

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

28 July 2025

DATE

SIGNATURE

Case No: 2023-113646

In the matter between:

FLEXICOR CABLES (PT) LTD

Applicant

and

HOWARD SHANE WOOLF

Respondent

JUDGMENT

Introduction

- [1] The Applicant, Flexicor Cables (Pty) Ltd, is a company in the business of manufacturing cables, connectors and related accessories (**“Flexicor”**). The Respondent is an attorney based in Johannesburg practicing under the name and style of Howard S Woolf (**“Woolf”**).
- [2] In this application, Flexicor seeks re-payment of the amount of R591 110.89 from Woolf.
- [3] It is not in dispute that Flexicor deposited the aforesaid amount (**“the funds”**) into Woolf’s trust account on 25 May 2023. Nor is it in dispute that Woolf transferred the funds to a third party, one Alberto Lorenzo Pavoncelli (**“Pavoncelli”**) the following day, that is, 26 May 2023.¹
- [4] Flexicor claims re-payment of the funds on the basis that Woolf was not entitled to dispose of them without Flexicor’s instructions or consent. Woolf, for his part, contends that Flexicor has failed to make out a case for the re-payment of the funds, whether in terms of contract, delict or on any other basis.
- [5] In what follows below, I will set out the circumstances in which the funds were deposited into Woolf’s trust account and thereafter transferred to Pavoncelli. The facts in this regard are largely common cause between the parties. Thereafter, I will consider whether Flexicor has made out a case for the re-payment of the funds.

¹ The date of the transfer of the funds by Woolf to Pavoncelli was initially in dispute between the parties. However, at the hearing of the application Woolf sought leave to file a supplementary affidavit. There was no objection to this by Flexicor and leave was accordingly granted. Woolf attached to his supplementary affidavit a redacted copy of his trust banking account for the month of May 2023 which confirmed that the funds had been transferred out of his trust account on 26 May 2025. This was accepted by counsel for Flexicor and the hearing accordingly proceeded on the basis that there was no longer a dispute between the parties as to the date on which Woolf transferred the funds out of his trust account.

The Material Facts

- [6] The story begins in May 2023. Flexicor's director, Eugenia Gualdi ("**Gualdi**") was approached by Pavoncelli, who proposed that he partner with Flexicor, through his company, Swiss Integr-8-Group, to establish a cable manufacturing company in Italy. Gualdi has explained that, following negotiations, Flexicor and Pavoncelli reached an agreement along the following lines:
- 6.1 A cable manufacturing entity would be established in Italy.
 - 6.2 Financing for the project would be sourced through a subsidy from the Italian Government.
 - 6.3 Pavoncelli would register a company in Italy, with the name ItalCor, through which the entity would operate.
 - 6.4 Flexicor would hold an 85% shareholding in the entity while Pavoncelli, through his company, would hold a 15% shareholding.
 - 6.5 The cost of setting up the entity, "the project cost", would be R700 000.00.
 - 6.6 Flexicor would deposit R591 110.89 into Woolf's trust account, this being its 85% contribution to the project cost ("the funds").
 - 6.7 The funds would be placed in an interest bearing account.
 - 6.8 In the event that the project deliverables were met, notably the securing of the subsidy from the Italian government and the establishment of ItalCor, the funds would be transferred to Swiss Integr-8-Group, Pavoncelli's company.
 - 6.9 In the event that the project deliverables were not met, the funds would be returned to Flexicor, with interest.

[7] On 25 May 2023, and in accordance with the above, Flexicor deposited the funds into Woolf's trust account, the details of which were provided to Gauldi by Pavoncelli. Flexicor had had no prior dealings with Woolf and did not communicate with Woolf with regards to the deposit.

[8] Months passed and Pavoncelli was not keeping his end of the bargain. Gauldi became increasingly concerned and started making enquiries. Gauldi then discovered, through her attorney, that Pavoncelli had previously swindled a South African businessman out of millions of rands through abuse of an attorney's trust account. This was confirmed in a Supreme Court of Appeal ("**SCA**") judgment. This discovery must have brought with it a sense of fearful apprehension and alas, shortly thereafter, Gauldi confirmed that Pavoncelli had taken no steps to apply for an Italian Government subsidy. Nor he had he taken any steps to register a company in Italy. In short, the entire deal had been a scam.

[9] Gauldi took legal advice and, on 13 September 2023, her attorney wrote to Woolf, setting out the details of Flexicor's "agreement" with Pavoncelli and asking Woolf to confirm:

9.1 that he represented Pavoncelli;

9.2 that the funds had been deposited into his trust account on 25 May 2023;

9.3 that the funds had been placed in an interest bearing account; and

9.4 that, since the project objectives agreed between Flexicor and Pavoncelli had not been achieved, the funds would be returned to Flexicor, with interest.

[10] Woolf responded to Flexicor in a letter dated 15 September 2023. He stated that *"I was aware that the funds deposited into my trust account were paid and deposited by your client for the benefit of my client, and in regard to the then*

prospective business relationship between our respective clients". Save as above Woolf stated that had no knowledge of the arrangements between Flexicor and Pavoncelli.

- [11] Further correspondence ensued between the parties which failed to produce a resolution of the matter and on 1 November 2023 Flexicor launched the present application against Woolf for the repayment of the funds.

Flexicor's Claim

- [12] Flexicor's claim against Woolf is pleaded in its founding affidavit solely in the following terms:

"Apart from paying the money into the respondent's trust account, there was never any communication between the applicant and the respondent. Under those circumstances the respondent received the money on behalf of the applicant. As such he had to obtain the Applicant's mandate and could not make payment without the applicant's instructions or consent."

"It is submitted (and will be argued at the hearing) that the money in the trust account at all times remained the applicant's funds and the respondent could not lawfully dispose of it without the applicant's consent."

- [13] In his answering affidavit, Woolf pleaded that Pavoncelli (who was his client) informed him that Flexicor was to deposit funds into Woolf's trust account in relation to a prospective business arrangement between the two. Pavoncelli advised Woolf that the funds were immediately required for the new business venture and instructed that they be transferred into his account in Italy forthwith. Acting in accordance with these instructions, Woolf transferred the funds to Pavoncelli on 26 May 2023. Woolf pleaded that he had no idea what the prospective business arrangement between Flexicor and Pavoncelli was.

- [14] Insofar as Flexicor's claim for the re-payment of the funds was concerned, Woolf pleaded that Flexicor had failed to make out a case for the relief sought. In particular, Woolf contended that Flexicor would have had to establish either a contractual or delictual right to the relief sought but had failed to plead either cause of action in its founding papers.

The Parties' Submissions

- [15] At the hearing of the application, Adv Theron SC, who appeared on behalf of Flexicor, confirmed that its claim was founded in delict. He submitted that the doctrine of *res ipsa loquitur* applied, that Woolf had put up no defence to Flexicor's claim and that the relief sought ought accordingly to be granted.
- [16] Adv Pincus SC, who appeared on behalf of Woolf, submitted that Flexicor had failed to make out a case in delict for the relief sought. In particular, he submitted that Flexicor had failed to plead facts to establish the delictual elements of either wrongfulness or fault.
- [17] Somewhat unusually, at the hearing of the matter, counsel on both sides sought to rely on the same two judgments in support of their arguments. These were *Hirschowitz Flionis v Bartlett and Another* 2006 (3) SA 575 (SCA) and *Du Preez and Others v Zwiegers* 2008 (4) SA 627 (SCA).
- [18] In order to properly assess the parties' respective submissions, it is necessary to consider these judgments in some detail. I do so below.

The Case Law

The Hirschowitz Judgment

- [19] In this case, the appellant firm of attorneys, Hirschowitz Flionis, received a deposit of R3.1 million into its trust account without information as to the identity

of the depositor or the purpose for which the deposit was intended. (It should be noted that only one of the partners of the appellant firm, Flionis, was involved in the events relating to the case.)

[20] The deposit had been made by the first respondent, Bartlett, who was also an attorney. Bartlett had borrowed the money, with the intention that it be held in trust until he gave instructions to Flionis as to how it should be disbursed.

[21] It transpired that an elaborate fraud was being perpetrated against Bartlett. In execution of this fraud, one Ms Karen Hardaker told Bartlett that Flionis had been informed of the purpose of the deposit and instructed Bartlett not to communicate with Flionis. Bartlett obliged and made no contact with Flionis.

[22] Thereafter, Flionis received instructions from one Mr Charlie Gambino (which were patently suspicious) to make certain payments from the money that had been deposited by Bartlett. Flionis did so.

[23] When Bartlett eventually discovered the fraud and demanded repayment of the deposit, he was informed that it had been paid out.

[24] Bartlett instituted a delictual action against Flionis in the High Court for damages for pure economic loss.

[25] The High Court found that Flionis had owed Bartlett a legal duty of care. It found further that Flionis had been negligent by omission in disbursing the money without querying Gambino's (patently suspicious) instructions or tracing the true depositor. Notably, both the legal duty of care resting on Flionis in the circumstances and the grounds on which it was alleged that Flionis had acted negligently were pleaded by Bartlett. The High Court awarded Bartlett damages in the amount of R3.1 million.

[26] On appeal to the SCA, it was common cause that Flionis had been negligent by omission in the respects found by the High Court.

[27] The issues on appeal were:

27.1 whether there had been a legal duty of care on Flionis; and

27.2 whether Bartlett had been contributorily negligent in not informing Flionis of the deposit or its purpose.

[28] On the first issue, the SCA held that there were a number of considerations which, as a matter of legal policy, compelled the conclusion that Flionis had been under a duty of care in relation to Bartlett. These were the following:

“(i) the appellant was a firm of practising attorneys and as such proclaimed to the public that it possessed the expertise and trustworthiness to deal with trust money reasonably and responsibly; (ii) Bartlett had reasonably relied on that and particularly on the fact that the money would be in the appellant’s trust account until he instructed otherwise; (iii) even when an attorney discovered an anonymous and unexplained deposit in his trust account, it required minimal management to transfer the money to a suspense account and to trace the depositor; and (iv) unreasonable conduct that might put the money at risk would, as a reasonable foreseeability, cause loss to the depositor or beneficiary. The legal convictions of the community would undoubtedly clamour for there to be liability in the circumstances.”²

[29] On the second issue, the SCA found that the appellant had established contributory negligence on the part of Bartlett. This was so because a reasonable person in Bartlett’s position would not have accepted Hardarker’s assurances that he need not contact Flionis (particularly on such an important matter and given that he only knew Hardarker over the telephone). A reasonable person in Bartlett’s position would have put Flionis in the picture so as to avoid any risk.

[30] Quantifying the parties’ respective degrees of fault, the SCA assessed that Flionis was 60% at fault and Bartlett 40% at fault in respect of the loss sustained

² Paragraph [30] at 589C-F.

by Bartlett. The award of damages by the High Court therefore fell to be reduced from R3.1 million to R1.86 million.

The Du Preez Judgment

- [31] In this case, the appellant, Versatile Construction CC (**“the corporation”**) deposited the sum of R385 000.00 into the trust account of the respondent attorney, Zweigers.
- [32] The corporation’s sole member, Mr Du Preez, in partnership with one Mr Johst, had sought to obtain a foreign loan for a project which the corporation would undertake. The loan was to be procured through an entity called DLA International Financial Services. Under the loan agreement with DLA the borrowers (Du Preez and Johst) were required to pay the sum in question as a refundable deposit. The deposit was to be paid into Zweigers’ trust account where it would be held pending onward payment to DLA on implementation of the loan.
- [33] However pursuant to instructions from a client, Mr Michael Louw, who himself claimed to be entitled to the deposit, Zweigers paid the money to a company designated by Louw. Zweigers did so without contacting the corporation or anyone representing it, and despite correspondence from both the corporation and DLA pertaining to what ought to be done with the deposit, which conflicted with Louw’s instructions.
- [34] When DLA subsequently failed to pay out the loan moneys, Du Preez tried to recover the deposit from Zweigers to no avail.
- [35] Du Preez, Johst and the corporation, as co-plaintiffs, then sued Zweigers for damages in the sum of R385 000.00. The claim was based in contract, alternatively delict. The High Court dismissed the action but granted leave to appeal on the delictual claim.

- [36] On appeal, the SCA held, following *Hirschowitz*, that Zwiegers had owed the appellants a legal duty of care.
- [37] The SCA held further that Zwiegers had been negligent in failing to make contact with the depositor (the identity of which was known to him) in the face of the conflicting instructions he had received pertaining to what was to be done with the deposit.
- [38] The SCA accordingly upheld the appeal and granted damages against Zwiegers in the amount of R385 000.00.
- [39] In the hearing before me, Mr Theron argued that it was clear from these judgments that Woolf owed a legal duty of care to Flexicor. He argued further that Woolf had obviously been negligent and that this was a case of *res ipsa loquitur*.
- [40] Mr Pincus, on the other hand, argued that the judgments underscored the need to plead wrongfulness and fault in a delictual claim for pure economic loss. Not only had Flexicor failed to plead negligence but its failure to do so had the consequence that Woolf was precluded from pleading contributory negligence. Mr Pincus submitted further that the facts in *Hirschowitz* and *Du Preez* were in any event distinguishable from the present case, in that Woolf had not received conflicting instructions with regards to the funds, nor were the instructions he had received pertaining to the funds “patently suspicious”.

Analysis

- [41] It is trite law that a litigant must plead every element of a delict in order to disclose a valid cause of action. This applies equally in motion proceedings where an applicant must stand or fall by its founding affidavit. The founding papers must set out a complete cause of action on their face. The SCA has defined “*cause of action*” as “*every fact which it would be necessary for the*

*plaintiff to prove in order to support his right to judgment.*³ It is not enough to simply recite a legal conclusion, for example by stating that the defendant or respondent acted “wrongfully” or “negligently” without pleading the material facts that underpin each delictual element.⁴ Thus a claimant must allege facts to establish every element of the delict, namely: conduct, wrongfulness, fault (intention or negligence, unless it is a strict liability delict), causation and harm (damages).⁵

- [42] As is evident from the portions of Flexicor’s founding affidavit quoted above, it failed to plead either wrongfulness or fault. We are not dealing here with a strict liability delict. Flexicor’s failure to plead fault is therefore, on its own (and without regard to whether or not the other elements of delict may have been sufficiently pleaded) fatal to its claim.
- [43] It is important to emphasise that this is not simply a matter of form, but fundamentally one of substance. Flexicor’s failure to plead fault means that it has failed to articulate any basis for its contention (made only in argument) that Woolf acted negligently in transferring the funds to Pavoncelli.
- [44] Mr Pincus is correct that the *Hirschowitz* and *Du Preez* judgments are distinguishable on the facts. Central to the finding of negligence in *Hirschowitz* were the twin facts that the identity of the depositor was unknown to Flionis and the instructions given to him by Charlie Gambini were patently suspicious. In *Du Preez*, it was the fact that the attorney in question, Zwiegers, had been given conflicting instructions pertaining to the deposit and failed to take steps to clarify them.
- [45] In this case, where Woolf knew the identity of the depositor and was informed by his client of the purpose of the funds, it is by no means clear that he acted negligently in transferring them to Pavoncelli. Certainly, this is not a case of *res*

³ *Mckenzie v Farmers Co-operative Meat Industries Ltd* 1922 AD 16 (A).

⁴ *Radebe and Others v Eastern Transvaal Development Board* 1988 (2) SA 785 (A).

⁵ See for example *Evrigard (Pty) Ltd and Another v Select PPE (Pty) Ltd and Others* [2024] ZAGPJHC 183.

ipsa loquitur, where the only reasonable inference from the proven facts is one of negligence, as suggested by Mr Theron.

[46] Like *Hirschowitz*, this is case in which, had negligence been pleaded, Woolf may well have countered with a defence of contributory negligence, in that, like *Bartlett*, it may well be that Flexicor ought to have communicated with Woolf regarding the deposit so as to avoid any risk. As Mr Pincus correctly submitted, Flexicor's failure to plead negligence, meant that Woolf was precluded from pleading contributory negligence.

[47] In short, Flexicor's failure to properly plead its delictual claim has the consequence that it failed to aver and therefore establish fault on the part of Woolf. The application must therefore be dismissed.

[48] Both parties were in agreement that costs ought to follow the result and be awarded on Scale C.

[49] For all of the above reasons, I make the following order:

Order

1. The application is dismissed with costs on Scale C.




H BARNES
ACTING JUDGE OF THE HIGH
COURT
JOHANNESBURG

Heard: 10 February 2025

Reasons/Judgment: 28 July 2025

Appearances:

Applicant:

Adv E Theron SC (heads of argument drawn by Adv P Van den Berg SC)
instructed by Van Veijeren Attorneys

Respondent:

Adv Pincus SC instructed by Harold S Woolf Attorneys