmuller unsuccessfully demanded more security for the first respondent's claim.

- (8) Until 1 July 2005 Rousseau practised as a sole practitioner under the name J J Rousseau Attorneys. From 1 July 2005 until 1 November 2005 Rousseau practised in partnership with Ms Leonie Nell. On 1 November 2005 Mr Drikus Lombard bought out Rousseau's interest in the partnership and from that date Rousseau was employed as a consultant by J J Rousseau Attorneys. Later, the second respondent purchased the practice of J J Rousseau and Rousseau continued to work for the second respondent as a consultant;
- (9) In about May 2006 Lombard took over the file in the case between the applicant and East Auto but Wingate-Pearse was not satisfied that Lombard continue to conduct his matters and terminated his mandate to the second respondent. On about 2 June 2006 the second respondent withdrew as attorney of record in the action.
- (10) On 20 July 2006 Legodi J heard the matter. He dismissed the corporation's defence and granted judgment against it for payment of R185 473,19, interest thereon calculated at the rate of 13,5 % per annum compounded monthly from 15 July 2001

to date of payment and costs of suit on the scale as between attorney and client;

- (11) On 20 July 2006 the applicant's attorney, Mr Alex Eliot, of KHL, telephoned Rousseau, informed him that judgment had been granted in favour of the applicant and requested him to pay over to KHL the money held in trust by the second respondent. On 25 July 2006 Eliot addressed a letter to Rousseau in which he referred to the telephone conversation of 20 July 2006, enclosed a copy of the court order of 20 July 2006 and asked Rousseau to transfer all amounts held by the second respondent in its trust account in relation to East Auto into KHL's trust account. On 28 July 2006 Lombard answered KHL's letter and informed KHL that all funds which the second respondent had held in trust had been paid to East Auto's new attorney, Braückmann Jooma Attorneys. On 11 August 2006 KHL addressed a letter to Braückmann Jooma in which KHL set out the history of the litigation and the funds held in trust and demanded that Braückmann Jooma pay R193 000 into KHL's trust account to be held in trust by KHL for the benefit of the applicant. This letter indicates that a copy was sent to Rousseau of Rousseau Nell and Lombard. On 14 August 2006 Braückmann Jooma replied to his letter and confirmed that they had received R143 000 from the second respondent and that they had paid over all the funds to Wingate-Pearse on whose instructions they acted.

Braückmann Jooma also stated that they had not given an undertaking to retain any funds on trust and that they did not have any funds which they could pay over to KHL;

(12) In August 2006 the applicant issued a writ of execution pursuant to the judgment obtained on 20 July 2006 and the sheriff attached machinery belonging to East Auto. When the corporation failed to make arrangements to pay the judgment debt the applicant instructed the sheriff to arrange a sale in execution of the goods attached. The sheriff arranged for such a sale to be held on 11 October 2006;

(13) On 10 October 2006 the first respondent and East Auto, represented by its new member, Lourens van Wyk, signed the acknowledgment of debt in favour of the applicant, and the applicant instructed the sheriff to cancel the sale in execution. The first respondent agreed to bind himself in his personal capacity as debtor for the debts of East Auto to the applicant;

(14) The sum of R505 860,12 for which the first respondent acknowledged his indebtedness is made up as follows –

(i) R185 473,19 in respect of the applicant's claim against East Auto;

- (ii) R180 386,93 in respect of interest on the capital amount of R185 473,19 calculated at the rate of 13,5 % per annum compounded monthly from 15 July 2001 to 4 August 2006.
 - (iii) R140 000 in respect of the applicant's agreed costs;
- (15) In terms of the acknowledgement of debt the first respondent undertook to pay the debt owing as follows:
 - (i) R50 000 on or before 16 October 2006;
 - (ii) equal instalments of R30 000 per month for six months up and until 1 April 2007;
 - (iii) the balance in equal monthly instalments of R40 000 commencing on 1 May 2007;
- (16) In terms of the acknowledgement of debt the full balance would become payable immediately in the event of the first respondent failing to pay any instalment in accordance with the agreement;
- (17) The first respondent failed to pay all the instalments in accordance with the acknowledgment of debt and the applicant

decided to proceed against the first respondent for payment of the full balance owing: i.e. R234 732,28.

- (18) The balance owing to the applicant by the first respondent in terms of the acknowledgement of debt is R234 732,28 together with interest thereon calculated at the rate of 15,5 % per annum compounded monthly from 3 July 2007 until date of payment.

[8] The first respondent raises the following contentions:

- (1) The acknowledgement of debt signed by the first respondent is in reality a suretyship by the first respondent for East Auto;
- (2) The applicant was obliged to execute against East Auto before proceeding against the first respondent and should have proceeded with the sale in execution. Had it done so this application would not have been necessary;
- (3) The applicant was also obliged to proceed against East Auto when it was placed in liquidation. Had it done so this application would not have been necessary;
- (4) In the circumstances it would be unreasonable and inequitable for the court to grant the relief sought against the first respondent;

- (5) Rousseau was *mala fide* and dishonest *vis-à-vis* the applicant;
- (6) Rousseau should have retained R193 000,00 to cover the capital and costs of the applicant's claim;
- (7) Rousseau should be ordered to pay the entire amount outstanding to the applicant.

[9] The second and third respondent's contend that they did not give an undertaking to pay the applicant's claim to the applicant and that at best for the applicant there is a dispute of fact on the issue which was foreseeable. They deny that Rousseau's letter to Brandmuller of 26 April 2005 was a *stipulatio alteri* in favour of the applicant and that the applicant accepted the benefit of the stipulation. They also deny that the funds held in trust by Rousseau and/or Rousseau Nell and Lombard were earmarked for payment to the applicant. The second and third respondents have not dealt with the applicant's delictual claim for damages.

[10] The case against the first respondent is straightforward. The first respondent admits that he signed the acknowledgement of debt; that it contains the terms relied upon; that the amount claimed is owing and that it is due and payable. It is clearly not a deed of suretyship and accordingly must not be dealt with as such. There is no merit in the

contention that the applicant was obliged to execute against East Auto before proceeding against the first respondent. No authority is relied on in support of this contention. There is also no merit in the contention that Rousseau should have paid the sum of R193 000 to the applicant and should now be ordered to pay the entire claim against the first respondent. No authority is relied on in support of this contention. The acknowledgement of debt is clearly a separate and valid and enforceable cause of action against the first respondent – see ***Adams v SA Motor Industry Employers Association 1981 (3) SA 1189 (A)*** at 1198B-F - and he must be held liable in accordance with its terms. In short, the first respondent has not put up a legal defence to the applicant's claim against him and the applicant is entitled to the relief claimed.

- [11] As already mentioned the applicant's main cause of action against the second and third respondents is an undertaking to pay the applicant's claim. This is not consistently alleged in the applicant's founding affidavit. In paragraph 23 it is alleged that during the telephone conversation between Eliot and Rousseau on 20 July 2006 –

'The third respondent verbally undertook to effect payment of the funds being held in trust by the second respondent (practising under the name and style of Rousseau Nell and Lombard Attorneys) for the purposes of discharging the claim of the applicant against East Auto, upon production of the court order referred to above'

In paragraph 64 the applicant alleges that the applicant's main claim against the second and third respondents is based on –

‘the verbal undertaking provided by the third respondent acting on behalf of the second respondent to Eliot on 20 July 2006 to effect payment of the applicant's claim in the action (subject to receipt of the court order dated 20 July 2006) and as more fully set out in annexure ‘G’ hereto’.

- [12] Since this is not expressly averred this cause of action implies that Rousseau personally and/or the firm, Rousseau Nell and Lombard, undertook to pay a debt owing by the firm's client, East Auto, to the applicant. If it does not imply this there cannot be a claim against Rousseau personally or the second respondent. The applicant alleges that the undertaking was given during a telephone conversation between Eliot and Rousseau on 20 July 2006 and that this conversation was recorded in a letter to the second and third respondents on 25 July 2006 (i.e. annexure ‘G’). A perusal of the letter shows that it does not purport to record the undertaking alleged and that it certainly does not record that Rousseau or his firm was undertaking personal liability for payment of the sum of R193 000. The amount is not even referred to. In the letter, after referring to the copy of the court order attached, the author, Eliot, says –

‘Please be so kind as to transfer all amounts, which are currently being held in the trust account of Rousseau, Nell & Lombard in relation to East Auto Hydraulics CC, into the trust account of

KHL, to be held by KHL in trust for the benefit of Aeroquip South Africa (Pty) Limited.'

It is striking that this does not accord with the undertaking alleged to have been given to Eliot. On the face of it, is merely a request from one attorney to another attorney to transfer funds in the latter's trust account to the former's trust account. Lombard's immediate response in a letter dated 28 July 2006 was to say that all funds held in trust had been paid over to Braückmann Jooma Attorneys. When KHL demanded payment from Braückmann Jooma they immediately said they had paid over the funds to Wingate-Pearse on his instructions. In his answering affidavit Rousseau says that when Eliot asked that the funds held in trust by Rousseau Nell and Lombard be paid to him, he, Rousseau, said he must first discuss this with Wingate-Pearse. Rousseau denies that he undertook to pay the funds to KHL trust account. Rousseau says that at that stage neither he nor Rousseau Nell and Lombard was acting on behalf of Wingate-Pearse. This is borne out by the notice of withdrawal as attorneys dated 2 June 2006 and the correspondence already referred to.

- [13] The applicant has not referred to any authority that an attorney becomes personally liable for payment of a debt where he fails to pay over to a client's creditor an amount held by him on behalf of his client in his trust account. The contrary appears to be true. An attorney who holds an amount of money in his trust account on behalf of a client is obliged to use it for no other purpose than he is instructed by the client.

It is trite that it must always be available to the client. In ***Law Society, Transvaal v Matthews 1989 (4) SA 389 (T)*** at 394 the court said:

‘I deal now with the duty of an attorney in regard to trust money. Section 78(1) of the Attorneys Act obliges an attorney to maintain a separate trust account and to deposit therein money held or received by him on account of any person. Where trust money is paid to an attorney it is his duty to keep it in his possession and to use it for no other purpose than that of the trust. It is inherent in such a trust that the attorney should at all times have available liquid funds in an equivalent amount. The very essence of a trust is the absence of risk. It is imperative that trust money in the possession of an attorney should be available to his client the instant it becomes payable. Trust money is generally payable before and not after demand. See ***Incorporated Law Society, Transvaal v Visse and Others; Incorporated Law Society, Transvaal v Viljoen 1958 (4) SA 115 (T)*** at 118F-H. An attorney’s duty in regard to the preservation of trust money is a fundamental, positive and unqualified duty. Thus neither negligence nor wilfulness is an element of a breach of such duty: ***Incorporated Law Society, Transvaal v Behrman 1977 (1) SA 904 (T)*** at 905H. It is significant that in terms of s83(13) of the Attorneys Act a practitioner who contravenes the provisions relating to his trust account and investment of trust money will be guilty of unprofessional conduct and be liable to be struck off the roll or suspended from practice’.

These principles obviously apply to any person who deposits funds in an attorney’s trust account – see ***Hirschowitz Flionis v Bartlett and Another 2006 (3) SA 575 (SCA)*** and ***Du Preez v Swiegers 2008 (4) SA 627 (SCA)***.

[14] The applicant's counsel requested the court to reject Rousseau's evidence with regard to the conversation on 20 July 2006 and find that he had given the undertaking alleged by the applicant in its founding affidavit. He submitted that Rousseau was not a credible witness. Reference was made to the role played by Rousseau in preparing the agreement containing the warranty referred to when Rousseau knew it to be false, seemingly assisting Wingate-Pearse to perpetrate a fraud on the first respondent, either by allowing the document to be presented to the first respondent without qualification or by not informing the first respondent about the existence of the applicant's pending claim against First Auto and the plea filed in the High Court which contradicts what Rousseau says in these proceedings. All these matters indicate that Rousseau is not honest or credible. The problem which arises is twofold. First, the version put up by Rousseau is probable. His undisputed evidence is that neither he nor the second respondent was acting on behalf of Wingate-Pearse and that it was Wingate-Pearse's funds in the second respondent's trust account. In these circumstances it is improbable that an attorney would simply pay over a client's funds held in the attorney's trust account without obtaining instructions from the client to effect such payment. The legal position of the attorney with regard to trust money heightens the probability. Second, Eliot's allegations with regard to the telephone conversation are not borne out by his actions and the contemporaneous documents. If Eliot had formed the impression that

Rousseau was dishonest and was not to be trusted and he had just obtained an undertaking from Rousseau to pay the applicant's claim the reasonable and prudent thing to do would be to record the undertaking immediately and send it to Rousseau. This Eliot did not do. He allowed five days to elapse and then sent Rousseau a letter which does not confirm an undertaking to pay the applicant's claim against East Auto – either by Rousseau or the second respondent or East Auto – and merely requests that funds held in trust by the second respondent be transferred to KHL's trust account. It is not even stated that the funds will be transferred to pay the applicant's claim against East Auto. Apart from these problems, it appears that the applicant and/or Eliot choose to view the facts as they would like them to be rather than as they are in reality. In this regard I refer to the allegations made regarding the *stipulatio alteri* and the earmarking of funds for the applicant which will be considered later. I am therefore not satisfied that the applicant's factual averments about the telephone conversation on 20 July 2006 are inherently credible or that Rousseau's allegations are so far-fetched or clearly untenable that I would be justified in rejecting them on the papers – see ***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd supra*** at 635B-C.

- [15] The applicant's counsel concluded his argument by requesting the court to refer the dispute relating to the undertaking (and possibly other matters) for oral evidence in terms of Rule 6(5). In view of the matters referred to I am of the view that the probabilities are heavily in favour of

the second and third respondents' version and that I should not accede to the request – see *Kalil v Decotex (Pty) Ltd and Another 1988 (1) SA 943 (A)* at 979H-J.

[16] With regard to the cause of action based on the *stipulatio alteri* the applicant relies on Rousseau's letter to Brandmuller of 26 April 2005 in which Rousseau stated that we place an amount of R193 000 in trust in order to cover the capital and costs. While acknowledging that this 'undertaking' was given to the first respondent and not the applicant the applicant contends that it was clearly a stipulation for the applicant's benefit. The applicant submits that this undertaking was accepted by the applicant by its conduct after the undertaking was given and at the latest on 20 July 2006 when Eliot telephoned Rousseau to advise him that judgment had been granted against East Auto and to request that the second and third respondents make payment to the applicant of the sum of R193 000. I do not agree that an undertaking was given or, if it was, that it was for the benefit of the applicant and that the applicant accepted the undertaking.

[17] A contract may be validly entered into for the benefit of a third party and if the third party accepts the stipulation made in his favour he can sue upon it. It is clear that if the third party wishes to enforce the stipulation in his favour he must accept it. Until he has notified his decision to the *promissor* there is no *vinculum juris* between them. The third party may accept the stipulation at any time while it remains open

– see *Mutual Life Insurance Co of New York v Hotz* 1911 AD 556 at 567; *Crookes NO and Another v Watson and Others* 1956 (1) SA 277 (A) at 291B-F; *Joel Melamed and Herwitz v Vorner Investments* 1984 (3) SA 155 (A) at 172A-D.

[18] The applicant's first difficulty is the interpretation of the letter. It does not in its terms promise anything let alone payment to the first respondent. There is also no suggestion in the letter that it is intended to operate in favour of any third party. The letter was written in reply to Brandmuller's letter referring to Wingate-Pearse's breach of warranty and demanding that Wingate-Pearse rectify the breach by paying the applicant. Wingate-Pearse was clearly not prepared to do this and Rousseau's letter makes this clear. On the face of it, Rousseau's letter indicates that the money was placed in trust as some kind of security. That is what Rousseau refers to in his letter to KHL of 26 April 2005. The applicant's second difficulty is that even if the letter could be construed as a stipulation in favour of the applicant there is no evidence that the applicant accepted it. At no stage was this conveyed to Rousseau and even when Eliot and Rousseau had their conversation on 20 July 2006 Eliot did not refer to the stipulation.

[19] With regard to the applicant's cause of action that the funds were earmarked for the applicant so that the applicant became the owner of the funds or at least had a claim to ownership of the funds no authority has been referred to in support of this contention. For present

purposes I shall assume that this is a valid cause of action. On the evidence it is not disputed that the funds were held in trust on behalf of Wingate-Pearse. That being so, the second and third respondents were obliged to manage the funds strictly in accordance with his instructions even if he was no longer their client – see ***Hirschowitz Flionis v Bartlett and Another supra*** paragraph 21, 22 and 30; ***Du Preez and Others v Swiegers supra*** paragraph 19. In so far as the applicant relies on Rousseau's letter to Brandmuller of 26 April 2005 this does not in any way indicate that the funds were earmarked for the applicant. The rest of the evidence simply does not establish that the funds in the second respondent's trust account were earmarked for payment to the applicant and that the second respondent was obliged to pay them to the applicant – see ***Smith v Daniels and Another 1997 (4) SA 711 (SECLD)*** at 714G-715B.

[20] The applicant has failed to make out a case against the second and third respondents and its claim against the second and third respondents must be dismissed.

[21] I have already ruled that the applicant is not entitled to make out a new case for delictual damages in its replying affidavit. Nevertheless it must be pointed out that the applicant's case is based primarily on the judgments of ***Hirschowitz and Flionis v Bartlett and Another supra*** and ***Du Preez and Others v Swiegers supra***, both of which involved claims against attorneys who received and held funds in trust for the

plaintiff. That is clearly not the case here. Furthermore, as already pointed out, in law the second and third respondents were obliged to give effect to the depositor's instructions.

- [22] Finally, the question of Rousseau's conduct must be considered. On the face of it he acted dishonestly and unprofessionally in preparing the agreement for the sale of the members interest in East Auto, well knowing that the warranty in respect of existing or pending litigation was untrue, in allowing this to be conveyed to the first respondent and thereby assisting in the perpetration of a fraud on the first respondent. On the face of it he also seems to have filed a plea in the High Court in the case of **Andre Gross v J.J. Rousseau** Case No 39551/2007 which contradicts what he says in this application. This conduct should be investigated by the Law Society and appropriate steps taken against Rousseau if this is found to be necessary.

Order

- [23] The following order is made:

I The first respondent is ordered to pay to the applicant the sum of R234 732,28 together with interest thereon at the rate of 15,5 % per annum from 3 July 2007 to date of payment;

- II The first respondent is ordered to pay the applicant's costs of suit in respect of the applicant's case against the first respondent.

- III The applicant's claim against the second and third respondents is dismissed with costs.

- IV The registrar is requested and directed to send a copy of this record together with the judgment in this matter to the President of the Law Society of the Northern Provinces to investigate the conduct of Mr Johannes Jacobus Rousseau who practises in Middelburg in the light of this judgment.

B.R. SOUTHWOOD
JUDGE OF THE HIGH COURT

CASE NO: 36949/08

HEARD ON: 1 April 2009

FOR THE APPLICANT: ADV. S.W. DAVIES SC

INSTRUCTED BY: Ms T. van Straaten of Friedland Hart &
Partners

FOR THE FIRST RESPONDENT: Mr. A.P. Brandmuller

INSTRUCTED BY: Mr. A.P. Brandmuller of Brandmullers
Attorneys

FOR THE 2ND AND 3RD RESPONDENTS: ADV. I. VERMAAK-
HAY

INSTRUCTED BY: Ms D. Janse van Vuuren of Rita Jordaan
Attorneys

DATE OF JUDGMENT: 16 April 2009