REPORTABLE

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

Case number: 5127/2012

In the matter between:

FAIROAK INVESTMENTS HOLDINGS (PTY) LIMITED Applicant

and

THE CHAIRPERSON, ATTORNEYS' FIDELITY FUND
BOARD OF CONTROL First Respondent

THE ATTORNEYS' FIDELITY FUND
BOARD OF CONTROL Second Respondent

JUDGMENT

INTRODUCTION

1. This is an application by Applicant, Fairoak Investments Holdings (Pty) Limited ("**Fairoak**"), against First Respondent, the Chairperson of the Attorneys' Fidelity Fund Board of Control, and Second Respondent, the Attorneys' Fidelity Fund Board of Control (the "**Board of Control**"), for an order that:

"1. The Respondents' decision rejecting the Applicant's claim of 11 June 2010 against the Attorney's Fidelity Fund, on the ground that it was not lodged timeously, is set aside.

2. The Respondents are ordered to consider the Applicant's claim against the Attorneys' Fidelity Fund of 11 June 2010 in accordance with this judgement.

3. The Respondents, opposing this application, are ordered to pay the Applicant's costs.

4. The Applicant is granted further or alternative relief."

2. The Board of Control rejected Fairoak's claim in terms of the Attorneys Act, No 53 of 1979 ("**the Act**"), that was lodged with the Attorneys' Fidelity Fund ("**the Fund**") on 11 June 2010 for the amount of R1 566 000.00 arising from the theft of its money, held in trust by an attorney, Mr Izak Minnie ("**Minnie**"), who had been removed from the roll of attorneys by an order of court on 19 October 2010 after being sequestrated on 9 June 2010.

3. Fairoak's claim was rejected by the Board of Control, because according to the latter written notice of the claim in terms of section 48(1)(a) of the Act was not given to the Board of Control within three months after Fairoak allegedly became aware of the theft or, by the exercise of reasonable care, should have become aware of the theft.

OPPOSED MOTION PROCEEDINGS

4. An applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by a respondent, based upon the admitted facts in the applicant's affidavits together with the facts alleged by the respondent, unless the latter's allegations are, in the opinion of the Court, not such as to raise a real, genuine or *bona fide* dispute of fact or are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers (**Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)** at 634-635C; **Wightman t/a JW Construction v Headfour (Pty) Ltd and Another 2008 (3) SA 371 (SCA)** at 375E-F).

5. The denial by a respondent of a fact alleged by an applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact. If, in such a case, the respondent has not applied for the deponent concerned to be called for cross-examination in terms of Rule 6(5)(g) of the Uniform Rules of Court, and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof, and include this fact among those for determination whether the applicant is entitled to the relief sought (**Ripoll-Dausa v Middleton NO and Others 2005 (3) SA 141 (CPD)** at 151F-152A).

6. A bare denial can give rise to a real, genuine and *bona fide* dispute of fact, when there is no other way open to the disputing party and nothing more could be expected of him. When the facts averred are such that the

disputing party must necessarily possess knowledge of them and be able to provide an answer or evidence, if they not be true or accurate, but rests his case on a bare or ambiguous denial, a finding that the test is satisfied will be problematic. A legal adviser, who settles an answering affidavit, has a serious duty to ascertain and engage with the facts disputed by a respondent, and to reflect such disputes fully and accurately in the answering affidavit, otherwise a Court is justified in taking a robust view of the matter (**Wightman *supra*** at 375G – 376A).

7. The aforementioned observations are apposite herein:

7.1. In view of Fairoak's allegations *inter alia* that:

7.1.1. the Board of Control's refusal to consider the claim was premised on the view that Fairoak should have been aware of the theft by Minnie from July 2009 and constitutes a material error of fact;

7.1.2. the director of Fairoak, who dealt with Minnie, was a lay person, who had no reason until 9 November 2009 to believe that anything was amiss or to mistrust Minnie;

7.1.3. the delay after 9 November 2009, in lodging the claim, was attributable to a *bona fide* attempt by Fairoak to comply with

a procedural requirement, mentioned by the applicable Law Society, as a requisite for the claim against the Fund;

7.1.4. the Board of Control rigidly applied the three month statutory time limited, without regard to the reasons for Fairoak's failure to comply therewith;

7.1.5. the Board of Control's decision was not related to the information before it, moreover, that it did not take relevant circumstances pertaining to Fairoak's explanation for the delay into account, and it disregarded the purpose of the Fund, resulting in its decision, which does not comply with the scope and purpose of the legislation, establishing the Fund, rejecting a sound claim on technical and formalistic grounds.

7.2. When regard is had to Respondents' response, namely, that Fairoak's abovementioned "**allegations constitute legal submissions which are disputed and which would be dealt with in legal argument at the hearing of the application**", in particular whether Respondents provided a factual basis for their defence.

THE RELEVANT FACTUAL MATRIX

8. The facts, having regard to the approach on the papers, are set out hereunder.

9. During 2004 Fairoak purchased certain immovable property from Mr S Olivier, ("**Olivier**"). A director of Fairoak, Mr Stephanus Petrus Hartzer, the deponent to Fairoak's affidavit ("**Hartzer**"), instructed Minnie, of Izak Minnie Incorporated, a specialist property lawyer, to act on behalf of Fairoak to facilitate the payment of the purchase price by issuing guarantees and liaising with the transferring attorneys appointed by Olivier.

10. Hartzer, as a director of Fairoak, had many dealings with Minnie and trusted him as an honest and professional attorney, who was engaged in many transactions by Fairoak, which involved the flow of hundreds of millions of Rand through Minnie's trust account, resulting from many property transactions, without any problems.

11. Fairoak paid an amount of R2 556 000.00 to Minnie. The said amount represented the purchase price of R2 300 000.00, due to Olivier and also transfer duties and legal fees, payable in the amount of R256 000.00.

12. The monies were paid by Fairoak into the trust account of Izak Minnie Incorporated held with ABSA Bank Limited, to secure transfer of the property bought from Olivier.

13. Minnie caused a guarantee to be issued by ABSA Bank Limited on 22 October 2004. That guarantee was delivered by Minnie on 29 October 2004 to Olivier's transferring attorneys, which occurred out of time, having regard to the terms of the deed of sale concluded between Fairoak and Olivier.

14. Olivier accordingly cancelled the sale, but Minnie assured Hartzer that the cancellation of the sale was unlawful, having regard to the provisions of the deed of sale.

15. Minnie funded litigation on Fairoak's behalf to compel Olivier to effect transfer of the property concerned to Fairoak.

16. The litigation against Olivier, including attempts to appeal, failed.

17. After Hartzer had been informed by Minnie that Fairoak failed to obtain transfer of the property from Olivier, despite litigation, Hartzer requested Minnie to refund the amount paid by Fairoak into the trust account of Izak Minnie Incorporated, as well as any interest earned thereon.

18. Minnie thereafter continued to give various reasons why payment to Fairoak could not be made, such as that he was waiting for the closing of the investment, and that the investment could not be closed prior to the receipt by ABSA Bank Limited of the original guarantee.

19. Hartzer became agitated and frustrated with Minnie, but during approximately July 2009 Minnie made payment of R1 000 000.00 to Fairoak and issued 3 post-dated cheques to Fairoak for the balance of R1 656 000.00 namely in the amounts of R250 000.00, R256 000.00 and R1 150 000.00 respectively, calculated by Minnie to be due and payable to Fairoak in terms of what was held in trust.

20. The post-dated cheques were issued pursuant to a meeting between Minnie and Hartzer, held on 13 July 2009. Subsequent thereto Minnie sent a letter dated 15 July 2009 to Fairoak and Hartzer, advising as follows:

> "**1. Bogemelde en die vergadering te u kantore Maandag 13 Julie verwys.**
>
> **2. Soos bespreek onderneem ons hiermee die volgende:**
>
> **2.1 Ons sal aan Fairoak Investment Holdings voor of op 31 Julie 2009 die bedrag van R1 150 000-00 betaal;**
>
> **2.2 Daarmee saam sal 'n bedrag van R250 000-00 ten opsigte van die rente op die belegging ook betaal word; en**
>
> **2.3 Die transportkoste in die bedrag van R256 000-00 sal dan ook aan Fairoaks betaal word.**
>
> **3. Ten opsigte van die balansrente en regskoste sal ons Mnr Minnie en Mnr Faan Hartzer dan later 'n vergadering hê.**
>
> **4. Ons vertrou u vind bogemelde in orde en bedank u vir die ooreenkoms so bereik.**"

21. Fairoak deposited the cheques. The cheques were returned to Fairoak unpaid, because Minnie had stopped payment of the cheques.

22. In a letter dated 31 July 2009 to Fairoak, Minnie explained why payment was stopped, *inter alia*, as follows:

> "**2. U is in besit van die tjeks getrek op Izak Minnie inc, en vir onderskeidelik R1 150 000-00, R250 000-00 en R256 000-00, en gedateer vir vandag, 31 Julie 2009.**
>
> **3. U is bewus van die feit dat Izak Minnie inc in likwidasie is.**
>
> **4. U is ook bewus van die feit dat skrywer nou as IZAK MINNIE PROKUREURS besigheid doen.**
>
> **5. Ons het aanvanklik met ABSA die verstandhouding gehad dat ons, aangesien die besigheid van Izak Minnie inc wat nie deur die likwidasie geraak word nie, ons nog die trustrekening sal kan gebruik vir die ordelike oordra van die relevante besigheid.**
>
> **6. ABSA het egter nou – in hierdie week – op hulle regsafdeling se instruksie die rekeninge gevries, en kan die rekenings en tjeks en oorplasings nou slegs in samewerking met die likwidateurs geskied.**
>
> **7. Die nuwe rekeninge vir Izak Minnie Prokureurs is in die proses, en sal eers teen Donderdag/Vrydag vg week operasioneel wees (dan sal ons ook nuwe tjekboeke hê.**
>
> **8. Die drie tjeks moet derhalwe asb nie aangebied word nie, aangesien dit gestop moet word.**
>
> **9. Ek sal u sodra die nuwe rekeninge operasioneel is, dadelik nuwe tjeks gee.**"

23. From 31 July 2009 Hartzer continued unsuccessfully to obtain payment from Minnie who kept stalling him and making promises of payment from day to day.

24. Minnie remained Fairoak's attorney and continued to practice as an attorney until 17 November 2009, when he was suspended in his practice.

25. Eventually Hartzer, a lay person, without legal knowledge, became uncomfortable with Minnie's explanations why payment was delayed. During November 2009 he consulted an attorney, Mr JJ Badenhorst ("**Badenhorst**") of TG Bosch-Badenhorst Attorneys, Conveyancers and Valuers.

26. On 9 November 2009 Badenhorst lodged a written complaint against Minnie with the Law Society of the Northern Provinces, ("**the Law Society**"), contained in a letter dated 9 November 2009 to which an official complaint form, duly completed, was annexed.

27. By letter, dated 17 November 2009, Fairoak and Hartzer were informed as follows by Minnie:

> "**1. The above and our previous discussions refer.**
>
> **2. Regrettably, as advised telephonically and as is evident from the amplification to our letterhead, Izak Minnie inc. was placed in liquidation.**

3. As further advised, we traded under Izak Minnie Attorneys from 1st July 2009, but it proved not to be viable. Consequently, our offices is closed effectively from today.

4. I therefore send to you, under cover hereof, all the files currently still with us and pertaining to Featherbrooke, Fairoaks, Lotti Trading, and Mr Faan Hartzer.

5. As regards older files of Commercial, general and Litigation nature, kindly note that these have been sent to Metrofile as and when they were finalized. Should you wish to retain these files, kindly instruct us accordingly.

6. As regards the claim against the Attorneys Fidelity Fund, kindly take note that I am meeting with the Fund's representatives in Cape Town next week, to discuss the various claims. I had a phone call from Mr Hans Badenhorst a couple of days ago, and I accept for the moment that he will be representing you for/with the claim. I will keep you posted on progress.

7. It was my pleasure to have been at your service as Attorney through all these years."

28. On or about 25 November 2009 the Law Society advised Badenhorst that Minnie had been suspended from practice as an attorney in terms of an order of the High Court, granted on 17 November 2009.

29. The Law Society thereafter sent a further letter dated 8 December 2009 to Badenhorst in which it confirmed that Minnie had been suspended from practice as an attorney on 17 November 2009, and advised that Mr Johan van Staden has been appointed as the Curator *Bonis* "**over the practice**". Badenhorst was also advised that all claims "**against trust funds**" of Izak Minnie Attorneys had to be submitted against the Attorneys' Fidelity Fund. Annexed to the said letter was a memorandum "**… on the procedure for**

the presentation of claims against the Fund, together with a Framework for a sworn affidavit in support of a claim against the Attorneys Fidelity Fund". In the letter it was specifically noted that "**… all the requirements set out in the framework must be adhered to …**".

30. The memorandum outlined the procedure for the presentation of a claim against the Fund and contained *inter alia* the following statements:

30.1. The Fund is a fund of last resort. If it is apparent that stolen money or property can be recovered from another source, the Fund will require a claimant to first exhaust all available legal remedies against all persons liable in law.

30.2. Regarding the procedure for the presentation of the claims against the Fund:

- The claim should be submitted to the Fund by way of an affidavit.

- The defaulting attorney's entire office file (cover and contents) should accompany the affidavit.

- Except where the Board of Control has directed that a formal inquiry in terms of the Fund's regulations should be held,

consideration of the claim will be confined to the Affidavit submitted.

- Any allegations in the affidavit in connection with the amounts entrusted to the attorney must therefore be corroborated.

31. By 8 December 2009 Fairoak, represented by Badenhorst, was made aware of the procedure that had to be followed and of the time-frame for notice of the claim to the Fund.

32. In view of the requirements mentioned by the Law Society Badenhorst concluded that the claim should not be submitted until the office file of Minnie had been obtained from the Law Society. He accordingly addressed a letter dated 7 January 2010 to the Law Society to obtain the client file pertaining to Fairoak's claim.

33. In a letter dated 12 January 2010 the Law Society referred to Badenhorst's aforementioned request and stated in paragraph 2 thereof as follows:

"**Kindly note, that the writer hereof, being the Legal Official of the Curators Department can be contacted with any enquiries, and do I confirm that we will peruse our records to ascertain whether we are in possession of your client file**."

34. Relying on the abovementioned undertaking by the legal official from the Law Society Badenhorst submitted various letters dated 14 January 2010,

25 February 2010, 11 May 2010 and 28 May 2010 respectively, to the Law Society referring to his request for the content of the relevant file.

35. Despite all these letters to the Law Society, during a period of 5 months, the latter failed to respond at all, and there was no compliance with Badenhorst's request, namely to provide him with a copy of the file so that he could complete the affidavit to submit the claim to the Fund, in terms of the prescribed procedure.

36. Minnie's estate was sequestrated on 9 June 2010.

37. Due to the Law Society's failure to respond to his letters Badenhorst submitted Fairoak's claim on 11 June 2010 without the content of the file required in terms of the memorandum by the Law Society. In a letter dated 11 June 2010 Badenhorst indicated to the Fund that the filing of the claim was delayed due to his attempts to obtain the relevant file from the Law Society.

38. By letter dated 5 July 2010 Mr S D Maile, the Senior Claims Manager of the Fund, informed Badenhorst that:

"**I wish to advise that I have perused the claim documentation herein. It is my submission that the claim cannot be sustained against the Attorneys' Fidelity Fund as it was not lodged timeously.**

It appears that your client have (sic) **known about the problem or ought with the exercise of reasonable care to have been aware of the theft as early as July 2009, but he only lodged the claim in June 2010 against the Fund.**

This claim seems not to have been lodged in accordance with the provisions of Section 48 of the Attorneys Act 53 of 1979 as amended.

I propose closing my file. However, should you feel strongly that this is a good claim please advice accordingly. I will then refer the matter to the Fund's Board of Control to be finalised."

39. On 9 July 2010 Badenhorst requested in writing that the matter be referred to the Board of Control for its consideration and final decision.

40. By letter dated 5 August 2010 one S Matthews, the Claims Administrator of the Fund, advised Badenhorst that:

"***…* the Fund's** (sic) **claim in this matter has been referred to the members of the Fund's Board of Control for consideration and decision**".

41. Badenhorst informed the Fund in a letter dated 13 August 2010 that it was "**impossible to file the claim earlier as we had attempted to recover the files from the Law Society which to date we have not yet been able to do.**"

42. On 18 August 2010 Mr S D Maile, the Senior Claims Manager of the Fund, replied as follows in a letter:

"**I refer to previous correspondence herein and would advise that the Fund's Board of Control resolved to reject this claim on the grounds that:**

1. **The claim was not lodged in terms of Section 48(1)(a) of the Attorneys Act 53 of 1979, as amended.**

The reason for the rejection of the claim as set out above are (sic) **not necessarily exhaustive, and the Fund's rights are fully reserved in the event that it might appear at a later stage that additional grounds for rejection, or any other defences, exist**."

43. On 21 October 2010 Badenhorst was informed by the Law Society that Minnie had been removed from the roll of attorneys by an order of court, granted on 19 October 2010.

44. On 4 February 2011 Badenhorst again wrote to the Fund, advising that Minnie's file had not yet been received from the Law Society and contended *inter alia* that:

"**5. One of the reasons for the delay was that we awaited the file which in terms of your own claim form, had to be annexed to the claim.**

6. We require another 14 (fourteen) days to submit a fully motivated application to you in terms of Section 48(2) of the Act.

7. Should you be of the opinion that the decision of 18 August 2010 is final we need your response and advises in this regard by not later than Wednesday 9 February 2011.

8. The reason is that our client will then be compelled to bring an application for the review of the decision (only if it was a final decision) and there remains very limited time for such an application.

9. We therefore appeal to you to grant our client's request and to afford us the further period of 14 (fourteen) days to submit the request in terms of Section 48(2).

10. We understand that there are approximately 180 claims against this Attorney."

45. By letter dated 11 February 2011 Mr S D Maile, the Senior Claims Manager of the Fund, responded as follows:

"**I refer to your letter dated the 4 February 2011.**

Kindly note that the claim has already been considered and finalised. Your application now in terms of section 48(2) of the Act seems odd therefore.

However claimants have been allowed to submit further representation to the Board where a claim was rejected, even though the Act does not make provision for a review.

You are therefore at liberty to make such further submissions upon receipt of which I will refer them to the Board."

46. In a lengthy letter dated 25 February 2011 Badenhorst relied *inter alia* on the following aspects for consideration by the Board of Control:

46.1. "**It is our view that the Board might not have had the opportunity to consider <u>all</u> the relevant circumstances which we intend to set out in detail hereunder**."

46.2. "**We intend to explain the delay in submitting the claim to the fund with reference to two distinct periods. The first being the period from July 2009 to November 2009 and the second from November 2009 to June 2010 when the claim was filed with the Fund. The first period was during the time when Hartzer dealt with the situation on his own and the second when this office became involved.**

46.3. "**As a starting point the relationship between Mr. Minnie ("Minnie") and his client should be understood. Hartzer, through his company Fairoak developed properties in the Roodepoort and other areas for many years. He used Minnie as a specialist property lawyer for many years and trusted him with his affairs. Through the years he and purchases** (sic) **of properties paid hundred of millions of rand into the trust account of Minnie without any comebacks or problems. He had no reason to believe that he would become a victim of**

blatant theft by the person he trusted. It should also be considered that when he confronted Minnie, Minnie, as a smooth and convincing operator was quick to alley any suspicions and fears Hartzer might have had and to assure him that he would be paid.

46.4. "**As at July 2009 Fairoak decided to require from Minnie a refund, plus interest, from trust monies in the account of Izak Minnie Inc. The total of R2 656 000.00 (TWO MILLION SIX HUNDRED AND FIFTY SIX THOUSAND RAND), including interest, was due to Fairoak by Minnie. R1 000 000.00 (ONE MILLION RAND) was paid creating the impression that monies was still available. (see: par 6.12 of the affidavit). A meeting was held on 13 July 2009 between Hartzer and Minnie during which meeting Minnie came up with all kind of excuses and promises that payment was forthcoming. Pursuant to this meeting 3 (three) postdated cheques were issued by Minnie for the balance owing. Hartzer was still confident that the monies would be paid.**

On the same day these cheques were presented for payment by Fairoak's bankers Minnie delivered a letter to Fairoak advising that the cheques had to be stopped as Izak Minnie Inc was in liquidation but that payment would be effected when his new firm's (Izak Minnie Attorney) trust account was in operation. He apparently had an arrangement with the bank (see the letter from Minnie attached hereto for easy reference dated 31 July 2009, marked "F"). This version was still credible to a layman who was unscrupulously led up the garden path by the person he trusted. The fact that these cheques were "stopped" and not merely referred to drawer gave credence to Minnie's version who belief (sic) **that a transfer of one trust account to another had to take place. At that stage Minnie was still allowed to practice as an attorney. It was only on or about 25 November 2009 when writer was informed by the Law Society that Minnie was suspended in his practice as an attorney by the High Court on 17 November 2009**."

46.5. "**After 31 July 2009 Minnie kept on making promises and kept on stalling Hartzer until November 2009 when Hartzer came to see the writer for assistance. There were numerous discussions on a weekly basis between Hartzer and Minnie and numerous excuses why the payment was delayed. As stated before Minnie was still practicing and there was no reason to doubt his reasons why, due to the liquidation of the**

one entity, the funds could not be transferred to the trust account and why payment could not be made to our client."

46.6. "**It was only when Minnie himself wrote to Fairoak and Hartzer on 17 November 2009 indicating that he has thrown in the towel that Fairoak and Hartzer in fact knew that they won't get any money back from Minnie.**"

46.7. "**Considering the above circumstances it is submitted that any decision premised on the fact that Fairoak knew or ought to have known by the exercise of reasonable care, as from as early as July 2009 that the money was stolen would be wrong (see the letter from Minnie (In Liquidation) dated 17 November 2009 attached hereto marked "G". According to the letter of Mr. Maile dated 5 July 2009 ("A") the Fund concluded that Fairoak knew or should have known about the theft from July 2009 onwards. It seems that the Board took the same stance.**"

46.8. "**We would ask the Board to reconsider this which should lead to the conclusion that this date is to be moved forward to 17 November 2009, alternatively, 9 November 2009.**"

46.9. "**Shortly after Hartzer came to see writer during early November 2009 about his problems with Minnie writer assisted Hartzer to lodge a complaint, dated 9 November 2009, against Izak Minnie of Izak Minnie Inc with The Law Society of the Northern Provinces ("the Law Society"). It should be noted that at that stage writer was wrongly under the impression that by lodging the said complaint a claim was simultaneously lodged with the fund. This wrong impression is evidenced by writers** (sic) **reply to the letter from Izak Minnie inc (In Liquidation) dated 17 November 2009, already attached hereto marked "G". In reply to paragraph 6 of this letter where Minnie stated, "As regards the claim against the Attorneys Fidelity Fund, kindly take note that I am meeting with the Fund's representatives in Cape Town next week, to discuss the various claims", writer replied in his letter dated 20 November 2009 as follows: "We have in the interim lodged a claim with the fund".**"

46.10. "**In a letter dated 8 December 2009, which writer only perused after the December holiday period on 5 January 2010, the Law Society responded to the letter of complaint dated 9 November**

2009. It was only when writer perused this letter from the Law Society that writer was made aware of the legal requirement that a separate detailed claim would have to be made against the Attorneys Fidelity Fund complying with their requirements. Attached to this letter was a memorandum on the procedure for presentation of claims against the Fund, together with a framework for a sworn affidavit in support of the claim. Writer was also informed that Mr Johan Van Staden was appointed as the *Curator Bonis* over the practice of Izak Minnie Inc."

46.11. "**Writer perused the memorandum and concluded that regardless the three month requirement it was stated in the document that it was essential to obtain the defaulting attorney's entire office file to have it available to be able to dispatch it together with the sworn affidavit. Unfortunately writer did not peruse section 48 of the Act independently and only relied on the contents of the memorandum. The content of the memorandum lead to some confusion to** (sic) **the mind of the writer. Writer labored under the wrong impression that the 3 (three) month period had been interrupted by the prior lodging or would only start to run once the file of Minnie was obtained. Moreover, notice of a complaint against Minnie was already given to the Law Society. Writer further understood the memorandum to state that the Fund "is empowered to waive compliance with this section".**"

46.12. "**Writer started to follow up immediately to obtain the file required for the claim. This is evidenced by the fact that on 7 January 2010 writer wrote to the Law Society as follows: "Can you please let us have the contact details for Mr. Johan Van Staden as we need to obtain all the files pertaining to our clients claim." In reply to this letter, on 12 January 2010, the Law Society stated that they would follow up.**"

46.13. "**On 14 January 2010 writer replied to the Law Society that "We look forward to hearing from you in due course". This was repeated in a letter dated 25 February 2010. The file was never sent. On 11 May 2010 writer wrote to the Law Society yet again and enquired "as a matter of extreme urgency". Again on 28 May 2010. No reply was forthcoming, not even to state that the file could not be obtained or located**."

46.14. "**When writer realized that the claim process was now being delayed unnecessarily it was decided by writer to file the claim and affidavit without the file. This took place on or about**

11 June 2010. In Hartzer's affidavit in support of his claim, he stated as follows explaining why the file was not included as part of the claim documents: "7. As no response was received from the law Society I am not in a position to annex the entire file of Minnie"."

46.15. "**Considering that the delay was occasioned by the attempt to provide the Fund with the file, as was stipulated in the memorandum as a requirement, the claim, it is submitted, was furnished as soon as practicable. As such the Board would be asked to exercise its discretion to extend the required 3 (three) month period for a sufficient period to cover the period in which Fairoak submitted written notice of its claim against the Fund.**"

46.16. "**We are aware that there exist many claims relating to trust monies embezzled by Minnie and that the Fund had knowledge of similar claims long before Fairoak submitted its claim. As such the lateness of this claim certainly would not have delayed any investigation into the affairs of Izak Minnie Inc.**"

46.17. "**Accordingly, we would ask the Board, having regard to all the circumstances that has been placed before it previously and now, to reconsider to accept Fairoak's claim.**"

47. Approximately 7 months later, by letter dated 23 September 2011, Ms V Dondolo, the Claims Manager of the Fund, informed Badenhorst as follows:

"**Please be advised that your client's claim was rejected because it was not lodged timeously in terms of Section 48(1)(a), as it was lodged with the Fund almost a year after the claimant became aware of the problem . Furthermore, the reasons given were not helpful at all to convince us to consider condonation of the compliance with Section 48(1)(a)**."

48. Fairoak's notice of motion was issued on 16 March 2012 and served on Respondents on the same date.

49. Respondents did not dispatch a record of the proceedings of the Board of Control or reasons relating to any decision by the Board of Control under review to the Registrar in terms of Rule 53(1)(b).

50. An opposing affidavit by Mr Jerome Losper ("**Losper**"), the Claims Director in the employ of the Board of Control, on behalf of Respondents, was delivered on 9 May 2012, in response to Hartzer's founding affidavit.

51. Losper referred in his affidavit to the decision by the Board of Control, sought to be reviewed by Fairoak. He did not aver that he had been present during any meetings by the Board of Control when the relevant issues were considered and decided upon. He also did not deal with the circumstances discussed and considered, including the weight attached thereto, by the Board of Control prior to any decision by the latter. In general Losper advanced reasons why, according to him, Fairoak's claim was lodged outside the required three month period. He averred that Respondents have declined to grant an extension of the three month period, "**… as the Applicant has not submitted sufficient grounds to justify the Respondents granting such an extension under section 48(2) of the Act**".

52. It was not alleged on behalf of Respondents that notice of Fairoak's claim on 11 June 2011 could cause any prejudice to the Fund or that the latter's investigation and/or the procedure arising from the claim, is as a result thereof affected in any manner whatsoever.

CLAIMS AGAINST THE FUND IN TERMS OF THE ACT

53. A person who has suffered a pecuniary loss, stemming from the theft of money by a practising attorney entrusted to him in the course of his practice, has in terms of section 26(a) of the Act a claim against the Fund, if:

53.1. written notice of the claim is given to the Council of the Society concerned and to the Board of Control within three months after the claimant became aware of the theft or by the exercise of reasonable care should have become aware of the theft (**section 26 and 48(1)(a) of the Act**); and

53.2. within six months after a written demand has been sent to him or her by the Board of Control, the claimant furnished the Board of Control with the proof which it may reasonably require (**section 48(1)b) of the Act**).

54. The provisions of section 48(1)(a) of the Act, in particular the meaning of "**became aware**" and "**reasonable care**" were considered by King J in **SVV Construction (Pty) Ltd v Attorneys, Notaries and Conveyancers Fidelity Fund 1993 (2) SA 577 (C) (584B-I)**. The relevant findings are summarised as follows:

54.1. The effect of section 48(1)(a) of the Act is to deprive a person of a claim (in terms of section 26(a) of the Act), unless notice in writing is given within the prescribed period. Such provision should be strictly construed **(584B and 585C)**.

54.2. To become aware of something involves a change from a state or condition of ignorance to awareness. It imports the actual, personal knowledge of something previously unknown by the claimant (**584J-585D**).

54.3. The required knowledge is not confined to the mental state of awareness, produced by personal participation in the theft or by information derived from the actual thieves, but includes a conviction or believe engendered by the attendant circumstances. Mere suspicion not amounting to conviction or knowledge is not knowledge (**585E**).

54.4. An awareness is required of the material facts which would create in the mind of the reasonable man the knowledge, in the sense of the belief or conviction, not merely the suspicion, that a theft had been committed. That 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, which is considerably more than mere suspicion or impression. A claimant has therefore to be able to say "**with the**

evidence at my disposal I, as a reasonable man, am satisfied that the attorney has committed theft" (**585F-H**).

54.5. Theft is a legal concept. Knowledge that theft has been committed is therefore required. The type of theft involved *in casu* is misappropriation of trust money. The material ingredient of such theft is the wrongful (in the sense of *mens rea*) dealing by an attorney with or appropriating to his own use of the monies entrusted to him (**585I – 586C**).

54.6. A debit balance in the trust account of an attorney is not necessarily indicative of theft. Reckless dealing with trust money does not necessarily amount to theft. Deficiencies in a trust account leading to a debit balance, resulting in dishonoured cheques, can be due, not to dishonesty, but to errors and miscalculations resulting from a failure to keep proper books of account (**586D-E**).

54.7. The exercise of reasonable care means acting as a reasonable prudent person would have done in the particular circumstances of a matter. A person must not have been negligent in failing to take whatever steps were reasonably open to him, steps whereby he should have become aware of the theft, i.e. if reasonable care had been exercised he would have become aware of the theft (**586I-587B**).

55. If the Board of Control is satisfied that, having regard to all the circumstances, a claim or the proof required by it has been lodged or furnished as soon as practicable, it may in its discretion extend any of the abovementioned periods. Section 48(2) of the Act, which gives that power to the Board of Control, reads as follows:

> **"(2) If the board of control is satisfied that, having regard to all circumstances, a claim or the proof required by the board has been lodged or furnished as soon as practicable, it may in its discretion extend any of the periods referred to in subsection (1)**".

56. No action can without leave of the Board of Control be instituted against the Fund unless the claimant has exhausted all available legal remedies against the practitioner in respect of whom the claim arose or his or her estate and against all other persons liable in respect of the loss suffered by the claimant (**section 49(1) of the Act**).

57. On payment by the Fund of money in settlement in whole or in part of any claim under the Act, the Fund is subrogated to the extent of that payment to all the rights and legal remedies of the claimant against any practitioner or any person in relation to whom the claim arose, or in the event of his or her death or insolvency or other legal disability, against any person having authority to administer his or her estate (**section 50 of the Act**).

58. The Board of Control consists of the serving presidents of all Law Societies, and three members of each Society elected annually by the Council of the Society (**section 28(1)(a) and (b) of the Act**).

59. A decision of the majority of the members of the Board of Control present at any of its meetings is the decision of the Board of Control (**section 34 of the Act**).

60. The Board of Control may appoint one or more committees to assist in the carrying out of its duties, the performance of its functions and the exercise of its powers. The Board may assign to a committee so appointed those of its powers as it may deem fit but will not be divested of any power which it may have assigned to a committee and it may also amend or withdraw any decision of any such committee. The purpose of such a committee is to either generally or specifically enquire into and to advise the Board of Control of any matter in relation to the duties, functions or powers of the Board (**section 34A(1)(a), 34A(2) and 34A(3) of the Act**).

61. On a proper and purposive interpretation of section 48 (2) read with section 48(1) of the Act the Board of Control should have done the following in terms of the Act:

61.1. It had to determine when Fairoak became aware of the theft or when, by the exercise of reasonable care, it should have become

aware of the theft, to establish whether the required written notice was given to it within three months after such date;

61.2. If the required notice was not received within the three month period, it had to have regard to **all the circumstances**, to decide whether notice of the claim, despite being lodged late, has been given as soon as practicable.

62. Rampai J remarked in **Sunet van den Berg N.O. v The Attorneys' Fidelity Fund and others,** an unreported decision in the **Free State High Court, Bloemfontein, Case No: A166/2012** at paragraphs 32 and 35 that the Fund **"was created for the prime and exclusive purpose of protecting innocent members of the public from abuse and thieving attorneys. Once it has been ascertained that the money has indeed been stolen by an attorney… then dictates of justice demand that the victim be compensated. To repudiate a clearly proven claim merely because the requisite notice in terms of section 48(1) was belated seems to be repulsive and inimical to the ethical norms which are deeply rooted in the moral and philosophical foundation of the relevant legislation. Moreover, the board of control must appreciate that the relatively short period of three months … was primarily inserted … to take appropriate steps to prevent further thieving, to retrieve, where possible, the proceeds of thieving and to prevent an incriminated attorney from dissipating misappropriated funds or**

concealing such funds or assets acquired by means of trust funds." I am in agreement with those remarks.

63. In **Northern Provence Development Corporation v Attorneys Fidelity Fund Board of Control 2003(2) SA 284 (TPD) at 297E** Moseneke J (as he then was) expressed the view, with which I agree, that there is no doubt that when the Board of Control exercises the statutory function conferred on it by section 48(2) of the Act, such conduct would be subject to normal review by the High Court and that the Court may direct that the Board of Control takes such steps as may be fair and just, regard being had to all the circumstances related to the dispensation which the affected party seeks.

64. From the letters referred to in paragraphs 38, 42, 45 and 47 above it appears that the Fund's approach to the matter was that Fairoak became aware during approximately July 2009 of the theft of the trust money held by Minnie. That resulted in the Fund's decision to reject Faroak's claim, because the reasons advanced by Faroak's did not convince the Fund to consider condonation.

65. I referred in paragraphs 49 and 51 above to the fact that no record of the proceedings of the Board of Control was dispatched in terms of Rule 53(1)(b) by Respondents nor did the opposing affidavit disclose what circumstances were in fact considered by the Board of Control, including the weight accorded thereto.

66. No proper factual basis exists for the Fund's decision that Fairoak had been aware during July 2009 already that Minnie had stolen the money entrusted to him by Fairoak. In this regard the following summary of facts will suffice for the finding that based upon the evidence at Fairoak's disposal, it is unlikely that the latter could have been aware during July 2009 that Minnie has committed theft:

66.1. There was at all relevant times, including July 2009, a long relationship of trust between Minnie and Hartzer;

66.2. Minnie advanced reasons to Hartzer why the total amount held in trust by him could not immediately be paid to Fairoak, which Hartzer believed, because he trusted Minnie;

66.3. During July 2009 when Hartzer became agitated and frustrated, Minnie paid an amount of R1 000 000.00 to Fairoak and furnished it with three post-dated cheques for the balance, in the total amount of R1 656 000.00;

66.4. Before the cheques could be deposited, Minnie stopped payment thereof. He explained to Hartzer why those cheques would be replaced, although that never occurred;

66.5. Since July 2009 Hartzer continued unsuccessfully to obtain payment from Minnie;

66.6. Minnie remained Fairoak's attorney until November 2009. The latter continued to practice as an attorney until 17 November 2009 when he was suspended in his practice;

66.7. During November Hartzer, a lay person, without legal knowledge, consulted Badenhorst, who lodged Fairoak's claim with the Law Society on 9 November 2010, when Minnie was still an attorney;

66.8. No office file or transaction record of Minnie was available to Fairoak, despite Badenhorst's various written requests to the Law Society therefor. That remained the position until 11 June 2010, when Fairoak's claim was also lodged with the Fund, two days after Minnie's estate was sequestrated on 9 June 2010;

66.9. In the absence of a file or a transaction record pertaining to Minnie's practice it is unlikely that Fairoak would have been aware of Minnie's dealings with trust money from which it could be ascertained whether trust monies were dealt with wrongfully or misappropriated by Minnie, to satisfy the legal concept of theft of trust monies;

66.10. Even if Hartzer consulted an attorney earlier than November 2009, when he approached Badenhorst, there is nothing to show and it is unlikely that access to Minnie's relevant records would have been

obtained before the claim was lodged with the Fund on 11 June 2010;

67. In view of the above the Board of Control committed a material error of fact when it based its decision upon the fact that Fairoak became aware (or should have become aware by the exercise of reasonable care) during July 2009 already that Minnie committed theft of trust money. The Board of Control should have found that in the absence of access to Minnie's records it is unlikely that Fairoak could have been aware (during July 2009) that Minnie wrongfully dealt with trust money or misappropriated such money, because mere suspicion, not amounting to conviction or knowledge, is not enough for a finding that Fairoak "**became aware**" of the theft for purposes of section 48(1)(a) of the Act.

68. The following circumstances should also have been considered by the Board of Control in terms of section 48(2) of the Act, to the extent that Fairoak became aware of the theft of money, held in trust by Minnie, more than three months before the Board of Control received written notice on 11 June 2010 of Fairoak's claim:

68.1. Fairroak established, at least *prima facie*, that it has a valid claim in terms of section 26(a) of the Act for the balance in the amount of R1 556 000.00 against the Fund;

68.2. Fairoak managed to recover R1 000 000.00 of its money from Minnie during the period preceding its claim against the Fund;

68.3. Hartzer trusted Minnie, who continued to act as Fairoak's attorney until November 2009;

68.4. Hartzer was at all relevant times mislead by Minnie and the former did not have access to any records or facts indicating that Minnie dealt wrongfully with or misappropriated the trust money held on behalf of Fairoak;

68.5. Minnie was allowed to practice as an attorney until 17 November 2009;

68.6. Written notice of Fairoak's claim was given to the Law Society on 9 November 2009;

68.7. On 8 December 2009 the Law Society required of Fairoak to submit its claim to the Fund by way of an affidavit accompanied by the entire office file of Minnie;

68.8. Despite an undertaking on 12 January 2010 by the Law Society to provide information about the required file to Badenhorst, the former failed for a period of 5 months to respond and/or comply with Badenhorst's request therefor, resulting in a delay of at least five months from January to May 2010;

68.9. No prejudice at all was caused to, or alleged by the Fund, arising from any time lapse before Fairoak's claim was lodged with the Fund on 11 June 2010;

68.10. Minnie was sequestrated on 9 June 2010, two days before Fairoak's claim was lodged with the Fund, and he was removed from the roll of attorneys on 19 October 2010, four months after Fairoak's claim had been received by the Fund.

69. In summary, it is clear therefore that Fairoak furnished a proper explanation to the Board of Control for any delay, moreover it has a valid claim against the Fund in terms of section 26(a) of the Act, no prejudice was caused to the Fund by any delay, which was undoubtedly of a relatively short duration and the Fund was aware of all relevant facts and circumstances long before Minnie was removed from the roll of attorneys. Those circumstances, in conjunction with the aspects referred to in paragraph 66 above, called for a decision by the Board of Control that the claim, assuming that it was late, was still lodged as soon as practicable and that Fairoak is entitled to condonation for any non-compliance with the provisions of section 48(1)(a) of the Act.

70. It is so that the distinction between an appeal and a review should not be blurred. A review is concerned with whether a functionary performed the function, with which he was entrusted. The role of a Court is to ensure that the decision-maker has performed that function. A review is therefore not

concerned with the correctness of a decision made by a functionary. (**MEC for Environmental Affairs and Development Planning v Clairison's CC 2013 (6) SA 235 (SCA) at 239I – 240A**).

71. If the Board of Control performed its statutory function in terms of section 48(2) of the Act, by considering all the circumstances, it would have extended the period in which notice had to be given, to include 11 June 2010.

72. The Board of Control did not only commit a material error of fact in deciding that Fairoak became aware, or should have been aware by the exercise of reasonable care, during July 2009 already that Minnie committed theft of trust money. Thereafter the Board of Control rigidly applied the three month statutory time limit without considering all the circumstances, in particular the reasons why Fairoak's claim was lodged on 11 June 2010. The decision of the Board of Control is therefore unrelated to the information available to it, because it failed to take all the circumstances into account, resulting in a failure to apply its mind properly or at all, in disregard of its purpose as a functionary in terms of the Act. That failure resulted in an irrational decision, to the effect that simply because it regarded Fairoak's claim as being lodged more than three months after becoming aware of the theft, Fairoak's otherwise valid claim falls to be rejected.

73. In the result Fairoak's application for the review and setting aside of the decision by the Board of Control in respect of Fairoak's claim in terms of section 26(a) of the Act succeeds.

74. I accordingly order as follows:

74.1. Respondents' decision rejecting Applicant's claim lodged on 11 June 2010 in terms of section 26(a) of the Attorneys Act No 53 of 1979 (**"the Act"**) against the Attorneys' Fidelity Fund is set aside;

74.2. Respondents, including the Attorneys' Fidelity Fund, are ordered to consider Applicant's claim in terms of section 26(a) of the Act on the basis that sufficient notice was given thereof in terms of section 48(1)(a) read with section 48(2) of the Act;

74.3. Respondents, jointly and severally, are directed to pay Applicant's costs of the application.

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J W OLIVIER, AJ

13 March 2014.