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

Case No: 25357/2010

In the matter between:

CENTURION BUS MANUFACTURERS (PTY) LTD	**First Plaintiff**
DANTEL SA CC	**Second Plaintiff**
and	
THE ATTORNEYS FIDELITY FUND	**Defendant**

JUDGMENT DELIVERED ON 26 JULY 2012

ALLIE, J

[1] Plaintiff instituted action in terms of section 26 of the Attorneys Act 53 of 1979 for reimbursement of money lost by a client as a result of its attorney's theft of such money held in trust.

[2] Both plaintiff's allege, that their attorney, Mr Dirk Nothnagel, received payment into his trust account of the amount of R 703 562, 52. Mr Nothnagel subsequently stole the money and was sequestrated.

[3] On behalf of plaintiffs, notice was given to defendant on 19 March 2010 that a claim for compensation was going to be lodged with defendant.

[4] Defendant raises a special plea in terms of section 48(1) of the Act which provides that no one will have a claim against the defendant unless written notice of that claim is given to the Board of Control of the defendant within 3 months after the claimant became aware of the theft or by the exercise of reasonable care, should have become aware of the theft.

[5] It is the adjudication of the special plea and response thereto that this court is seized with.

[6] Plaintiffs filed an application for condonation for the late notice to the defendant in the event that the court upheld the special plea.

[7] Defendant alleged that plaintiff's became aware of the theft or by the exercise of reasonable care, ought to have become aware of the theft during July 2009.

[8] Plaintiffs' representative, Mr Vermeulen testified on their behalf as follows:

8.1 Mr Nothnagel became plaintiffs' attorney as early as 2006.

8.2 In April 2009, first plaintiff lent and advanced to Mr Nothnagel the sum of R800 000 at his request. He would repay the money by end April 2009. Eventually Nothnagel paid the money at end July 2009. He did

not consider the late repayment of a personal loan to be indicative of theft of trust money.

8.3 First plaintiff paid money into Nothnagel's trust account as occupational rent pending the resolution of a dispute between it and the seller of the land. Second Plaintiff paid money into Nothnagel's trust account as part of the purchase price on an additional property purchased.

[9] Vermeulen found that Nothnagel's conduct in attending to the affairs of plaintiffs was becoming more and more unprofessional and by the end of May 2009, he terminated Nothnagel's mandate.

[10] He asked for his files, an account and for payment of the balance of the funds due to the plaintiffs. He sent an email to Nothnagel on 1 June 2009, demanding payment of all money due to plaintiffs.

[11] He received a statement from Nothnagel dated 9 June 2009, reflecting that the amount of R 703 564, 52 was due to plaintiffs and two cheques totalling the amount due to plaintiffs.

[12] On 9 June 2009, Nothnagel requested Vermeulen not to deposit the cheques.

[13] On 15 June Nothnagel again asked that the cheques not be deposited as his bank account had been frozen due to the bank incorrectly allowing a cheque to go off from his business bank account. At that stage, Vermeulen testified, he did not appreciate the distinction between an attorney's trust and business account nor that there was a problem of dishonesty if an attorney's trust cheques could not be met.

[14] On 23 and 24 June 2009, Nothnagel sent further emails to Vermeulen stating that he was in the process of establishing whether the funds had been released.

[15] On 29 June 2009, Nothnagel informed Vermeulen that if the cheques are presented for payment and the funds are not available, he will have to cease practicing as an attorney. He proposed to settle plaintiffs with money he would receive from his sister.

[16] On 29 June 2009, Nothnagel threatened to stop payment of the cheques in the event that Vermeulen presents them for payment.

[17] On 6 July 2009, the cheques were dishonoured on the basis that payment was stopped.

[18] Vermeulen lodged a complaint with the Law Society in July 2009. The Law Society cautioned him against making vague and unsubstantiated statements against Nothnagel. The Law Society also cautioned Vermeulen that he could only make allegations of theft against Nothnagel and lodge a claim against the defendant once he had established that Nothnagel had in fact stolen the money.

[19] At the end of July 2009, he consulted another attorney who advised him to sequestrate Nothnagel.

[20] During November 2009, he heard that Nothnagel's sequestration had been applied for previously but he warded off the application then by paying the amount due eventually. He assumed that Nothnagel would do the same in his case.

[21] He applied for the provisional sequestration of Nothnagel which was granted on 8 December 2009. Thereafter Nothnagel offered to pay R300 000 as a first payment on 15 December 2009, thereby creating the expectation that he would once again pay, albeit late.

[22] Vermeulen said that he initially thought that Nothnagel had just mismanaged the funds and did not suspect that he stole trust funds. He accepted that he may have been naive in believing and trusting Nothnagel. He

approached the bank for information concerning Nothnagel's account but was told that they could not divulge information without a warrant or court order. He denied that he had any means of establishing that Nothnagel had stolen the money.

[23] He subsequently established towards the end of November 2009, that the Law Society brought an application to suspend Nothnagel from practice on 28 July 2008 and later he learned they only obtained an order to strike Nothnagel from the roll of attorneys on 24 August 2010.

[24] Mr Wolmarans at the Law Society did not inform Vermeulen that there was a pending application for the suspension of Nothnagel.

[25] On 8 February 2010 Vermeulen obtained a final order of sequestration of Nothnagel. At that stage, he learned that there was another creditor to who Nothnagel owed R600 000. This led Vermeulen to conclude that Nothnagel must have stolen money.

[26] Plaintiffs gave notice to Defendant during March 2010 and allege that they did so well within the three months prescribed by section 48(1)(a) of the Act.

[27] Quite aside from the services that Nothnagel was meant to provide to Plaintiffs, first Plaintiff loaned Nothnagel R800 000 in April 2009 which was repayable at the end of April but was only paid in full at the end of July 2009.

[28] Vermeulen testified that although his belief that Nothnagel would eventually pay the money he held in trust on behalf of plaintiffs was naive , it was informed by the fact that Nothnagel eventually paid his private debt to first plaintiff in full and so he believed that although Nothnagel was dilatory when he has to pay, he eventually pays.

[29] Once he heard that another client of Nothnagel had to bring sequestration proceedings before Nothnagel paid that client's money, Vermeulen was strengthened in his belief that Nothnagel would pay the money due to the plaintiffs at some stage at least before an order of final sequestration was sought and obtained.

[30] It can readily be accepted that until Vermeulen had obtained the services of a new attorney to assist him in recovering the money from Nothnagel, he would not necessarily have understood the consequences of a dishonoured cheque drawn on an attorney's trust account or an attorney's inability to pay funds held in trust.

[31] Vermeulen himself admits in his founding affidavit that when Nothnagel said on 15 June 2009 that he will not have sufficient funds in his trust account because the bank "froze" his account, he should have realised that it was a lame excuse

[32] Once Vermeulen had employed an attorney, Mr Van Staden, by the end of July 2009 and had a consultation with Advocate Snyman and Mr Van Staden, Vermeulen alleged he then understood that he might not be able to recover the money.

[33] By end of July 2009, plaintiffs knew, by logical implication, if the money was not recovered, then Nothnagel must have either misappropriated the money or mismanaged it.

[34] Section 48(1) of the Act requires not only that a claimant must have been aware of the theft of trust funds but the claimant must, by the exercise of reasonable care have become aware of such theft.

[35] Section 48(1)(a) reads as follows:

> *"48.* ***Claims against fund: notice, proof and extension of periods for claims.***
>
> *(1) No person shall have a claim against the fund in respect of any theft contemplated in section 26 unless -*

"written notice of such claim is given to the council of the society concerned and to the board of control within 3 months after the claimant became aware of the theft or by the exercise of reasonable care should have become aware of the theft and;"

[36] From his evidence, it would seem that Vermeulen was so intimidated by the warning of the Law Society that he failed to lodge a complaint with the SAPS. He alleged that he attempted to exhaust all legal remedies before he established that there had indeed been theft of trust money and before lodging a claim with the defendant. Section 49(1) of the Act provides that no action may be brought against the defendant unless all available legal remedies against the practitioner have been exhausted.

[37] Section 26(a) of the Attorneys Act 53 of 1979 reads as follows:

"Purpose of the Fund

Subject to the provisions of this Act, the fund shall be applied for the purpose of reimbursing persons who may suffer pecuniary loss as a result of:

(a) theft committed by a practising practitioner, his candidate attorney or his employee, of any money or other property entrusted by or on behalf of such persons to him or to his candidate attorney or employee in the course of his

practice or while acting as executor or administrator in the estate of a deceased person or as a trustee in an insolvent estate or in any other similar capacity; and

(b) ..... "

[38] Section 48(1) non suits a claimant who attempts to claim in terms of section 26 where due notice has not been given. Section 48(3) however provides the board of control of the defendant with the discretion to extend the period in which notice has to be given under subsection (1).

[39] The role played by the Law Society in general in claims based on section 26 cannot be diminished. The reason for notice to the Law Society is clear. As the governing body vested with the statutory authority to investigate the financial affairs of an attorney in terms of Section 71 of the Act, they would clearly be best placed to pronounce upon whether there has been theft of trust monies. In this case, they simply failed in their duty to establish in July 2009 whether there had been theft of trust monies and failed to communicate any finding in this regard to the plaintiffs.

[40] Defendant's board of control comprise, serving presidents of all the Law Societies and three members of each Law Society yet defendant provided the court with no information about why Vermeulen's complaint to the Law Society of the Northern Provinces in July 2009, did not raise any warning signs for the Law Society and did not move them to immediately investigate the state of

Nothnagel's trust account when they had already brought an application in 2008 to suspend Nothnagel from practice.

[41] In **SVV Construction v Attorneys, Notaries & Conveyancers Fidelity 1993 (2) SA 577 (C)** the court found that section 48(1) requires that the claimant must have personal knowledge of the theft because that is what the words *"to become aware of"* mean. The court also concluded that the section should be restrictively interpreted. The court proceeded to discuss what is the knowledge that is required and found that it is awareness of the material facts which would create in the mind of the reasonable man the belief or conviction, not merely the suspicion, that a theft had been committed. The court went on to analyse belief or conviction and held that conviction is strong belief on the grounds of satisfactory reasons or evidence. The court found that the type of theft involved in these cases is wrongful dealing by an attorney with or appropriating for his own use, money which has been entrusted to him. The court accepted that a debit balance on an attorney's trust account do not in all instances lead one to the conclusion that the funds have been misappropriated because it could be the result of miscalculations and errors or reckless dealing. In that case, the court accepted that although the possibility of theft did occur to the claimant, it had no means of turning that suspicion into an awareness as the police were still investigating a complaint of theft against the attorney and the claimant only became aware of the theft when the prosecutor in the criminal case against the attorney showed the claimant bank statements of the attorney. The court

rejected the defendant's defence that the claimant failed to file a notice of the complaint timeously and that it failed to take reasonable steps to become aware of the theft.

[42] Having obtained a final order of sequestration against Nothnagel, plaintiffs then knew that Nothnagel clearly no longer had control or possession of their funds entrusted to him as he would have reimbursed them rather than have his estate finally sequestrated. At that stage in February 2010, plaintiffs then had evidence from which they could conclude that Nothnagel had misappropriated trust funds as the probabilities weighed in favour of that conclusion more then than it did at the stage of the provisional sequestration when Nothnagel was still promising to repay the money and the possibility existed then that he may still have access to funds that were badly managed.

[43] Applying the test enunciated in the **SVV Construction** case, the evidence supports the plaintiff's contention that only on 8 February 2010, did plaintiff's suspicion that Nothnagel had stolen trust money become sufficiently fortified to the extent that it became a strong belief that Nothnagel had in fact stolen trust money and had not merely mismanaged it.

[44] By the time plaintiffs applied for the provisional sequestration of Nothnagel, on 8 December 2009, the Law Society ought to have formed at least a *prima facie* view based on an inspection of Nothnagel's books which should

have been undertaken by then, yet they failed to inform the plaintiffs even then that there was a likelihood of theft of trust money.

[45] The purpose of the fund is clearly to protect persons who entrust money to attorneys that have subsequently stolen that money. The time period within which notification of claims must be made is itself subject to an extension within the discretion of the defendant precisely because the legislature envisaged that if a role-player who is meant to perform its functions in terms of the Act fails to do so, the board may grant an extension of time to a claimant who was not wilfully in default.

[46] Once plaintiffs lodged a complaint with the Law Society, consulted a new attorney and an advocate and tried to obtain information about Nothnagel's bank account, there was very little more he could do, save for lodging a complaint of suspected theft with the SAPS. In *casu*, the delay in plaintiffs notifying defendant and the Law Society that they intend to lodge claims was due entirely to the dilatory conduct of the Law Society.

[47] Since the Law Society who is an interested party in these proceedings and who must be aware of the proceedings by virtue of their representative who serves on the Board of Control of defendant, has remained silent, I cannot establish what their attitude is toward the plaintiffs not having given them formal notice that they intend to lodge a claim with the defendant.

[48] Plaintiffs have asked that the court condone their failure to give notice to the Law Society by virtue of the society already having brought an application to strike Nothnagel from the roll of attorneys when notice was given to the defendant.

[49] Notice to the Law Society concerned fulfils the purpose of alerting the governing body of the attorney's profession to the fact that sufficient material facts exist to believe that an attorney has stolen trust funds so that the statutory powers of the Law Society can be used to investigate the attorney concerned and bring the necessary court application to prohibit the attorney from practising. Notice in this instance would clearly be superfluous as the Law Society had already commenced an application to suspend Nothnagel from practice in 2008 and proceeded with an application to have him struck from the roll of attorneys thereafter.

[50] I have no allegations before me that explain why compliance with notice to the Law Society in substance, i.e, the notice of a trust shortfall given by plaintiffs in July 2009, when the complaint was lodged, is insufficient.

[51] Concerning notice to the defendant, I find that the plaintiffs took reasonable steps to become aware of the theft and were unable to become aware of the theft prior to 8 December 2010. Having become aware of the theft

once more material facts came to their attention on 8 February 2010, I find that plaintiffs notice to the defendant was timeously given.

[52] The special plea of the defendant that plaintiffs failed to file a notice to lodge a claim timeously and failed to take reasonable steps to become aware of the theft of trust money is dismissed.

[53] Since the plaintiffs have been successful in resisting the special plea, costs should follow the result.

IT IS ORDERED THAT:

The special plea is dismissed with costs.

ALLIE, J