IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Number: 37604/2015

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

24/10/2019

E.M. KUBUSHI DATE

In the matter between:

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|---|---|
| GERT JOHAN DANIEL JONCK | FIRST PLAINTIFF |
| KOEDOESDRAAI INVESTMENT (PTY) LTD | SECOND PLAINTIFF |
| CENTURIA 419 (PTY) LTD | THIRD PLAINTIFF |
| CENTURIA 420 (PTY) LTD | FOURTH PLAINTIFF |
| CENTURIA 421 (PTY) LTD | FIFTH PLAINTIFF |
| and | |
| THE ATTORNEYS FIDELITY FUND BOARD OF CONTROL | DEFENDANT |

JUDGMENT

KUBUSHI J

INTRODUCTION

[1] The plaintiffs have instituted two claims in these proceedings. Each of the claims is premised on the provisions of section 26 *(a)* of the Attorneys Act ("the Act").[1]

[2] In terms of section 26 *(a)* of the Act, any person who may suffer pecuniary loss as a result of theft committed by a practising attorney of any money or other property entrusted by or on behalf of such person to her/him in the course of her/his practice, may claim such loss from the Attorneys Fidelity Fund Board of Control ("the Fund"). These proceedings involve such money, that is, money deposited into the trust account of a practising attorney and subsequently defalcated.

[3] The allegations in the plaintiffs' particulars of claim, which are denied by the Fund, are that the plaintiffs suffered pecuniary loss as a result of the defalcation of the money they entrusted to Mr Peet Viljoen ("Mr Viljoen") an attorney practising under the name and style Peet Viljoen Ingelyf.

[4] Section 78 (1) of the Act provides that any practising attorney shall open and keep a separate trust banking account at a banking institution in the Republic and shall deposit therein the money held or received by her/him on account of any person.

[5] If the money paid into an attorney's trust account is stolen and/or misappropriated, any person, who suffers pecuniary loss as a result of such theft

[1] Act 53 of 1979.

and/or misappropriation, may be reimbursed by the Fund,[2] hence, in these proceedings the plaintiffs' claims are against the Fund.

[6] However, it has been held by our courts that the mere fact of payment of money into an attorney's trust account is not sufficient to show that such money is trust money. That is, the mere fact that money was paid into an attorney's trust account does not mean that that money is trust money or has been entrusted to the attorney.[3]

[7] In order to qualify for reimbursement in terms of s 26 *(a)* of the Act, the claimant must prove certain jurisdictional factors *to wit*, that she/he suffered pecuniary loss, the money was stolen by the attorney, the attorney concerned was a practising attorney, the money was entrusted to the attorney, and the money was entrusted in the course of the practice of the attorney.

[8] In this matter, it is common cause that at the time that the money claimed in claims 1 and 2 was deposited into the trust account of Peet Viljoen Ingelyf Mr Viljoen was a practising attorney and that such money was paid in the course of practice of Mr Viljoen. In claim 1 all the jurisdictional factors, including the misappropriation of the money by Mr Viljoen, are admitted. What is in dispute is the issue of 'entrustment'. In claim 2 the issue of 'entrustment' and the misappropriation of the money by Mr Viljoen are in dispute.

[9] Thus, in order for the plaintiffs to be reimbursed by the Fund they must prove, on a balance of probabilities, that when the money claimed was deposited in the

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[2] Section 26 (a) of the Act which provides that the Fund shall be applied for purposes of reimbursing persons who may suffer pecuniary loss as a result of theft committed by a practising attorney, his candidate attorney or his employee, of any money or other property entrusted by or on behalf of such persons to him or his candidate attorney or employee in the course of his practice.

[3] Industrial and Commercial Factors (Pty) Ltd v Attorneys Fidelity Fund Board of Control 1997 (1) SA 136 (A) at 143I–J.

trust account of Peet Viljoen Ingelyf, it was entrusted to that firm of attorneys; and in claim 2, they must further prove that Mr Viljoen stole the money which was entrusted to him. The main issue for determination, therefore, in claim 1 and claim 2, is whether the money paid by the plaintiffs into the trust account of Peet Viljoen Ingelyf was entrusted to the said firm of attorneys as envisaged in section 26 *(a)* of the Act. In essence the crux turns on the interpretation of the word 'entrusted' as contained in section 26 *(a)* of the Act against the backdrop of the facts in this case. A further issue for determination, in claim 2, is whether the money paid into the trust account was stolen or misappropriated by Mr Viljoen.

[10] The word 'entrusted' or 'entrustment' has been a subject of many a court case and I shall deal fully therewith later in the judgment.

[11] The evidence in this matter consists of the uncontroverted oral evidence of the first plaintiff, Mr Gert Johan Daniel Jonck ("Mr Jonck") and a trial bundle of documents referred to as Plaintiffs' Bundle of Discovered Documents marked exhibit "A" and exhibit "B". The exhibits were comprised of bank statements of the trust account of Peet Viljoen Ingelyf. Further documents were added to both exhibits by both parties during the hearing of evidence. A copy of the sequestration order of Mr Viljoen's estate was *per* agreement by the parties handed in court to form part of exhibit "A". This put to bed the denial by the Fund, in its plea, that it had no knowledge that Mr Viljoen's estate was sequestrated.

[12] As to the status of the documents in the bundle the parties agreed at the pre-trial conference held on 20 April 2017, that the documents are what they purport to be and that no formal proof of any document will be required unless either party gives notice to the other that a particular document is in dispute and that formal proof

thereof will be required. Copies of the originals were permitted and proof of the content of any document in the bundle was to remain in issue unless agreed to the contrary by the parties. The parties further agreed that as far as the correspondence in the bundle is concerned, it was admitted that the correspondence was sent and received as *per* the documents themselves.

[13] It was further agreed at the pre-trial conference that there would be no issues that were to be decided separately in terms of Uniform Rule 33 (4).

THE EVIDENCE

[14] As earlier stated, Mr Jonck is the only witness who testified. His testimony is in support of the plaintiffs' case and he testified as the duly authorised representative of the second, third, fourth and fifth plaintiffs. He was personally involved in the deliberations of all the transactions involved in this case.

[15] At the time of giving evidence, Mr Jonck was a businessman and held a Bachelor of Commerce (B.Comm) degree from the University of South Africa (UNISA). He worked as a share trader before taking up his current business interests.

[16] The plaintiffs' claims involve two property transactions which, I will in this judgment refer to as the "Bryanston Properties Deal" and the "Edenburg Properties Deal".

[17] The Bryanston Properties Deal comprised of the following three properties:

17.1 The remaining extent of portion 1 of Erf 58 of Bryanston Township, Registration Division IR, Gauteng;

17.2 Portion 2 of erf 58 Bryanston Township Registration Division IR, Gauteng; and

17.3 The remaining extent of Erf 58 of Bryanston Township, Registration Division IR, Gauteng;

[18] The Edenburg Properties Deal consisted of the following three properties:

18.1 Portion 1 of Erf 76 Edenburg;

18.2 Portion 3 of Erf 76 Edenburg; and

18.2 Erf 110 Edenburg.

[19] During February 2010, Mr Jonck was informed by one Herman Marx ("Mr Marx"), a person known to him through his father, that a certain firm known as Eildough Investments (Pty) Ltd ("Eildough") had acquired access to purchase certain properties from the Johannesburg Metropolitan Municipality ("the Municipality"), namely, the Bryanston Properties and the Edenburg Properties. The said Eildough did not have the necessary funds to purchase the properties and required assistance with the cash. Mr Jonck had the necessary cash flow and was interested. The arrangement was that Mr Jonck would buy the properties from the Municipality and later sell them back to Eildough for a profit of R500 000 (Five Hundred Thousand Rand).

[20] Eildough was at that time a client of Mr Viljoen, who as earlier stated, was an attorney practising under the name and style Peet Viljoen Ingelyf. Peet Viljoen Ingelyf was the firm of attorneys that would be appointed as conveyancers for the transfer and registration of the properties in both deals.

[21] The Bryanston Properties Deal was the first transaction that was concluded. An agreement was reached that the Bryanston Properties would be bought through a company known as Koedoesdraai (Pty) Ltd (the second plaintiff) ("Koedoesdraai"). Out of this transaction, Mr Viljoen was to be paid a commission of R500 000 (Five Hundred Thousand Rand).

[22] On 5 February 2010, a Deed of Sale was duly concluded between Eildough and Koedoesdraai for the sale of the Bryanston Properties for an amount of R3 000 000 (Three Million Rand). Mr Marx represented Koedoesdraai in the transaction. It was a salient term of the agreement that Peet Viljoen Ingelyf would attend to the transfer of the properties into the name of Koedoesdraai. It was further agreed that on the date of signature of the Deed of Sale Koedoesdraai would provide acceptable guarantees to Eildough for the full purchase price of R3 000 000 (Three Million Rand). Mr Jonck as a result thereto, caused a bank guarantee in the amount of R3 000 000 (Three Million Rand) to be issued to Peet Viljoen Ingelyf, payable against registration of transfer of the Bryanston Properties in the name of Koedoesdraai.

[23] The payment of the commission of R500 000 (Five Hundred Thousand Rand) to Mr Viljoen was not mentioned in the Deed of Sale. But, on 8 February 2010, Mr Marx still representing Koedoesdraai, executed an Addendum to the Deed of Sale in which it was stipulated that Koedoesdraai agreed to pay the amount of R500 000 (Five Hundred Thousand Rand) into the trust account of Peet Viljoen Ingelyf on date of signature of the Deed of Sale. In terms of the said Addendum, Mr Viljoen was entitled to the said amount of R500 000 (Five Hundred Thousand Rand) on the date of registration of the Bryanston Properties into the name of Koedoesdraai. The sole signatory of the Addendum was Mr Marx.

[24] Mr Jonck caused a further payment of R958 245, 20 (Nine Hundred and Fifty Eight Thousand Two Hundred and Forty Five Rand and Twenty Cents) to be paid into the trust account of Peet Viljoen Ingelyf to secure the value added tax ("VAT") payable on the purchase price, Mr Viljoen's commission and the legal costs and transfer duties pertaining to the Bryanston Properties. Two credit transfers in the amounts of R460 000 (Four Hundred and Sixty Thousand Rand) and R40 000 (Forty Thousand Rand) amounting to R500 000 (Five Hundred Thousand Rand) for the commission, were paid respectively, on 10 February 2010 and 11 February 2010. Such credits are reflected in the bank statements of Peet Viljoen Ingelyf contained in exhibit "B" of the record. The said bank statements also indicate that two payments of R460 000 (Four Hundred and Sixty Thousand Rand) and R40 000 (Forty Thousand Rand) were respectively, paid over from the trust account of Peet Viljoen Ingelyf to the account of one G Viljoen. A further amount of R458 245, 20 (Four Hundred and Fifty Eight Thousand Two Hundred and Forty Five Rand and Twenty Cents) being for the VAT, legal costs and transfer duties, was caused to be paid by Mr Jonck into the trust account of Peet Viljoen Ingelyf on 16 February 2010.

[25] On 15 February 2010, before the properties could be transferred into the name of the second plaintiff, the amount of R3 000 000 (Three Million Rand) for the guarantees was prematurely called up by Mr Viljoen and the amount was duly paid into the trust account of Peet Viljoen Ingelyf on the same day.

[26] On 19 February 2010, the Bryanston Properties were duly transferred from the Municipality to Eildough and from Eildough to Koedoesdraai, respectively. This was proved by the Deeds of Transfer contained in exhibit "A" of the record.

[27] Whilst the Bryanston Properties Deal was still in progress, Mr Marx approached Mr Jonck with a proposal for the purchase of another set of properties, the Edenburg Properties. The said properties were also allegedly acquired by Eildough from the Municipality and were available for sale.

[28] The agreement in respect of these new properties was that they would be acquired from Eildough by three separate property companies (the third, fourth and fifth plaintiffs) controlled by Mr Jonck and his father, Mr Salmon Johannes Jonck. In this instance, the agreement was that Mr Viljoen would be paid a commission of R2 000 000 (Two Million Rand).

[29] Consequently, on 23 February 2010, three Deeds of Sale were concluded between Eildough and the third, fourth and fifth plaintiffs respectively for the sale of the three properties. The first two properties were purchased at R1 000 000 (One Million Rand) each and the third at R2 000 000 (Two Million Rand). Each of the Deeds of Sale specifically stated that Peet Viljoen Ingelyf would act as conveyancers in respect of the transfer of each property into the name of the three plaintiffs, respectively. On 24 February 2010, Mr Jonck consented in writing to issue guarantees in respect of the purchase price of each of the properties.

[30] On 4 March 2010, Mr Jonck signed three written instructions for Peet Viljoen Ingelyf to invest R2 000 000 (Two Million Rand) of the R2, 500 000 (Two Million Five Hundred Thousand Rand) that he had undertaken to pay into the trust account, in an interest bearing trust investment account provided for in section 78 (2A) of the Act. The said amount was to be retained in the investment account pending transfer of the Edenburg Properties into the respective names of the third, fourth and fifth plaintiffs.

[31] The trust bank statement of Peet Viljoen Ingelyf shows that on 8 March 2010 an amount of R2, 500 000 (Two Million Five Hundred Thousand Rand) was received, which Mr Jonck testified was, as agreed between the parties in an Addendum to the main agreement, part payment of the purchase price of each of the three Edenburg Properties, which amounted to R666 666, 67 (Six Hundred and Sixty Six Thousand Six Hundred and Sixty Six Rand and Sixty Seven Cents) for each property. The R500 000 (Five Hundred Thousand Rand) remaining was to secure payment of the commission, the expenses and costs of transfer of the respective properties.

[32] Mr Viljoen arranged for the investment of the R2 000 000 (Two Million Rand) into a section 78 (2A) trust account as instructed by Mr Jonck. Mr Jonck was given proof of the investment. The record shows that on 15 March 2010, Mr Viljoen withdrew the amount from that account contrary to the instructions by the third, fourth or fifth plaintiffs and/or Mr Jonck. It was later learnt from email correspondence between the respective personal assistants of Mr Viljoen and Mr Marx that the two (Mr Viljoen and Mr Marx) had colluded to deceive Mr Jonck into believing that the R2, 000 000 (Two Million Rand) was still held in the section 78 (2A) investment, whilst in fact it was not so.

[33] Evidence show that on 8 March 2010, an amount of R850 000 (Eight Hundred and Fifty Thousand Rand) of the R2, 500 000 (Two Million Five Hundred Thousand Rand) was transferred to an account controlled by Mr Marx, apparently as part payment of a R1 000 000 (One Million Rand) commission payable by Mr Viljoen to Mr Marx of which Mr Jonck was unaware. The said amount of R850 000 (Eight Hundred and Fifty Thousand Rand) was, for unknown reasons, paid back into the trust account of Peet Viljoen Ingelyf on 15 March 2010. The remaining amount of the investment, R1, 150 000 (One Million One Hundred and Fifty Thousand Rand), was

transferred into the trust account of Peet Viljoen Ingelyf on 15 March 2010. These two amounts were further transferred into the personal account of Mr Viljoen, that is, the R1 150 000 (One Million One Hundred and Fifty Thousand Rand) on 15 March 2010 and the R850 000 (Eight Hundred and Fifty Thousand Rand) on 17 March 2010.

[34] On the same day, 15 March 2010, Mr Jonck received an email from Peet Viljoen Ingelyf which informed him that Eildough has instructed them to cancel the sale of the Edenburg Properties. Mr Jonck was also informed that Mr Viljoen's commission in respect of this transaction together with part payment on VAT and conveyancing costs have already been transferred from the section 78 (2A) investments and paid into Peet Viljoen Ingelyf trust account.

[35] In a further letter dated 25 March 2010 from Peet Viljoen Ingelyf, Mr Jonck was informed that the initial agreement was that Mr Viljoen would be paid R2 000 000 (Two Million Rand) in commission, and that R2, 500 000 (Two Million Five Hundred and Thousand Rand) was to be paid into the trust account of Peet Viljoen Ingelyf and that a further amount of R4 000 000 (Four Million Rand) was to be provided in guarantees. In both these letters, Mr Viljoen alleged that the purchasers (the third, fourth and fifth plaintiffs) had breached the terms of the respective Deeds of Sale and their agreement with him by failing to issue the required guarantees, hence the cancellation of the Deeds of Sale and his entitlement to the commission.

[36] The Edenburg Properties were, as such, never transferred into the names of the third, fourth and fifth plaintiffs. It further transpired that in fact Eildough was never the owner of the Edenburg Properties but the properties were legally owned by the

Municipality. The transfer of the properties was interdicted by the court which declared the Municipality the lawful owner. On 20 April 2010, when the court order was granted, a mere R357 285, 52 (Three Hundred and Fifty Seven Thousand Two Hundred and Eighty Five Rand and Fifty Two Cents) remained in the trust account of Peet Viljoen Ingelyf which the court ordered not to be paid out without the written consent of the second to fourth plaintiffs. However, the plaintiffs never received any of those funds nor did they receive the R2 500 000 (Two Million Five Hundred Thousand Rand), all this money is alleged to be stolen by Mr Viljoen.

[37] Meanwhile, whilst the Edinburg Properties Deal was in progress, Mr Jonck became aware that that Eildough had fraudulently presented that it was entitled to transfer the Bryanston Properties whilst in fact it was not the case. On 11 March 2010, the Municipality applied for an urgent order reversing the transfers of the Bryanston Properties. By then, the whole amount of R3 958 245, 20 (Three Million Nine Hundred and Fifty Eight Thousand Two Hundred and Forty Five Rand and Twenty Cents) secured by the plaintiffs had been depleted from Peet Viljoen Ingelyf's trust account.

[38] Mr Jonck confirmed that during all these transaction he never personally met with Mr Peet Viljoen nor any employee of the firm Peet Viljoen Ingelyf as the transactions were handled by Mr Marx. He, however, on one or two occasions spoke with Mr Viljoen on the telephone.

[39] It is common cause that eventually Mr Viljoen was struck from the roll of attorneys and his estate sequestrated. Through a letter of demand by Mr Jonck the Fund paid him the amount of R3 000 000 (Three Million Rand) in respect of the purchase price of the Bryanston Properties but the Fund refused to reimburse him

for the other money. The plaintiffs allege in the particulars of claim that they have suffered pecuniary loss in the amount of R958 245, 20 (Nine Hundred and Fifty Eight Thousand Two Hundred and Forty Five Rand and Twenty Cents) in respect of the Bryanston Properties Deal and R2 500 000 (Two Million Five Hundred Thousand Rand) in respect of the Endenburg Properties Deal, hence these claims.

SPECIAL PLEA

[40] The crux in these proceedings turns on the entrustment issue, but there is a preliminary matter of the special plea, or should I say the admissions made by the Fund in its plea over, which requires to be adjudicated first.

[41] In addition to pleading over on the merits, the Fund raised a special plea in respect of a time bar or a plea raising a time bar to the plaintiffs' claims in terms of section 49 (2) of the Act. The special plea was said to be interwoven with the merits of the matter and by agreement between the parties, was not to be dealt with before evidence was tendered.

[42] When the plaintiffs served the summons on the Fund paragraphs 15 and 26 of the particulars of claim read as follows:

> *"15. On 22 May 2014 Defendant notified the Plaintiffs' attorney of record of its rejection of the First, alternatively Second Plaintiff's claim . . ."*

and

> *"26. Following an enquiry in terms of regulation 8 (bis) of the Fidelity Fund Regulations published under GN 1581 in Government Gazette 2960 of 7 November 1941, the Defendant notified the Plaintiffs' attorney of record on 22 May 2014 of its rejection of the First, alternatively Second Plaintiff's claim pertaining to the Edenburg transactions."*

Both these averments were admitted by the Fund in its plea.

[43] Subsequently, on 14 August 2015, the plaintiffs filed a notice to amend their particulars of claim, by amending paragraphs 15 and 26 to read as follows:

> *"15 On 29 May 2014 Defendant notified the Plaintiffs' attorney of record of its rejection of the First, alternatively Second Plaintiff's claim . . "*

and

> *"26 Following an enquiry in terms of regulation 8 (bis) of the Fidelity Fund Regulations published under GN 1581 in Government Gazette 2960 of 7 November 1941, the Defendant notified the Plaintiffs' attorney of record on 29 May 2014 of its rejection of the First, alternatively Second Plaintiff's claim pertaining to the Edenburg transactions."*

The Fund did not object to these amendments and they were duly effected.

[44] Subsequent to the aforesaid amendments the Fund did not amend its plea to paragraphs 15 and 26. Consequently, the contention by the plaintiffs is that the amended dates of 29 May 2014 in paragraphs 15 and 26 of the amended particulars of claim stand admitted by the Fund.

[45] On 10 June 2016, after due notice to which no objection was made, the Fund filed a special plea, which was later amended, that the plaintiffs' claims were time-barred in terms of section 49 (2) of the Act.

[46] The special plea read in part as follows:

> *"3. Defendant –*
>
> *3.1 on 22 May 2014 gave formal written notice of the rejection of Plaintiffs' Claims 1 and 2, as set out in the Particulars of Claim; and*

*3.2 on 29 May 2019, at the request of Plaintiffs' attorneys, Mr Jerome Lopser, Defendant's Claims Executive, confirmed that rejection by email."*

[47] On 14 August 2015, the plaintiffs replicated to the Fund's special plea. In the replication the plaintiffs deny the averments in the special plea as follows:

*"3.1 On or about 23 May 2014, Defendant sent the letters attached as annexures "A" and "B" to Plaintiffs' attorney of record.*

*3.1.1 According to annexure "A" dated 22 May 2014 Defendant admitted Plaintiffs' claim 2 in the amount of R3 000 000.00.*

*3.1.2 According to annexure "B" dated 23 May 2014 Defendant rejected Plaintiffs' claim 2 in the amount of R3 450 000.00*

*3.2 Annexures "A" and "B" referred to supra are contradictory in that both refer to the same claim and do not specify with sufficient particularity which of Plaintiffs' claim and/or parts thereof were rejected by Defendant and which of Plaintiffs' claims and/or part thereof were admitted by Defendant.*

*3.3 On 29 May 2014 and at 9:44 Plaintiffs' attorney requested clarification of the discrepancy referred to in 3.1 and 3.2 supra by way of email attached as annexure "C". The email inter alia states:*

*"The problem is that both your letters refer to the same claim and it is not clear for me to distinguish which claim/clause of the claim the Fund admitted to."*

*3.4 On 29 May 2014 and at 10:03 Defendant notified Plaintiff by way of email attached as annexure "D" that the following claims were rejected by Defendant:*

*3.4.1 the VAT amount of R450 000, and the R500 000 that Viljoen took as commission (as set out in claim 1 of Plaintiffs' particulars of claim);*

*3.4.2 the claim of R2.5 million in respect of the Edenburg Properties (as set out in claim 2 of Plaintiffs' particulars of claim)*

*3.5 Notification of the rejection of claims as referred to in section 49 (2) of the Act accordingly took place on 29 May 2014* "

[48] The plaintiffs' submission is that the effect of the Fund's special plea is that it sets up facts which are inconsistent with the general admissions that inadvertently came about as a result of the Fund not amending its plea, following the amendment of the plaintiffs' particulars of claim.

[49] The contention being that there is no merit in the special plea because the Fund admitted that the rejection was recorded on 29 May 2014. The admission of the rejection of the claims on 29 May 2014, according to the plaintiffs, strikes out the time bar plea. The time bar plea cannot coexist with this admission - they are totally incompatible.

[50] To the contrary, the Fund's proposition is that the inadvertent admissions to the amended paragraphs 15 and 26 of the plaintiffs' particulars of claim cannot stand against the specific averments contained in the Fund's special plea and, as a result, those paragraphs in the amended particulars of claim must be deemed to have been denied.

[51] The answer to both arguments is not as simple as it appears to be. The plaintiffs' claims are based solely on the provisions of the Act and the remedies provided therein. The plaintiffs have, therefore, to meet the strict terms of the Act in order to found their claims. Section 49 (2) of the Act is, therefore, a statutory time-bar which cannot simply be ignored.

[52] The provisions of section 49 (2) of the Act prescribe a general period of limitation of twelve (12) months for the institution of legal proceedings against the Fund. The subsection clearly embodies, what is generally referred to as an expiry or limitation period. A time bar is typically an additional clause that bars or invalidates a claim made outside the prescribed timeframe.

[53] It is said that the purpose of provisions of this nature is to prevent inordinate delays in litigation which are damaging to the interests of justice. Delays in litigation are said to

> *"... protract the disputes over the rights and obligation sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. They thus serve a purpose to which no exception in principle can cogently be taken."*[4]

[54] Unlike other Acts, for instance the Prescription Act[5] which has conditions that delay the commencement of the running of prescription, non-compliance with the limitation prescribed in the subsection is not condonable.[6] The sanction for a failure to comply with the subsection is that the claimant is barred from instituting proceedings.[7] If non-compliance is invoked and proved, it prevents the claimant from enforcing her/his claim, thereby effectively exempting the Fund from performance.

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[4] See Mohlomi v Minister of Defence 1997(1) SA 124 (CC) at 129G – 130B.
[5] Act 68 of 1969.
[6] See Mohlomi v Minister of Defence supra at 133D and H – J.
[7] See Hartman v Minister van Polisie 1983 (2) SA 489 (A) and Minister of Safety and Security v Molutsi and Another.

[55] In light of what is set out above, it is clear that that the admissions made by the Fund may be of no moment. Whether the dates on which the Fund rejected the claims were admitted or not would not count if it can be found that the plaintiffs instituted their claims after the expiry of the limitation period stipulated in section 49 (2) of the Act. The admission of the date which falls outside the limitation period will not validate the claim, for once the limitation period has expired it exempts the Fund from performance. With the expiration of the limitation period, the claim is in effect, and in substance, extinguished.[6]

[56] The problem in this instance is that there are two dates on which each party avers that the rejection was made. According to the Fund, the claims were rejected on 23 May 2014 and in order for the plaintiffs to have complied with the requirements of the subsection, their claims ought to have been instituted on 22 May 2015. The claims having been instituted on 25 May 2015 and served on the Fund on 28 May 2015 means, according to the Fund, that they were instituted after the limitation period of twelve (12) months.

[57] The argument by the plaintiffs is different. Plaintiffs' proposition is that the date on which the Fund rejected the claim is 29 May 2014 hence the claims which were instituted on 25 May 2015 and served on the Fund on 28 May 2015 fall within the period of twelve (12) months stipulated in the subsection.

[58] The issue herein is whether the plaintiff's claims were rejected on 23 May 2014 or on 29 May 2014. A finding that the claims were rejected on 23 May 2014 would be dispositive of the whole matter as the claims would have been extinguished at the time of prosecution.

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[6] See Transnet Ltd v Ngcezula 1995(3) SA 538(A) at 550D.

[59] It is not in dispute that in terms of section 49 (2) of the Act, the plaintiffs claim should have been instituted within one (1) calendar year of the date of notification directed to the plaintiffs or their legal representative by the Fund, rejecting the claims to which the action relates.

[60] It is, also, common cause that a letter of rejection of the plaintiffs' claim was indeed sent to the plaintiffs on the 23 May 2014. On the 29 May 2014, the plaintiffs' attorneys requested clarification of a discrepancy they picked up in the said rejection letter. The clarification was provided by the Fund's attorneys on the same day by email.

[61] The plaintiffs are on that basis contending that since the clarification was received on 29 May 2014 that is the day that should be regarded as the rejection date whereas the Fund's submission is that the rejection date should remain the 23 May 2014.

[62] The clarification, according to the plaintiffs, was required because the letter of rejection did not specify which of the two claims was rejected and which was admitted. The amounts admitted and/or rejected were stated in the rejection letter in globular amounts without any specificity. This was cleared in the email of 29 May 2014.

[63] In response to the plaintiffs' argument that the rejection letter required clarification, the Fund argues that it ought to have been apparent to anyone receiving the letters that the amount that was to be paid out could not have related to the second claim which was for only R2 500 000 (Two Million Five Hundred Thousand Rand), an amount less than the R3 000 000 (Three Million Rand) paid.

[64] I am inclined to agree with the Plaintiffs on this score. The letters sent to the plaintiffs' attorneys admitting the R3 000 000 (Three Million Rand) claim and the rejection letter were not clear and required clarification. Even though it can be taken that it would be apparent, as suggested by the Fund, that the amount of R3 000 000 (Three Million Rand) admitted was for claim 1, but on the reading of the letters it is not so apparent.

[65] The plaintiffs' demand to the Fund was for two claims. Claim 1 was for payment of the amount of R3 958 245, 20 (Three Million Nine Hundred and Fifty Eight Thousand Two Hundred and Forty Five Rand Twenty Cents), claim 2 was for R2 500 000 (Two Million Five Hundred Thousand Rand). In the letter dated 22 May 2014, with a heading referring to claim 2, the Fund admitted the claim of R3 000 000 (Three Million Rand); and in a letter dated 23 May 2014 with a heading referring to claim 2, the Fund rejected an amount of R3 450 000 (Three Million Four Hundred and Fifty Thousand Rand). Both letters referred to claim 2 and the amounts in both letters are in the region of R3 000 000 (Three Million Rand) which is an amount that is in actual fact claimed in claim 1. From the reading of the two letters it appears as if the Fund is admitting and at the same time rejecting claim 1 because it is only in claim 1 that the plaintiffs claimed an amount of R3 958 245, 20 (Three Million Nine Hundred and Fifty Eight Thousand Two Hundred and Forty Five Rand Twenty Cents). Thus, it was necessary that a clarification be obtained. It is only when the clarification was received that it was apparent that the amount of R3 000 000 (Three Million Rand) admitted was for claim 1 and the amount of R3 450 000 (Three Million Four Hundred and Fifty Thousand Rand) rejected was in fact partly for claim 1 and partly for claim 2. I would in such circumstances hold that the date of rejection of the

claim is in fact 29 May 2014 when the amounts admitted and rejected were clarified to the plaintiffs' attorneys.

[66] On the basis of my aforementioned conclusions the special plea must fail.

THE MERITS

The Issue

[67] As earlier stated, the crux turns on the interpretation of the word 'entrustment' as contained in section 26 *(a)* of the Act against the backdrop of the facts in this case. Whether the money was entrusted or paid in to discharge a debt, is the question.

The Law

[68] The concept of 'entrustment' comprises two elements, namely, (a) to place in the possession of something, and (b) to subject to a trust. The latter element connoted that the person entrusted is bound to deal with the property or money concerned for the benefit of others.[9]

[69] As earlier stated in this judgment, the word 'entrusted' has been a subject of many cases in our courts. As a result, the parties' counsel referred me to a number of judgments wherein this word was discussed and defined. For the sake of brevity, I shall in this judgment refer only to two of those cases.

[70] In *British Kaffrarian Savings Bank Society v Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund Board of Control* [10] the court held that:

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[9] See Provident Fund for the Clothing Industry v Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund 1981 (3) SA 539 (W) at 543E-F.
[10] 1978 (3) SA 242 (E) at 250A-B.

*"The mere fact that money was paid into Walsh's [the attorney] trust account does not mean that it was either trust money or money paid to him in the course of his practice as an attorney (Paramount Supplies (Merchandise (Pty) Ltd v Attorneys Notaries and Conveyancers Fidelity Guarantee Fund Board of Control 1957 (4) SA 618 (T) at 625F-G) and the fact that the plaintiff was tricked into paying the money into Walsh's trust fund does not mean that Walsh held the money in trust for the plaintiff. And this is surely what "entrusted" in s 26 is intended to mean – that, if an attorney holds money in trust for someone and he steals the money, the person for whom he held the money in trust is entitled to recover from the defendant."*

*That court held further as follows:*[11]

*"The effect of section 26 (1) of the Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund Act 19 of 1941 which makes provision for the "reimbursing persons who may suffer pecuniary loss by reason of theft committed . . . by a practising attorney, notary or conveyancer, or by his clerk or servant in the course of his practice as such or . . ." is that when an attorney steals money entrusted to him in the course of his practice, the "person who may suffer pecuniary loss" by reason of the theft is the person on whose behalf the money is held "in trust". The section refers to money entrusted "by or on behalf of such persons" to the attorney, ie by or on behalf of the person who suffers the loss. A person towards whom the attorney has a fiduciary relationship pays the money to an attorney on behalf of such a one. Money has then been entrusted to an attorney by or on behalf of his client, ie the person with whom he has a fiduciary relationship. This is the situation protected by the Act. There must be a relationship of this fiduciary nature between the attorney and the person who has suffered loss before the latter can claim to be compensated in terms of the section.*

*The words "by or on behalf of such persons" in section 26 (1) of Act 19 of 1941 must be interpreted as referring to money paid to an attorney by or on behalf of a person with whom he has an attorney and client relationship or a fiduciary relationship. The meaning of these*

[11] at 242F – H.

*words must not be extended to cover money paid to an attorney by a third party who thinks that the attorney is acting for a client."*[12]

[71] However, in *Industrial & Commercial Factors v Attorneys Fidelity Fund*[15] when the court overturned the decision of the court *a quo* which found that the appellant therein failed to establish that the money was entrusted by or on behalf of the appellant to the attorney, remarked as follows:

> *"According to the construction of s 26 (a) it is only the person on whose behalf the money entrusted who would be entitled to reimbursement, provided the other requirements of the section has 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. Although the money in the present case was intended by the appellant to be entrusted on behalf of Braken, the facts show that she has suffered no loss at all and that she accordingly has no right to claim reimbursement.*
>
> *In my judgment s 26 (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."*

CLAIM 1

[72] The initial plaintiffs' claim in this regard was for an amount of R3 958 245, 20 (Three Million Nine Hundred and Fifty Eight Thousand Two Hundred and Forty Five Rand Twenty Cents) which was designated for payment for

72.1 R3 000 000 (Three Million Rand) as payment for the purchase price for the Bryanston Properties;

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[12] At p250D.
[15] 1997 (1) SA 136 (SCA).

72.2 R420 000 (Four Hundred and Twenty Thousand Rand) as the VAT portion of the purchase price;

72.3 R500 000 (Five Hundred Thousand Rand) to be paid to Mr Viljoen as commission on the Bryanston Properties deal; and

72.4 R38 245, 20 (Thirty Eight Thousand Two Hundred and Forty Five Rand Twenty Cents) to be paid to Peet Viljoen Ingelyf in respect of fees for the transfer of the Bryanston Properties and the administration relating to the transfer of shares in the Koedoesdraai, and the appointment of the First Plaintiff as Director of Koedoesdraai.

[73] The amount of R3 000 000 (Three Million Rand) was paid by the Fund to the plaintiffs on demand. The amount claimed in the summons is R920 000 (Nine Hundred and Twenty Thousand Rand) in respect of the VAT and commission. The amount of R38 245, 20 (Thirty Eight Thousand Two Hundred and Forty Five Rand Twenty Cents) does not form the subject of this claim.

[74] It is not in dispute that Mr Viljoen stole the whole amount of R3 000 000 (Three Million Rand) together with the amount of R920 000 (Nine Hundred and Twenty Thousand Rand) claimed in the summons. What is at issue here is whether the amount claimed was entrusted to Peet Viljoen Ingelyf.

[75] The plaintiffs contend that by paying the amount of R3 000 000 (Three Million Rand) to the first plaintiff, the Fund admitted that the money was entrusted to Peet Viljoen Ingelyf and that by implication the amount of R920 000 (Nine Hundred and Twenty Thousand Rand) was also entrusted since it fell under the same auspices. A further argument is that the amount of R500 000 (Five Hundred Thousand Rand)

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which was for the commission of Mr Viljoen was entrusted to him for his own benefit. According to the plaintiffs the requirement of benefit to others does not necessarily mean benefit to third parties as long as it is for the benefit of others.

[77] To the contrary, the Fund's argument is that the money paid in Peet Viljoen Ingelyf's trust account was not entrusted because the person entrusted is bound to deal with the property or money concerned for the benefit of others. In this instance, the money according to the Fund was not paid in order for Mr Viljoen to deal with it for the benefit of others. For example, the amount of R500 000 (Five Hundred Thousand Rand) that Mr Viljoen recovered as commission for his part in facilitating the respective transactions was recovered by agreement between the parties. Accordingly, the amount was paid to Mr Viljoen in terms of agreements between Mr Viljoen and the plaintiffs and he was entitled to the money on it being paid. The amount was not part of the Deed of Sale but a separate transaction. Mr Viljoen breached the terms of the agreement and repayment should be in terms of the contract. Such money could never have been intended to be held by him in trust, so it was argued. The amount of R3 000 000 (Three Million Rand) was paid back by the Fund only because it was meant for the purchase price of the Bryanston Properties the transfer of which never ensued, so it was submitted.

[78] In support of its argument the Fund relied on the judgment in *The Attorneys Fidelity Fund Board of Control v Mettle Property Finance (Pty) Ltd*[16] where it was held that there was no entrustment by a bridging financier to an attorney and payment by the bridging financier to the attorney's trust account is intended to discharge the bridging financier's obligation to pay the loan amount to the borrower. It is the Fund's contention that in the present case similar considerations apply.

[16] 2011 ZASCA 133.

[79] I do not think that the considerations in the *Mettle Property* case find application in this matter. In *Mettle Property*, the money paid into the trust account of the attorney was paid by the bridging financier for payment to the attorney's client. The attorney was only a conduit.

[80] In the present case, the amount of R500 000 was paid as part of the purchase price of R3 000 000 (Three Million Rand) to the Peet Viljoen Ingelyf for the benefit of Mr Viljoen. *Per* the Addendum to the Deed of Sale, the commission was payable only on registration of the properties in the name of the second plaintiff. As the registration did not happen it cannot be said that Mr Viljoen suffered pecuniary loss. The loss was suffered by the first plaintiff alternatively the second plaintiff. The first plaintiff and in the alternative the second plaintiff is the person by whom the money was entrusted and is thus entitled to reimbursement.

[81] The amount of R420 000 (Four Hundred and Twenty Thousand Rand) was not dealt with in argument by the Fund. But it should be dealt with similar to the R500 000 (Five Hundred Thousand Rand). The amount was paid as part of the purchase price for payment to the South African Revenue Services, same was not paid. As a result, the first plaintiff and in the alternative the second plaintiff suffered pecuniary loss and should be reimbursed the said amount.

CLAIM 2

[82] The claim by the plaintiffs here is for the payment of the amount of R2 500 000 (Two Million Five Hundred Thousand Rand) which was deposited in the trust account of Peet Viljoen Ingelyf. The only available evidence is that Mr Jonck specifically instructed Mr Viljoen to invest the amount of R2 000 000 (Two Million Rand) in terms of section 78 (2A) of the Act. The evidence is also that the amount to

be so invested was part payment of the purchase price for each of the three properties amounting to R666 666, 67 (Six Hundred and Sixty Six Thousand Six Hundred and Sixty Six Rand Sixty Seven Cents) respectively. This amount was paid and invested in lieu of the guarantees that were required before the property could be transferred in the names of the third, fourth and fifth plaintiffs.

[83] The money, in my view, was to be dealt with for the benefit of the seller of the respective properties. The deal fell through, and as a result the first plaintiff alternatively, the third, fourth or fifth respondent suffered pecuniary loss and are entitled to payment of the amount of R2 000 000 (Two Million Rand).

[84] The amount of R500 000 (Five Hundred Thousand Rand) meant for the commission of Mr Viljoen should be dealt in the same way as the commission in claim 1.

[85] In both claims, it is evident from the testimony of Mr Jonck that, at all material times, Mr Viljoen represented Mr Jonck and/or the plaintiffs as clients when accepting payment of the money into Peet Viljoen Ingelyf's trust account. As a conveyancer, Mr Viljoen acted for both the seller and the purchasers. The evidence of Mr Jonck as supported by the Deeds of Sale and the Addenda thereto supports the contention that it was the obligation of Mr Viljoen to retain the money in his trust account and to deal with it on behalf of Mr Jonck and/or the plaintiffs as *per* the stipulations in the agreements. More particular the amount of R2 000 000 (Two Million Rand) in claim 2 which Mr Jonck specifically instructed Mr Viljoen to put in an investment vehicle in terms of section 78 (2A) of the Act.

[86] The contention by the Fund that the amount of R2 500 000 (Two Million Five Hundred Thousand Rand) was not stolen by Mr Viljoen has no substance. The

evidence on record, which is not contested, indicates that Mr Viljoen cashed in on the section 78 (2A) investment without the knowledge or consent of Mr Jonck and/or the third, fourth and fifth plaintiffs. When the investment was recalled, the transfer had not yet taken place and was never to take place because Eildough had no claim to the properties. This can never be anything but theft. If the amount of R2 000 000 (Two Million Rand) was meant for the commission of Mr Viljoen as the Fund wants to suggest, on what basis would Mr Jonck had instructed Mr Viljoen to invest it.

[87] Consequently, the plaintiffs have succeeded in their claims and are, therefore, entitled to be paid the amounts of R3 420 000 (Three Million Four Hundred and Twenty Thousand Rand) being, R920 000 (Nine Hundred and Twenty Thousand Rand) in respect of claim 1 and R2 500 000 (Two Million Five Hundred Thousand Rand) for claim 2.

AMENDMENT OF THE PARTICULARS OF CLAIM

[88] At the end of argument the plaintiffs' counsel applied for an amendment to the particulars of claim which was not opposed. The application was to amend the amount of R450 000 (Four Hundred and Fifty Thousand Rand) in claim 1 of the particulars of claim, wherever it appears, to R420 000 (Four Hundred and Twenty Thousand Rand), and to amend the amount of R950 000 (Nine Hundred and Fifty Thousand Rand) wherever it appears in the particulars of claim to R920 000 (Nine Hundred and Twenty Thousand Rand). As there was no opposition, I granted the amendment.

THE ORDER

[89] Consequently, I make the following order:

1. CLAIM 1

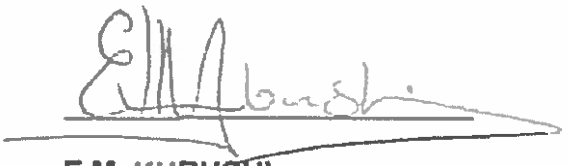
1.1 The first and second plaintiffs' claim succeeds with costs.

1.2 The defendant is ordered to pay to the first and second plaintiffs an amount of R920 000 (Nine Hundred and Twenty Thousand Rand).

2. CLAIM 2

2.1 The first, third, fourth and fifth plaintiffs' claim succeeds with costs.

2.2 The defendant is ordered to pay to the first, third, fourth and fifth plaintiffs an amount of R2 500 000 (Two Million Five Hundred Thousand Rand).



**E.M. KUBUSHI**
**JUDGE OF THE HIGH COURT**

**Appearance:**

| | |
|---|---|
| **Applicant's Counsel** | : Adv L W De Koning, SC |
| **Applicant's Attorneys** | : Renqe Kunene Inc. |
| **Respondents' Counsel** | : Adv G. Olivier |
| **Respondents' Attorneys** | : Brendan Muller Inc |
| **Date of hearing** | : 27 November 2018 and |
| | : 19 June 2019 |
| **Date of judgment** | : 24 October 2019 |