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

Case No: A620/2011

In the matter between:

ATTORNEYS FIDELITY FUND BOARD OF CONTROL **Appellant**

and

MARK ANDREW CLAASSENS **Respondent**

JUDGMENT DELIVERED ON 4 DECEMBER 2012

ALLIE, J

[1] This appeal is against the judgment of the court *a quo* in which appellant was ordered to pay to the respondent an amount of 4 million rand, being trust money stolen by an attorney, Izak Minnie.

[2] Respondent has cross appealled against the refusal of the court *a quo* to award to him interest from the date that he had placed appellant *in mora*.

[3] In the court *a quo*, the parties argued the matter with a set of papers containing a founding affidavit and a Notice in terms of Rule 6(5)(d)(iii) in which Appellant stated that it opposed the respondent's claim for reimbursement solely on a point of law, namely that the money that respondent had deposited into Minnie's trust account was to be invested on respondent's behalf and was

accordingly subject to the provisions of section 47(1)(g) of the Attorneys Act 53 (the Act) of 1979.

[4] In the founding affidavit, the respondent alleged that in terms of the agreement between him and Minnie, he paid the money into Minnie's trust account which was to be held in terms of section 78(2A) of the Act.

[5] The respondent rejected appellant's decision that the money was an investment for which its liability was excluded in terms of section 47(1)(g). On respondent's behalf it was argued that his and Minnie's intention had to be considered, namely that the money was to be used as loans for bridging finance.

[6] No answering affidavit was filed, consequently, the facts alleged by respondent concerning the written agreement entered into between him and Minnie and the agreed terms upon which he would deposit money into Minnie's trust account and upon which the latter would repay it to respondent were not disputed by appellant.

[7] Appellant claimed in it's Notice in terms of Rule 6(5)(d)(iii), that since the money was paid into Minnie's trust account in terms of section 78(2A), it was also subject to the limitation of liability under section 47(1)(g).

[8] The primary dispute is whether section 47(1)(g) applied to the underlying transactions between the parties involving the money and whether any or all of

the provisions of section 47(5) applied to the transactions and which accordingly justified appellant's rejection of respondent's claim.

[9] Section 47(1)(g) reads as follows: *"Limitation of liability of fund. (1) The fund shall not be liable in respect of any loss suffered:-*

.....

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

[10] The common cause facts are that the respondent was approached by Minnie to enter into an agreement with him whereby respondent would provide bridging finance to the conveyancing clients of Minnie, pending registration of transfer of properties purchased, whereupon sufficient funds would be made available to repay to respondent the bridging finance together with interest at a rate of 3% per month. The rate of interest was in excess of the applicable lending rate of registered financial institutions at the time.

[11] In terms of the agreement, Minnie would from time to time request loans from respondent at the request of his clients and Minnie irrevocably undertook to repay respondent the amounts loaned and interest upon receipt of the proceeds of the property transactions.

[12] Subsequent to respondent paying into Minnie's trust account money for use by various clients of Minnie in a total amount of 4 million rand, it was discovered that Minnie had in fact misappropriated the money and had not paid it over to his clients as he had led respondent to believe he would.

[13] On 17 November 2009, Minnie was suspended from practice and sequestrated on 8 June 2010.

[14] Appellant's counsel argued that in terms of the agreement, respondent would deposit the funds into an interest bearing trust account of Minnie under section 78(2A) of the Act. The agreement to provide bridging finance does not contain an express reference to section 78(2A). It is common cause however, that the money was paid into such a designated trust account of Minnie. It was thereafter subject to the provisions of the Act applicable to trust money.

[15] A Deed of Suretyship which Minnie had signed guaranteeing payment of loan amounts from time to time was signed by Minnie in his personal capacity and not as holder of an attorney's trust account although the attorney's firm is clearly reflected as the principal debtor and no mention is made in that agreement of an investment in terms of section 78(2A).

[16] On Respondent's behalf, it was contended that the funds were paid into Minnie's trust account and were subject to the protection of Section 26 which

states that the Fidelity Fund shall reimburse people who pay money to an attorney who was acting in the course of practice and later stole the money. Respondent's counsel further argued that section 26 prevented the Fidelity Fund from relying on the limitation of liability in section 47(1)(g).

[17] Appellant's counsel made the point that respondent paid the money to Minnie as an investment on his own behalf in his capacity as an investor in Minnie's clients' transactions and not merely as a client, therefore he assumed the risk that accompanied the investment and which is therefore subject to the limitation of liability contained in sections 47(1)(g) and 47(5)(c).

[18] On respondent's behalf, reliance was placed on an allegation that Minnie acted as his agent and so, it was submitted, his claim was saved by the provisions of section 47(5)(a) which reads as follows:

> *"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 investment is made and over which investment the practitioner exercises exclusive control as trustee, agent or stakeholder or in any fiduciary capacity."

[19] Appellant's counsel countered that sections 47(5)(b) and (c) provided for a situation where the money should not be regarded as an investment in terms of section 47(1)(g) if it was lent in circumstances contemplated by those subsections.

[20] Section 47(5)(b) and (c) provides as follows:

"47(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-

(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)"

[21] A further question argued, was whether the lending of the money was a scheme by respondent and Minnie in terms whereof respondent would invest in the transactions of Minnie's clients. The argument was advanced on respondent's behalf that the money was not lent as an investment.

[22] Appellant's counsel argued that the fact of the high rate of interest was proof that the agreement was meant to yield a return on investment. That allegation was submitted as proof of the existence of a scheme.

[23] Respondent's counsel relied on the fact that appellant did not file an answering affidavit disputing the allegation that 3% interest per month is a higher rate of interest than the applicable lending rate, to claim that it was opportunistic for appellant to argue that a scheme existed between respondent and Minnie.

[24] The agreements do not reflect two separately discernible investments at two different stages in the loan transaction as contended for by appellant's counsel. The allegations in the founding affidavit do however support the contention of the scheme being an investment. That contention can be crystallized as follows:

24.1 Firstly there is the return of 3% per month interest on all loans given by respondent to Minnie for use by his clients and this aspect of the

agreement is not disputed. The conclusion that the agreed rate of interest represents a return on an investment is disputed.

24.2 Secondly there is the period representing the time when the money was paid by respondent into Minnie's trust account and the time when the amount would be required by the individual borrowers, when the money was to be invested by Minnie on behalf of respondent in a section 78(2A) trust account as alleged by respondent and not denied by appellant.

[25] The sub paragraphs to section 47(1) limit the liability of the Fidelity Fund to compensate claimants in cases where money was stolen by persons other than the practitioner; where the practitioner's fidelity fund certificate had been guaranteed by some other person or entity, thereby making the guarantor liable to compensate; where the relevant law society warned the claimant against employing the services of the particular practitioner and in sub paragraph (g), where money was invested without an underlying transaction on the instructions of the claimant, presumably to discourage, inter alia, money laundering transactions.

[26] In the case of **King & Others v Attorney's Fidelity Fund Board of Control 2010(4) SA 185 (SCA) at para 33**, the court held as follows concerning the meaning of the word "invest" in section 47(1)(g):

"[1] The term 'invest' is not defined in the Act. It must accordingly be given its ordinary grammatical meaning. I agree with the court a quo that the legislature, when using the word in s 47(1)(g), intended it to have the ordinary meaning as defined in The Concise Oxford English Dictionary, viz to 'put money into financial schemes, shares or property with the expectation of achieving a profit'. (See also The Shorter Oxford English Dictionary which defines 'invest' as: 'To employ (money), in the purchase of anything from which interest or profit is expected')."

[27] We accept respondent's unchallenged allegation that the money was paid into Minnie's trust account as an investment in terms of section 78(2A). Thereafter, the money becomes subject to those provisions of the Act that regulate reimbursement of money invested in terms of section 78(2A), that were subsequently stolen by the attorney into whose trust account the money was paid.

[28] Section 47(5)(a) offers some mitigation for the harsh consequences to a claimant if he were to be prevented from claiming reimbursement, by the provisions of section 47(1)(g). Section 47(5)(a) affords a claimant relief where it can be established that the practitioner was instructed to invest in a section 78(2A) trust account on a temporary basis pending the finalization of an underlying transaction for which that money was meant to be utilized.

[29] Sections 47(5)(b) and (c) remove the relief provided to claimants by sub paragraph (a) in situations where the money was invested in a section 78(2A) account pending the finalization of an underlying transaction and the money was to be utilized only to give effect to a term in the underlying agreement to which the lender is a party, **excluding** underlying loan agreements where the lender did not specify the borrower but he was introduced to the borrower by the practitioner for the purpose of making the loan and the practitioner advised on the terms of the loan agreement.

[30] In short, sections 47(5)(a), (b) and (c) read conjunctively, remove the protection afforded to claimants who instruct a practitioner to invest their money under a section 78(2A) investment pending fulfilment of a transaction if that transaction is a loan which was orchestrated by the practitioner and the claimant together.

[31] The intention of the legislature is clearly to afford no protection to people who engage in money lending schemes or who deal collusively, with attorneys' trust money.

[32] Counsel for the appellant argued that section 47(5)(c) applied to the transaction as section 47(5)(b) could not apply since respondent did not specify the borrower and Minnie advised respondent about the terms and conditions of the loan agreement. The court *a quo* found that that neither Section 47(5)(b) nor

(c) applied to the transaction and that section 47(5) (a) read, disjunctively from section 47(5) (b) or (c) applied.

[33] The rules of interpretation do not allow for a disjunctive reading of sections 47(5) (a) and (b) or (c). There is no "or" between (a) and (b) nor between (a) and (c). Sub-paragraph (b) qualifies sub-paragraph (a) while sub-paragraph (c) qualifies sub- paragraph (b). Section 47(5) (a) must be read with subsection (b) or with subsection (c) but not as an alternative to them.

[34] The court *a quo* erred in reading section 47(5) disjunctively and in granting the respondent the relief sought.

[35] When section 47(5)(a) is read with sub-paragraph (c) and applied to the facts of this case, then Minnie must be regarded as not having been instructed to invest the money in terms of section 78(2A) since, on respondent's own version, he was engaged in an arrangement with Minnie to lend money to Minnie's clients in circumstances where the arrangement is subject to the exclusionary proviso contained in section 47(5)(c).

[36] In the light of the conclusion I have reached, it follows therefore that the cross-appeal must fail.

IT IS ORDERED THAT:

1. The appeal succeeds and the appellant is declared not liable to reimburse the respondent;

2. The cross-appeal concerning the refusal to award interest, fails because the appeal on the merits is successful.

ALLIE, J

I AGREE

ZONDI J

I AGREE

SALDANHA, J