REPUBLIEK VAN SUID-AFRIKA

REPUBLIC OF SOUTH AFRICA

IN HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENGDIVISION: PRETORIA)

23/7/14

Case No: 51429/12

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

23/07/2014
DATE

SIGNATURE

8 JULY 2014

BEFORE THE HONOURABLE JUDGE RABIE

In the matter between:

V.C.DU PLESSIS	**Plaintiff**
and	
THE ATTORNEYS FIDELITY FUND	**First Defendant**
J.S. KOKA N.O.	**Second Defendant**

JUDGMENT

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1. The plaintiff instituted action against the defendants in an attempt to recover the loss he had suffered as a result of the theft of trust money by his erstwhile attorney, Mr P. Viljoen (hereinafter "the attorney"). The attorney

has since been struck from the roll of attorneys and has also been finally sequestrated and his firm liquidated. The second defendant is the liquidator in the insolvent estate of the attorney. Since the respective insolvent estates of the attorney and his firm yielded no meaningful dividend, the plaintiff's claims were directed at the first defendant. Only the first defendant opposed the action. For ease of reference, I shall further refer to the first defendant merely as "the defendant".

2. The defendant is the Attorneys Fidelity Fund, established in terms of section 8 of the Attorneys' Admission Amendment and Legal Practitioners' Fidelity Fund Act 19 of 1941 read with section 25 of the Attorneys Act, Act 53 of 1979 (hereinafter "the Act"). The claim against the defendant arises from the provisions of section 26(a) of the Act which reads as follows:

"26 Purpose of Fund
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, his candidate attorney or his employee, of any money or other property entrusted by or on behalf of such persons to him or to his candidate attorney or employee in the course of his practice or while acting as executor or administrator in the estate of a deceased person or as a trustee in an insolvent estate or in any other similar capacity;"

3. It is at this point relevant to note that section 47 of the Act makes provision for the limitation of the aforesaid liability of the defendant in certain circumstances. For present purposes the limitation mentioned in section 47(1)(a)(g) of the Act is relevant. This section reads as follows:

"47 Limitation of liability of fund

(1) The fund shall not be liable in respect of any loss suffered -

...

(g) by any person as a result of theft of money which a practitioner has been instructed to invest on behalf of such person after the date of commencement of this paragraph."

4. The meaning of the phrase "instructed to invest" is explained in section 47(5) and for present purposes the provisions of section 47(5)(b) is relevant. This subsection reads as follows:

"(5) For the purposes of subsection (1)(g), a practitioner must be regarded as not having been instructed to invest money if he or she is instructed by a person-

(a) ...

(b) to lend money on behalf of that person to give effect to a loan agreement where that person, being the lender-

(i) specifies the borrower to whom the money is to be lent;

(ii) has not been introduced to the borrower by the practitioner for the purpose of making that loan; and

(iii) is advised by the practitioner in respect of the terms and conditions of the loan agreement;"

5. From the aforesaid it is clear that, broadly speaking, the defendant is liable to reimburse persons who have suffered pecuniary loss as a result of, *inter alia*, theft committed by an attorney of money entrusted to that attorney. The defendant is, however, not liable for a loss suffered by a person as a result of the theft of money by an attorney if that attorney had been instructed to invest such money on behalf that person. If the attorney had, however, been instructed to lend money on behalf of a person to give effect to a loan agreement where that person specified who the borrower is, and if that person had not been introduced to the borrower by the attorney for the purpose of making that loan, and if that person had been advised by the

attorney in respect of the terms and conditions of the loan agreement, then that instruction does not amount to an instruction to invest as envisaged in section 47(1)(g). The defendant would thus be liable for a loss suffered as a result of the theft of such money by the attorney.

6. The plaintiff instituted three claims. The first claim came about as follows: On 4 December 2008 the plaintiff and the attorney entered into an agreement in terms of which the plaintiff instructed the attorney, *inter alia*, as follows: The attorney had to prepare a written loan agreement between the plaintiff and Broad Brush Investments 15 (Pty) Ltd (hereinafter "the company") in terms of which the plaintiff lent and advanced an amount of R2,5 million to the company against the registration of a mortgage bond over property of the company as security for the repayment of the aforesaid amount. The attorney would receive the aforesaid amount from the plaintiff in trust and effect payment thereof to the company, without any deduction, against registration of the mortgage bond. The attorney also had to register the mortgage bond. The attorney also had to collect and receive all payments made by the company in repayment of the loan in terms of the loan agreement in trust and to effect payment thereof, without any deduction, to the plaintiff.

7. The attorney prepared the written loan agreement and on 5 December 2008 the plaintiff deposited the amount of R2,5 million into the trust account of the attorney. In breach of their agreement the attorney failed to register the mortgage bond as security for the loan and, without cause or instruction from the plaintiff, paid only the amount of R1,25 million to the company. The balance of the amount paid to him, namely R1,25 million, was unlawfully

retained by the attorney for his own purposes. This amount, which the plaintiff says had been stolen from him by the attorney, is the subject of the first claim.

8. The matter did not end there. As a result of the aforesaid short payment, the company and the plaintiff became embroiled in a dispute about the money. At all relevant times the attorney succeeded in hiding the fact that he had stolen half of what the plaintiff had paid to him and had only paid the other half over to the company. An interdict was launched against the plaintiff to prevent him from dealing with certain shares ceded to him as security for the loan. In response, the plaintiff filed a counter application for the repayment of the amount of R1,25 million which had been paid to the company. The litigation was ultimately settled with the company undertaking to pay the R1,25 million it had received, plus interest thereon, back to the plaintiff. The total amount was R1 330 725,00.

9. The attorney, however, failed to pay the amount of R1 330 725,00 over to the plaintiff and the plaintiff consequently claimed this amount from the defendant in the present proceedings as his second claim. It should be mentioned that at some point the attorney stated that the amount of R 675 305,00 was paid by him in respect of the aforesaid litigation and in respect of the fees of counsel who appeared in the litigation. It was the evidence of the plaintiff that if that were the case, the litigation fees and the fees of Counsel were exorbitant, but that he had been advised that he should not proceed with this part of the second claim against the defendant in the present proceedings but should take it up in another forum. Consequently the second claim of the

plaintiff in the present proceedings was reduced by subtracting the aforesaid amount from the amount of R1 330 725,00, leaving a total of R 655 420,00 which then constituted his reduced claim against the defendant. It was the plaintiff's case that the attorney had stolen this amount from him.

10. The third claim arose from a similar agreement between the plaintiff and the attorney but this time it related to a loan agreement between the plaintiff and a certain Mr P.J. Visagie in terms of which the plaintiff agreed to lend and advance an amount of R2,8 million to Mr Visagie against registration of a mortgage bond over his property as security for the repayment of the loan. The attorney had to prepare a guarantee to the value of R2,4 million representing the purchase price in respect of the sale of a certain member's interest to Mr Visagie which guarantee would be payable against registration of the mortgage bond in favour of the seller of the member's interest. The balance of the amount of the loan namely R400 000,00 was paid to the attorney to hold in trust for payment to Mr Visagie only on registration of the mortgage bond.

11. The plaintiff paid the amount of R2,4 million to the attorney in the form of a cheque which the attorney had to cash and hold in trust for payment against the guarantee. The amount of R400 000,00 was paid into the trust account of the attorney. In breach of the agreement the attorney, however, failed to register the mortgage bond and to issue the guarantee and originally also failed to pay the aforesaid sum of R400 000,00 to Mr Visagie. It appears that at some point the attorney paid the amount of R250 000,00 to Mr Visagie but unlawfully retained the amount of R150 000,00 for himself. This

constituted theft on the part of the attorney and the amount of R150 000,00 is claimed from the defendant as his third claim.

12. In its plea the defendant merely baldly denied most of the factual allegations made in the plaintiff's particulars of claim and made no positive statements in opposition thereto. The only defence put forward by the defendant in respect of all three claims was a denial of liability on a very specific basis. In respect of all three claims the relevant averments are contained in paragraph 4 of the plea. This paragraph reads as follows:

> "4. Save to admit that certain payments were made to Piet Viljoen Attorneys, the first defendant denies liability on the following basis:
>
> 4.1 that payment made was not made to Piet Viljoen as an instruction to invest the money in terms of section 78(2A) but as instruction to lend money to the broad brush company on behalf of the plaintiff, and to give effect to a loan agreement, wherein the plaintiff specified the so-called Broad Brush Investment 15 (Pty) Ltd (the Company) as the borrower in terms of section 47(5)(b),
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> 4.2 In the alternative the first defendant denies liability on the basis that the plaintiff has not being introduced to the Broad Brush Investment 15 (Pty) Ltd (the Company) by Piet Viljoen Attorneys (practitioner) for purposes of the loan and
>
> 4.3 The plaintiff was advised by Piet Viljoen in respect of the terms and conditions of the loan agreement, to which the plaintiff is a party to it." (sic)

13. On a proper analysis of the defendant's plea, it appears that the defendant did not make any averment which could result in protecting the defendant against the claims of the plaintiff. In fact, the defendant pleaded facts which clearly disentitles it from relying on the protection offered by section 47(1)(g). The facts pleaded by the defendant are those mentioned in section 47(5)(b) which have the result that it cannot be said that the plaintiff had instructed the

attorney to invest the money on his behalf as envisaged by section 47(1)(g). As such, the defendant had confirmed in its plea that the plaintiff is entitled to be compensated for the loss he suffered as a result of the theft of the money by the attorney, despite the formal denial of liability elsewhere in the plea.

14. In order to succeed with his claims against the defendant, the plaintiff had to prove that (a) he has suffered a pecuniary loss; (b) by reason of theft committed by the attorney; (c) of money entrusted by him or on his behalf to the attorney; and (d) in the course of the practice of the attorney. As indicated before, the defendant baldly denied the factual averments of the plaintiff in his particulars of claim but could put up no facts contradicting those pleaded by the plaintiff. In these circumstances and since the defendant failed to plead facts which would allow it to escape liability under section 26 of the Act, the plaintiff only had to prove the facts mentioned in (a) to (d) above.

15. Since it was clear on the pleadings that the defendant would probably not be able to ward off the claims of the plaintiff, it was suggested on behalf of the plaintiff prior to the trial, that the trial should proceed on the basis of a stated case. The defendant declined this invitation.

16. During the opening address of Advocate Amm, on behalf of the plaintiff, he analysed the pleadings and the facts which are admitted or not denied therein and also referred to the relevant documentation in the trial bundle and the admission by the parties during the pre-trial conference that the documents in the trial bundle are what they purport to be. After the opening

address Advocate Nowezenitz, on behalf of the defendant, was constrained to concede that the payments were all made into the trust account of the attorney and that the misappropriation of the money by the attorney constituted theft as envisaged in section 26 of the Act. Adv Nowezenitz was for obvious reasons not able to support the defendant's denial of liability based on the provisions of section 47 of the Act. The only possible question which could conceivably arise, was whether the money was paid to the attorney subject to a trust.

17. Before the evidence of the plaintiff was presented, Advocate Nowezenitz indicated that the defendant wished to make a settlement proposal but since his client was in the Cape province, he could not get proper instructions. The matter consequently stood down and eventually only commenced at approximately lunchtime on the next day. At that point Advocate Nowezenitz informed the court that his mandate had been terminated by the defendant. The defendant's Attorney, Mr Sebola, then appeared for the defendant and moved for a postponement. The application for a postponement was dismissed in a separate judgement by this court. At that point Mr Sebola withdrew as a representative for the defendant.

18. The plaintiff testified on his own behalf. It is not necessary to refer to all the evidence of the plaintiff. He explained his relationship with the attorney and the separate transactions mentioned in the particulars of claim which caused him to make the respective payments to the attorney to be held in trust. He explained how the attorney had stolen the money paid to him by the plaintiff and by Broad Brush Investments 15 (Pty) Ltd and how the attorney

succeeded in keeping the true facts hidden. The evidence of the plaintiff confirmed all the relevant facts contained in the particulars of claim which are necessary to allow him to succeed with his claim against the defendant and this includes the fact that the money paid to the attorney was in fact entrusted to the attorney by the plaintiff and on his behalf as envisaged in section 26 of the Act.

19. The plaintiff also proved that he had exhausted all available legal remedies against the attorney and that he had complied with the requirements set by sections 48 and 49 of the Act.

20. As far as costs are concerned it was submitted on behalf of the plaintiff that this court should make a special order as to costs against the defendant. It was submitted, *inter alia*, that the defendant's defence was entirely *mala fide*. The plaintiff's initial claim was repudiated on 4 October 2011 on the basis that it "fails the test proposed by section 47(5)(b) of the Attorneys Act 53 of 1979." The denial of liability on this ground also found its way to the defendant's plea which was dated 25 October 2012. However, on the facts of the case, which were confirmed by the defendant in its plea, the liability of the defendant was never limited by the provisions of section 47(5)(b) of the Act but was in fact confirmed. Yet the defendant's proceeded to trial. The defendant clearly did not give the necessary attention to the case. So, for example, the defendant failed to make proper discovery. The defendant also knew that it would not be able to rebut the factual evidence of the plaintiff as it was indicated on defendant's behalf that no witness would testify on behalf of the defendant. *Inter alia* for this reason it was suggested on behalf of the plaintiff during the

pre-trial conference attended by Mr Sebola on behalf of the defendant, that the stated case should be presented to the court. This request was not acceded to.

21. The matter proceeded to trial and at a very late stage, a few days before the trial, Advocate Nowezenits was briefed to represent the defendant. It was submitted that this in itself is an indication that the defendant never took the matter seriously and never genuinely intended to defend the matter and to participate in the litigation. It was submitted that it became clear that when Advocate Nowezenits applied his mind to the matter, he realised that the defendant had no case to present. The matter stood down from approximately 15:00 on the first day until approximately 13:00 on the second day to allow the defendant to present the plaintiff with a settlement offer. This did not happen and, instead, Advocate Nowezenits was debriefed.

22. It was submitted that the defendant has for the past four years prevented the plaintiff from being compensated in circumstances where the defendant never had a *bona fide* defence. It was submitted that right from the start, when the plaintiff's claim was repudiated during October 2011, the defendant did not have a sustainable defence. The defendant realised this or at least should have realised it if it had applied its mind to the case, yet it proceeded to trial regardless. Furthermore, when, during the opening address, it could not have been clearer that the defendant did not have a sustainable defence, the defendant's response was to dismiss its advocate - a practitioner with vast experience.

23. It was further submitted that by its *laissez faire* attitude and cavalier approach to litigation in this case in particular, the defendant had shown its disrespect to the Court and the administration of justice.

24. I agree with the submissions on behalf of the plaintiff. The plaintiff had a statutory right to institute a claim against the defendant. The defendant and its attorneys were obliged to give their full attention to the case right from the start. They were obliged to establish the true facts and to study the applicable legal principles and then to apply the law to the facts. Instead, however, they either deliberately ignored the provisions of the Act or they failed to take the trouble to study its provisions and to apply them to the facts of this case. Had they done so, this matter would have been concluded years ago and would not have proceeded to trial. The costs that were incurred in the process, were totally wasted. The defendant is funded by public money and should take particular care that such funds are not wasted. The defendant and its attorneys approached the action in a very lackadaisical manner. Apart from what I have already mentioned this is evident from the poor state of the pleadings. The plea is replete with grammar-, spelling-, typographical- and other mistakes. Even the defendant's own name and that of the attorney were incorrectly pleaded.

25. In all the circumstances, especially those relating to the wasting of costs and the manner in which the defence and the trial were conducted, I am of the view that this court should express its dissatisfaction by making an appropriate order of costs. I can furthermore find no reason why the plaintiff should be out of pocket.

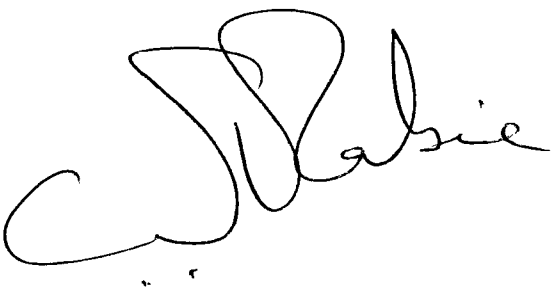
26. In the result the following order is made:

1. The first defendant is ordered to make payment to the plaintiff as follows:

In respect of Claim 1	R1 250 000,00
In respect of Claim 2	R 655 420,00
In respect of Claim 3	R 150 000,00
Total:	R2 055 420,00

2. The first defendant is ordered to pay interest on the above amounts to the plaintiff at the rate of 15.5% *per annum* from 29 July 2009 to date of payment.

3. The first defendant is ordered to pay the plaintiff's costs of the action on the scale as between attorney and client.



C.P. RABIE

JUDGE OF THE HIGH COURT

8 JULY 2014