Record.

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO. 8205/01

In the matter between:

MICHAEL YEATS N.O.	First Plaintiff
WENDY ELIZABETH YEATS N.O.	Second Plaintiff
NIGEL RAYMOND TATHAM N.O.	Third Plaintiff

and

THE ATTORNEYS FIDELITY FUND BOARD OF CONTROL Defendant

JUDGMENT : DELIVERED 6th MAY 2003

VAN HEERDEN J:

Introduction

In this matter, the three plaintiffs, in their capacities as the trustees of the Michael Yeats Family Trust ('*the Trust*'), seek reimbursement from the Attorneys Fidelity Fund ('*the Fund*'), of money allegedly entrusted by the Trust to a practising attorney and stolen by such attorney when he absconded from South Africa. The claim is brought against the defendant, the Attorneys Fidelity Fund Board of Control, in terms of the Attorneys Act 53 of 1979 ('*the Act*'), under section 27 of which Act the Fund vests in and is administered by the defendant.

The plaintiffs' case is that money was entrusted to the said attorney in the course of his practice as such, within the meaning of section 26(a) (read together with the definition of '*practice*' in section 1) of the Act. Section 26(a) renders the Fund liable to reimburse persons who suffer pecuniary loss as a result of theft by a practising attorney of such money. The plaintiffs allege further that the money paid by the Trust to the attorney in question was to be invested on behalf of the Trust in an account contemplated by section 78(2A) of the Act, on a temporary or interim basis pending legal advice on investment in foreign companies and the implication of exchange control legislation on such investments.

The defendant denies that the money was **entrusted** to the attorney within the meaning of section 26(a) of the Act, but also contends that, even if it is found that there **was** an entrustment within the meaning of that section, the plaintiffs' claim should still fail for the following reasons:

(i) The money was not entrusted to the attorney **in the course of his practice as an attorney.**

(ii) Alternatively, if it **was** so entrusted, the attorney was instructed to invest the money on behalf of the Trust in an account contemplated in section 78(2A) of the Act; this instruction to invest fell within the ambit of section 47(1)(g) of the Act and, accordingly, the Fund is not liable in respect of any loss suffered by the plaintiff as a result of the theft of such money. In this regard, the defendant denies that the attorney in question was instructed to pay the money into a

section 78(2A) account on a temporary or interim basis only pending the conclusion or implementation of a matter or transaction, as envisaged in section 47(5)(a) of the Act.

Factual Background

The following facts are common cause:

- As at 20 March 2000, one Spyridon Akritidis ('*Akritidis*') was a duly admitted attorney of the High Court and was in possession of a then current fidelity fund certificate, as envisaged by section 41 of the Act and issued in terms of section 42 thereof. At that time, Akritidis practised as a sole practitioner under his own name in Sandown, Gauteng.
- On 20 March 2000, an amount of R1 million was transferred from the trust account of Tatham Wilkes & Company, attorneys of Pietermaritzburg, to a trust account in the name of Akritidis at the Sandton Branch of Nedbank Limited. This transfer took place by means of the deposit of a cheque for the said amount at the Pietermaritzburg Branch of Nedbank Limited.
- Akritidis subsequently absconded from the Republic of South Africa and his estate has been finally sequestrated. The trustees of his insolvent estate have no personal knowledge of his whereabouts. It would appear that there are insufficient unencumbered assets in Akritidis' insolvent estate in the Republic of South Africa to repay the

abovementioned amount of R1 million to the Trust. (This last fact was admitted by the defendant subject to the plaintiffs proving that Akritidis stole the abovementioned amount – which is not admitted by the defendant – and subject also to any dividend accruing to the plaintiffs from Akritidis' insolvent estate being deducted from any amount which this Court might order the defendant to pay to the plaintiffs.)

- The Trust gave due notice of its alleged claim against the Fund to the Law Society of the Transvaal and to defendant, as it was required to do under section 48 of the Act. However, on or about 27 June 2001, the defendant gave written notice to the Trust that it had rejected the Trust's claim. In terms of section 49 of the Act, the defendant gave leave to the Trust to institute action against the Fund, and such action was instituted within one year of the rejection by the defendant of the Trust's claim.

The defendant does not, however, admit the averment made by the plaintiffs in their particulars of claim to the effect that Akritidis had a reputation for having an expertise in exchange control legislation and investment in foreign companies. The defendant also does not admit the plaintiffs' allegations that, following the transfer of the R1 million to Akritidis' trust account, the trustees of the Trust would have given Akritidis further instructions in respect of this money after receiving and considering Akritidis' advice on the investment of this amount in foreign

companies and the implication of exchange control legislation on such investments.

Statutory Background

Section 26(a) of the Act provides that the Fund shall be applied for the purpose of reimbursing persons who may suffer pecuniary loss as a result of –

> *'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 ...'*

The other sections of the Act which are relevant to the matter before me were conveniently summarised by Cleaver J in the recent case of *Tollemache v Attorneys Fidelity Fund* [2003] 1 All SA 364(C) as follows (at par [17]):

- *'Section 47(1) creates certain exceptions where the Fund is not liable in respect of loss suffered,* ***inter alia*** *where such loss is suffered* "by any person as a result of theft of the money which a practitioner has been instructed to invest on behalf of such person after the date of commencement of this paragraph." *(Section 47(1)(g))*
- *Section 47(4) provides that, subject to section 47(5), a practitioner must be regarded as having been instructed to invest money for the purposes of section 47(1)(g) where the person who entrusts the money to the practitioner, or for whom the practitioner holds the money,*

"instructs the practitioner to invest all or some of that money in a specified investment or an investment of the practitioner's choice."

- *In terms of section 78(1), any practising practitioner is obliged to open and keep a separate trust banking account at a banking institution in the Republic and to deposit therein the money held or received by him on account of any person. This is an attorney's normal trust account and the interest earned on this account is paid to the Fund (section 78(3)).*
- *In terms of section 78(2)(a) a practitioner may invest in a separate trust, savings or other interest-bearing account opened by him with any banking institution or building society any money deposited in his trust banking account which is not immediately required for any particular purpose. Interest earned on any such account is paid to the Fund (section 78(3)) and since the attorney is dealing with trust funds which have been pooled in his trust account, no authority is required from any client to open such an account. The section permits interest to be earned for the benefit of the Fund at a higher rate than would be earned on the normal trust account and attorneys have over the years been encouraged to make use of this section so as to build up the resources of the Fund.*
- *Section 78(2A) makes provision for specifically identified funds to be invested for the benefit of a client. The section reads:*

  "(2A) Any separate trust savings or other interest-bearing account -

(a) which is opened by a practitioner for the purpose of investing therein, on the instructions of any person, any money deposited in his trust banking account; and

(b) over which the practitioner exercises exclusive control as trustee, agent or stakeholder or in any other fiduciary capacity,

shall contain a reference to this subsection."

If a client instructs his attorney to deposit monies to a section 78(2A) account, this would in ordinary parlance be an instruction to invest the money for the client's benefit. It follows that if the stolen money is money which the client instructed the attorney to invest in a section 78(2A) account, the Fund's liability would normally be excluded. However, liability will not be excluded if the provisions of section 47(5) apply.

- *Section 47(5) 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) to pay the money into an account contemplated in section 78(2A) if such payment is for the purpose of investing such money in such account on a temporary or interim basis only

pending the conclusion or implementation of any particular matter or transaction which is already in existence or about to come into existence at the time that the investment is made and over which investment the practitioner exercises exclusive control as trustee, agent or stakeholder or in any fiduciary capacity;

(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; or

(c) to utilise the money to give effect to any term of a transaction to which that person is a party, other than a transaction which is a loan or which gives effect to a loan agreement that does not fall within the scope of paragraph (b)." '

As was the situation in the *Tollemache* case (*supra*), the plaintiffs' case as pleaded makes it clear that the plaintiffs rely on the exemption contained in section 47(5)(a) of the Act. As indicated above, the plaintiffs allege that the

R1 million was paid to Akritidis with an instruction that it be invested on behalf of the Trust in an account contemplated by section 78(2A) of the Act, on a temporary or interim basis pending legal advice on investment in foreign companies and the implication of exchange control legislation on such investments.

As regards the *onus* of proof in respect of sections 47(1) and 47(5) of the Act, section 47(1) sets out various statutory exceptions to the Fund's general liability for pecuniary loss suffered as a result of thefts of the kind described in section 26. It is thus for the Fund (the defendant) to plead and establish the section 47(1) exception on which it relies. In the present proceedings, it is implicit from the pleadings that part of the plaintiffs' case is that the R1 million in question was to be **invested** by Akritidis **for the benefit of the Trust**, thus bringing into play the ground of exception set out in section 47(1)(g) of the Act.

However, as indicated above, section 47(5) of the Act in turn creates certain exclusions from the general ground of exception contained in section 47(1)(g). This being so, both Mr **Rogers SC**, who appeared for the defendant, and Mr **Dickson SC**, who appeared for the plaintiffs, submitted that it was for the **plaintiffs** to allege and prove that the exception contained in section 47(1)(g) of the Act is **not** applicable because of the presence of one or other of the qualifications stated in section 47(5) - *in casu*, that the R1 million was paid to Akritidis in the circumstances specified in section 47(5)(a). In my view, this

submission accords with the general principles for determining the incidence of the *onus* of proof (as set out in, for example, *Eskom v First National Bank of Southern Africa Ltd* 1995 (2) SA 386 (A) at 390B-394E) and is clearly correct. As was pointed out by Mr **Rogers**, the Fund administers monies to which all practitioners contribute, and members of the public who suffer a loss at the hands of dishonest attorneys are given a statutory remedy which they would not ordinarily have. In most cases, however, the facts giving rise to this statutory claim would not be within the knowledge of the Fund, but would rather be within the peculiar knowledge of the claimant concerned. In particular, the section 47(5) qualifications of the section 47(1)(g) exception to the Fund's general liability in respect of theft of the kind described in section 26, all relate to matters which would ordinarily be peculiarly within the knowledge of the claimant. It is thus in accordance with policy and fairness that the **claimant** should be required to allege and prove the applicability of one or other of those qualifications. (Cf, in this regard, *Santam Bank Ltd v Voigt* 1990 (3) SA 274 (E) at 279B-F.)

The Evidence before this Court

The only witnesses called on behalf of the plaintiffs were Michael Yeats ('*Yeats*'), the first plaintiff and one of the trustees of the Trust, and one Stephen Leith Anticevich, one of the two joint trustees of Akritidis' insolvent estate. Yeats testified that the Trust was created (and registered in 1993) for the purpose of investing money for the benefit of the Trust beneficiaries, such beneficiaries

being himself, his wife (the second plaintiff, Wendy Elizabeth Yeats, who is also a trustee of the Trust), and their two children. The third trustee of the Trust, Nigel Raymond Tatham ('*Tatham*'), the third plaintiff, is an old friend of Yeats and also his attorney. Tatham is not a beneficiary of the Trust.

Yeats is a building project manager and also a property developer. After completing a building management degree at the University of Cape Town, he worked for three years in the building industry before going into business (a wholesale cash and carry business) with three colleagues in 1983. While his colleagues were responsible for the trading side of the business, Yeats was responsible for finding appropriate premises in various urban centres and, having done so, setting the business up at such premises. Until 1989, Yeats managed the business in Pietermaritzburg. From that year, he dedicated about 50% of his working time to the business, doing freelance property management work for the rest of his time.

By 1999, the wholesale business set up by Yeats and his colleagues had 18 branches across South Africa and also in Windhoek (Namibia). In that year, the Trust – which apparently held '*Yeats' portion*' of the shares in the trading company through which the wholesale business operated – sold such shares to a company known as '*Massmart*' for a price of R14 million. Yeats did not, however, sell to Massmart his shares in the company which owns the business properties, and he still holds such shares.

R2 500 000.00 of the price of R14 million was paid out in June 1999, the balance being paid out somewhat later. As the Trust did not have a bank account in its name at that time, the R2,5 million was deposited into the trust account of Tatham Wilkes & Company. Part of this amount was utilised to pay off the mortgage bonds on the Yeats family residence and holiday homes, as well as the balance owing to Stannic in respect of certain motor vehicles, leaving an amount of between R1,7 million and R1,8 million in the Tatham Wilkes trust account. A bank account in the name of the Trust was subsequently opened at Standard Bank (Pietermaritzburg Branch) and the balance of the purchase price paid by Massmart was deposited into this account.

Yeats said that he told one Justin van Maasdyk ('*Van Maasdyk*'), while playing golf with the latter, that he (Yeats) wished to invest money belonging to the Trust in foreign companies. Van Maasdyk is an old friend of Yeats' father who worked for Stannic in the 1980's, through which company Yeats' wholesale business did a lot of its vehicle and equipment financing. Van Maasdyk later moved from Stannic to the NBS and, by 1999, he had retired. A short while after the abovementioned conversation between Yeats and Van Maasdyk on the golf course, Van Maasdyk telephoned Yeats to tell him about a certain Mark Tingle ('*Tingle*'). Tingle allegedly knew of an attorney in Johannesburg by the name of Akritidis who might be able to assist Yeats in investing money in foreign companies. Yeats was interested in this suggestion – according to him,

exchange control in South Africa was being relaxed at that time and he needed to determine the available options for overseas investment.

Yeats therefore telephoned Tingle and arranged a meeting with him and Van Maasdyk at the latter's home in Durban. At this meeting, which took place on 17 March 2000, Yeats told Tingle that the Trust was desirous of investing R1 million in foreign companies through legal channels. Tingle informed Yeats that Akritidis, an attorney in Johannesburg, would be able to advise Yeats in this regard and that Akritidis had '*a Reserve Bank approved scheme*'. Tingle spoke very highly of Akritidis, stating that he (Tingle) had consulted him on numerous occasions. Moreover, Yeats believed that Van Maasdyk, at whose home the meeting was held and who was present at the said meeting, would not advise Yeats to do anything which was detrimental to the interests of the Trust.

Quite a while before this meeting with Tingle, in November 1998, both Yeats and his wife had each invested R400 000.00 offshore, the then maximum personal allowance permitted in terms of the Exchange Control Regulations. (See, in this regard, the expert summary in respect of Mr W F Grassman, a Section Head in the Investigations Division of the Exchange Control Department of the South African Reserve Bank ('*SARB*'), filed by the defendant in terms of Rule 36(9)(b) of the Uniform Rules of Court, and admitted by the plaintiffs as evidence, thus obviating the need for the defendant to call Mr Grassman as an expert witness.)

During March 2000, Yeats and his wife each invested a further R100 000.00 offshore, although Yeats was unable to recall whether this was done prior to or after the meeting with Tingle on 17 March 2000. (As appears from Mr Grassman's expert summary, the permissible offshore investment for a private individual resident in South Africa had been increased from R400 000.00 to R500 000.00 on 23 February 1999, and was further increased to R750 000.00 on 23 February 2000.) The persons who assisted Mr and Mrs Yeats with their offshore investments in November 1998 and March 2000 were their accountant (Mr Mitchell of Mitchells Chartered Accountants Pietermaritzburg, who is also the accountant of the Trust), the Pietermaritzburg Branch of BDO Financial Services CC, and the Standard Bank (Pietermaritzburg Branch), with which Mr and Mrs Yeats each have personal bank accounts. Yeats testified, however, that, despite this previous assistance in investing offshore, he did not, prior to the meeting with Tingle, approach any of these persons for advice in respect of the options (if any) whereby the Trust might legally invest money in foreign companies. According to Yeats, his impression was that '*insurance investment advisors*' in Pietermaritzburg (with one of whom he had shared an office) worked with a limited range of companies, and would not have had the necessary expertise to furnish him with the advice he required in respect of the Trust.

It is interesting to note that, under cross-examination, Yeats stated that, in April 2001, he and his wife each invested a further amount of R250 000.00 offshore (thereby bringing their personal offshore investments up to the limit of R750

000.00 each, which limit had applied since 23 February 2000). Once again, they were assisted in remitting these additional funds offshore by BDO Financial Services CC (Pietermaritzburg Branch). At much the same time (April 2001), BDO Financial Services CC arranged for the '*shift*' of the amount of R250 000.00, which had been remitted offshore in March 2000 and invested in Yeats' name in a fund known as '*Templeton US Dollar Liquid Reserve*', to a fund known as '*Templeton Global Growth Fund*' (in which latter fund the abovementioned amount of R250 000.00, remitted overseas on Yeats' behalf in April 2001, was also invested).

On Yeats' version, he simply informed Tingle at their meeting on 17 March 2000 that the Trust was seeking advice on the lawful investment of R1 million in foreign companies. Tingle's only role was to provide Yeats with an introduction to Akritidis. This Tingle would apparently have done by contacting Akritidis and communicating the Trust's requirements to Akritidis. Yeats expected that Akritidis would thereafter contact him (Yeats) to take the matter further.

On 18 March 2000 (the day after the meeting between Yeats, Tingle and Van Maasdyk), Tingle sent Yeats a letter by telefax transmission (addressed to '*Mr M Yates*'), which letter formed part of Exhibit '*A*', the plaintiffs' Bundle of Documents for Trial). Under the letterhead '*Between Decks Investment CC (CK 97/11231/23), Computer and Technology Investment Services*', this letter reads as follows:

'Hi Mike

I confirm our conversation of the 17th March 00 and detail the following.

The amount paid will be deposited into the following attorney's trust account either by inter bank transfer or bank guaranteed cheque. We shall acknowledge receipt of the moneys on sight of the deposit slip or sight of the moneys in the trust account.

Name of Trust Account	:	*SPYRIDON AKRITIDIS Attorneys*
		Nedbank Trust Account
Name of Bank	:	*Nedbank*
Bank Account	:	*1970748605*
Branch Name	:	*Sandton*
Branch Number	:	*8197-005.*

These moneys will be held and invested in terms of Section 78(2)A [sic] *of the attorneys trust account act* [sic], *until confirmation by yourselves or a* [sic] *appointed representative that we have performed our obligations to yourselves, whereupon the aforesaid funds will be paid over to our client.*

Kind regards

Mark Tingle'

As was submitted by Mr **Rogers**, this letter dated 18 March 2000, in at least four respects, bears no relation to what Yeats testified was discussed between himself and Tingle at their meeting on the previous day:

- Tingle's letter stated that '***we***' (ie Tingle and/or Between Decks Investment CC) would acknowledge receipt of the sum of R1 million on sight of the deposit slip or sight of the said sum in Akritidis' trust account. By contrast, Yeats testified that he would not have entrusted any money whatsoever to either Tingle or his close corporation; that he would not have deposited any money belonging to the Trust in any account other than an attorney's trust account; and that his intention was simply to transfer the sum of R1 million from one attorney's trust account to another such account. Yeats himself conceded under cross-examination, however, that this statement in Tingle's letter (viz '*we shall acknowledge receipt* ...') was not reconcilable with his (Yeats') version of his discussion with Tingle and his alleged view that Tingle was simply '*the conduit*' to put Yeats into contact with Akritidis.
- In his letter, Tingle also stated that the sum of money in question would '*be held and invested*' in Akritidis' trust account until confirmation '*by yourselves or a* [sic] *appointed representative that* ***we*** [ie Tingle and/or his close corporation] *have performed* ***our obligations to yourselves***' (my emphasis). According to Yeats, however, Tingle's only role was to provide an introduction to Akritidis and he (Tingle) **had** no other **obligations** to Yeats or the Trust. Neither Tingle, nor his close corporation, was going to give Yeats or the Trust any advice, and the Trust certainly had no contract with Tingle or his close corporation. Any '*confirmation*' in respect of further dealings with the R1 million

deposited into Akritidis' trust account would only have been given - to Akritidis - after Yeats had received advice from Akritidis and had consulted his fellow trustees and Mr Mitchell. Yeats also said that he needed to be satisfied, prior to giving any such '*confirmation*', that the proposed overseas investment was a legal one, with the necessary SARB approval, and that the money of the Trust would be safely and wisely invested. In this regard too, Yeats conceded under cross-examination that the content of Tingle's letter was totally at odds with his (Yeats') version of his discussion with Tingle at their meeting.

- Tingle concluded his letter of 18 March 2000 by stating that, after the said '*confirmation*' had been furnished, the money deposited into Akritidis' trust account '*will be paid over to* ***our client***' (emphasis added). On Yeats' version, no money would have been destined for any client of Tingle or of his close corporation, nor had there been any discussion whatsoever along those lines. Yeats testified, however, that the words '*our client*' in the concluding paragraph of Tingle's letter could possibly have been a reference to a '*foreign company*' registered either overseas or in South Africa, in which the money of the Trust might have been invested, or to any one of a number of other (unspecified) possibilities. According to Yeats, he did not really concern himself with the meaning of these words upon reading Tingle's letter – he required a lot more information before he committed the

Trust to any investment, and he expected that this information would in due course be furnished to him by Akritidis.

- The overall tenor of Tingle's letter suggests strongly that some arrangement or '*deal*' had been reached between Tingle and Yeats at their meeting on 17 March 2000, a material term of which was that the Trust would make a payment of R1 million to the specified Akritidis' trust account. Under cross-examination, however, Yeats testified that **no** such arrangement or '*deal*' was struck between himself and Tingle at their meeting and that, although the possibility of the Trust's paying the said sum to Akritidis before Yeats had consulted with Akritidis was discussed at his (Yeats') meeting with Tingle (viz that there had been some discussion of '*the possibility of the process to be followed*'), Yeats himself made the decision to deposit the said sum into Akritidis' trust account. He testified that he would have made this decision very shortly after his meeting with Tingle and, in any event, some time between such meeting and 20 March 2000, ie the date upon which the money was transferred into Akritidis' trust account.

Yeats testified further that his decision to transfer the money to Akritidis' trust account was motivated by two considerations, namely (i) to demonstrate his *bona fides* to Akritidis; and (ii) that Akritidis was able to get a slightly better interest rate on moneys in his trust account than the interest rate applicable to moneys deposited in the Tatham

Wilkes trust account. As was pointed out by Mr **Rogers**, however, Yeats mentioned only the second of these considerations in the affidavit which he made in support of the Trust's claim against the defendant. Furthermore, under cross-examination, Yeats was apparently unable to recall whether he ever disclosed to Tingle what interest rate was then applicable to the moneys of the Trust in the Tatham Wilkes trust account. Yeats also said that Tingle did not actually inform him, at their meeting, of what interest rate would be earned on the Trust's money should it be deposited into Akritidis' trust account – all Tingle apparently told Yeats in this regard was that the Trust's money would earn interest at a '*slightly better rate*' with Akritidis than with Tatham Wilkes & Company. According to Yeats, no '*actual figures*' in respect of the respective interest rates on the two attornies' trust accounts were discussed at the meeting on 17 March 2000.

When cross-examined as to whether, at the time he received Tingle's letter, Yeats noticed the discrepancies between the contents of the letter and his discussion with Tingle the previous day, Yeats testified that he could not remember; that the '*important thing*' in his view was the advice which he would obtain from Akritidis and the '*end result*' of such advice, and not the '*details of the process*' to be followed in obtaining such advice. As far as he (Yeats) was concerned, money invested in an attorney's trust account was as safe as money invested in a bank, and the R1 million in question was simply moving from one

attorney's trust account to another. The first tranche of the purchase price (viz R2,5 million) had been deposited into the Tatham Wilkes trust account in July 1999 and was being held in such account on an indefinite basis until the Trust decided what to do with this money. Although a bank account in the name of the Trust was opened some six weeks after this initial payment, and although the Trust's money thereafter invested '*on call*' with the bank was earning interest at a slightly higher rate than the Trust's money in the Tatham Wilkes trust account, Yeats did not transfer the money from the latter to the former account, as he did not regard the difference in interest rate as '*significant*'.

I am inclined to agree with Mr **Rogers'** contention that, given that Yeats had not previously dealt with either Tingle or Akritidis, and that the amount involved was substantial, it does seem most unlikely that Yeats, as a seasoned businessman, would not, upon reading Tingle's letter, immediately have been struck by the fact that (on Yeats' version) the contents of such letter bore little relation to the discussion which he had had with Tingle the previous day. This notwithstanding, however, Yeats did not contact Tingle and ask for an explanation; on the contrary, it seems that he decided to transfer the sum of R1 million from the Tatham Wilkes trust account to the Akritidis' trust account without conducting any further investigation into either Tingle or Akritidis, not even to the extent of requesting his co-trustee, regular attorney and longstanding friend, Tatham, to make any enquiries in this regard. For the reasons set out below, however, it is not necessary for me to make any finding on this point.

Yeats testified further that he had sent Tingle's letter by telefax transmission to Tatham and had instructed the latter to transfer the amount of R1 million of the Trust's money from the Tatham Wilkes trust account to the Akritidis' trust account, details of which latter account were set out in Tingle's letter. This transfer then took place, as indicated above, on 20 March 2000. Tingle's letter was sent to Tatham by telefax transmission without any accompanying letter from Yeats – according to Yeats, he was in constant contact with Tatham and would have '*briefed*' Tatham on '*what was going on*'. He (Yeats) forwarded Tingle's letter to Tatham simply in order further to '*enlighten*' Tatham and to furnish Tatham with the details of the relevant Akritidis' trust account.

It is common cause that, after the transfer of the R1 million on 20 March 2000, there was no progress whatsoever in the matter until late July 2000, when Yeats heard from Tingle that Akritidis had ceased practice and had absconded from South Africa, apparently having stolen the money in his trust account (including the abovementioned R1 million). Yeats stated that, during this four-month period, he contacted Tingle telephonically every two or three weeks to ask him when he (Yeats) would be meeting with Akritidis and/or when he would be receiving further information from Akritidis. Yeats' understanding was apparently that Tingle would communicate the Trust's requirements to Akritidis and that Akritidis would then contact Yeats to set up a meeting, possibly sending documentation to Yeats to read before such meeting. During the telephonic

communications between Yeats and Tingle in this four-month period, Tingle apparently repeatedly assured Yeats that he (Tingle) would '*sort everything out*', but none of the '*promises*' made by Tingle in this regard came to anything.

Despite the lack of any communication from Akritidis, Yeats made no attempt whatsoever to contact Akritidis directly during this four-month period. His explanation for this failure was that he was '*working through Tingle*' who kept reassuring him that '*something would happen*'. In the meantime, he (Yeats) had no cause for concern as the Trust's R1 million was in an attorney's trust account, earning interest. Yeats nevertheless conceded under cross-examination that one of the purposes of investing the Trust's money offshore was as a hedge against currency depreciation and that, this being so, the lapse of time was not unimportant. The depreciation of the rand over the four months in question would indeed steadily have reduced the value of any offshore investment ultimately made by the Trust. However, according to Yeats, he wanted to '*diversify his investments*', and it was difficult to invest R14 million wisely in a relatively short period of time.

Finally, Yeats testified that, as far as he was concerned, Akritidis would not only advise him on the investment of the Trust's money in foreign companies and the implication of exchange control legislation on such investments. In addition, if Akritidis' advice was to the effect that it was possible legally to make such investments in foreign companies, and if the trustees of the Trust accepted his

advice in this regard, Akritidis would have been asked by the trustees to take whatever steps were necessary in order legally to arrange the investment transaction(s) decided upon by the trustees.

Stephen Leith Anticevich ('*Anticevich*'), one of the two joint trustees of Akritidis' insolvent estate, testified that the Trust had proved a claim against the said insolvent estate, being one of a number of creditors (with claims totalling approximately R45 million) to have submitted claim documents to the trustees of the insolvent estate. The Akritidis' account into which the Trust's R1 million had been transferred on 20 March 2000 was the attorney's '*ordinary*' trust banking account (referred to in section 78(1) of the Act), but this amount was no longer in either this account, nor in any other account in the name of Akritidis in South Africa. Akritidis apparently had many trust accounts, held at various different banks, as well as operating a business account from time to time. After the sequestration of his estate, Anticevich and his co-trustee did not find significant funds in any of these accounts, most of which had either been closed or were in overdraft.

According to information furnished to Anticevich, it would appear that, over the 2½ year period prior to his absconding from South Africa, Akritidis had remitted a total of approximately R580 million offshore; it is estimated that some R200 million of this total amount was remitted by Akritidis during the six/seven month period from January to July 2000. By far the greater portion of the funds '*moved*'

by Akritidis out of South Africa were remitted illegally, although it would appear that some of the monies remitted offshore did reach their '*proper foreign destination*', ie as required by the parties in South Africa on whose behalf Akritidis had remitted these funds. Although there were instances where Akritidis had utilised '*genuine import documentation*' to legally remit funds overseas, these instances were very rare.

According to Anticevich, many of the clients who had advanced monies to Akritidis claim to have dealt with Akritidis on the basis that he would obtain the necessary SARB approval on their behalf legally to remit such monies offshore. However, in Anticevich's view, some of the persons who advanced monies to Akritidis for transfer offshore knew that these funds were being remitted illegally.

Discussion

As indicated above, the defendant denies that the R1 million was **entrusted** to Akritidis within the meaning of section 26(a) of the Act.

In *Industrial and Commercial Factors (Pty) Ltd v Attorneys Fidelity Fund Board of Control* 1997 (1) SA 136 (A) it was held that, in order to '*activate*' the liability of the Fund to reimburse persons who have suffered pecuniary loss as a result of thefts of the kind described in section 26(a), the claimant must show that:

> '*(1) he suffered pecuniary loss;*
>
> *(2) by reason of theft committed by a practising attorney;*

(3) *of money entrusted by or on behalf of the* [claimant] *to the attorney;*

(4) *in the course of his practice as such*' (at 140E).

The mere fact of the payment of money into an attorney's trust account is not sufficient to show that such money is trust money (see the *Industrial and Commercial Factors* case (*supra*) at 143I-J). In this case, the majority (per F H Grosskopf JA) cited with approval (at 144B-C) a passage from the judgment of Nicholas J in the case of *Provident Fund for the Clothing Industry v Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund* 1981 (3) SA 539 (W) at 543E-F, where the learned judge had held that the concept of '*entrustment*' ('*to entrust*') comprises two elements, namely (a) to place in the possession of something, and (b) to subject to a trust. The latter element, it was said, connoted that the person entrusted is bound to deal with the property or money concerned for the benefit of others.

According to the majority judgment in the *Industrial and Commercial Factors* case (*supra*), the notion of '*entrustment*' in section 26(a) of the Act (the Afrikaans – signed - text of which uses the word '*toevertrou*') does not imply that the handing over of the money concerned '*has to be subject to a trust in the technical legal sense of the word*' (at 144D-I)). Furthermore, the majority held that section 26(a) makes provision for reimbursement to either (a) the person **by whom** the money has been entrusted; or (2) the person **on whose behalf** the money has

been entrusted; provided of course that such person has suffered pecuniary loss (at 145E-F).

Mr **Rogers** submitted that an '*entrustment*' as contemplated in section 26(a) cannot be found to have been established where there has been no proof of any communication between the claimant (whether in person or represented by an agent) and the attorney in question as to the purpose of the payment or the basis on which the money is to be held. It is indeed so that, if the client manifests to the attorney an intention to subject the money to a trust, the element of entrustment is not defeated merely because, at the time of receiving the money, the attorney had the concealed and dishonest intention of stealing the money (see, in this regard, the *Industrial and Commercial Factors* case (*supra*) at 142B-H). Mr **Rogers** contended, however, that the client's intentions must at least have been communicated to the attorney, either by the client himself or herself or through the client's agent.

In my view, Mr **Rogers**' contentions in this regard are entirely sound. Such contentions are supported not only by the approach adopted by the majority in the *Industrial and Commercial Factors* case (*supra*), but also with the approach adopted in the minority judgment (per Marais JA), in which the concept of '*entrustment*' is analysed with reference to '*the understanding*' or '*the arrangement*' which exists between the attorney and his or her client (at 149H-150I). Mr **Rogers**' contention are also consistent with the approach adopted to

the interpretation of section 26(a) of the Act in *SVV Construction (Pty) Ltd v Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund* 1993 (2) SA 577 (C). In this latter case, King J pointed out that section 26 of the Act provides for the reimbursement of a person who suffers pecuniary loss as a result of the theft of money entrusted to a practising attorney by the person himself or herself or by by someone else acting on his or her behalf (at 588H-I). According to King J:

> '*The phrase* "by on or behalf of" *in this context connotes or caters for two contingencies: a person places money with an attorney, entrusts it to him, for himself or on his own behalf or he does so on behalf of another; here* "on behalf of" *could presumably encompass the concepts* "as agent for" *and* "for the benefit of", *provided that the person on whose behalf the money is placed acquires a legal right* ***vis-à-vis*** *the attorney because the money is held for him. Thus, if A places money on his own behalf in trust with an attorney, he is the person who has entrusted it and is entitled to reimbursement; if he places it on behalf of, say, his wife, she is the person on whose behalf the money has been entrusted and she is entitled to reimbursement*' (at 590B-D).

As argued by Mr **Rogers**, the plaintiffs pleaded that Tingle was the person who acted on behalf of the plaintiffs in communicating with Akritidis. Thus, in the plaintiffs' replication to the defendant's plea, the plaintiffs stated that the transfer of the R1 million to the Akritidis' trust account on 10 March 2000 '*was accompanied by the express alternatively implied alternatively tacit instruction by*

M.A. Tingle (acting in so doing on behalf of Plaintiffs) to AKRITIDIS to invest it in an account contemplated by Section 78(2A) of the Act.' Yeats testified that he himself had no communication whatsoever with Akritidis. Although apparently available, Tingle was not called as a witness for the plaintiffs and the plaintiffs did not attempt to adduce hearsay evidence as to what Tingle told Akritidis (if anything). There is no evidence before me as to whether Tingle communicated with Akritidis in respect of the R1 million transferred into the Akritidis' trust account. Even if one assumes, in favour of the plaintiffs, that Tingle **did** communicate with Akritidis in this regard, there is no evidence before the Court as to what Tingle told Akritidis. Thus, it is impossible to determine whether what Tingle said to Akritidis (if anything) was such as to convey to the mind of Akritidis that the R1 million had been '*impressed with a trust* ***for the benefit of***' the Trust. (See, in this regard, the *Industrial and Commercial Factors* case (*supra*) at 145D-F, and the *SVV Construction* case (*supra*) at 589G).

Tingle's letter dated 18 March 2000 does not take this aspect any further; on the contrary, it could be said that certain sentences in this letter (as analysed above) point in the opposite direction to any contention that Tingle communicated to Akritidis the fact that the R1 million transferred or to be transferred was to be '*impressed with the trust*' for the benefit of the Trust.

It follows that I am in agreement with Mr **Rogers**' submission that the plaintiffs have failed to prove, as they were required to do in terms of section 26(a) of the Act, that the R1 million in question was '*entrusted by or on behalf of* [the Trust] *to*' Akritidis. For this reason alone, the plaintiffs' claim must in my view be dismissed. This being so, it is not necessary for me to deal with Mr **Rogers**' contention - and with Mr **Dickson's** attempted rebuttal of this contention - that Yeats' evidence was unsatisfactory, inconsistent with the inherent probabilities and lacking in credibility. It is also unnecessary for me to deal with the defendant's contention that the R1 million was not entrusted to Akritidis '*in the course of his practice*' as an attorney, as required to establish the defendant's liability in terms of section 26(a) of the Act. (On this requirement, see *Tollemache v Attorneys Fidelity Fund (supra)* at paras [12-16], a part of the judgment of Cleaver J which is very relevant to the facts of the present case)

Even if, however, I am wrong in my conclusion that the plaintiffs have failed to establish the requisite '*entrustment*' of the money in question in terms of section 26(a) of the Act, there is another reason why the plaintiffs' claim cannot, in my view, succeed. It is this: the plaintiffs rely on section 47(5)(a) of the Act and, as indicated above, it is the plaintiffs who are required to prove the existence of the circumstances set out in this section. In particular, the plaintiffs must prove that Akritidis was instructed, either by the plaintiffs or on their behalf, to pay the R1 million into a section 78(2A) trust account '*for the purpose of investing such money in such account on a temporary or interim basis only pending the*

conclusion or implementation of any particular matter or transaction which is already in existence or about to come into existence at the time that the investment is made ...'.

As submitted by Mr **Rogers**, in seeking to bring the matter within the ambit of section 47(5)(a), the plaintiffs are confronted by an insuperable evidential obstacle to establishing that Akritidis was '*instructed*' in the manner set out in this section. The plaintiffs' pleaded case is that the Trust's instructions were conveyed to Akritidis by Tingle. However, since Tingle was not called as a witness and since the plaintiffs made no attempt to adduce hearsay evidence as to what Tingle told Akritidis (if anything), there is no admissible evidence before me as to whether the instructions (if any) given to Akritidis fell within the ambit of section 27(5)(a). It is not enough that the plaintiffs themselves had the intention that Akritidis **should** be so instructed. The plaintiffs have not proved that such instruction was conveyed to Akritidis.

Moreover, even if it is assumed in favour of the plaintiffs that Akritidis **was** instructed in this manner, it would appear that any such instruction would not have fallen within the scope of the qualification set out in section 47(5)(a). As cogently argued by Mr **Rogers**, the only thing which could in the present notionally qualify as a '*particular matter or transaction*' was the proposed investment of the Trust's money in foreign companies. Such proposed investment was plainly not a matter or transaction '*already in existence*'. It also

seems clear that it was not a matter or transaction '*about to come into existence*', within the meaning of section 47(5)(a). I agree with Mr **Rogers**' submission that the phrase '*about to come into existence*' ('*wat op die punt is om te ontstaan*' in the Afrikaans (signed) text) must entail something more than merely a transaction which **may** possibly come into existence at some indeterminate time in the future.

For the purposes of the present case, it is not necessary for me to determine what the precise meaning of the phrase '*about to come into existence*' in section 47(5)(a) of the Act is - in *casu*, the foreign companies in which the investments might be made had not been identified; there had been no negotiations with such companies; and the form which the investments might take was entirely nknown. Indeed, whether there would ultimately be any such investment at all s allegedly dependent upon legal advice which Akritidis was still to give. It cannot be said, by any stretch of the imagination, that the plaintiffs have lished that the investment of the Trust's R1 million in the relevant Akritidis' ccount was made on a temporary basis pending the conclusion or ntation of a matter or transaction which is already in existence or is come into existence as contemplated in section 47(5)(a). For this the plaintiffs have failed to establish their case and their claim must in ismissed.

Order

In the circumstances, the plaintiffs' claim is dismissed with costs.

.....

B J VAN HEERDEN