



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER
JUDGES: NO
(3) REVISED.

DATE: 24/01/2026

SIGNATURE [Redacted]

Case no. 080522-2024

In the matter between:

FEFELETHU ENTERPRISE (PTY) LTD

First Applicant

(Reg. no. 2016/280788/07)

SIYAMBONGA CYPRIAN HILLIE

Second Applicant

NOLUFEFE CYNTHIA (nee MBOLAMBI) HILLIE

Third Applicant

and

GUNTER ATTORNEYS INC.

First Respondent

MAX GUNTER

Second Respondent

JUDGMENT

The judgment and order are published and distributed electronically.

Case Summary;

Claim for repayment of monies paid into a trust account in terms of section 86(4) of Legal Practice Act as deposit pending transfer of property in motion proceedings referred to oral evidence. Agreement cancelled and Applicants claim back balance of deposit (portion of which was repaid after cancellation of agreement) while Respondents averred that part of deposit paid to sellers, pending transfer, with the consent of Applicants. Respondents' defence based on interpretation of clause in agreement reading "access to deposit per mutual consent". Respondents raised legal point that no cause of action was disclosed in affidavits. Held that, on the common cause averments as set out in the founding affidavit, fiduciary relationship established between Applicants and Respondents and averment of breach of such duties implies unlawful breach. Held that the meaning of the words used in the relevant clause must be interpreted inter alia in the context of all the terms of the agreement and the instruction to invest, and that Respondents' interpretation will result in an absurdity. Claim upheld.

P A VAN NIEKERK, J

INTRODUCTION:

[1] Second Applicant and Third Applicant, who are married to each other, are the Directors and Shareholders in the First Applicant. First Respondent is a law firm duly registered and incorporated in terms of the Legal Practice Act, 28 of 2014 ("LPA") and the Second Respondent is a practising attorney and director of the First Respondent. The Applicants apply in motion proceedings for an order against the Respondents which is framed in the Notice of Motion as follows:

- "1. Directing the Respondent to reimburse the Applicants the amount of R1 105 684.57 (One Million One Hundred and Five Thousand, Six Hundred and Eighty Four Rands and Fifty Seven Cents), together with interest thereon within 5 days of this order;

2. *Ordering the Respondents to pay the costs of this application on the scale of attorney and client, including the cost of counsel;*
3. *Further and/or alternative relief as the court may deem fit."*

[2] The application was enrolled as an opposed motion and on 21 May 2023 Mangolela AJ made draft order prepared by the Respondents an order of court which reads:

"It is ordered:

1. *The matter is referred to oral evidence in terms of Rule 6(5)(g) in the light of factual disputes;*
2. *The Founding Affidavit will stand as a particulars of claim/declaration;*
3. *The Answering Affidavit will stand as a plea;*
4. *The Replying Affidavit will stand as a replication;*
5. *The court hearing the oral evidence will decide on the alleged liability of the First and/or Second Respondents. Evidence shall be led in respect of the following issues:*
 - 5.1 *The true intention of the contracting parties to the written sale agreement annexed to the Founding Affidavit as Annexure "C" ("the Agreement");*
 - 5.2 *Whether the manuscript inscription in paragraph 20 of the agreement was by agreement;*
 - 5.3 *If it was the intention of the contracting parties to the agreement that the deposit paid over may be used for expenses of the sellers before transferred occurred;*
 - 5.4 *If the Applicant/s sanctioned the handwritten inscription in paragraph 20 and if the contracting party reached consensus in this regard;*

5.5 The effect and weight of the instruction to invest trust monies in terms of annexure "G" to the Founding Affidavit and its effect on interpretation of the actual intention of the contracting parties.

6. The parties should approach the office of the Deputy Judge President for a possible hearing date or possible directions;

7. No cost order is made."

[3] It needs to be remarked that it is unfortunate that the draft order couched in the terms as set out above was made an order of court. As will transpire hereinlater, one of the issues that arise between the parties relates to the interpretation of a specific clause inserted in a written agreement and, with reference to the applicable authorities, it is clearly not the intention of the parties which informs the interpretation of the document but the purpose of interpretation is to establish the true meaning of the specific document. The draft order further displays confusion between the referral of an application to trial, and the referral of certain specific issues to oral evidence as it arose in an application. This remark is made in the context of the contents of paragraph 1 of the order read with paragraphs 2, 3 and 4 thereof.

[4] The matter was referred to the Special Motion Court roll of this division and enrolled for hearing on 19, 20 and 21 January 2026. On 8 January 2026 this court notified the parties that the case-lines Index does not comply with paragraph 7 of this court's Consolidated Practice Directive 1 of 2024 ("CPD") and that there is no compliance with paragraphs 25.17 and 25.18 of the CPD which requires a pre-trial conference and filing of a joint practice note prior to the hearing of the matter. The Minutes of a "*virtual meeting held on 30 July 2025*", which purports to be pre-trial minutes, were uploaded onto case-lines and this document failed to achieve the purpose of a pre-trial conference in the sense that no effort was made to define the issues between the parties, to reach consensus on common cause issues, or to allude the court or any of the parties to matters that will

be relevant in the adjudication of the matter, such as the intention to argue legal points or raise any points *in limine*.

- [5] When the matter was called on Monday 19 January 2026, this court was informed that the Respondents' attorney of record (who was substituted as the attorney for the Respondents on 6 January 2026) communicated with the Applicants' attorney of record on the issue of the lack of compliance with paragraphs 25.17 and 25.18 of the CPD, with no result. This court then indicated that the court intends to stand the matter down in order for the parties to comply with paragraphs 25.17 and 25.18 of the CPD and was then informed by counsel acting on behalf of Respondents that counsel intends to raise points *in limine* which were not raised in the Answering Affidavit nor in respect of which any prior notice was given to the Applicants. The first point *in limine* which the Respondents intended to raise was namely an alleged lack of *locus standi* of the First Applicant, and the second point *in limine* intended to be raised was namely that there is no cause of action disclosed in the affidavits of the Applicants against the Respondents. Counsel for the Applicants objected to these points in limine being raised on the basis that the Applicants were prejudiced by the points *in limine* raised without due and proper notice at that stage, and after some discussion of the matter this court ruled that the Respondents not be allowed to raise these points *in limine* but that the arguments in that regard may be raised in final argument at the end of the matter.
- [6] The court directed the parties to convene and comply with paragraphs 25.17 and 25.18 of the CPD after which a joint practice note was filed after hours on 19 January 2026. This joint practice note has the following features:
- [6.1] In paragraph 4 thereof the Respondents sets out legal argument in support of the points *in limine* to be raised at the conclusion of the matter;

[6.2] An agreed factual chronology and common cause facts are recorded in paragraphs 5 and 6;

[6.3] The issues for determination are set out in paragraph 7.

[7] The effect of the joint practice note was *inter-alia* to eliminate for the need for two witnesses which the Respondents intended to call, to provide more clarity on the issues to be determined and to allow the matter to be finalised within two days instead of the allocated three days. Had the parties complied with the provisions of paragraph 25 of the CPD timeously, the matter would have been finalised in two court days instead of three days and the wasted court day of Monday 19 January 2026 could have been avoided. This fact will become relevant insofar as the costs order made hereunder is concerned.

RELEVANT BACKGROUND FACTS:

[8] The background facts which informs the dispute between the parties, as it transpires from the recorded chronology and common cause facts in the joint practice note and the undisputed evidence of the Second Applicant and Third Applicant, as well as the evidence of the Second Respondent who testified during the hearing on 20 January 2026, can conveniently be summarised as set out hereunder.

[9] On 22 August 2022 the Second Applicant and Third Applicant in their personal capacities signed an Offer to Purchase ("OTP") an immovable property situate at Midstream, Gauteng (*"the property"*). The property was jointly registered in the names of two persons (*"the sellers"*) who

signed the Offer to Purchase on 26 August 2022 , thereby entering into an agreement of sale of the immovable property. ("the agreement").

[10] Paragraphs 1 and 2 of the agreement contains the following terms:

"1. PURCHASE PRICE R7 350 0000

1.1 *The purchase price is Seven million three hundred and fifty thousand and is payable as follows:*

1.2 *A deposit of R1 500 000 One million and Five hundred thousand rands within _____ days after acceptance of the offer.*

1.3 *Payment of the balance of the purchase price shall be secured by the PURCHASER by way of an approved Bank guarantee to be furnished to the SELLER'S Conveyancers within 60 days after date of acceptance and shall be payable against registration of transfer.*

1.4 *The amounts shall be paid to the SELLER'S Conveyancers _____ who shall hold such amount in an interest-bearing Trust account for the credit of the PURCHASER. The Parties to this Agreement hereto give their consent in terms of the Section 86(4) of the Legal Practice Act 28 of 2014 to deposit any amount referred to in Clause 1.2 in an interest-bearing account, with the Bank nominated by the SELLER'S Conveyancers.*

2. APPROVAL OF BOND – SUSPENSIVE CONDITION

2.1 *This Agreement is subject to the suspensive condition that a loan of Five million eight hundred rand R5 850 000 secured by a mortgage loan approved in principle to be registered over the property is obtained by the PURCHASER or the SELLER on his behalf on the normal terms and conditions of any Registered Commercial Bank within a period of 30 (thirty) days from the last day of signature hereof or such extended period as the parties may agree to in writing.*

2.2 *In the event of the aforesaid Bond not being granted within the period stipulated in Clause 2.1 above, alternatively within such extended time period as the parties may have agreed to in writing, then and in such event, this offer shall lapse and shall have no force and effect and the SELLER shall be obliged to return to the PURCHASER together with interest all monies paid by the PURCHASER hereunder in reduction of the purchase price."*

- [11] Central to the dispute in this application, is the contents of paragraph 20 of the agreement which contains a handwritten clause inserted under the heading "Other conditions;" which reads as follows;

"20 **OTHER CONDITIONS**

Deposit payment dates:

1. R1 000.00 2 September 2022
2. R500 000.00 7 October 2022
3. Occupation 1 October 2022 if Seller finds alternative accommodation
4. Access to deposit per mutual agreement"

- [12] First Respondent was appointed to attend to the transfer of the property by the Sellers and on 8 September 2022 the Applicants signed a document titled "*Instruction to invest trust monies (in respect of a conveyancing transaction Section 86(4) of the Legal Practice Act, 2014 (Act 28 of 2014)*" ("the instruction to invest") and which was directed to the First Respondent. The instruction to invest refers to the transfer of the property from the Sellers to the Applicants and contains the following provisions which are quoted hereunder namely:

"I/We, the undersigned,

(1.) SIYAMBONGA CYPRIAN HILLIE,

Identity no.

Married out of community of property

(2.) NOLUFEFE CYNTHIA MBOLAMBI

Identity no.

Married out of community of property

being the Transferee/s in the abovementioned transaction, hereby confirm my/our instructions to Gunter Attorneys to invest all funds paid to Gunter Attorneys by me/us on account of the purchase price, on the basis that:

- 1. the amount is invested in a trust savings account or other interest-bearing account;*
- 2. the account contains as reference to Section 86(4) of the Legal Practice Act, 2014 (Act 28 of 2014);*
- 3. in terms of section 86(5) of the Legal Practice Act No. 28 of 2014, 5 of the interest which accrues on such investment must be paid over to the Legal Practitioners Fidelity Fund and vests in the Fund.*
- 4. the interest which accrues on each investment is to be for the company/close corporation/my benefit and is to be paid to me/us into the bank account indicated in the attached Personal Information document, after deducting your professional fee and costs for administering the investment, as soon as possible after the date of registration of the above-mentioned transaction.*
- 5. the capital amount invested is to be paid in accordance with the transferor's instructions on the date of registration of transfer.*
- 6. I am aware of the fact that while the funds are so invested with the said bank, the funds are not protected against a possible liquidation of the said bank".*

[13] On 8 September 2022 the First Respondent and/or Second Respondent attended to opening an Investment account in terms of section 86(4) of LPA at Grindrod Bank and R1 million in respect of the first tranche of the deposit referred to in the OTP was paid into that account in terms of the instruction to invest ("the trust account"). The remainder of the deposit being R500 000.00 was paid into the trust account on 28 September 2022.

- [14] From 20 September 2022 various payments were made by Respondents to third parties at the behest of one of the Sellers, on authority of Second Respondent, from the trust account. The Applicants complied with the terms of the Agreement but was unable to obtain transfer of the property into their names by virtue of the following events:
- [14.1] One of the Sellers passed away and an Executor for his estate was appointed while the other Seller was sequestrated and a Trustee was appointed for his insolvent estate;
- [14.2] The trustee of the insolvent estate elected not to proceed with the agreement;
- [15] During May 2023 a meeting was held between the Applicants and the Second Respondent as well as two of the Second Respondent's associates, who then informed the Applicants that the transfer of the property could not be effected for the reasons as aforesaid, but that the trustee of the insolvent estate of the one Seller would be prepared to enter into a new agreement of sale. When the Applicants enquired about the deposit which they paid as aforesaid, they were informed that certain payments were made to third parties on the behest of the one sellers and that the remainder of the deposit will be repaid to the Applicants.
- [16] Applicants protested this fact and the Applicants' attorney of record addressed correspondence to the Respondents on 31 July 2023 which recorded that the Applicants have not consented to any payments being made to third parties until the transfer and registration of the property has occurred, that the payments of any amounts from the trust account amounts to misappropriation of trust monies, and a demand was made for the full refund of the deposit of R1.5 million. It was further recorded that a failure to comply with that demand will result in the Applicants seeking legal relief.
- [17] It was further recorded that the Applicants accepted a counter-offer by the trustees and it is common cause that the Applicants thereafter signed a new Offer to Purchase in terms whereof the

Applicants *inter alia* had to pay a deposit of R900 000.00, as well as certain additional listed expenses in relation to the property, which resulted that *de facto* the Applicants paid a higher purchase price of the property. It is thus clear that the original agreement was cancelled by mutual consent, that a new agreement was entered into, and that Applicants reserved their rights in respect to the deposit paid into the trust account in terms of the original agreement.

- [18] The new deposit in relation to the new Offer to Purchase amounting to R900 000.00 was paid by the Applicants during October 2023 and the property was eventually registered in the name of the Applicants on 17 April 2024.
- [19] During the evidence of the Applicants the following facts were established to be common cause:
- [19.1] That the handwritten clause as it appears under Clause 20 of the Agreement was inserted and appeared in the agreement at the time when the Applicants signed the OTP;
- [19.2] That the Applicants were made aware of the Sellers' request to receive funds from the deposit in advance at the time when they signed the agreement, and that the Applicants in principle did not object to such a request.
- [20] During cross-examination of the Applicants by Respondents' counsel it was never put to the Applicants that they were informed and/or required to consent to any of the payments made at the behest of the one seller to third parties on any of the occasions when such payments were made by the Respondents from the trust account. The Applicants specifically testified that they were never consulted nor were their permission requested when these payments were made.
- [21] During the evidence of the Second Respondent he confirmed that he never consulted the Applicants or sought their permission to effect any payments from the trust account to third parties at the behest of one of the sellers. From the evidence of the Second Respondent it was established that he was informed by one of his staff members that the Applicants consented that

such funds could be paid at the time when the agreement was signed, and during the evidence of the Second Respondent he continuously reverted to the provisions of the clause in the Agreement which reads: "*Access to deposit per mutual agreement*" as a legal ground which, according to Second Respondent, entitled him to pay funds from the trust account to third parties at the behest of one of the sellers without consulting the Applicants.

ISSUES FOR DETERMINATION:

[22] In paragraph 7 of the joint practice minute the parties attempted to define the issues for determination. Included in this list of issues for determination there are matters which, in my view, forms part of the enquiry on the issue relating to the meaning of the disputed portion of Clause 20 of the agreement. The parties also listed that "*the true intent and meaning of the offer to purchase should be interpreted*" which reflects a clear confusion on the nature of the enquiry in relation to interpretation, as will be referred to more fully *infra*. Having read the respective affidavits filed on behalf of the parties, having read the part of the joint practice minute where the parties purports to frame the issues for determination, and having read the points *in limine* which the Respondents intended to raise and which eventually formed part of the argument on behalf of Respondents at the end of the hearing of the matter, the issues for determination transpires to be the following:

[22.1] Did the Applicants disclose a cause of action in the Founding Affidavit? If so, what cause of action did the Applicants disclose in the Founding Affidavit?

[22.2] Were the payments effected by Second Respondent from the trust account lawful? This enquiry necessitates the interpretation of the clause "*access to deposit per mutual consent*" as inserted in clause 20 of the agreement as the Respondents raised this clause as a contractual term between the parties which entitled the Respondents to pay various

amounts from time to time from the trust account without prior consultation or permission from the Applicants.

- [22.3] Is the nature of the relief as claimed by the Applicants an order for restitution, or is it damages, and if the relief claimed by the Applicants constitute damages, did the Applicants quantify such damages?

ANALYSING THE APPLICANTS' CAUSE OF ACTION:

- [23] In paragraph 4.9 of Heads of Argument filed on behalf of the Respondents the following submission is made:

"The Applicants' cause of action is contractual and their claim is for restitution for repayment of a deposit paid into the account of the First Respondent, which deposit was paid for a transfer of a property in favour of the Applicants."

This was also the tenure of argument advanced on behalf of the Respondents during the hearing of the matter, and based on the contention that the Applicants' cause of action is contractual, it was *inter alia* argued on behalf of the Respondents that the Applicants lack the necessary *locus standi* to institute a claim against the Respondents due to the fact that the Respondents were not a party to the agreement on which the Applicants rely to reclaim their deposit.

- [24] On the other hand, it was argued on behalf of the Applicants that the claim is found on the basis of a relationship which existed between the Applicants and the Second Respondent by virtue of the instruction to invest and the provisions of sections 84 to 87 of LPA. In the founding affidavit it was specifically averred that the Applicants provided Respondents with the instruction to invest and that the amount of R1.5 million was paid into that trust account and these facts were common cause. Applicants' counsel further referred to paragraphs 32 and 34 of the Founding Affidavit which reads:

- "32. *The Applicants have a clear right to institute these proceedings. We are the ones that have advanced the deposit to the Respondents for the purchase of the property. It was our estates that have been impoverished and we stand prejudiced and out of pocket with the owed monies. It is not in dispute that we are the purchasing parties of the property. The deposit also served as proof that we paid over the monies. The Respondents as conveyancers have a mutual duty to reimburse our full deposit in the light of the initial failed transaction. They had no authority and no right to use the deposit for any other purpose.*
33. *It cannot be denied that we have suffered harm and are continuing to suffer harm by being out of pocket. We are out of pocket to the tune of R1.1 million which is a substantial amount of money which we can put to good use."*

- [25] In paragraph 30 of the Founding Affidavit the Applicants avers that they lodged a complaint against Second Respondent with the Legal Practice Council for unprofessional conduct, stating that the conduct of the Second Respondent by paying monies from the trust account without their authority amounts to a misappropriation of trust monies.
- [26] Respondents' counsel argued that the pleadings do not refer to any other cause of action save a contractual claim. In essence the Respondents' counsel argued that on no reasonable construction of the pleadings can it be found that the Applicants established a *vinculum iuris* between the Applicants and the Respondents.
- [27] In *Jowell v Bramwell-Jones & Others*¹ it was *inter alia* held that pleadings must be read as a whole, and no paragraph can be read in isolation. It was further held that a distinction must be drawn between *facta probanda*, or primary factual allegations which every Plaintiff must make and the *facta probantia*, which are the secondary allegations upon which the Plaintiff will rely in support of his primary factual allegations. It is further established law that facts need to be pleaded and

¹ *Jowell v Bramwell-Jones and Others* (543/97) (2000) ZASCA; (2000) 2 All SA 161 (A) (28 March 2000) at 899 F - G

conclusions of law need not be pleaded. Certain allegations expressly made may carry with them implied allegations and pleadings must be so read.

- [28] In *Phillips v Fieldstone Africa (Pty) Ltd & Another*² the issue arose whether a claim based on a fiduciary duty could be found to exist on evidence relating to claims based on breaches of contractual terms where the existence of a fiduciary duty was not specifically pleaded. In that matter the learned judge quoted the following passage from *Hodgkinson v Simms* (1994) 3 SCR 377 (SCC) which reads:

"The existence of a contract does not necessarily preclude the existence of fiduciary duties between the parties. On the contrary, the legal incidence of many contractual agreements are such as to give rise to a fiduciary duty. The paradigm example of this class of contract is the agency agreement, in which the allocation of rights and responsibilities in the contract itself gives rise to fiduciary expectations".

- [29] In the same matter the court held:

*"There is no magic in the term 'fiduciary duty'. The existence of a such a duty and its nature and extent are questions of fact to be adduced from a thorough consideration of the substance of the relationship and any relevant circumstances which affect the operation of that relationship"*³

The learned judge then refers to the fact that the nature and extent of the relationship between the parties was canvassed at length during the trial and concluded that the pleadings, properly construed, embodied a claim based on the breach of a fiduciary relationship, and that no label is demanded of the pleader.⁴

² *Phillips v Fieldstone Africa(Pty) Ltd & Another* 2004 (3) SA 465 (SCA) par [26] to [28]

³ *Phillips v Fieldstone Africa (Pty) Ltd & Another, supra*, par. [27]

⁴ See: *Phillips v Fieldstone Africa (Pty) Ltd & Another*, par [28]

- [30] The principle that the cause of action upon which a party relies need not be specifically labelled in pleadings is a well-established principle. Pleadings in an action requires *facta probanda* which satisfies the elements of the cause of action and in motion proceedings evidence in support of a cause of action are required.
- [31] Where the Applicants referred to the fact that the amount of R1.5 million was paid into an account opened in terms of Section 86(4) of LPA in terms of the instruction to invest trust monies which they signed on 8 September 2022, in the terms as set out above, these facts clearly establish a fiduciary relationship between the Second Respondent and the Applicants. In terms of this fiduciary relationship the Respondents were *inter alia* obliged to comply with paragraphs 4 and 5 of the instruction to invest trust monies. Section 86(4) of LPA empowers the First Respondent to open a separate trust savings account or other interest bearing account for the purpose of investing therein any money deposited in the trust account of the practice on behalf of the Applicants over which the practice exercises exclusive control as trustee, agent or stakeholder or in any other fiduciary capacity.
- [32] Where it is therefore common cause in the affidavits that the deposit was paid by the Applicants into a trust account in terms of the provisions of Section 86(4) the LPA, opened and administered by the Respondents in terms of the provisions of the instruction to invest trust monies, the Applicants clearly established the existence a fiduciary relationship between themselves and the Respondents and which fiduciary relationship exists *ex lege* and need not pertinently being pleaded or labelled in the affidavits.
- [33] The breach of a fiduciary duty is unlawful.⁵ An allegation of the breach of a fiduciary duty therefore clearly implies an allegation of unlawful conduct.

⁵ See: *Law Society of the Cape of Good Hope v Randall* 2016 JDR 6828 (ECG) at par. [43]

[34] In *Afrisure CC & Another v Watson NO & Another*⁶ it was held as follows:

"[54] This brings me to the Respondent's claim for damages against De Villiers, based on alleged breach of his fiduciary duties as a trustee of Publiserve. Claims of this nature have been described as *sui generis* in that they are based neither in contract nor in delict. They find application primarily with reference to the relationship between directors and their companies but no reason has been suggested, and I can think of none, why De Villiers would owe Publiserve a lessor fiduciary duty than a director would owe to his/her company".

[35.1] In summary, by virtue of the provisions of Section 86(4) of LPA read in conjunction with the terms of the instruction to invest trust monies, the Respondents are in a fiduciary relationship *vis-a-vis* the Applicants and therefore have a fiduciary duty towards Applicants, and that a breach of that duty is unlawful. The breach of a fiduciary duty gives rise to a claim which is *sui generis*, and not established in terms of contract or delict. Where the affidavit of the Applicants established the facts underlying the existence of such fiduciary duty without specifically labelling the Applicants' cause of action as such, the Applicants have established a cause of action against the Respondents. The Respondents' argument that the Applicants failed to establish a cause of action can therefore not be upheld.

THE RESPONDENTS' DEFENCE ANALYSED:

[36] Having established that the Respondents acquired a fiduciary duty towards the Applicants, the breach of such duty is unlawful and gives rise to a claim as referred to above.⁷

⁶ See: *Afrisure CC & Another v Watson NO & Another*, 2009 (2) SA 127 (SCA)

⁷ See: paragraph [33] *supra* and *Afrisure CC & Another v Watson NO & Another* (*supra*), par. [54] to [59]

- [37] Any payment by either of the Respondents contrary to the instruction to invest signed by the Applicants on 8 September 2022 will amount to the trustee exceeding his powers and/or payment for an improper purpose and/or failure to exercise an independent discretion as a trustee and/or conflict with his duty as a trustee to prevent an illegal payment.⁸ In paragraph [59] of the *Afrisure*-judgment referred to in paragraph [34] above the duty of the trustee to take steps to prevent unlawful payments to be made was established and any failure to prevent such payments constituted a breach of his fiduciary duty.
- [38] In the circumstances of this matter, based on the common cause facts, the Second Respondent authorised various different transactions of payments from the trust account to third parties without any prior notice to, or permission from the Applicants, in respect of each or any of those transactions. The Applicants therefore *prima facie* established a breach of the fiduciary duty which Respondents owed them, with a resultant claim following that breach. The defences available to a trustee found to be in breach of a fiduciary are limited. In *Volvo (South African) (Pty) Ltd v Yssel*⁹ it was held as follows in paragraph [14]:

"Monies that are earned secretly in breach of a duty of trust fall to be disgorged by the fiduciary and there is little room for him/her to avoid that consequence. Recently in Philips v Fieldstone Africa (Pty) Ltd & Another Hehe JA summarised the position, as it has been articulated in various decided cases as follows:

'the rule is a strict one which allows little room for exceptions. It extends not only to actual conflicts with interest but also to those which are a real sensible possibility the defence opened to a fiduciary who breaches his trust are very limited; only the free consent of the principle after full disclose will suffice.'"

⁸ See: *Afrisure CC & Another v Watson NO & Another (supra)*, par. [58]

⁹ 2009 (6) SA 531 (SCA)

- [39] *In casu* the Respondents can escape liability only in the event of the Respondents proving the free consent of the Applicants after full disclosure. It is trite law that the existence of a fiduciary duty implies that a trustee should act with *uberrimae fidei*, like a *pater familias*, and take greater care in the administration of the assets placed in trust assets than such trustee would take in the administration of his/her own assets. Considering the aforesaid principles, the Respondents' defence should be analysed.
- [40] Respondents' defence is based on the existence of the portion of the handwritten clause inserted under Clause 20 of the Agreement which reads:

"Access to deposit per mutual consent"

This clause, so testified the Second Respondent, is a contractual term between the Applicants and the sellers that allowed the Respondents from time to time, as and when the sellers required same, to withdraw funds from the trust account and pay to the sellers such amounts which the sellers requested, without any reference whatsoever to the Applicants. The Respondents contended that such clause should be interpreted to mean that the Applicants allowed the sellers to have free and unfettered access to the deposit of R1.5 million paid into the trust account and that this clause therefore allowed the Second Respondent to authorise such payments from the trust account. This clause, so argued counsel acting for Respondents, should be interpreted to have the meaning as testified by Second Respondent. The reference to "...mutual consent", so testified Second Respondent, simply means that the specific clause was inserted into the agreement by mutual consent and does not refer at all to consent required from Applicants for access to the deposit.

INTERPRETATION OF CLAUSE 20 OF THE AGREEMENT

[41] The purpose of interpretation is to establish the true meaning of a document. The purpose of interpretation is not to establish the intention of the parties. In *Natal Joint Municipal Pension Fund v Endumeni Municipality*¹⁰ it was held in paragraph 18 as follows:

“Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision of provisions in the light of the document as a whole and the circumstances attended upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production.”

In paragraph [20] of the same judgment it was held:

“Unlike the trial judge I have deliberately avoided using the conventional description of this process as one of ascertaining the intention of the legislator or the draftsman, nor would I use its counterpart in a contractual setting, ‘the intention of the contracting parties’, because these expressions are misnomers’ insofar as they convey or understood to convey that interpretation involves an enquiry into the mind of the legislator or the contracting parties. The reason is that the enquiry is restricted to ascertaining the meaning of the language of the provision itself.”

[42] Considering the aforesaid judgment, the term “access to deposit by mutual consent” must be interpreted with regard to the context provided by reading the particular provision in the light of the document as a whole and the circumstances attending upon its coming into existence.

¹⁰ 2012 (4) SA 593 (SCA)

- [43] The document as a whole (the agreement) provides for the deposit of R1.5 million to be paid into a trust account, and to remain there until transfer is effected (clauses 1.4 and 2.1 of the agreement). The circumstances under which the relevant parts of the agreement which relates to a deposit came into existence, on the undisputed evidence of the Applicants, is namely to pay a substantial deposit in order to facilitate the grant of a bond by a financial institution. This clause should also be interpreted in the context of the relevant instruments and circumstances where the Applicants provided a written instruction to invest monies in a trust account in terms of the provisions of Section 86(4) of the LPA, and which created a fiduciary relationship between the Respondents and the Applicants. Second Respondent, being a duly admitted attorney, is fully aware of the nature and extent of this relationship and its concomitant obligations.
- [44] In the context of the aforesaid it is therefore, in my view, absurd to argue that the words “.....*mutual consent*” is meant to record that the insertion of that specific clause was by mutual consent. It is simply non-sensical to argue that the insertion of any clause into a contract must be specifically recorded to be by consent of the parties because the signature of a contract by parties establish consent to each and every clause thereof. The words “....by mutual consent” must be read to have a purpose in the agreement and, considering the aforesaid context and purpose of the document, can only relate to the fact that access to the funds may be obtained by consent of the Applicants.
- [45] The aforesaid interpretation is an interpretation which gives effect to the trustees' duty to account and safeguard the interest of the beneficiaries. This interpretation is an interpretation which is harmonious with the obligation of a trustee not to make illegal payments, to exercise an independent discretion, to place himself in a position where a payment is not in conflict with his duty as a trustee and where the trustees have to take steps to prevent any unlawful payments. This duty clearly implies that the administrator of a trust account such as the account opened

under Section 86(4) of LPA can only effect payments from such an account with the informed consent of the owner of the funds. Informed consent clearly implies prior consultation and a disclosure of all relevant facts. In my view the words “*access to deposit per mutual consent*” should therefore be interpreted to mean that the Respondents had to obtain consent from the Applicants for each and every transaction in respect of which funds were paid from the trust account, after having disclosed to the Applicants what the purpose of such intended payments were and what the amount of such intended payments were. Absent such consent, the payments constituted a breach of the Respondents’ fiduciary duty.

[46] The Respondents therefore failed to disclose a defence.

REMEDY:

[47] From the authorities quoted *supra*¹¹ the breach a fiduciary duty may give rise to a claim for damages or disgorgement. *In casu*, it was argued on behalf of the Applicants that the claim is for damages, quantified to be the balance between the deposit of R1.5 million paid, and the amount repaid by Respondents to Applicants. On behalf of the Respondents it was argued that the Applicants failed to prove damages as there are many factors which may influence the claim for damages and that, due to the fact that the Applicants’ cause of action was not properly disclosed, Respondents were not availed of an opportunity to adduce any evidence which may affect the quantification of damages.

[48] Respondents’ submissions in this regard cannot be upheld. The Respondents’ defence is limited¹² and, once breach of the fiduciary duty is established, Respondents must pay back to the Applicants whatever amount was paid into that account. It is neither a claim based on delict nor a

¹¹ See: *Afrisure & Another v Watson*, par [54]

¹² *Volvo Southern Africa (Pty) Ltd v Ysel (supra)*, par [14]

claim based on contract, but a *sui generis* claim and a trustee, once being held to be in breach of its fiduciary duties, must return whatever received by the trustee in that capacity. It therefore follows that the Applicants are entitled to judgment in an amount equal to the amount paid into the trust account in terms of the instruction to invest trust monies, less the amount already repaid by Respondents.

COSTS:

- [49] Applicants seek an order for costs on a punitive scale being attorney and client scale. Considering the fact that the Second Respondent is a practising attorney and therefore aware of the nature and extent of his fiduciary duties towards the Applicants, the fact that the Second Respondent received a substantial amount in trust from the Applicants and then paid approximately 80% of this amount to third parties without any reference whatsoever to the Applicants, in my view constitutes a gross dereliction of the Respondents' fiduciary duties towards the Applicants. In my view this conduct alone warrants a punitive order for costs. During the evidence of the Second Respondent he was unable to advance any other reason why he did not obtain prior informed consent from the Applicants when making any of the requested payments, but repeatedly reverted back to the clause which reads "*Access to deposit per mutual consent*". The Second Respondent's interpretation of the words "*by mutual consent*" as set out above is so absurd that it warrants the inference of malice when it is considered that the Second Respondent is a legal practitioner.
- [50] For the reasons as set out in paragraphs [4] to [7] *supra* it is clear that the cost occasioned by the matter standing down on Monday 19 January 2026 was caused by the failure of the Applicants' legal representatives to comply with the CPD and I am therefore of the view that there is no reason why Respondents should be held liable for the wasted costs occasioned by the matter standing down on Monday, 19 January 2026 and that Applicants' legal representatives should be disallowed any fees for that day.

ORDER:

[51] In the premises, I make the following order:

1. First Respondent and Second Respondent are ordered, jointly and severally the one paying the other to be absolved, to pay to the Applicants the amount of R1 105 684.57 (One Million One Hundred and Five Thousand Six Hundred and Eighty Four Rand and Fifty Seven Cents) together with *mora-tore* interest from date of this order to date of payment;
2. First Respondent and Second Respondent are ordered to pay the costs of the application, jointly and severally, the one paying the other to be absolved, on the scale as between attorney and client taxed on Scale B, save and except for any wasted costs occasioned when the matter stood down on Monday 19 January 2026.
3. The Applicants' legal representatives shall not be entitled to charge any fees in relation to their appearance on Monday, 19 January 2026.




P A VAN NIEKERK J
Judge of the High Court
Gauteng Division, Pretoria

Appearance on behalf of the parties:

For the Applicants:

Adv. BB Letuka

Instructed by:

Monyemorathoe Attorneys Inc.

For the Respondent:

Adv. N Nortje

Instructed by:

LJ du Plooy & Associates Inc.