Republic of South Africa

# IN THE HIGH COURT OF SOUTH AFRICA
# (WESTERN CAPE HIGH COURT, CAPE TOWN)

**Case Number: 26153/2010**

In the matter of:

**CLASSENS, MARK ANDREW** **Applicant**

versus

**ATTORNEYS FIDELITY FUND BOARD OF CONTROL** **Respondent**

**Judgment: 04 August 2011**

**MIA AJ:**

[1] In this matter the applicant seeks an order directing that the Attorneys Fidelity Fund (hereafter "the Fund") be declared liable to compensate him and an order directing the Fund to reimburse him for money stolen by a practicing attorney. The applicant is an adult businessman residing in Roodepoort. The respondent is the Attorneys Fidelity Fund Board of Control, a board established in terms of the Attorneys Act, No

53 of 1979 (hereafter "Act"). The Attorneys Fidelity Fund Board of Control administers the Fund which reimburses persons for monies stolen as provided in terms of section 26 of the Act. The applicant was a client of Izak Minnie Incorporated (hereafter Minnie), a private company which conducted business as a firm of attorneys.

[2] The following facts as reflected in the applicant's affidavit are common cause as indicated by Counsel for the respondent:

The applicant gave instructions to Minnie from time to time as his personal and business attorney. As a result, a relationship of trust built up and a standing loan agreement as reflected below was entered into between the applicant and Minnie. In terms of the loan agreement the applicant would provide bridging finance to sellers and would receive 3% interest on amounts loaned each month. Minnie would approach the applicant when a seller requested bridging finance and the applicant would pay the money into the trust account of Minnie. Minnie would pay the money to the sellers and would then attend to transfer of the property upon instruction from the seller. The loan and the 3% interest per month would be repaid to the applicant once the sale of the property was registered and the proceeds of the sale received by Minnie. The applicant transferred monies into the trust account during the period 28 August 2008 to 26 June 2009 in the total amount of 4 million rand. The monies paid into the trust account were never paid over to the sellers as provided in the standing loan agreement. Minnie was suspended from practice by the North Gauteng High Court on 17 November 2009 and sequestrated in terms of an order of the South Gauteng High Court on 9 June 2010. The applicant lodged a claim with the respondent which was rejected in terms of section 47(1) (g) of the Act.

[3] The loan agreement between the applicant and Minnie reads as follows:

"STANDING LOAN AGREEMENT

ENTERED BETWEEN

IZAK MINNIE INC

("Iminc")

AND

MARK ANDREW CLAASENS ("MARK")

1. Iminc from time to time holds instructions to register Transfers, Bonds and other property related transactions for and on behalf of various clients.
2. Some of these clients may from time to time need bridging finance, to be arranged against the proceeds of these registrations of Transfer and/or Bonds.
3. Mark is willing to from time to time extend loans on application, to be repaid, together with their lending fee of 3% per month, after registration of the Transfers and/or Bonds or relevant other property transaction.
4. IMinc will therefore approach Mark for loans when requested by their client(s), and if Mark is in a position to do so, will advance such monies to IMinc on loan.
5. IMinc hereby irrevocably undertakes to keep Mark covered for all monies so received on loan, together with the lending fee upon receipt of the proceeds of the registration of Transfer and or Bonds against which such advances are made.

THUS SIGNED AT LONEHILL ON 25/08/08

OBO IZAK MINNIE INC"

[4] The applicant's case is that the money was paid into Minnie's trust account and the money was held in an account in terms of section

78(2A) of the Act pending payment to the seller. The Fund is liable for theft of money by an attorney where the money was paid in the course of the attorney's practice. The applicant seeks an order directing the Fund to reimburse him for the 4 million rand he paid to Minnie, interest on the above amount as well as costs herein. The respondent denies that the money was entrusted to the attorney in the course of his practice as required in terms of section 26 of the Act. The respondent further submitted that the funds entrusted to the attorney were an investment and the Fund's liability is excluded in terms of section 47(1)(g) of the Act.

**ENTRUSTMENT**

[5] Section 26 (a) of the Attorneys Act provides:

> "Subject to the provisions of this Act, the fund shall be applied for the purpose of reimbursing persons who may suffer pecuniary loss as a result of-
>
> a) theft committed by a practising practitioner, his candidate attorney or his employee, of any money or other property entrusted by or on behalf of such persons to him or to his candidate attorney or employee in the course of his practice or while acting as executor or administrator in the estate of a deceased person or as trustee in an insolvent estate or in any other similar capacity,.."

[6] In order to succeed applicant must show that (1) he suffered a pecuniary loss; (2) by reason of theft committed by a practising attorney; (3) of money entrusted by or on behalf of the applicant to Minnie; (4) during the course of his practice.

[7] It has not been disputed by the respondents and I accept that the applicant paid the money to Minnie and that he suffered a pecuniary loss as a result of theft of monies by Minnie. On the issue of

entrustment, it would not have been unusual for Minnie as an attorney to receive money in the form of bridging finance secured on behalf of sellers. In this instance Minnie applied for the bridging finance which the sellers required and received such monies from the applicant. I have had regard to the observation made in **Tollemache v Attorneys Fidelity Fund 2003(6) SA 664 (C)** where Cleaver J stated at paragraph [16]:

> "I think it fair to say that there has been great change in attorneys' practices since the time when the judgment in the *Paramount Suppliers* case was handed down in 1957. Whereas the work done by attorneys at that time was fairly narrowly delineated, the type and range of services offered by attorneys today is vastly different".

Thus it was not unusual for Minnie to have received the money to be paid to sellers as bridging finance into his trust account in the course of his practise. I am satisfied that the money was entrusted to Minnie in the course of his practise as required in terms of section 26(a) of the Attorneys Act.

**Instruction to invest in terms of section 78(2A)**

[8] The respondent did not file an answering affidavit, to refute the applicants version. It relied on the notice filed in terms of rule 6(5)(d)(iii) to dispute applicant's claim on a point of interpretation of the Act. The respondent refuted that it was liable to pay the applicant 4 million rand and submitted that if the Court found that the money was entrusted as per Section 26(a) of the Act, the money paid to Minnie was an investment and this precluded the Funds liability in terms of section 47(1) (g) of the Act.

[9] It was submitted on behalf of the respondent that the loan amounts

made available to the sellers and which were paid to Minnie fall within the ambit of "money which a practitioner has been instructed to invest on behalf of such person". This amounted to an investment and the Fund's liability was thus excluded in terms of section 47 (1)(g). Section 47(1) (g) provides:

> "47(1) The fund shall not be liable in respect of any loss suffered—
>
> (*a*) ...
>
> (*b*) ...
>
> (*c*) ...
>
> (*d*) ....
>
> (*e*) ...
>
> (*f*) ....
>
> (*g*) by any person as a result of theft of money which a practitioner has been instructed to invest on behalf of such person after the date of commencement of this paragraph."

[10] Counsel submitted on behalf of the applicant that it was the applicant's intention to transfer the monies into Minnie's account with the intention of providing a loan rather than it being an investment. In support of the submission Counsel referred to the matter **Industrial and Commercial v Attorneys Fidelity Fund 1997(1) SA 136 AD at 142** where Grosskopf JA, held that:

> "the issue of entrustment in the present case should be judged in the light of the appellant's intention, and not Mares professed intention".

In line with the aforementioned case, Counsel submitted that the Court can only find that it was the applicant's intention that the monies be

used as loans for bridging finance. Further that this intention informed the nature of the transaction.

[11] The respondent bears the onus in proving that the Fund's liability is limited because the payment of money was an investment. The respondent did not file an opposing affidavit, and accepted the facts as indicated above and relied on an interpretation of the law to conclude that the entrustment of funds to Minnie were an investment and excluded the liability of the Fund.

[12] In view of the Act's silence in defining the term "investment" I have had regard to the ordinary dictionary meaning given to the word "investment" [paragraph 13]. In **King v Attorneys Fidelity Fund 2010(4) SA 185 (SCA) at 198 A-B,** Mpati J, agreed with the court *a quo's* application of the ordinary grammatical meaning to the words "to invest". Counsel referred me to the Concise Oxford Dictionary where the word investment is described as:

> "an action or process of investing, a thing worth buying because it may be profitable or useful in the future."

The Oxford English Dictionary describes the word "invest" relevant to these circumstances as

> " to employ (money) in the purchase of anything from which interest or profit is expected; now esp. in the purchase of property, stocks, shares etc. in order to hold these for the sake of the interest, dividends, or profits accruing from them" also "to make an investment, to invest capital; colloq to lay out money, make a purchase" .

[13] Counsel for the respondent submitted that the fundamental misconception made by the applicant was that it did not regard a loan

as an investment. Referring to the definition of "investment", Counsel for the respondent pointed out that the definition was not limited to purchasing property as this ignored the wider definition where a person employed money not only to purchase land but also for the purpose of investing money in a scheme with a view to receiving a profit or gain such as the factoring scheme described in **King and Others v Attorneys Fidelity Fund Board** (*supra*). When this is applied to the present matter Counsel submitted that the applicant paid money to Minnie at the latter's request to lay out such money with a view to realising a profit. Counsel for the respondent pointed out that the profit at 3% per month exceeded by far the rate of interest the applicant would have received had he deposited his money with a registered financial institution. In the event that this money was available for an extended period, the laying out of monies with Minnie would realise 3% per month and if added over twelve months, the applicant would receive 36% interest on money paid into Minnie's trust account.

[14] On the facts before me, it is not clear that the applicant intended to leave the money in Minnie's account indefinitely as an investment. Applicant deposited funds into Minnie's account as and when Minnie requested funding for bridging finance. This is further supported by the terms of the agreement which require repayment of the loan upon transfer of the sellers property to the buyer, and receipt of the purchase price of the property. This period does not usually stretch over a period of twelve months. The applicant also stated that he enquired from Minnie about the repayment of the funds a few months after the money was deposited into Minnie's account. Thus the above facts do not support a version that the funds were made available for extended periods for investment purposes. The facts are thus distinguished from the facts in **King** *(supra)* that the claimants in the **King** *(supra)* matter

envisaged that their funds would be invested with a view to gaining a profit and the scheme was devised to realise this goal.

[15] *In casu*, it is clear that the applicant relies on section 47(5) (a) of the Act which provides:

> Section 47 (5)(a) of the Attorneys Act provides:
>
> "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(2) (A) 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"

[16] The applicant contended that the monies were intended to be held in a section 78(2A) account pending the payment of bridging finance to the seller. These funds cannot be regarded as an investment if they were paid into a section 78(2A) account prior to it being made available to the seller as bridging finance. Minnie is the applicant's agent in this instance and is purported to have had exclusive control as the agent. As a conveyancer attending to transfer of the property of the seller and receiving bridging finance, it is implied that Minnie exercised exclusive control over the transaction as the agent of the applicant and in view of him being appointed as conveyancer by the seller.

[17] The respondent relied on the applicant's version and submitted that on this version, section 47(5) (b) and (c) of the Act indicated that the

monies paid to Minnie were an investment. These sections provide that the applicant must not be regarded as having instructed the attorney to invest money for the purposes of section 47(1)(g) where the person instructed the attorney to:

> "(*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 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*)."

[18] Counsel for the respondent pointed out that section 47(5)(b) did not apply to the applicant as the applicant did not specify the borrower. Further, Minnie introduced the sellers to the applicant when a request was made for a deposit of money to provide bridging finance. Minnie also advised the applicant in respect of the terms and conditions of the loan. Counsel also submitted further that the loan had to fall within the catch all clause in section 47(5)(c) if it is accepted that 47(5)(b) was not applicable. Counsel submitted thus that the applicant could not rely on 47(5)(b) or 47(5)(c) to escape the consequences of section 47(1)(g).

[19] The applicant relied on section 47(5)(a) to indicate that the amounts deposited were not an investment as provided in section 47(1)(g). The money was clearly intended to be a loan for a short period, to the

seller for bridging finance. Minnie acted as an agent for the applicant and exercised exclusive control over the investment. It followed that Minnie would have control over the money paid to the seller and as conveyancing attorney would have control over the money received from the seller. In light thereof, I am of the view that the money deposited was not an investment as envisaged in section 47(1)(g) of the Act. I have had regard to the submissions made in terms of section 47(5)(b) and (c) of the Act on behalf of the respondent and agree that section 47(5(b) does not avail itself to the applicant having regard to the terms of the agreement. The transaction is also precluded from the provisions of section 47(5)(c ). However section 47(5)(a) does avail itself to the applicant and thus the monies paid to Minnie cannot be an investment such as to preclude the Fund's liability.

[20] In addition to the above the respondent also relied on the matter of **King** *(supra)* where the Court dealt with a factoring scheme entailing the discounting of estate agents commissions by paying out the commissions before they were due less a certain percentage which would be paid as a profit to the lenders. The facts *in casu* are distinguishable from the facts in **King** *(supra)* and are specifically precluded from the operation of section 47(1)(g) by the provisions of section 47(5)(a) of the Act which the applicant has relied on.

**Interest**

[21] The applicant has requested interest on the amount of 4 million rand. Having regard to the provisions of section 47(2) of the Act, I am not persuaded that the Fund is liable to pay the applicant interest on the above amount. Section 47(2) indicates that interest is not applicable on the amount stolen when the Fund is liable to reimburse monies stolen. Thus interest is not applicable to the amount claimed by the applicant.

**Costs**

[22] The applicant has been successful in this application and it is appropriate that cost follow the cause.

[23] In the result the following order is made:

1. The respondent is declared liable to reimburse the applicant in the amount of 4 million rand.
2. The respondent is ordered to pay the applicant 4 million rand.
3. The respondent shall pay the cost of this application.

**MIA AJ**