IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

NOT REPORTABLE CASE NO: 17448/2004

In the matter between:

19/4/200

ABSA BANK BPK APPLICANT

And ...

DIAMOND INGELYF 1 ST RESPONDENT

BALJU POLOKWANE 2ND RESPONDENT

LOUIS TRICHARDT BOUSENTRUM (EDMS) BPK 3RD RESPONDENT

JUDGMENT

WEBSTER J

After hearing argument in this matter I granted an order in the following terms:

"1. Die tweede respondent (DIE BALJU, POLOKWANE) se distribusieplan gedateer 9 Oktober 2002 word onreëlmatig verklaar deurdat dit nie voldoen aan die bepalings van reël 46(14)(b) nie en word tersyde gestel en hy word gelas om 'n behoorlike distribusieplan op te stel;

2. Die derde respondent (LOUIS TRICHARDT BOUSENTRUM (EDMS) BPK) was uit hoofde van die bepalings van aanhangsel "F" tot die funderende eedsverklaring verplig om benewens die bedrag van

R982 000.00 ook die atslaersgelde van R7 980.00, sowel as rente op die koopsom teen 22.75% *per jaar vanaf datum van die veiling tot op datum van betaling van die koopsom, sowel as alle agterstallige en toekomstige belastingsgelde en heffings verskuldig aan die Polokwane Plaaslike Owerheid, te betaal, synde die bedrag van R322 699.27;*

3. *Die tweede respondent in sy hoedanigheid as balju:*

3.1 sal die nodige stappe neem om nakoming van die voorwaardes van die veiling teen die derde respondent at te dwing;

3.2 sal aan die applikant behoorlik rekenskap gee in die verband;

3.3 sal die balans verskuldig aan die applikant betaal."

I reserved my judgment on the issue of costs and undertook to furnish my judgment and reasons at a later stage. They follow below.

This application came before me as an opposed matter. The issue to be determined was the construction of the terms and conditions of a sale in execution.

The parties are ABSA BANK (the applicant), DIAMOND INC, a firm of attorneys (the first respondent), the SHERIFF OF POLOKWANE (the second respondent), and LOUIS TRICHARDT

BOUSENTRUM EDMS BPK (the third respondent). Not cited in the application were the Polokwane Local Authority (the execution creditor) and Erf 208 Pietersburg BK (the execution debtor).

The execution creditor instituted an action and in due course obtained a judgment in this court against the execution debtor for the sum of R149 161.00 being the arrear rates, taxes and service charges then owing to it by the execution debtor. A warrant of execution authorising the attachment of the immovable property in respect of which the rates had not been paid was duly issued. The second respondent duly attached the property and sold it in execution at a public auction for R982 000.00 to the third respondent. The second respondent duly instructed the first respondent to effect transfer of the property to the third respondent. The first respondent duly carried out his mandate and paid the amount that was then due and owing to the execution creditor, namely R322 699.27 and the sum of R659 300.73 to the applicant, the mortgager of the property that had been owned by the execution debtor. The disputed commenced.

The applicant, through its attorneys challenged the second respondent: it contended that the terms and conditions of the sale in execution had not been complied with fully, in particular with regard to the recovery from the 3rd respondent of all monies that were due and payable by it in accordance with the provisions of the terms and conditions of the sale in execution. The second respondent took up the issue with the first respondent and was re-

assured that nothing further was payable by the third respondent. The issue was then taken up by the applicant's attorneys on the one hand and the first and second respondent's, respectively. A letter addressed by the applicant's attorneys to the second respondent reads as follows:

"Ons verwys na u distribusie in die aangeleentheid.

Ons kliënt is van mening dat aangesien die verkoopsvoorwaardes bepaal dat die koper die uitstaande belastings en heffings moet betaal die volle opbrengs van die veiling aan ons kliënt oorbetaal moet word

Ons heg hierby aan 'n afskrif van 'n skrywe versend aan mnr. Diamond vir u aandag.

Ons verneem graag van u.

Die uwe
ROOTH & WESSELS ING."

A letter addressed to the first respondent from the applicant's attorneys reads as follows:

"Ons verwys na die gesprek tussen ons mnr. Geyser en u mnr. Diamond.

Ons bevestig dat ons kliënt nie tevrede is met die distribusie in hierdie aangeleentheid nie, aangesien hulle van mening is dat die verkoopsvoorwaardes daarvoor voorsiening maak dat die koper die uitstaande belastings en heffings moet betaal.

U het ons meegedeel dat u gesag het vir u standpunt dat die vonnis bedrag verhaal kan word uit die opbrengs van die veiling en nie van die koper nie.

Ons versoek u om ons na hierdie gesag te verwys sodat ons ons kliënt kan adviseer. Intussentyd behou ons kliënt hulle regte voor.

Die uwe
ROOTH* & *WESSELS ING. "

It was common cause that the second respondent took up the subject matter of the further payments due by the third respondent with the first respondent on two separate occasions: in both instances the first respondent persisted that no further payment was due by the third respondent. Further, the first respondent ignored the letter referred to above addressed to it by the applicant's attorneys.

Save for the prayer in paragraph 3.3 of the Notice of Motion the second applicant did not oppose the application as such. The third respondent elected to abide by the decision of the court. The first respondent persisted in its view and opposed the application, contending that its interpretation was the correct one. It was only in the first respondent's Heads of Argument dated 4 April 2005 and filed with the registrar on 5 April 2005, that the first respondent conceded in paragraph 31 of its aforesaid heads of argument:
"The plain meaning of the words in clause 5.2 *and the context of the words does not permit of the interpretation placed on that clause by the first respondent and that argument is no longer persisted with. "*

It is appropriate that the nigger in the woodpile, so to speak, be revealed. The relevant condition in the "Conditions of Sale" reads as follows:

"5.2 Die koper is bo en behalwe bostaande betaling, ook aanspreeklik vir die betaling aan die Eiser of Afslaer van:

5.2.1 Rente op die koopprys teen 22.75% *per jaar, welke rente maandeliks vooruit vanaf datum van verkoping, tot datum van betaling bereken moet word. Die koper onderneem om in die waarborg, wat ingevolge paragraaf* 5.1 *hiervan gelewer moet word voorsiening te maak vir die betaling van die rente.*

5.2.2 Afslaersgelde onmiddellik na afloop van die veiling.

5.2.3 Hereregte, die koste vir die opstel van hierdie voorwaardes, oordragkostes, alle agterstallige en toekomstige belastings, gelde en heffings verskuldig aan die plaaslike owerheid. Betaling van hierdie gelde moet geskied binne 7 *(sewe) dae na datum waarop die koper deur die eiser of Afslaer daartoe versoek is."*

It was common cause that the third respondent was never called upon to pay the amounts set out in paragraphs 5.2.1, 5.2.2 and 5.2.3, supra and further that such amounts have not been paid to date hereof.

It was further common cause that the point of the dispute no longer being in issue the only matter for adjudication is the question of costs. Mr. Van der Merwe who appeared together with Mr. Du Preez for the applicant submitted that an attorney's duties

and responsibility are not restricted to his or her client only. He submitted that the duties of an attorney extend beyond the protection and advancing his client's cause and relied on Pretorius en Andere v McCallum 2002(2) SA 423 where it was held that there was no reason in principle why a claim based on an attorney's duty of care to ensure that expectation of the intended beneficiary in a will was realised should not be upheld. He submitted further that the principle of holding that an attorney had a duty of care extended beyond his own client (Fourie's Conveyancing Practice Guide, 2nd Edition at page 18), where the learned author John Christie states:

"The financial aspects of a transfer of property are of utmost importance. It is one of the responsibilities of the conveyancer to take control of the financial aspects of any transaction and to ensure that these are in order prior to registration of transfer. Negligence or mistakes on the part of the conveyancer can result in financial loss to clients and can render the conveyancer liable for damages. "

Mr. Green who appeared for the first respondent submitted that an attorney does not owe a duty to "the other party" in a matter to ensure that what he does is correct and will not cause the other harm. He relied on the decision in Road Accident Fund v Shabangu and Another 2005(1) SA 265 SCA where Cloete JA held:

"The attorney-client relationship imposes a duty on an attorney to advance the interests of his client, even where that course will cause harm to the opposite party; and in general, an attorney will

incur no liability to the party on the other side in doing so: White v Jones [1995] 2 AC 207 (HL(E)) at 256C - D. In Ross v Caunter [1980J 1 Ch 297 Sir Robert Megarry V-C said at 322B - C:

'In broad terms, a solicitor's duty to his client is to do for him all that he properly can, with, of course, proper care and attention. Subject to giving due weight to the adverb "properly", that duty is a paramount duty. The solicitor owes no such duty to those who are not his clients. He is no guardian of their interests. What he does for his client may be hostile and injurious to their interests; and sometimes the greater the injuries the better he will have served his client. The duty owed by a solicitor to a third party is entirely different There is no trace of a wide and general duty to do all that properly can be done for him. '

Of course the relationship and concomitant duty owed to the client will not protect the attorney civilly or criminally against unlawful conduct such as fraud. An attorney is not entitled nor obliged to advance his client's interests at all costs. But, generally speaking, it is no part of an attorney's function to protect the interests of the opposite party by doing, or refraining from doing, something that might injure that party. Something more is required."

He submitted that the first respondent was under no duty to demand any performance from the third respondent. He submitted that it was incumbent on the applicant as well as the second respondent to ensure that the third respondent fulfilled his obligations. He submitted further that the Pretorius en Andere case referred to by Mr. Van der Merwe applied only in the so-

called "disappointed beneficiaries". He submitted further that if there was any breach of duty towards the second respondent that that was a matter between the first and second respondents and that this application is neither the occasion nor forum for any breach of contract: the issue was simple, he submitted and that was because there was nothing privy between the applicant and the first respondent.

Mr. Van der Westhuizen submitted that the second respondent had at all times been acting *bona fide* as a public officer and consequently ought not to be mulcted for costs. In this regard he referred to the well-known case of Coetzeestroom Exploration and General Mining Co v Registrar of Deeds 1902 TS 216 as followed in Fleming v Fleming en 'n Ander 1989(2) SA 253 (A); Maclean v Haasbroek NO and Others 1957(1) SA 464 (A) at 468H - 469A. He submitted that the first respondent's interpretation of clause 5(2) of the Conditions of Sale had been so patently wrong that it was just that the first respondent pay the costs of the other litigants as it would be "just", in accordance with the provisions of rule 10(4)(b) read with rule 6(14) that the first respondent pay the costs of the applicant as well as the second respondent.

The issues in this case are quite simple. Armed with a valid judgement the execution creditor instructed the second respondent to proceed with the sale in execution of the immovable property of the judgment debtor. Conditions of sale were drawn

up in writing. The relevant one for purposes of this judgment is condition 5(2) quoted above. After the property had been sold in the auction on 10 July 2002 the first respondent was instructed to effect transfer to the third respondent. By then the first respondent was aware of the judgment also obtained by the applicant against the execution debtor *(Vide* paragraph 7 of the founding affidavit and paragraph 9 of the first respondent's answering affidavit). When the applicant paid the sum of R982 000.00 to the first respondent the first respondent was well-aware that two major creditors had to be paid in order to satisfy fully or partially, as the case might be, the judgments obtained by the applicant and the execution creditor.

In executing his mandate to transfer the property to the third respondent the first applicant had been chosen by the execution creditor to do so and to pay out the proceeds of the sale. When it came to the payment to these two competing creditors the first respondent was aware of the conditions of sale. The second respondent had raised the question of recovering the amounts set out in clause 5.2.1, 5.2.2 and 5.2.3. The second respondent avers that he instructed the first respondent to recover the amounts set out in these sub-paragraphs. The first respondent refused to do so, maintaining that the third respondent owed nothing further. The financial situation as I understand it is that the applicant was then owed Rl 025 042.89 and the execution creditor's claim had risen from R149 161.00 (the judgment) to R322 699.27. The applicant's attorneys were

contesting the first respondent's interpretation of clauses 5.2.1, 5.2.2 and 5.2.3. The first respondent paid out the parties in accordance with what it believed to be the correct interpretation of the conditions of sale. When it was asked to produce its "authority" that it was relying on in interpreting the conditions of sale it elected not to do so.

The question as to whether the first respondent owed the applicant a duty of care must be viewed against this factual background. Common sense dictates that it did so owe such a duty to the applicant. Further, that duty is sanctioned by the law. In dealing with this issue Conradie J (as he then was) remarked as follows in the Pretorius case (supra), at pages 426A to 430 H:

"In 'n toonaangewende Kaliforniese beslissing waarin 'n bevoordeelde 'n notaris wat versuim het om 'n testament behoorlik te laat attesteer, aangespreek het, verklaar die Hof die volgende:

'The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm. '

(Biakanja v Irving (1958) *320 P 2nd* 16, 49 *Cal 2nd 647.)*

In die latere beslissing in Lucas v Hamm (1961) 364 *P 2nd* 685, 56 *Cal 2nd* 583 - *ook uit Kalifornië - is by die bogemelde die oorweging gevoeg* '.. *whether the recognition of liability ... would impose an undue burden on the profession'.*

Enkele jare later is Lucas v Hamm in Heyer v Flaig (1969) 449 *P 2nd* 161, *70 Cal 2nd* 223 *toegepas en die omvang van die regsplig verder ontleed:*

'The duty thus recognised in Lucas stems from the attorney's undertaking to perform legal services for the client but reaches out to protect the intended beneficiary. We impose this duty because of the relationship between the attorney and the intended beneficiary; public policy requires that the attorney exercise his position of trust and superior knowledge responsibly so as not to affect adversely persons whose rights and interests are certain and foreseeable. Although the duty accrues directly in favour of the intended testamentary beneficiary, the scope of the duty is determined by reference to the attorney/client contract. Out of the agreement to provide the services to a client, the prospective testator, arises the duty to act with due care as to the interests of the intended beneficiary. We do not mean to say that the attorney/client contract for legal services serves as the fundamental touchstone to fix the scope of this direct tort duty to the third party. The actual circumstances under which the attorney undertakes to perform his legal services, however, will bear on a judicial assessment of the care with which he performs his services. '

Die benadering van die Court of Appeal in Ross v Caunters (a firm) [1979] 3 All ER 580 (Ch) by die uiteensetting van die beginsels wat volgens die Hof behoort te geld, toon treffende ooreenkomste met die wat die howe in die bogemelde sake aantreklik gevind het. Die kopskrif vat die ratio van die beslissing van Sir Robert Megarry VC soos volg saam:

'(1) A solicitor who was instructed by his client to carry out a transaction to confer a benefit on an identified third party owed a duty to that third party to use proper care in carrying out the instructions because:

(i) It was not inconsistent with the solicitor's liability to his client for him to be held liable in tort to the third party, having regard to the fact that the solicitor could be liable for negligence to his client, both in contract and in tort;

(ii) There was a sufficient degree of proximity between a solicitor and an identified third party for whose benefit the solicitor was instructed to carry out a transaction for it to be within the solicitor's reasonable contemplation that his acts or omission in carrying out the instructions would be likely to injure the third party, and

(iii) There were no reasons of policy for holding that a solicitor should not be liable in negligence to the third party, for the limited duty owed to him of using proper care in carrying out the client's instructions differed from the wider duty owed to the client of doing for the client all that the solicitor could properly do, and far from conflicting with or diluting the duty to the client, was likely to strengthen it.

(2) The fact that the plaintiff's claim in negligence was for purely financial loss, and not for injury to the person or property, did not preclude her claim, for, having regard to the high degree of proximity between her and the solicitors arising from the fact that they knew of her and also knew that their negligence would be likely to cause her financial loss, the plaintiff was entitled to recover the financial loss she had suffered by their negligence. '

Mnr Rosenberg namens die respondent het daarop gewys dat die sogenaamde Anns-toets (wat in die saak van Anns and Others v London Borough of Merton [1977] 2 *All ER* 492 *(HL) geformuleer is) in Engeland in onguns verval het (Murphy v Brentwood District Council [1990]* 2 *All ER 908 (HL); kyk ook I N Duncan-Wallace 'Anns Beyond Repair'* (1991) *The Law Quarterly Review* 228 *en Dugdale and Stanton Professional Negligence 2nd ed at 81.) Vo/gens Anns was voorsienbare skade verhaalbaar tensy daar beleidsoorwegings teen die toestaan van regshulp bestaan het. Beleidsoorwegings word egter sedert Murphy voorop gestel sodat die posisie in die Engelse reg nou is soos dit nog altyd by ons was dat 'n regsplig nie uit blote voorsienbaarheid ontstaan nie, maar uit 'n gebalanseerde beskouing van al die oorwegings wat in 'n bepaalde geval 'n remedie wenslik of onwenslik sou maak. (Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 (3) *SA 824 (A); Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) *SA* 475 *(A) te 504E - G.)*

Dat die nuwe, meer konserwatiewe, benadering van die Engelse Howe teenoor aksies vir suiwer vermoënskade, nie daar in die weg van die erkenning van 'n aksie vir 'n teleurgestelde

bevoordeelde gestaan het nie, blyk uit die beslissing van die Court of Appeal in White and Another v Jones and Others [1993] 3 *All ER 481 (CA) waar die riglyne wat vir aanspreeklikheid neergelê word nie van dié in ons eie regstelsel verskil nie:*

'I turn next to consider whether there is between a solicitor and intended beneficiary a relationship of proximity and whether it is fair, just and reasonable that there should be a liability imposed on the solicitor to compensate the intended beneficiary. I shall consider these two headings together, because there is no real demarcation line between them. They shade into each other. Both involve value judgments. Under the third heading the Court makes its assessment of the requirements of fairness, justice and reasonableness. Likewise, although less obviously, built into the concept of proximity or neigbourhood is an assessment by the Court that in a given relationship there "ought" to be liability for negligence. These two headings are no more than two labels under which the Court examines the pros and cons of imposing liability in negligence in a particular type of case. This is well illustrated in the instant case, where some of the points which fall for consideration could happily be considered under either heading. '

In ander Statebondslande is aanspreeklikheid in die geval van 'n teleurgestelde bevoordeelde oor die algemeen erken, alhoewel daar ook teenstemme opgegaan het. In die Kanadese reg is daar die beslissing van die British Columbia Supreme Court in Whittingham v Crease & CO [1978] 5 *WWR* 45 *(waarna in die uitspraak in Ross v Caunters (supra) verwys word). In Australië*

tref ons die beslissing in Watts v Public Trustee for Western Australia [1980] WAR 97 aan. Die verweerder het nalatiglik versuim om op te merk dat die oorledene se testament vir die opstel waarvan hy verantwoordelik was, deur laasgenoemde se eggenote as getuie onderteken is. Die verweerder is aanspreeklik gehou. In Nieu-Seeland het dit met die Public Trustee voorspoediger gegaan. Sutherland v Public Trustee [1980] 2 NZLR 536 was 'n saak waar die verweerder op aandrang van die testateur nie voorsiening gemaak het vir 'n bemaking aan sy stiefkinders nie, en waarin die Regter opmerk dat daar geen regsplig kon bestaan teenoor persone wat die erflater, op wie se advies of vir watter rede ook al, nie in sy testament benoem wou hê nie.

'n Regsplig is egter deur die Nieu- Seelandse Appèlhof erken in Cartside v Sheffield, Young and Ellis [1983J NZLR 37 'n beslissing waarin die uitspraak van die Hof a quo ([1981] NZLR 547) omvergewerp is. Dit was 'n geval waar die testatrise - wat reeds baie oud was - te sterwe gekom het sewe dae nadat sy instruksies vir die opstel van 'n nuwe testament aan haar prokureurs gegee het sonder dat die nuwe testament verly is. Redelike sorg omvat sowel redelike kundigheid as redelike stiptelikheid.

In Skotland het die Hof in Weir v J M Hodge and Son 1990 SLT 266 die mening uitgespreek dat Robertson v Fleming (1861) 4 Macq 167, die saak wat tot Ross v Caunters (supra) in die weg van die erkenning van deliktuele aanspreeklikheid van 'n prokureur teenoor 'n derde gestaan het, 'is to be regarded as out of sympathy with the modern law of negligence' (270). Die belese

Regter het egter die mening gehuldig dat hy as Lord Ordinary nie by magte was om van 'n beslissing van die House of Lords af te wyk nie.

Mnr Rosenberg het sterk gesteun op die feit dat Ross v Caunters (supra) nie byval gevind het by twee van die drie lede van die Hof van Victoria in Seale v Perry [1982] VR 193 *nie.*

Die besware teen die erkenning van aanspreeklikheid wat in Seale v Perry (supra) geopper word, wentel almal om die onregmatigheidskriteria wat op hulle beurt natuurlik weer van beleidsoorwegings afhang. Ek vind die voorbeelde, wat Regter Murphy aangee en sy redes vir die verwerping van 'n regsplig met eerbied onoortuigend. Hy toon aan die hand van allerlei voorbeelde watter onbevredigende resultate 'n algemene reël in sekere omstandighede sou oplewer. Dit is egter juis kenmerkend van 'n regsplig dat dit by bepaalde omstandighede aangepas kan word Die feit dat 'n prokureur vir 'n besondere doen of late teenoor 'n teleurgestelde bevoordeelde aanspreeklik is, beteken nie prinsipieël dat hy teenoor ander derdes (wat byvoorbeeld met sy kliënt sake doen) aanspreeklik moet wees nie. Wat goeie en verstandige beleid met 'n bevredigende resultaat in die een geval is, hoef nie goeie en verstandige beleid in 'n ander geval te wees nie.

Mnr Rosenberg het verder betoog dat, anders as wat Megarry VC in Ross v Caunters (supra) ten aansien van die Engelse reg bevind het, die Suid-Afrikaanse reg nie, naas 'n kontraktuele verpligting om bevredigende professionele dienste te lewer, ook 'n verpligting uit onregmatige daad om nie suiwer vermoënskade te veroorsaak,

erken nie. Hieruit sou, aldus die betoog, volg dat 'n professionele raadgewer soos 'n prokureur wat geen deliktuele aanspreeklikheid teenoor sy eie kliënt opdoen nie, ook nie sodanige aanspreeklikheid teenoor 'n vreemdeling sou kon opdoen nie. Ek is egter van oordeel dat mnr Rosenberg se beroep op Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd (supra) as steun vir hierdie betoog misplaas is. Lillicrap se saak bevestig juis dat 'n hof nie deliktuele aanspreeklikheid sal oplê waar dit nie nodig is nie; met ander woorde, waar die remedie nie daartoe sou dien om die regsgevoel van die gemeenskap te bevredig nie. Oplegging van 'n regsplig sou onnodig wees waar daar toereikende kontraktuele remedies is. Selfs al sou 'n prokureur dus deur sy kliënt vir die veroorsaking van suiwer vermoënskade slegs kontraktueel aangespreek kon word, sou dit myns insiens nie volg dat hy deliktueel nie op grond van dieselfde doen of late teenoor 'n derde aanspreeklik kon wees nie. Die onvermoë van 'n kliënt om 'n prokureur uit onregmatige daad aan te spreek (as daar so 'n beletsel bestaan) kan hoogstens een van talle elemente wees wat by die oplegging van deliktuele aanspreeklikheid van die prokureur teenoor 'n derde ter sprake kom. Dit sou hoegenaamd nie deurslaggewend wees nie. Die omvang van 'n prokureur se aanspreeklikheid teenoor 'n derde sou miskien van die bepalings van sy kontrak met sy kliënt kon afhang, maar dit is weer eens 'n beleids- of billikheidsoorweging.

Ten slotte het mnr Rosenberg gesteun op die argument dat 'n bevoordeelde voor die dood van die erflater geen reg op 'n bemaking het nie. Hy het bloot 'n verwagting, 'n spes successionis.

As die bevoordeelde dan geen vordering het teen 'n erflater wat hom in sy verwagtinge teleurgestel het nie, aldus die betoog, sou hy immers ook geen reg hê teen die erflater se prokureur nie. 'n Erflater staan onder geen verpligting om enigeen te laat erf nie. Daar kan dus geen vordering teen hom wees nie. Dit beteken egter nie dat 'n prokureur wat onderneem om toe te sien dat 'n erflater se wense in werklikheid omskep word geen aanspreeklikheid opdoen as hulle weens sy nalatige toedoen skipbreuk ly nie.

Wat die verbintenisskeppende potensiaal van die spes successionis betref, handel Steyn LJ in White and Another v Jones and Others (supra at 502a - c) op, met eerbied, oortuigende wyse met die betoog dat 'n spes geen reg kan skep nie:

'While in England we have much to learn from the imaginative legal developments in Australia in contract and tort, the categorisation of the beneficiary's interest as a mere spes successionis seems to me not to advance the substantive arguments. The negligent solicitor assumes a responsibility to give effect to his client's testamentary wishes. The solicitor knows all along that the product of his professional services - the will - can speak only at the death of the testator. The solicitor further knows that upon the death of the testator the beneficiary's interest crystallises and that the mere expectation ought then to become an entitlement to the legacy. Due to the solicitor's negligence the beneficiary's interest never becomes an entitlement That seems a principled basis on which to impose liability in tort. There are undoubtedly other arguments to be considered. But it seems to

me that by attaching the label spes successionis to the beneficiary's initial interest one is not saying anything of any substantive value about the question whether a solicitor should or should not be immune from liability for negligence in a case of this kind. '

Ek dink dat Rogers 'The Action of the Disappointed Beneficiary' (infra) die vermeende probleem treffend uitlig wanneer hy sê (te bI 597):

'The right, if any, which the beneficiary has is not a vested right to an inheritance but the right not to have the prospect of an inheritance frustrated by professional negligence. '

Of die verlies van 'n vooruitsig op 'n erflating skadeveroorsakend is, is 'n kousaliteits-, nie 'n beginselprobleem nie.

'n Vergelyking van die benadering soos dit onlangs in hierdie Afdeling tot uiting gekom het in Arthur E Abrahams & Gross v Cohen and Others 1991 (2) *SA 301 (C) met dié in Ross v Caunters en White v Jones (supra) toon dat die rigtinggewende oorwegings dieselfde is. In hierdie saak het dit gegaan oor die aanspreeklikheid van 'n prokureur wat as eksekuteur opgetree het en versuim het om die bevoordeeldes van sekere jaargeldpolisse van hulle aansprake in kennis te stel. Die Hof bevind by monde van Regter Marais (312A - D):*

'The persons to whom the duty is owed are not members of a large and indeterminate class. They are few in number and immediately identifiable. The nature of the loss which they may suffer is not indeterminable. On the contrary, it is obvious what it will be. The time when such loss may be suffered is similarly not

indeterminate; it is also known. The relative ease with which the duty may be discharged and liability avoided is also a factor which pre-disposes me towards recognising that such duty exists. I can certainly think of no public policy to which the recognition of such a legal duty would be inimical. Indeed, I believe that society at large would regard it as entirely reasonable to recognise a legal duty of this kind and to impose liability for loss suffered as a consequence of its negligent breach. '

Daar is, soos ek hoop die voorafgaande bespreking sou aandui, dus geen beginselbeswaar in die Suid-Afrikaanse reg teen die ontvanklikheid van 'n vordering gegrond op 'n regsplig van 'n prokureur om te sorg dat 'n beoogde bevoordeelde se verwagtinge bewaarheid word nie. Daar is geen rede waarom ons reg nie die pad sou loop wat reeds deur regstelsels in die VSA, Kanada, Australië, Nieu-Seeland en Engeland (maar met die uitsondering van Skotland) bewandel is nie. Dit is dan ook die standpunt van al die plaaslike skrywers wat akademiese bydraes oor die onderwerp gelewer het. (HJ Erasmus 'Wills: the Price of Negligence' (1980) De Rebus at 389; *Owen Rogers 'The Action of the Disappointed Beneficiary'* (1986) *103 SALJ* 583; *G A M Radesich 'Negligent attorneys and disappointed beneficiaries'* (1987) *50 THRHR at 276; Midgley Lawyers' Professional Liability* (1992) *at 90.)"*

The Shabangu case relied on by Mr. Green is clearly distinguishable from the present case. In that case the plaintiff sought to hold an attorney liable to repay the appellant the amount of a fraudulent claim that had been settled: the attorney

had not been party to the fraud and had acted in good faith on behalf of a client who had conceived the idea to defraud the appellant. In the present case the first respondent was acting not as an attorney but a conveyancer. Whilst a conveyancer is instructed in a manner similar to that of an attorney the functions and duties of the former differ materially from that of an attorney. In the transfer of immovable property the conveyancer transfer ownership of immovable property from one person to another subject to any conditions that must be complied with prior to or simultaneously with the transfer. Such transfer is based inevitably and without exception on a " ... *deed of alienation signed by the parties thereto or by their agents acting on their written authority*" (Section 2(1) of Act No. 68 of 1981, as amended) unless the land has been sold at a public auction and the provisions of section (2) of the said act do not find application in accordance with the provisions of section 3. In casu the first respondent was aware of the conditions of sale and the obligations of the third respondent. Had the meaning of contested clauses not been clear to it, it was under an obligation in the interests of the applicant, the second respondent as well as the third respondent to secure confirmation from the parties that the meaning it ascribed to the provisions of clauses 5.1, 5.2 and 5.3 of the conditions of sale was correct and acceptable to the parties. If there was no unanimity the parties would have had to resolve the issue prior to the transfer of the property. The duties of a conveyancer differ fundamentally from those of an attorney. The learned author H.S. Nel in the work, Jones Conveyancing in South Africa, Fourth Edition, page 17

states: "A *registrar of deeds is in no way, however, responsible for ensuring that the necessary financial arrangements have been made as regards any transaction he registers, these arrangements being entirely the concern of the conveyancer(s) concerned".* The first respondent in conceding that its interpretation of the financial obligations of the third respondent had not been met not only erred but acted to the loss and prejudice of applicant for the relevant conditions of sale were i.a. for the express protection of the creditors of the judgment debtor and specifically in this instance, the applicant as the mortgagor. In these circumstances the first respondent could not and was not in the same circumstances of an attorney representing a client in a case. The Shabangu case therefore does not find application in this matter.

Whilst the applicant may not have been privy to the instructions to the first respondent by either the execution creditor or the second respondent, the first respondent was at all material times hereto fully aware of the extent that his interpretation would affect the applicant. It was fully aware of the deficit that would result between the judgment the applicant had and the amount that would be paid to the applicant according to the first respondent's construction of clause 5.2. The first respondent fully appreciated the loss the applicant stood to suffer. According to the quotation from the Biakanja decision quoted above from the Pretorius case (supra) the first respondent was clearly under a duty of care. Whatever the relationship between the applicant and the second respondent may be the first respondent was clearly

under a duty to protect the applicant - it matters not whether that duty is *ex contractus* or *ex delictio*.

Mr. Van der Merwe described the first respondent's refusal to either call on the third respondent to pay the outstanding levies, taxes and rates or to cause the second respondent to do so from the third respondent as "arrogance". This criticism appears to have merit. The first respondent was invited to produce its authority for the view it held in the letter dated 16 October 2002, quoted fully above. The application herein was served on the first respondent on 12 July 2004. The first applicant's answering affidavit was served and filed on 25 August 2004. The first respondent had ample opportunity to reflect upon and analyse the relevant conditions of sale for almost two years. The first respondent was not prepared to abide by the decision of the court but went on full steam ahead in contesting the correct interpretation of the relevant conditions. I have little doubt that had the first respondent adopted a sensible approach the matter would have been resolved quickly and inexpensively between the parties. I have no reason to doubt the second respondent's averments that the third respondent is willing and ready to pay what he owes on the transaction. The protracted delay in brining closure on the dispute lies squarely at the door of the first respondent.

Mr. Green submitted that even if I were to reach the above conclusion it would be inappropriate for me to grant an order for

costs. He opined the view that that would be a matter that would be properly and adequately aired at a trial based on professional negligence. That cannot be. I am in as good a position as any court to determine that the first respondent is the sole cause of the institution of this application, its passage through this court over two years culminating in a sudden and unexplained abandonment of the stance it so steadfastly adhered to. It is not necessary, in my view, to canvass the issue of costs further than I have done above. Even though the first respondent may not have been given express instructions to recover any funds from the third respondent its conduct has been so mischievous that even though no order has been made against it, it was the sole cause of the litigation and is liable for costs.

Mr. Van der Merwe submitted that the first respondent should be ordered to pay the costs consequent upon the employment of two counsel. I am not satisfied that the issues in this matter were that lengthy, complicated or intricate to justify the use of two counsel. Accordingly the following order is made:

The first respondent is ordered to pay the applicant's costs as well as the second respondent's costs.

G. WEBSTER

JUDGE OF THE HIGH COURT

Date of hearing	08/04/2005
Counsel for the Applicant	Adv. J.L. Van der Merwe (SC)
	Adv. D.B. du Preez
Instructing Attorneys	Rooth & Wessels Inc
Counsel for the 1st Respondent	Adv. *I.P.* Green
Instructing Attorneys	Savage Jooste & Adams Inc
Counsel for the 2nd Respondent	Adv. J.A. Van der Westhuizen
Instructing Attorneys	Weavind & Weavind