IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 19/1250

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

08/08/19
DATE

SIGNATURE

In the matter between:

HOWDEN AFRICA (PROPRIETARY) LIMITED Applicant

and

THE LEGAL PRACTITIONERS FIDELITY FUND BOARD Respondent

J U D G M E N T

MILTZ AJ:

Introduction

1. The applicant is HOWDEN AFRICA (PROPRIETARY) LIMITED. The respondent is THE LEGAL PRACTITIONERS FIDELITY FUND BOARD.

2. The applicant seeks a money judgment against the respondent for payment of R7.5 million and ancillary relief. The claim includes the costs of the applicant incurred in an action under case number 39278/2017. In that action the applicant claimed and obtained summary judgment for R7.5 million and ancillary relief against Hooyberg Attorneys. In the action the applicant claimed money that was stolen by Clement Jos Hooyberg (*"Hooyberg"*) who was a practitioner at the time of the alleged theft of the funds. Hooyberg practised as a partner in the firm Hooyberg Attorneys.

3. From the date of commencement of the Legal Practice Act 28 of 2014 (*"the Legal Practice Act"*) on 1 November 2018:

    3.1. the Attorneys Fidelity Fund Board of Control which was capable of suing and being sued in its own name in terms of Section 27(3) of the Attorneys Act 53 of 1979 (*"the former Attorneys Fidelity Fund Board of Control"*), continued in existence under

the name of the Legal Practitioners Fidelity Fund, managed and administered by the respondent in terms of Section 61(1) of the Legal Practice Act;

3.2. the former Attorneys Fidelity Fund Board of Control ceased to exist and all assets, rights, liabilities and obligations which on 1 November 2018 vested in the former Attorneys Fidelity Fund Board of Control, vested in the respondent.

4. The applicant seeks judgment in respect of the alleged liability of the respondent to the applicant for the liability of the former Attorneys Fidelity Fund Board of Control to the applicant in terms of the provisions of Sections 26(a), 45(1)(a) and 47(2) of the Attorneys Act on the grounds that:

4.1. a theft of monies was committed;

4.2. by a practising practitioner Hooyberg;

4.3. of money totalling R7.5 million allegedly entrusted by the applicant to Hooyberg.[1]

[1] The applicable provisions of s 26(a) of the Act reads as follows:
'Subject to the provisions of this Act, the fund shall be applied for the purpose of reimbursing persons who may suffer pecuniary loss as a result of....
(a) Theft committed by a practising practitioner . . . of any money or other property entrusted by or on behalf of such persons to him... in the course of his practice . . .'

5. It is common cause that the applicant complied with the statutory requirements that procedurally entitle the applicant to make such a claim including the obtaining of a judgment against Hooyberg.

6. The crucial issue in the application is whether the facts of the matter are such as to distinguish the claim of the applicant in the present application from those in *The Attorneys Fidelity Fund Board of Control v Mettle Property Finance (Proprietary) Limited*[2] in which payment of bridging finance by a factoring company to an attorney simply to discharge an indebtedness to a mortgagor or seller was held not to constitute an entrustment.

7. It is also necessary to consider whether if the applicant's payments to Hooyberg Attorneys constituted entrustment whether the applicant suffered a loss.[3]

The facts

8. On approximately 30 October 2015 the applicant's representative met with Hooyberg in Johannesburg where it was agreed between the applicant and Hooyberg that Hooyberg would draft two separate loan agreements. These were an enterprise development loan agreement and a supplier development loan agreement.

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2 2012 (3) SA 611 (SCA).

3 *Industrial and Commercial Factors (Proprietary) Limited v Attorneys Fidelity Fund Board of Control* 1997 (1) SA 136 (A).

9. The proposed enterprise development agreement was to be entered into between the applicant, Hooyberg Attorneys and Buhle Bethu Waya Cages (Proprietary) Limited (*"BBWC"*).

10. The proposed supplier development agreement was to be entered into between the applicant, Hooyberg Attorneys, Sindawonye Services (Proprietary) Limited (*"SS"*) and Themba Njalo Camden (Proprietary) Limited (*"TNC"*).

11. On 30 October 2015 it was discussed and agreed between the applicant and Hooyberg that:

11.1. monies would be entrusted by the applicant to Hooyberg Attorneys for the benefit of BBWC, SS and TNC;

11.2. Hooyberg Attorneys would hold in their trust account monies deposited into the trust account, would administer the monies in the trust account, disburse the monies to BBWC, SS and TNC and would charge a monthly administration fee of R3 000 excluding VAT from the interest accruing on the monies in the trust; and

11.3. Hooyberg Attorneys would draft the supplier development loan agreement and the enterprise development loan agreement.

12. On 17 December 2015 the applicant, Hooyberg Attorneys and TNC concluded a written supplier development loan agreement.

13. On the same day the applicant, Hooyberg Attorneys and BBWC concluded a written enterprise development loan agreement.

14. The written supplier and enterprise development loan agreements were concluded on identical terms (*"the loan agreements"*) save that the capital amount loaned in terms of the supplier development loan agreement to TNC was R5 million whereas the amount loaned by the applicant to BBWC in terms of the enterprise development loan agreement was R2.5 million.

15. These amounts (*"the capital amounts"*) would be paid by the applicant to the respective borrowers by payment into an account described as *"the Holding Account"* which would be administered by Hooyberg Attorneys as the account administrator for the benefit of TNC and BBWC.

16. Hooyberg Attorneys as the account administrator would administer the Holding Account and would be entitled to a fee of R3 000 per month for administering the holding account which fee would be payable by the applicant in terms of the loan agreements.

17. The latter term does not conform with the oral agreement of 30 October 2015 in that whereas the loan agreements recorded that the applicant as the lender would be liable for the administration fee, the parties had envisaged previously that the R3 000 would be charged to the interest that accrued on the monies in the trust.

18. As will appear more fully below such interest would be for the benefit of the borrowers TNC and BBWC and not the applicant as lender so that the provisions of the loan agreements to the contrary suggest a departure from the initial intention of the parties in relation to who would be responsible for the fee.

19. In terms of the loan agreements Hooyberg Attorneys on written request from TNC and BBWC respectively would withdraw from the capital amount held in the Holding Account and make payment to TNC or BBWC into their respective accounts subject to either of them providing Hooyberg with a valid tax invoice or implementation agreement containing details that were in conformance with the purpose of the loan agreements as defined and provided the withdrawal amount did not exceed the amounts set out in the relevant provisions of the loan agreements.

20. The loan agreements provided that the portion of the capital amount in the Holding Account not yet advanced would bear interest at the prime

rate less 3.62% calculated daily on the basis of a 365 day year and compounded in arrears at the end of each interest period of a month.

21. A strange feature of the loan agreements is that all interest accrued on the portion of the capital amount remaining in the Holding Account would be for the benefit of TNC / BBWC and would be paid by Hooyberg Attorneys from the Holding Account to TNC / BBWC on a monthly basis. The only amount liable to be repaid to the applicant as lender in terms of the loan agreements would be the capital amount and nothing else. Also strange is that according to the affidavits the agreements were negotiated by Hooyberg and that representatives of TNC and BBWC only appeared on the scene at the signature stage.

22. These strange features of the negotiation of the loan agreements and their terms suggest that the applicant may have been set up by Hooyberg to enable him to extract the capital and steal it. It is quite conceivable that the borrowers did not intend to borrow the capital advances at all.

23. Nevertheless such an inquiry need not concern me as the claim is made on the basis of Section 26(a) of the Attorneys Act and the parties have agreed that the monies paid to Hooyberg Attorneys by the applicant were stolen. The claim is not resisted on the basis that they were not.

24. On 21 December 2015 the applicant paid amounts of R5 million and R2.5 million into the trust account of Hooyberg Attorneys. From time to time thereafter Hooyberg Attorneys accounted for the interest accrued and for the agreed monthly administration fees due to Hooyberg Attorneys in terms of the loan agreements.

25. On 11 November 2016 the applicant learnt that Hooyberg had been struck off the roll of attorneys and that his trust account had been placed under the curatorship of the Law Society of the Northern Provinces.

26. The applicant submitted a claim against the former Attorneys Fidelity Fund Board of Control. By 8 December 2016 the applicant had learnt that neither TNC nor BBWC had received any monies from Hooyberg Attorneys. There were insufficient funds in the trust account and it emerged that the monies paid by the applicant to Hooyberg Attorneys had been stolen by Hooyberg. The claim was made timeously.

27. On 18 January 2017 the former Attorneys Fidelity Fund Board of Control required the applicant to exhaust all available legal remedies against Hooyberg and the applicant did so.

28. The former Attorneys Fidelity Fund Board of Control also informed the applicant that if it established a valid claim against the former Attorneys Fidelity Fund Board of Control as envisaged by Section 26 of the

Attorneys Act then it would reimburse the applicant for its costs incurred in the action against Hooyberg being the taxed party and party costs and attorneys' fees on a scale between R700 and R1 000 per hour.

Discussion

29. On 28 June 2018 the former Attorneys Fidelity Fund Board of Control rejected the applicant's claim. It did so on the basis that the claim *"does not comply with Section 26(a) of the Attorneys Act"*.

30. The reasons relied on for rejecting the claim were that with reference to the loan agreements the monies paid to Hooyberg Attorneys were not to be held in trust on anyone's behalf and were paid over in discharge of the obligation of the applicant to pay the sums loaned to the borrowers TNC and BBCW.

31. In summary the respondent's contention was that the monies paid into the trust account of Hooyberg Attorneys were not entrusted to Hooyberg Attorneys on behalf of the applicant because the monies were paid in discharge of the obligations of the applicant as lender in accordance with the provisions of the loan agreements.

32. Therefore once the monies had been paid to Hooyberg Attorneys they were held in trust for and on behalf of the borrowers TNC and BBWC respectively. They were not held for and on behalf of the applicant.

33. The respondent also contends that the applicant did not suffer a pecuniary loss because when the monies were stolen by Hooyberg they were held for and on behalf of TNC and BBWC respectively and not for and on behalf of the applicant. The loss suffered was not the applicant's loss.

34. The applicant argues that its intention in making payment into the trust account of Hooyberg Attorneys was not merely to discharge the applicant's obligations in terms of the loan agreements to advance the capital amount to TNC and BBWC respectively. The applicant contends that its intention was to entrust the monies paid to Hooyberg to be dealt with by Hooyberg for the benefit of not only TNC and BBWC but also of the applicant. The applicant contends that Hooyberg Attorneys' trust account was not merely a conduit.

35. In support of its argument the applicant relies on the circumstances leading up to the conclusion of the agreements and the terms of the agreements themselves especially those that obliged Hooyberg Attorneys after the monies drawn down from the holding account would be repaid by the borrowers to pay the monies to the applicant on the repayment date and to administer the monies paid to Hooyberg Attorneys pursuant to the agreements.

36. The applicant's argument on this issue is that because the funds in the Holding Account were never depleted by the borrowers the borrowers did not suffer a loss but the applicant did because it could not get its money back.

37. A critical aspect of the applicant's submission in this regard is that because neither BBWC nor TNC ever received the monies because they never complied with the draw down provisions of the agreements, they were never obliged to top up the holding account and the repayment date never arrived. This is addressed more fully below.

38. It was common cause amongst the parties that the payment by the applicant of monies into the trust account of Hooyberg Attorneys constituted an entrustment[4]. The difference between the parties is whether the entrustment was for the borrowers BBWC and TNC or for the borrowers and also the applicant as the lender.

39. Further issues that arise are whether entrustment only for the benefit of the borrowers impacts on the applicant's claim and whether even if the entrustment was for the borrowers and the lender the theft of the money resulted in a pecuniary loss for the applicant.

40. These issues will be considered more fully below with reference to the applicable authorities.

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[4] I do not agree that there was entrustment for reasons addressed below but nothing turns on this.

41. The respondent places considerable store on the provisions of the loan agreements and particularly on the provisions of three clauses being:

41.1. clause 6.2.1 in which the borrowers acknowledged and agreed that payment of the capital amounts by the lender into the Holding Account would fully discharge the lender's obligation to advance the capital amount to the borrowers;

41.2. clause 6.2.2. in which the borrowers acknowledged that they had received the full benefit of the capital amounts; and

41.3. clause 14 in which the borrower indemnified the lender from and against any properly evidenced expense, loss, damage or liability which an indemnified party may incur amongst other things as a consequence of entering into the loan agreements with the borrowers or performing any act thereunder.

42. The respondent argues that these provisions of the respective agreements evidence the intention of the parties which was that after the payment of the capital amounts into the trust account of Hooyberg Attorneys the applicant as the lender had no further obligations in relation to the capital amounts and that in the ordinary course it would become entitled to repayment of the capital amounts after the borrowers had topped up same and the repayment date had arrived.

Therefore only the borrowers undertook any risk in respect of the monies in trust until the repayment date would arise. This was reinforced by the provisions of the indemnity they provided to the applicant in clause 14 of the loan agreements.

43. The parties obviously never considered that a situation might arise in which the borrowers did not draw down on the capital amount in the Holding Account. Although alluded to briefly in argument neither party presented its case on the basis of what the parties to the loan agreements intended if such a situation arose. The consequences for the applicant when seeking repayment of the capital amount in such circumstances were not considered or discussed.

44. Presumably that intention will be traversed if the applicant claims payment from the borrowers. But it does not follow that because there was not and apparently could not be a draw down of the monies by the borrowers that therefore the repayment date would never arrive[5].

45. The provisions of the agreements relied on by the respondent are consistent with the *"conduit"* approach adopted in the Supreme Court of Appeal in respect of the entrustment of monies[6].

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5 The benevolent provisions of the loan agreements suggest that the parties' intention even might have been that the capital amount would never be repaid.

6 *Attorneys Fidelity Fund Board of Control v Mettle Property Finance (Pty) Limited (supra).*

46. The fact that the applicant would pay the administration fee does not alter the position. The administration fee has no bearing on or relationship with the discharge by the applicant of its obligations to pay the capital sum. As already observed the loan agreements were strange in several respects but in the context of the apparent intention of the parties that capital would be made available to the borrowers at no cost and that they would enjoy the fruits thereof in the form of interest, it is not surprising that the applicant as lender was prepared to spare them the cost of the administration of the monies by accepting liability for the fees.

47. In *Industrial and Commercial Factors v Attorneys Fidelity Fund*[7], Grosskopf JA said the following:

> *"In view of the aforegoing I am satisfied that the appellant has shown a sufficient element of entrustment to bring it within the ambit of s 26(a).*
>
> *The respondent supported the following further finding of the Court a quo to the effect that the money was not entrusted "by or on behalf of" the appellant:*
>
> > *"The phrase "by or on behalf of" as used in s 26(a) of the Act envisages*
> >
> > *(a) a person who entrusts money with a practitioner for himself; or*
> >
> > *(b) a person who entrusts money with a practitioner on behalf of another. SVV Construction (Pty) Ltd v Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund 1993 (2) SA 557 (C) at 590 B - D.*

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[7] Supra at 144I/J to 145G.

> *In the example postulated in (a) above it is the person who entrusts the money for himself who will in appropriate circumstances be entitled to reimbursement; In example (b) it will be the person on whose behalf the money was entrusted who might be entitled to reimbursement."*

According to this construction of s 26(a) it is only the person on whose behalf *the money was entrusted who would be entitled to reimbursement, provided the other requirements of the section have been met. This view seems to stem from the conception that in order to entrust money it has to be impressed with a trust* for the benefit of *a particular person, and that only that person could possibly suffer pecuniary loss and be entitled to claim reimbursement. Such a construction seems to lose sight of the fact that in circumstances such as the present it is only the person* by whom *the money is entrusted, who will suffer pecuniary loss. Although the money in the present case was intended by the appellant to be entrusted on behalf of Branken, the facts show that she has suffered no loss at all and that she accordingly has no right to claim reimbursement.*

In my judgment S26(a) makes provision for reimbursement to either

(1) *the person* by whom *the money has been entrusted; or*

(2) *the person* on whose behalf *the money has been entrusted;*

provided such person has suffered pecuniary loss.".

48. There is nothing contentious in the portion of the judgment referred to and quoted above. It says no more than that a person on whose behalf money has been entrusted even if not paid by that person can claim the loss under Section 26(a) provided that the person concerned has suffered a pecuniary loss.

49. Even the person who pays money thereby entrusting it on his own behalf can claim under Section 26(a) but only if he has suffered a loss. The common elements of the situations envisaged in (a) and (b) in

relation to the meaning of the words *"by or on behalf of"* in section 26(a) of the Attorneys Act are that regardless of who paid or entrusted the money, a person on whose behalf the money was entrusted will have a claim provided he has suffered pecuniary loss.

50. When Hooyberg stole the money it was being administered for the borrowers who through the theft were deprived of the benefits of the loan which prevented them from drawing down on the capital amount.

51. The *sine qua non* for the loss suffered by the borrowers and their inability to access the capital amount was the theft of the funds by Hooyberg. Any loss suffered by the applicant will be a consequence of the borrowers' failure to pay back the capital amount which the applicant advanced to them in terms of the loan agreements.

52. As an aside I have reservations as to the question of entrustment especially in light of the *dictum* in the judgment in the *Attorneys Fidelity Fund Board of Control v Mettle Property Finance (Proprietary) Limited*[8] in which the court per Van Heerden JA referred to the words of Grosskopf JA in *Industrial and Commercial Factors (supra)* that:

> *"Where money is paid into the trust account of an attorney it does not follow that such money is in fact trust money ... if money is simply handed over to an attorney by a debtor who thereby wishes to discharge a debt, and the attorney has a mandate to receive it on behalf of the creditor, it may be difficult to establish an entrustment."*.

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[8] Para [16] at 615H-I/J

53. In referring to the portion of the aforesaid judgment the court considered that the payment of bridging finance to the conveyancer simply constituted the discharge of the debt to a mortgagor or seller. Immediately upon its payment the debt was discharged and there was no entrustment.

54. The words of the clauses in the agreements referred to and relied on by the respondent envisage a similar situation in this case. They expressly recognise that the payments fully discharged the applicant's obligation to advance the capital amount to the borrowers and that the borrowers acknowledged that they had received the full benefit of the capital amounts upon such payment. Nevertheless the respondent contended for entrustment not for the applicant but for the borrowers so this does not require further exploration.

Conclusion and Order

55. In the circumstances:

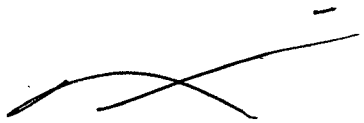
55.1. I do not consider there was an entrustment of monies in the circumstances of the payment by the applicant of the capital amounts to the Holding Account under the administration of Hooyberg Attorneys;

55.2. Even if I am wrong the entrustment was for the benefit of the borrowers and not the applicant lender; and

55.3. the lender did not suffer a pecuniary loss through the theft of the capital amount by Hooyberg although it might not recover same from the borrowers.

56. I find therefore that the respondent validly repudiated the applicant's claim as not complying with or falling within the ambit of section 26 of the Attorneys Act.

57. Therefore the application is dismissed with costs.



I. MILTZ
ACTING JUDGE OF THE HIGH COURT, JOHANNESBURG

Counsel for the Applicant:	L. Hollander
Instructed by:	Schindlers Attorneys
Counsel for the Respondent:	G. Oliver
Instructed by:	Attorneys Brendan Muller Inc.
Date of hearing:	30 July 2019
Date of Judgment:	08 August 2019