Republic of South Africa
In the High Court of South Africa
(Western Cape Division, Cape Town)

[REPORTABLE]

CASE NUMBER: A21/14

In the matter between:

PROBEST PROJECTS (PTY) LTD **APPLICANT**

And

THE ATTORNEYS, NOTARIES AND CONVEYANCERS FIDELITY GUARANTEE FUND **RESPONDENT**

JUDGMENT DELIVERED ON 15 AUGUST 2014

MANTAME, J

1 INTRODUCTION

[1] This is an appeal against the judgment of Irish, AJ that was delivered on 29 April 2013. Appellant filed a claim against the Respondent for payment of an amount of R9.1m that was paid over into the trust account of Izak Minnie Incorporated that was stolen by an attorney practising in that firm, Izak Minnie ("Minnie").

[2] Respondent, in turn, filed two special pleas, namely that:-

2.1 There was no entrustment of monies, as contemplated in the "Act" (Attorney's Act, 53 of 1979) as the monies paid over to Izak Minnie

Incorporated were paid over in terms of a business arrangement entered into between Appellant and Minnie; and

2.2 Appellant's claim against the Fund was time-barred in terms of Section 48(1)(a) of the Attorneys Act, 53 of 1979 which provides that:

"(1) No person shall have a claim against the fund in respect of any theft contemplated in Section 26 unless –

(a) 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; …"

[3] The *court a quo* dismissed the first special plea and upheld the second special plea on the basis that the respondent had established that the Appellant became aware of the theft of its funds by 23 July 2009. It is common cause that the claim was only lodged with the respondent on 20 November 2009, which is more than three months after the 23 July.

2. SUMMARY OF FACTS

[4] It is common cause that Messrs William Conly Annandale and René de Matteis on behalf of the Appellant were approached by Minnie to invest on property developments on which some of his clients were experiencing difficulties in re-selling the units that have been built due to the fact that they have been sold and the bonds for some reason were withdrawn from the purchasers and would get them at a discount of between 15% and 20%. Annandale and de Matteis did not view the properties. Since they had been dealing with Minnie for about 10 years and had never had difficulties with his dealings, they entrusted the transactions to him. De Matteis proceeded to transfer an amount of R9.1m during 19 January 2009 – 17 March 2009 to Izak Minnie Incorporated Trust account. Respondent received no trust receipts for this amount. Minnie, as agreed with respondent, was to pay for all transactions leading to the successful transfer of these properties.

[5] Respondent realised that Minnie was delaying in transferring the properties, and they started to put pressure on him. In April/May 2009, he promised to finalise the transactions and promised to pay the money back if he could not finalise same. At some point Minnie cited delays being due to the inability to get the clearance certificates from the municipality. In about June 2009, Minnie further advised respondent that his books were behind and would be updated shortly. He was still dealing with the Law Society. In the meantime, he offered respondent some security in the form of properties. On 23 July 2009, Minnie signed an acknowledgment of debt and furnished some suretyships to the respondent. This agreement provided for another written agreement that was entered into between Appellant and Minnie on 4 August 2009. Respondent discovered that there were caveats registered against those properties which he had given as security at about end October, beginning November 2009. Subsequent thereto, Appellant gave notice to institute a claim to respondent on 20 November 2009 in terms of Section 48(1)(a) of the Act. Annandale, who is director of respondent according to his testimony, was not aware of Minnie's financial difficulties and liquidation up until November 2009.

[6] Respondent refused to pay the claim on the basis that the notice of such claim was not given within 3 months after the claimant became aware of such theft or by the exercise of reasonable care should have become aware of the theft.

3. ISSUES

[7] This court is now called upon to determine whether the *court a quo* erred in upholding the second special plea, and further dismissing respondent's claim.

4. ARGUMENT BY THE PARTIES

[8] Mr Van Zyl for the appellant submitted that in **SVV Construction (Pty) Ltd v Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund 1993 (2) SA 577 (C) at 585,** the court considered the provisions of Section 48 (1) (a) and stated that knowledge in this context constitutes personal knowledge, based on the restrictive interpretation of a statutory provision of this nature:

"I accordingly hold that becoming aware in the section imports that actual, personal knowledge of the claimant.

What then is this 'knowledge'?

It is not confined to 'that mental state of awareness produced by personal participation in the theft or by information derived from the actual thieves, but includes also a conviction or belief engendered by the attendant circumstances' (per Watermeyer CJ in R v Patz 1946 AD 845 at 857, who is also reported to have said (loc cit) '(o)n the other hand mere suspicion not amounting to conviction or belief is not knowledge').

What is then required is the awareness of material facts which would create in the mind of a reasonable man the knowledge, in the sense of the belief or conviction, not merely the suspicion, that a theft had been committed (by a practising attorney in the course of his practice).

'Belief or conviction' connotes something less than certainty in the mind, but at least that which amounts to 'mental acceptance of a proposition, statement or fact, as true, on the ground of authority or evidence (OED sv 'belief'); 'conviction' is 'strong belief on the ground of satisfactory reasons or evidence' (OED); just as this is more, considerably more, than mere suspicion (however well founded the suspicion may subsequently prove to be) so also is it stronger than an impression (cf Feffrey v Andries Zietsman (Edms) Bpk 1976 (2) SA 870 (T) at 871 E – F)

In other words, the person in the position of a claimant has to be able to say: 'with the evidence at my disposal, I, as a reasonable man, am satisfied that the attorney has committed theft' (cf Gramophone Co Ltd v Music Machine (Pty) Ltd and Others 1973 (3) SA 188 (W) at 207 F – G).

Theft is a legal concept and to this extent, although this is not necessarily so in all instances (cf R v Thornton and Another 1960 (3) SA 600 (A) at 611 G – H), knowledge, in the sense above set out, ie that the known facts convey to a reasonable man that theft has been committed, is also required."

[9] Counsel for the appellant submitted further that, Mr Annandale, the director of the appellant had no personal knowledge of the misappropriation of funds or theft up until November 2009. He was informed by Minnie that funds were gone which

Annandale understood to have been stolen. Therefore Minnie misrepresented the factual position as to the theft of funds. Appellant through its representatives was not aware of theft on 23 July 2009 when he entered into those agreements. Besides, respondent did not rely on knowledge of theft of trust funds in the plea, more specifically in relation to the date of 23 July 2009. Further, respondent did not rely on the second part of Section 48 (1) (a) of the Act, to the effect that it was not pleaded that with the exercise of reasonable care, the Appellant should have been aware of the theft.

[10] In response to the above contention, Mr Oliver for the respondent argued that, although that was an issue before the *court a quo*, it is not an issue on appeal, since the finding of the *court a quo* was that the directors of appellant actually knew on 23 July 2009 that the funds had in fact been stolen. In any event, respondent pleaded wide enough to include a defence that appellant should, through the exercise of reasonable care, have known that the funds had been stolen. On the probabilities appellant would surely have taken immediate steps in order to recover the money and would have obtained legal advice in the event of appellant knowing the money had been stolen. Further, the attorneys who assisted with the drafting of the acknowledgment of debt and surety documents would have advised appellant to institute a claim with respondent. Appellant therefore elected not to lodge a claim but elected to rely on an acknowledgment of debt. So the only inference that may be drawn from such circumstances is the Appellant either knew that Minnie stole the money, but elected not to institute a claim with the respondent or attempted to protect Minnie by rather taking its chances by entering into the agreements and have Minnie sign an acknowledgment of debt to repay the stolen funds.

[11] Mr Oliver further contended that appellants avoided making the original acknowledgment of debt documents available to the *court a quo* at all cost. The implication is that appellant was avoiding the contents of such documents coming to the knowledge of the court, as it would be clear that the directors of the appellant knew that the monies have been stolen. Once there is actual knowledge, as the *court a quo* found, the first part of Section 48 (1) (a) applies. Therefore, he argued that the appellant failed to make out a case for misdirection on the part of the *court a quo* and that the appeal should be dismissed with costs.

5. ANALYSIS OF EVIDENCE AND THE APPLICABLE LAW

[12] At the start of the hearing, in the *court a* quo, parties agreed that evidence would be adduced by way of affidavits and a bundle of documents would be prepared which would also serve as part of evidence. Evidence in this matter most unfortunately turns out on the evidence that was tendered by appellant (Annandale at the Law Society inquiry and his affidavit) and Minnie (at the Law Society inquiry and his affidavit). No evidence was tendered by the respondent.

[13] Appellant submitted that there were no facts that were placed in the *court a quo* justifying a finding that appellant knew or should have known that the money was stolen.

[14] I now turn to deal with the evidence that was before the *court a quo*. Annandale testified at the Law Society inquiry that their panic levels about Minnie's behaviour towards his lack of delivery to their mandate started to rise at about June / July 2009. Even though Annandale gave evidence and filed affidavits about the steps they have taken to find out about the monies that were paid into Izak Minnie Inc's trust account, no specific dates were furnished precisely of what happened where and when. The only dates available is when the monies were transferred into the trust account over the period 19 January 2009 – 17 March 2009. There are no dates on which appellant sought advice, and/or instructed Viljoen French and Chester Inc, Randburg to prepare acknowledgment of debt and suretyship agreements that were signed on 23 July and 4 August 2009 respectively. I agree with the inference that was drawn by the *court a quo* that appellant had a firm of attorneys involved by 23 July 2009. Having regard to the evidence that was led at the law society inquiry and the new law firm instructed by appellant being conveyancers, it should have occurred to the said attorneys that something was seriously wrong with Minnie's trust account. It would have immediately rang a bell into an attorneys ear, immediately a client comes with the version such as that of the appellant to start probing deeper into what happened with Izak Minnie Inc. The only reason why those attorneys prepared an offer of security, instead of reporting the matter to the law society was that the directors of the appellant wanted to protect Minnie against the law society as they had a long standing relationship. Further, the

court a quo was correct in finding that by the 23 July 2009, appellant's directors knew that their money was gone from the trust account and therefore their funds were stolen. It is furthermore inconceivable that appellant's attorneys did not know about Izak Minnie Inc's liquidation from June 2009 until November 2009 when Minnie broke the news himself and when the same attorneys discovered that certain caveats were registered against those properties.

[15] Appellants submitted that there were no facts placed before the *court a quo* justifying a finding that appellant knew or should have known that the monies were stolen. If the *court a quo* had to determine the time period of which the claim was to be lodged, it surely had to deal with the requirements of Section 48 (1) (a) and ascertain if the claim was lodged within the said time periods. Besides, for the second special plea raised by the respondent to be determinable, the judge had to trace the footsteps backwards as to when the appellant became aware of the theft. In my view, the appeal ground raised by the appellant is mischievous. It cannot be disputed that the first agreement that was concluded on 23 July 2009 between appellant and Minnie had the clear implication that appellant must have known, and therefore did know that Minnie had misappropriated the monies for investment in his own projects. If appellant believed that his monies were still in the trust account, he would not have concluded the agreements he had on 23 July 2009 and 4 August 2009 respectively. Those agreements were basically entered into by the parties in order to secure repayment of monies that were paid in Izak Minnie's trust account.

[16] Minnie, at the Law Society Inquiry, pages 146 – 147 of the record testified that:-

> *"Mr Molefe: Now how did this affidavit come about?*
>
> *Mr Minnie: When I advised Probest of the apparent problem regarding the funds and that stage a possible trust shortfall, I also advised them what the procedure would be for them to lodge a claim and to assist in lodging a claim I had the duty to at least, to the best of my abilities set out the circumstances leading up to the problem.*

> *Mr Molefe:* *Yes, but explain the steps in detail, from the point where you had this affidavit taken down, tell this Committee how it happened.*
>
> *Mr Minnie:* *When I discussed the problem with Probest's director, I indicated to them that they in all probability will have to seek the services of another attorney to assist them with a claim against the Fund …"*

It is common cause therefore that appellant had a new set of attorneys by 23 July 2009. Judging from Minnie's testimony, respondent knew about the shortfall in the trust account before the services of other attorneys were sought. The new attorneys did not lodge the claim with respondent, but rather prepared agreements referred to above. The reasons for doing so could be gleaned at page 149 of the record where Minnie testified that:-

> *"Mr Minnie:* *I think so, because in the beginning as the pressure mounted and we flight through various means and procedures to alleviate it, we tried to sort out the problems and hoped that by putting up from my investment properties for sale, we could sort out the funds problem, the problem was trust funds, that is and it became clear towards late last year, 2009, I would say about October or thereabout, that there is no way around …"*

This testimony again confirms that the directors knew all along that there was a trust shortfall in Izak Minnie Inc trust account, but rather tried other means in sorting out the problem. It was only in October 2009, when they could not wiggle their way through, that they sought refuge from respondent.

[17] Further Minnie's testimony was confirmed by his affidavit dated 13 January 2010 that could be found at page 74 of the record that:-

> *"13. I appraised PROBEST of the situation and advised that a claim be lodged on their behalf with the attorneys' fidelity fund."*

[18] The legislation is clear that a written notice of a claim has to be 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. Seemingly the 3 months period was not met by the respondent due to the fact that Minnie and the appellants explored other ways to solve the shortfall issue in the trust account. Blame could not be shifted to the respondent after the appellants were tardy in resolving the issue.

[19] Taking into account all the evidence, I come to the conclusion that appellant personally knew of this theft at least by 23 July 2009. In this regard, see **SVV Construction v Attorneys, Notaries and Conveyancers Fidelity 1993 (2) SA 577 at 585 par D – E,** (*supra*) where King, J held that:-

> *"I accordingly hold that becoming aware in the section imports the actual, personal knowledge of the claimant.*
> *What then is this 'knowledge'?*
> *It is not confined to 'that mental state of awareness produced by personal participation in the theft or by information derived from the actual thieves, but includes also a conviction or belief engendered by the attendant circumstances'…"*

6. FINDINGS

[20] In my view, appellant knew about the theft of funds by 23 July 2009. It was only after they discovered that certain caveats were registered against those properties that Minnie put as security that they immediately lodged the claim with the respondent.

[21] In my judgment, I cannot find fault with the decision of the *court a quo.* Having considered the facts above, it is highly unlikely, improbable and far-fetched that appellant did not know about the theft of funds by 23 July 2009.

[22] In the circumstances, I propose the following order.

-The appeal is dismissed with costs including costs of 20 September 2013.

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MANTAME, J

I agree, and it is so ordered.

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HLOPHE, JP

I agree.

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WEINKOVE, AJ