IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO. 13667/2008

In the matter between:

H E S POTGIETER **Applicant**

and

CAPRICORN BEACH HOMEOWNERS ASSOCIATION **First Respondent**

PINCUS MATZ MARQUARD ATTORNEYS **Second Respondent**

JUDGMENT DELIVERED 20 MARCH 2012

GANGEN, A J:

[1] In this matter Applicant claims payment of a balance of R451 614.03 which was paid electronically by Applicant erroneously to First Respondent on 2 July 2008. The error arose as Applicant's secretary selected First Respondent (*Capricorn Beach Homeowners Association*) as the payee instead of the client (*Capricorn Beach Joint Venture*). Applicant is a practising attorney and the funds were the proceeds of a sale and transfer of immovable property by Applicant's client to one Manyama. It is not in dispute that the payment was made erroneously.

[2] First Respondent contends that he is entitled to the funds as Applicant's client was indebted to First Respondent and that First Respondent was entitled to apply set-off. Second Respondent is a firm of attorneys who hold the funds in trust pursuant to an agreement between the parties.

[3] The first issue is whether Applicant has locus standi to make this Application. The application is opposed on the basis that Applicant has no locus standi as he acted as agent for his client, Capricorn Beach Joint Venture and not as principal.

[4] Applicant argued, on the authority of the Supreme Court of Appeal in the case of *Wypkema v Lubbe* 2007(5) SA138, that it had locus standi.

[5] In that case, the court considered the nature of an attorney's trust account summarised in *Fuhri v Geyser and Another* 1979(1) SA 747(N) at 749C-E as follows by Hefer J:

> '(D)espite the separation of trust money from an attorney's assets thus affected by s 33(7), it is clear that trust creditors have no control over the trust account; ownership in the money in the account vests in the bank or other institution in which it has been deposited (*S v Kotze* 1965 (1) SA 118 (A) at 124), and it is the attorney who is entitled to operate on the account and to make withdrawals from it (*De Villiers NO v Kaplan* 1960 (4) SA 476 (C). The only right that trust creditors have, is the right to payment by the attorney of whatever is due to them, and it is to that extent that they are the attorney's creditors. This right to payment plainly arises from the relationship between the parties and has nothing whatsoever to do with the way in which the attorney handles the money in his trust account.'

[6] The Court accordingly held that "when an attorney draws a cheque on his trust account, he exercises his right to dispose of the amount standing to the

credit of that account and does so as principal and not in a representative capacity".

[1] The First respondent however, argues on the authority of the Appellate Division in *Joel Melamed & Hurwitz vs Cleveland Estates* 1984(3)SA148 AD and *Desai NO vs Desai & others* 1996(1)SA 141 AD that the conveyancer acts as agent for his client and not as principal.

[2] In the case of *Joel Melamed* supra, the issue was whether the nomination of the conveyancer in a Deed of Sale amounted to a contract for the benefit of a third party and in the *Desai* case, the facts related to the purchaser's right to claim transfer from the Seller and not the conveyancer. The facts of these two cases differ from the present case and are not relevant to the present case.

[3] The First Respondent also referred to the case of *Whaley and Others v Cone Textile(PVT)Ltd* 1989(3)SA 574 where it was found that the costs of transfer were due to the Seller and not the conveyancer and submitted that this was more so in respect of the proceeds of the sale. By virtue of the contract of sale between the seller and purchaser, the purchase price is payable by the Purchaser to the Seller and the conveyancer receives same as agent for the seller. There is a clear distinction in the present case.

[4] In this case, we are dealing with the situation where the applicant has accepted the payment on behalf of his client and, as attorney, has the obligation to pay his client. There is a distinction between the act of receiving

the funds and the act of accounting to his client in respect of the funds. In the latter case, the attorney clearly acts as principal.

[5] First Respondent argues further that once the monies left the trust account, the capacity in which Applicant does so becomes academic and the amount becomes the client's money and therefore set-off can apply. I do not agree.

[6] In the present case the Applicant, as a practising attorney, was intent on making payment to his client pursuant to the completion of a conveyancing transaction whereby his client sold immovable property to one Manyama and with the proceeds of the sale being payable to the client. The Applicant was obliged as a practising attorney to account to his client for the funds and as such did so as principal. It would not be a defence to a claim by the client for the attorney to submit that he had paid the wrong person and therefore he had discharged his duty to the client.

[7] The second aspect is that the Applicant did not intend paying the First Respondent. The funds were paid to the First Respondent in error. The Applicant did not have instructions to pay the First Respondent the proceeds of the sale and the Applicant cannot be said to have made the error on behalf of his client. The First Respondent does not dispute the error and accordingly cannot claim that the Applicant in these circumstances acted as agent for his client.

[8] The third aspect regarding Applicant's locus standi is regarding Applicants liability to his client to pay the proceeds of the sale to the client and that the Applicant would be held personally liable for the payment to his client (*Fuhri's* case supra).

[9] In the case of *Frikkie Pretorius Inc and Another v Glass* 2011(2) SA 407 KZP at par 19 the court said-

> "In considering the duty of an attorney in dealing with trust money the Court in *Aeroquip SA v Gross and others* held-
>
> [13] The Applicant has not referred to any authority that an attorney becomes personally liable for payment of a debt where he fails to pay over to a client's creditor an amount held by him on behalf of his client in his trust account. The contrary appears to be true. An attorney who holds an amount of money in his trust account on behalf of a client is obliged to use it for no other purpose than he is instructed by the client. It is trite that it must always be available to the client. In *Law Society, Transvaal v Matthews* 1989 (4) SA 389 (T) at 394 the court said: 'I deal now with the duty of an attorney in regard to trust money. Section 78(1) of the Attorneys Act obliges an attorney to maintain a separate trust account and to deposit therein money held or received by him on account of any person. Where trust money is paid to an attorney it is his duty to keep it in his possession and to use it for no other purpose than that of the trust. It is inherent in such a trust that the attorney should at all times have available liquid funds in an equivalent amount..."

[10] I now come to the question of First Respondent's claim to the funds in circumstances where the payment was made erroneously to the First Respondent. The First Respondent initially agreed to pay the funds to the Applicant but subsequently changed its view and proceeded to apply set off against a debt which alleged was due by the Applicant's client to the First Respondent.

[11] The Applicant, referred this Court to the authority of *Nissan South Africa(Pty) Ltd v Marnitz N O & Others* 2005(1)SA 441 where the Supreme Court of Appeal dealt with the question of what are the consequences of mistakenly transferring money to an incorrect bank account?. The Court found that "payment is a bilateral juristic act requiring the meeting of two minds."

[12] In the *Nissan* case(supra), the Court said –

> "Where A hands over money to B, mistakenly believing that the money is due to B, B, if he is aware of the mistake, is not entitled to appropriate the money. Ownership of the money does not pass from A to B. Should B, in these circumstances, appropriate the money, such appropriation would constitute theft (*R v Oelsen 1950 (2) PH H198;* and *S v Graham 1975 (3) SA 569 (A)* at 573E-H). In *S v Graham,* it was held that, if A. mistakenly thinking that an amount is due to B, gives B a cheque in payment of that amount and B, knowing that the amount is not due, deposits the cheque, B commits theft of money although he has not appropriated money in the corporeal sense. It is B's claim to be entitled to be credited with the amount of the cheque that constitutes the theft. This Court was aware that its decision may not be strictly according to Roman-Dutch law but stated that the Roman-Dutch law was a living system adaptable to modern conditions. As a result of the fact that ownership in specific coins no longer exists where resort is made to the modern system of banking and paying by cheque or kindred process, this Court came to regard money as being stolen even where it is not corporeal cash but is represented by a credit entry in books of account."

[13] The Court in that matter went further to state that-

> "the position can be no different where A, instead of paying by cheque, deposits the amount into the bank account of B. Just as B is not entitled to claim entitlement to be credited with the proceeds of a cheque mistakenly handed to him, he is not entitled to claim entitlement to a credit because of an amount mistakenly transferred to his bank account. Should he appropriate the amount so transferred, i.e. should he withdraw the amount so credited, not to repay it to the transferor but to use it for his own purposes, well knowing that it is not due to him, he is equally guilty of theft."

[14] In the present case, the Applicant intended to effect payment to his client and had no instructions or intention to pay a third party and the First Respondent had no expectation of payment. There could accordingly have been no

meeting of minds. The First Respondent accordingly did not become entitled to the funds credited to its account and was not entitled to appropriate same or to apply set-off against the funds so received.

[15] In any event, the Applicant acted as principal and the Applicant was not indebted to the First Respondent. Set-off could accordingly not apply in these circumstances.

[16] Furthermore, it is clear that the debt was not liquidated as the calculation of the amount owed by Applicant's client to the First Respondent was the subject of a dispute between the parties and that the First Respondent did not agree to the Applicant's client's proposed formula to determine its liability in respect of the water charges.

[17] The First Respondent also contended that there was an agreement between it and the Applicant that the funds would be held in trust pending the settlement of the underlying dispute between the First Respondent and the Applicant's client. The Applicant denies that this is so and submits that if this were so the Applicant would not have made the application and that the agreement to hold the funds in Second Respondent's trust account was to safeguard the funds pending the resolution of the dispute between Applicant and First Respondent. In support of this, the Applicant refers this Court to the fact that the proceedings were instituted in August 2008 and that this would not have been the case if there was the agreement as alleged by the First Respondent.

[18] It appears to me that for such an agreement to have been made, having regard to the authorities referred to above, Applicant's client would have had to consent to the arrangement or be a party to the agreement. There is no evidence that this was in fact so.

[19] This Court according orders-

1. First and Second Respondents to pay the amount of R451 614.03 to Applicant.

2. First Respondent to pay interest on R451 614.03 at 15.5% per annum from 21 July 2008 to date of payment.

3. First Respondent to pay the costs of the Application.

GANGEN, AJ