IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 7307/2016

In the matter between:

DEVLAND CASH AND CARRY (PTY) LIMITED Applicant

and

ATTORNEYS FIDELITY FUND Respondent

Court: Justice J Cloete

Heard: 1 March 2017 (supplementary notes delivered on 7 March 2017 and 8 March 2017)

Delivered: 22 March 2017

JUDGMENT

CLOETE J:

Introduction

[1] The applicant seeks two orders. The first is to declare that an irrevocable undertaking issued to it by LBG Attorneys (*'LBG'*) on 15 June 2009 *'constituted trust funds'* held for and/or on its behalf as contemplated in s 26(a) of the Attorneys Act 53 of 1979 (*'the Act'*). The second is for payment by the respondent of R814 962.35 together with interest thereon as a consequence of the failure by LBG to adhere to that undertaking.

[2] The respondent raised various defences in its answering affidavit but persisted only with three, all of which centre around entrustment. First, the applicant has not established that monies were in fact paid into LBG's trust account. Second, there was no other "entrustment" as envisaged in s 26(a) of the Act. Third, in any event, payment was not made to the attorney concerned in the course of his practice.

Background facts

[3] On 15 June 2009, ostensibly on the instructions of his client, Mr Naven Naidoo of Coifax Investments (Pty) Ltd (a company registered and trading in Harare, Zimbabwe), attorney Leslie Brian Ganas of LBG furnished the applicant (represented by Mr Shiraz Gathoo) with the following irrevocable undertaking:

'Sirs

RE: NAVEN NAIDOO

We act for Mr Naven Naidoo and have been instructed as follows:

(a) Our client has placed an amount of R1 000 000,00 (one million rand) in our trust account.
(b) Acting on the instructions of Naven Naidoo, we hereby provide this irrevocable undertaking:

For the Credit ***: Devland Cash & Carry,*** *for the amount of* ***R1 000 000,00 (one million rand only).***   *Conditions of payment:*   *(a) Payment to be effected 45 days after the issue of an invoice.*   *(b) Invoice/s shall in total not exceed an amount of R1 000 000,00 (one million rand*

We trust the above to be in order,

Yours faithfully

LBG ATTORNEYS
Per LB Ganas

BANK ACCOUNT DETAILS: LBG Attorneys Trust Account, ABSA Bank Randburg, Account no. […], ACB Code. 632005'

[4] On 1 July 2009 Ganas provided the applicant with a further irrevocable undertaking in the following terms:

'Dear Sir

RE : NAVEN NAIDOO

We act for Mr Naven Naidoo and have been instructed as follows :-

(a) our client has placed an amount of R1,000,000.00 (ONE MILLION RAND) in our Trust Account;

(b) acting on the instructions of Mr Naven Naidoo, we hereby provide this irrevocable undertaking:

For the Credit of:

COIFAX INVESTMENTS (PROPRIETARY) LIMITED

REGISTRATION NO. 6558 2004.

NO. 1 ELSWORTH ROAD, BELGRAVIA, HARARE, ZIMBABWE

Conditions of payment :

a) payment to be effected 45 (FORTY FIVE) days after the issue of an invoice;

b) Invoice/s shall in total not exceed an amount of R1,000,000.00 (ONE MILLION RAND).'

[The same trust account details are reflected thereunder].

[5] In the founding affidavit Gathoo alleged that, acting on the strength of these undertakings, the applicant sold and delivered goods on a running account facility to Coifax at Naidoo's special instance and request during the period 2 July 2009 to 12 November 2009. The applicant was aware at the time that trading with Coifax posed a substantial credit risk, given its operation in Zimbabwe during a period of adverse economic conditions and a prevailing climate of political instability. Gathoo alleged that this was the very reason why the applicant insisted on the irrevocable undertaking of 15 June 2009 as security to discharge the debt.

[6] The applicant's statements annexed to the founding affidavit reflect that Coifax itself made regular payments directly to the applicant until about 24 August 2010 whereafter they appear to have ceased. This resulted in the applicant reconciling the Coifax account on 4 February 2011, at which date the amount owed to it was R814 962.35.

[7] On 28 February 2011 the applicant called upon LBG to effect payment of the sum owed *'as per the conditions of the irrevocable undertakings*' but received no response. During the period 28 February 2011 to 1 August 2011 Gathoo also continued communicating directly with Naidoo regarding settlement of the amount owed. He did not divulge details of these discussions, or indeed, if Naidoo ever directed him to Ganas for payment in terms of the irrevocable undertakings. According to Gathoo the applicant first became aware of LBG's *'potential theft and or misappropriation'* on 1 August 2011 when he was notified by Naidoo that LBG had been *'liquidated'.* It was thereafter established that Ganas (and LBG) had been interdicted or suspended from practicing on 7 June 2011 due to *'an ongoing investigation against the conduct of affairs of* [Ganas] *for impropriety'* by the Law Society.

[8] The applicant thereafter submitted a claim to the respondent in accordance with s 26 of the Act. Having set out the history, Gathoo alleged that:

> *'15.15 The firm LBG Attorneys is therefore no longer trading and this provides cogent reasons as to the difficulty by the Claimant's Attorneys of record in contacting the firm or its principal member.*

15.16 The Claimant now therefore has no reasonable prospect of calling upon the security of trust funds as per the letters of irrevocable undertaking.

15.17 It is axiomatic from the undertaking, marked as "Annexure DCC1" [i.e. the undertaking of 15 June 2009]*, that the trust funds placed with LBG Attorneys was placed as unconditional security and the trust funds thereto indeed belong to the Claimant. It is on this cause of action that the Attorneys Fidelity Fund claim is made in terms of the provisions of section 26 of the Act.'*

[my emphasis]

[9] Although in its founding affidavit and the heads of argument the applicant relied on both undertakings, the relief sought in its notice of motion was based squarely on the undertaking of 15 June 2009 and it was confirmed by Mr Patel, who appeared on behalf of the applicant, that reliance was placed only on that undertaking, although he stated that the later one of 1 July 2009 must also be considered when having regard to the context in which the first was furnished. Given that no details were provided by Gathoo as to how the second undertaking came about (other than to baldly allege that its purpose was *'that funds were also held in trust for the credit of Coifax…'*), I am constrained to have regard to its wording only.

[10] From the outset the respondent took the position that the applicant was required to provide proof *'to show how, when and where the R1 million was entrusted to Mr Ganas for the issue of the irrevocable undertakings'* before proceeding to consider the claim. In a letter dated 25 October 2012 it informed the applicant's attorney, Mr Patel, that:

> *'Please note that it is not clear from the annexures mentioned in your aforementioned fax whether there were any underlying funds to back up the undertakings issued by the alleged defaulter. The alleged defaulter had a pattern of dishonest and fraudulent behaviour and one cannot exclude the possibility of him putting up a fraudulent irrevocable guarantee, where there is no underlying funds to back up such undertakings.'*

[11] The applicant disputed that it was required to provide such proof on two grounds. The first was that it was the *'primary onus and responsibility'* of the respondent to *'investigate the modus operandi of LBG Attorneys, its assigned representatives/employees and/or intermediaries involved herein'.* The second was that *'the issued irrevocable undertakings in favour of the Claimant provide prima facie and/or sufficient proof to the Claimant that it was backed by underlying trust funds, when the Claimant supplied goods on the strength of the irrevocable undertakings'.*

[12] In a letter addressed by Mr Patel to the respondent on 7 July 2014 the applicant maintained that it accepted in good faith that there were underlying trust funds at the time when the irrevocable undertakings were issued. Mr Patel stated that: *'To expect our client as a member of the public to investigate the existence of underlying trust funds lacks any legal basis and sends a message to the public of the Fund's lack of trust and credibility in the attorneys profession'.* The respondent was also advised that: *'There is no present contact by our client with Mr Ganas nor with Coifax Investments (Pty) Ltd and/or intermediaries that were involved…'*.

[13] In its reply dated 22 September 2014 the respondent's Mr Losper wrote:

> *'As previously advised, the onus is on your client to prove that the money claimed herein was entrusted by or on behalf of your client in order to succeed with its claim. Without such proof the fund will not be in a position to consider this claim favourably. The irrevocable undertakings do not, in our view, constitute sufficient proof of entrustment of the money that your client claims herein. I find it hard to believe that your client is not in a position to make contact with Coifax Investments (Pty) Ltd and/or any intermediaries in order to establish whether there were underlying trust funds at the time when the irrevocable undertakings were issued by LB Ganas Attorneys.*
>
> *Lastly, if your client is not in a position to provide us with such proof, I will refer the matter to the Fund's Board of Control for final consideration.'*

[14] The requested proof was not provided. On 6 March 2015 the applicant was notified that the respondent's Board of Control had resolved that the irrevocable undertakings did not constitute sufficient proof of entrustment. The applicant was again asked to contact Coifax Investments (Pty) Ltd for *'confirmation to show how, when and where the R1 million was entrusted to Mr Ganas for the issue of the irrevocable undertakings'.* Still it was not provided. By letter dated 20 May 2015 the respondent formally rejected the claim:

> *'The Fund's Board of Control resolved to reject this claim as there is no evidence on record that the funds were entrusted to the alleged defaulting attorney, as required in terms of section 26(a)…*
> *The reason(s) for the rejection of the claim as set out above are not necessarily exhaustive…'*

[15] The applicant persists in its view that it is not obliged to establish payment by Coifax to LBG because, so it contends, an attorney's irrevocable undertaking

is no different to a guarantee issued by a financial institution. The rationale advanced is that both of *'these industries represent by* [their] *very nature a degree of trust and fiduciary duty towards members of the public'.*

[16] Without conceding that it was obliged to do so, the respondent obtained from the Law Society the trust account bank statements of LBG for the year 2009. It is apparent therefrom that an amount of R1 million was paid into that account on 28 May 2009 but the depositor is not identified. The applicant contended that this payment constitutes sufficient proof that it was in fact made by Naidoo because of its proximity to the date when LBG issued the irrevocable undertaking of 15 June 2009. However, even though this payment is reflected, it takes the matter no further from an evidential point of view, given the absence of independent confirmation that the depositor was Naidoo on Coifax's behalf.

Discussion

[17] Section 26(a) of the Act provides that:

> *'**26. Purpose of fund.**—Subject to the provisions of this Act, the fund shall be applied for the purpose of reimbursing persons who may suffer pecuniary loss as a result of—*
>
> *(a) theft committed by a practising practitioner, his or her candidate attorney or his or her employee, of any money or other property entrusted by or on behalf of such person to him or her or to his or her candidate attorney or employee in the course of his or her practice or while acting as executor or administrator in the estate of a deceased person or as a trustee in an insolvent estate or in any other similar capacity;…'*

[18] For purposes of s 26(a) *'entrusted'* comprises two elements: (a) to place someone else in the possession of something; (b) subject to a trust, which means that the person entrusted is bound to deal with it for the benefit of another: *Provident Fund for the Clothing Industry v Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund* 1981 (3) SA 539 (W) at 543E-F.

[19] The respondent's liability is not limited to those cases where the money or property concerned was impressed with a trust in the *'technical legal sense of the word'*. S 26(a) makes provision for reimbursement (provided of course that the other requirements are met) to either (a) the person by whom the money has been entrusted; or (b) the person on whose behalf it has been entrusted: *Industrial and Commercial Factors (Pty) Ltd v Attorneys Fidelity Fund Board of Control* 1997 (1) SA 136 AD at 144B-E and 145E-F.

[20] The first issue that arises is whether the applicant bears the onus to establish what I will call "physical entrustment", i.e. that LBG was in fact placed in possession of the money, notwithstanding the furnishing of the irrevocable undertaking of 15 June 2009. This in turn involves a consideration of whether the undertaking established a contractual obligation on the part of LBG to pay the applicant, independent of the underlying arrangement between the applicant and Coifax.

[21] As previously stated the applicant's assertion that it bears no such onus proceeds from the premise that an attorney's irrevocable undertaking (in whatever form) must be placed on the same footing as a guarantee issued by

a financial institution, although neither party was able to provide me with any direct authority to this effect. The applicant also contends that this must be so because both the attorney's profession and the financial services industry *'have a fiduciary duty towards members of the public'*. The applicant accordingly argues that the fact of the irrevocable undertaking is, of its own, sufficient to prove physical entrustment. I will accept for present purposes that Gathoo in good faith believed that the irrevocable undertaking necessarily implied that it was furnished pursuant to a physical entrustment by Naidoo.

[22] Section 26(a) of the Act speaks only of *'entrustment'* which is not defined. It is settled law that an essential element of entrustment, for purposes of s 26(a), is physical entrustment, i.e. placing someone else in the possession of something.

[23] In support of his argument Mr Patel referred *inter alia* to the Guidelines of the Law Society of KwaZulu Natal for the Conduct of Property Law Matters where, in clause 2.4, the following is stated:

> *'2.4 Care should be taken in drafting undertakings. Attorneys issuing undertakings should be aware of the application of the "reliance theory" pursuant to which the substance of an undertaking may take precedence over its form. Reference in this regard should be made to* Ridon vs Van der Spuy & Partners (Wes Kaap Inc) *2002 (2) SA 121 (C) in which it was held that an undertaking by the defendant firm of attorneys to pay on behalf of its client was properly construed as a personal undertaking of the firm and not that of the client.'*

[24] In *Ridon* the attorney concerned issued the plaintiff with the following written undertaking:

> *'Dear sir*
> *Ashanti Estates/J V Ridon*
> *Our transfer Factaprops 131 (Pty) Ltd/Signal Hill Farm*
> *On behalf of Mr M Schoeni we hereby undertake to pay to yourself the amount of R358 000 upon registration of the above property in the name of the purchaser.*
> *We confirm that we expect transfer to be registered by more or less the end of May 2000.*
> *Yours faithfully*
> *Van der Spuy & Partners*
> *Per:*
> *S van den Berg'*

[25] The plaintiff had based his claim squarely on contract. He alleged that the defendant gave him a written undertaking that the sum of R358 000 would be paid by the defendant to the plaintiff upon registration of transfer of the immovable property concerned; and that, to the defendant's knowledge, this written undertaking was accepted by the plaintiff, thereby giving rise to a binding contract between the parties. The plaintiff also alleged that, in breach of this contract, the defendant failed to pay the full amount but only R177 596, leaving a balance due of R180 403. This was because the defendant's client instructed it not to pay the full amount to him as certain other amounts, yet to be quantified, had to be set off against it. These instructions had been received by the defendant approximately one month prior to registration of transfer and, despite the plaintiff's several telephonic enquiries thereafter

about progress of the transfer, the defendant had never informed him of such instructions. The defendant however maintained that the undertaking was given by it in its capacity as the agent and attorney of its client. This being so, the admitted acceptance thereof by the plaintiff did not give rise to a contract between the plaintiff and the defendant and accordingly there could be no breach giving rise to liability on the part of the defendant.

[26] Accepting the attorney's evidence that, by drafting and signing the letter of undertaking, he did not intend to bind the defendant but to act as agent for his client, the court at 135C-I stated:

> *'In a case such as this one, where there is no subjective* consensus *(meeting of the minds) between the plaintiff and the defendant, resort must be had to the so-called "reliance theory" in order to determine whether a binding contract has come into being between the parties (see further below). However, in order to apply the reliance theory, it is necessary to determine what the defendant's "expressed intention" ("declared intention") was by reference to and interpretation of "the words which he used or to which he appears to have assented" (see* Irvin & Johnson (SA) Ltd v Kaplan *1940 CPD 647 at 651).'*

[27] In *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) it was held at para [18]:

> *'The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and*

> *syntax; the context in which the provision appears; the apparent purpose to which it is directed and material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'*

[28] During his evidence the attorney had conceded that, had the undertaking not been qualified by the phrase *'on behalf of Mr M Schoeni'*, the defendant would have been personally liable for payment to the plaintiff of the sum specified therein. Rejecting the argument advanced by the defendant that the aforementioned phrase, properly interpreted, necessarily indicated that the author was merely acting as authorised agent for his client, the court found at 136C-138B:

> *' In my view, Mr* Smit's *approach ignores the reality that, like most words and phrases, the phrase "on behalf of" does not have a single "ordinary" or "literal" meaning and that, where such phrase appears in a document, the meaning thereof will necessarily depend upon the context in which it is used, its interrelation to the language of the document as a whole and the nature and purpose of the transaction as it appears from such document (see, in this regard,* Sassoon Confirming and Acceptance Co (Pty) Ltd v Barclays National Bank Ltd *1974 (1) SA 641 (A) at 646B-C). As was pointed out by Diemont JA in* List v Jungers *1979 (3) SA 106 (A) at 118D-E:*

"It is, in my view, an unrewarding and misleading exercise to seize on one word [phrase] in a document, determine its more usual or ordinary meaning, and then, having done so, to seek to interpret the document in the light of the meaning so ascribed to that word [phrase]. Apart from the fact that to decide on the more usual or ordinary meaning of the word [phrase] may be a delicate task…it is clear that the context in which the word [phrase] is used is of prime importance"…

It is clear from the South African case law that the phrase "on behalf of" does not necessarily *suggest agency. So, for example, in* Hills v Stanley *1930 NPD 268 it was held that, notwithstanding the use by an attorney of the phrase "on my client's behalf" in a letter addressed to a third party, this letter created a* vinculum juris *between the attorney and the addressee thereof. In that case the appellant, an attorney, wrote a letter to the respondent in which he first referred to a contract made between his client and the respondent (the addressee of the letter). Having recorded the terms of that contract, the letter further provided that:*

"Payment will be made by me on my client's behalf out of the monies to be received by me on his behalf from the South Coast Junction Area Local Administration and Health Board without binding myself to a definite date.

The Court interpreted this passage as containing an undertaking by the appellant to pay to the respondent such moneys as might come into the appellant's hands from a particular source in discharge of his client's debt to the respondent:

"While the letter undoubtedly does purport to be, and is in fact, a record of the contract between the appellant's principal and the respondent, the passage which I have read imposed upon the appellant, in his personal capacity, *a duty to apply the funds coming into his hands on behalf of his principal, in payment of the debt of the principal to the respondent. The respondent accepted that undertaking by his signature, and it then became the duty of the appellant to apply the moneys to the payment of [his principal's] debt to the respondent and to no other purpose"…*

At the time this undertaking was given, the author thereof (Van den Berg) was the conveyancer attending to the transfer of Signal Hill Farm from Factaprops to the purchaser…

Prior to the giving of the undertaking, the plaintiff had been involved in settlement negotiations with the Ashanti group of companies, represented by Schoeni. The outcome of these settlement negotiations was reflected in the e-mail communication dated 26 April 2000 addressed by Schoeni to the defendant. In terms hereof, the plaintiff was obliged to comply with certain conditions and, in return for such compliance, he was to receive the sum of R358 000 from the proceeds of the sale of Signal Hill Farm. To Van den

Berg's knowledge the plaintiff had complied with all these conditions. More particularly, the plaintiff had signed a document, drafted by Van den Berg on the instructions of Schoeni and/or Grabowski, in which the plaintiff waived certain rights. This document, which was signed by the plaintiff in Van Den Berg's presence (as required by Schoeni and/or Grabowski), made specific reference to the plaintiff's "claims" against Factaprops in relation to Signal Hill Farm. To Van den Berg's knowledge the plaintiff required the undertaking in "exchange for" the waiver of his rights and as written confirmation of the fact that he (the plaintiff) would be receiving from the defendant *the sum of R358 000 on registration of transfer of the farm---this was the very purpose of the undertaking…*

Against this factual background the balance of probabilities favours the conclusion that the use of the words "on behalf of Mr M Schoeni" must not *be interpreted to mean that the written undertaking was given by the defendant* only *in its capacity as the agent and attorney of its client. On the contrary, while the undertaking was clearly given by Van den Berg* on the instructions of *his client, a contextual interpretation of the undertaking (along the lines set out in* Coopers & Lybrand and Others v Bryant *(*supra*)) indicates, in my view, that, irrespective of Van den Berg's* actual *intention, his "expressed intention" was that the defendant was assuming personal liability to pay the sum of R358 000 to the plaintiff, upon registration of transfer of Signal Hill Farm, out of the proceeds of such transfer coming into its hands on behalf of Factaprops, and that this personal liability could not be terminated by a purported withdrawal by its client of the underlying mandate to pay.'*
[my emphasis]

[29] Mr Patel also referred to *Kruger v Property Lawyer* (420/2010) [2011] ZASCA 80 (27 May 2011). In that matter the attorney furnished a written letter of undertaking to the respondent who provided bridging finance to sellers of immovable property. The bridging loan was to be made pending transfer of certain properties in which the attorney was engaged on behalf of the sellers (albeit not as conveyancer). The relevant part of the undertaking read that:

> *'Ons onderneem hiermee onherroeplik om die bedrag van R500 000,00 (Vyfhonderd Duisend Rand) tesame met 20% (twintig persent) en 10% ("raising fee") in die volgende rekening in te betaal op datum van registrasie van die bogemelde eiendomme in die Aktekantoor te Pretoria:*
> *Proplaw Bridging*
> *Absa, Brooklyn*
> *Branch: 632 005*
> *Account Number: […]*
> *tensy ons van regsweë verhoed word of aangestel word as agente namens die Suid Afrikaanse Inkomste Diens ooreenkomstig Art 99 van die Wet op Inkomstebelasting No.58/1962 soos gewysig.'*
> [my emphasis]

[30] Two issues arose on appeal, the first being the proper construction of the undertaking, and in particular whether it constituted an undertaking independent of the underlying transaction. The second is not relevant for present purposes.

[31] The court, pointing out that the undertaking was issued pursuant to the bridging loan (and should therefore be construed in that context, i.e. the factual matrix in which the parties operated, so as to give it a commercially sensible meaning), found that it was clear from the wording of the undertaking that the appellant: (a) undertook to pay against registration of transfer of the properties; (b) on the instructions of the client; and (c) that the word *'onherroeplik'* implied that the appellant's mandate could not be revoked by the client. At paras [8] – [10] it found that:

> *'[8] …The fact that the appellant acted as the agent of the borrowers* [i.e. the sellers] *in giving the undertaking does not mean, of course, that it could not have incurred a personal liability in terms of the letter*

of undertaking [Cf *Ridon v Van der Spuy and Partners (Wes-Kaap) Inc* 2002 (2) SA 121 (C) at 137I-138B]. *The word used is "onderneem" leaving no doubt that a personal obligation was envisaged. The real question, however, is not whether the appellant undertook to pay but what the content of this undertaking was.*

[9] The purpose of the undertaking was that the appellant, as the attorney involved in the transfer of the properties, would make payment to the respondent of the money lent and other charges from the proceeds received from the sale of the seven properties by the company and Mr Bell. This is clear from the terms of the bridging request…

[10] The undertaking is not to pay "regardless" but to effect payment from the receipt of the proceeds of the sales. Nor was it envisaged that the proceeds would vest in the appellant: by virtue of the "cession" the proceeds in the agreed amount had to be paid to the respondent. It would have been absurd for the appellant to have given an unconditional, independent undertaking in these circumstances. The letter of undertaking itself contains a reference to the bridging finance provided to Mr Bell and the Trust, recites the properties to be transferred and links payment of the undertaking to registration of transfer. Seen in this context, the undertaking amounts to no more than an undertaking to make payment from the proceeds of the sales. It is common cause that the sales of the company's properties left a deficit. The proceeds of the sale of the seventh property by Mr Bell left a net balance which was paid to the respondent. It follows that the respondent is not entitled to any further payment from the appellant.'

[32] Mr Patel submitted that the court in *Kruger* used the words "undertaking" and "bank guarantee" interchangeably in paragraphs 8 and 9 of that judgment, and also submitted that, in the particular circumstances of the present matter, LBG's representation to the applicant in its undertaking of 15 June 2009 *'of the record of the placement and entrustment of funds in the section 78(1) account…is as good, if not better, than a bank guarantee'.*

[33] I can find no reference in paragraphs 8 and 9 of the *Kruger* judgment to the word "bank guarantee", nor any indication that the court considered the undertaking to be on the same footing as a bank guarantee. Moreover, unlike the case in *Ridon*, the applicant's claim is not based on a contract between itself and LBG. Indeed, there is no evidence that Gathoo ever conveyed his acceptance of the undertaking to LBG. It is instead founded on the contention that, because security was provided by LBG pursuant to a purported payment by Naidoo of R1 million into its trust account, the money therefore automatically became the applicant's money to call on when required (i.e. *'It is axiomatic from the undertaking that the trust funds placed with LBG Attorneys was placed as unconditional security and the trust funds thereto indeed belong to the Claimant. It is on this cause of action that the claim is made…in terms of section 26 of the Act'.*)

[34] Having regard to the content of the undertaking, it cannot be said that LBG undertook to pay "regardless" but rather to effect payment from the monies purportedly already placed by Naidoo in its trust account upon the conditions set forth therein. The physical entrustment was the express basis on which the undertaking was issued when regard is had to the plain wording thereof. The "expressed intention" was premised on the purported payment. Furthermore, the later undertaking of 1 July 2009 is in substantially similar terms, with the only material difference being that the monies purportedly paid by Naidoo were being held by LGB for the credit of Coifax instead of the applicant. Seen in this context, the undertaking of 15 June 2009 amounts to

no more than an undertaking to make payment from those monies upon the happening of certain events. Accordingly, and adopting the court's words in *Kruger*, it would have been absurd for LBG to have personally given an unconditional, independent undertaking in the circumstances. (Cf *Lombard Insurance Co Ltd v Landmark Holdings (Pty) Ltd and Others* 2010 (2) SA 86 (SCA) especially at paras 19-20).

[35] I am furthermore not aware of any authority to the effect that an attorney has a fiduciary duty towards members of the public at large. In LAWSA 2ed Vol 14(2) at para 306 the following is stated:

> *'**Duties***
> *The standard of ethical conduct required of an attorney in his or her dealings with the courts and clients, and the vital role he or she plays in the administration of justice have often been stated. The attorney has an overriding duty to the court, even when adherence to such duty may create an unfavourable result for the client: and that duty is to disclose to the court all factors and matters relevant to the matter in issue in order that a fair and just result may be obtained. Failure to observe and have regard to this duty and responsibility to the court in any proceedings…may well amount to a serious breach of professional conduct.*
>
> *Of the attorney and client relationship Van Zyl* [Judicial Practice 33] *says: "He must manifest in all business matters an inflexible regard for truth: there must be a vigorous accuracy in minutiae, a high sense of honour and incorruptible integrity; he must serve his client faithfully and diligently…*
>
> ***Liability towards third parties***
> *An attorney is not responsible for any wrongful act committed by him or her* qua *attorney within the scope of his or her authority…There is, however, a duty of care owed by an attorney conducting litigation on behalf of a client, to the court, and a duty of care towards the opponent. An attorney drawing a*

> *contract between the client and an unrepresented party has a duty to be fair to both parties.'*
> [my emphasis]

[36] I am also not aware of any authority to the effect that, in matters such as these, the respondent bears the onus to disprove physical entrustment, which the applicant appears to suggest. The general approach of our courts is that it is the claimant who bears the onus to show that the requirements of s 26(a) have been met.

[37] Having regard to the aforegoing, I conclude that it was indeed incumbent upon the applicant to show, on a balance of probabilities, that monies were in fact paid by Naidoo to LGB prior to the furnishing of the undertaking of 15 June 2009. This is also not a matter where Gathoo was brought under the impression by the respondent that this would never be an issue in this litigation. As far back as 25 October 2012 it was made clear to the applicant that the respondent required some sort of proof that there were underlying funds to support the undertakings issued by LGB. There is simply no evidence that Gathoo ever made the appropriate enquiries with Naidoo or anyone else. The applicant throughout adopted the stance that it had no obligation to do so and therefore would not do so. There is no cogent evidence that such physical entrustment ever in fact took place. On this ground the applicant's claims must therefore fail.

[38] However, if I am wrong, it is nonetheless necessary to consider the other defences raised. For this purpose I will assume that physical entrustment occurred.

[39] The remaining questions are whether: (a) the money was "entrusted" to Ganas by the applicant; and (b) if it was, whether the money was entrusted to Ganas "in the course of his practice as an attorney".

[40] Mr Patel relied on the following passage in *British Kaffrarian Savings Bank Society v Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund Board of Control* 1978 (3) SA (ECD) at 249D-F:

> *'It seems to me, when an attorney steals money entrusted to him in the course of his practice, the person who "may suffer pecuniary loss" by reason of the theft is the person on whose behalf the money is held "in trust". The section refers to money entrusted "by or on behalf of such persons" to the attorney, ie by or on behalf of the person who suffers the loss. A person towards whom the attorney has a fiduciary relationship pays money to an attorney or someone else pays money to an attorney on behalf of such a one. Money has then been entrusted to an attorney by or on behalf of his client, ie the person with whom he has a fiduciary relationship. This is the situation protected by the Act. There must be a relationship of this fiduciary nature between the attorney and the person who has suffered loss before the latter can claim to be compensated in terms of section 26.'*
> [my emphasis]

[41] When asked to explain why he placed reliance on this passage, given the basis upon which the applicant had formulated its claim, Mr Patel submitted that the issuing of the irrevocable undertaking per se gave rise to a fiduciary

duty on the part of Ganas *vis-à-vis* the applicant and, because that duty was breached, the respondent is liable to reimburse the applicant for the pecuniary loss suffered. However this is not the case made out in the applicant's founding affidavit. Moreover I have certain fundamental difficulties with this submission.

[42] In *Attorneys Fidelity Fund Board of Control v Mettle Property Finance (Pty) Ltd* 2012 (3) SA 611 (SCA) the latter paid money into an attorney's trust account pursuant to various bridging-finance transactions. The attorney in turn undertook to pay Mettle from the proceeds of a bond and two property transfers upon registration thereof. He failed to pay and Mettle sued the Fund alleging entrustment as envisaged in s 26(a) of the Act. The Supreme Court of Appeal found that, although the attorney had irrevocably undertaken to pay, both in terms of the bridging-finance agreements and various warranties and undertakings, there had in fact been no entrustment. After referring to the meaning of the word *'entrust'* for purposes of a claim in terms of s 26(a) it held that:

> *'[12] The first element is not contentious – the moneys, representing the initial purchase price in each case, were indeed placed in Langerak's possession. The second element is more problematic. There is no doubt that Mettle trusted the various warranties and the undertakings given by Langerak, and relied upon Langerak for repayment of, inter alia, the initial purchase price on the date of registration. That does not, however, mean that Mettle "entrusted" the money to Langerak as required by s 26(a) of the Act…*
>
> *[15] …Mettle – in paying the initial purchase price in each transaction to Langerak as the representative of the mortgagor or seller from whom Mettle had purchased a loan claim or a seller's claim – was simply discharging its*

> *debt to such mortgagor or seller. The payment was unconditional and, the moment the initial purchase price was paid into Langerak's trust account in terms of the master agreement, Mettle's debt was discharged. Langerak was no more than a conduit for the money…*
>
> *[16] This being so, there was no "entrustment" of money by Mettle to Langerak. In the words of FH Grosskopf JA in the* Industrial and Commercial Factors *case:*
>
> > *"Where money is paid into the trust account of an attorney it does not follow that such money is in fact trust money … If money is simply handed over to an attorney by a debtor who thereby wishes to discharge a debt, and the attorney has a mandate to receive it on behalf of the creditor, it may be difficult to establish an entrustment." '*

[43] In the present matter the undertaking of 15 June 2009 reflects that the money was held in trust by LBG for the credit of the applicant or, put differently, on its behalf. However the later undertaking of 1 July 2009 made it clear that the same money (it is not suggested that R2 million was ever paid by Naidoo into LBG's trust account) was henceforth to be held, not for the credit of the applicant, but for the credit of the applicant's debtor Coifax, which was not a client of Ganas (according to both undertakings the client was Naidoo). Therefore, from that date onwards, it should have been clear to the applicant that the money had not been entrusted on its behalf but on behalf of someone else, notwithstanding that the purpose of the undertaking, as far as Gathoo was concerned, was to provide security for the payment obligations of Coifax. As pointed out in *Industrial and Commercial Factors* (*supra*), s 26(a) makes provision for reimbursement to either the person by whom the money has been entrusted, or the person on whose behalf it has been entrusted. The applicant does not fall into either category.

[44] Moreover, the applicant does not rely on theft of the money by Ganas and/or LBG, which is one of the fundamental requirements of s 26(a). Instead it relies on the breach of an irrevocable undertaking furnished by LBG as the basis for claiming pecuniary loss from the respondent in terms of s 26(a) of the Act.

[45] In *Attorneys Fidelity Fund v Injo Investments CC* 2016 (3) SA 62 (WCC) it was found that :

> *'[32] In the appeal before us it is clear that at all material times PV purported to represent the client in accepting payment of the money into its trust account. This is borne out by the terms of the discounting agreement, the warrantee, and indeed Swanepoel's own evidence. PV's obligation was not to retain the money in trust and to deal with it on the client's behalf, but simply to pay it straight over to the "client". In other words, PV's trust account was nothing other than a conduit, as was found in* Mettle *(*supra*) – notwithstanding the respondent's claim that it sought to obtain security by payment into that account.'*

[46] To my mind, and as submitted by Mr Bisschoff who appeared for the respondent, similar considerations apply in the present matter. The only role that Ganas played in the transaction between the applicant and Coifax was to irrevocably undertake to pay over money to the applicant 45 days after presentation of invoices which had purportedly been entrusted to it for the credit of Coifax by Naidoo. Moreover, the facts show that the applicant itself did not regard the undertaking furnished as the first port of call for payment, but rather that it would only call upon Ganas to pay in the event of Coifax's default. There is no evidence that Ganas (or LBG) accepted the money and

issued the irrevocable undertaking in the context of any transaction in which Ganas was involved in the course of his practice as an attorney.

[47] Furthermore,in *Mettle* at para [17] the court concluded as follows:

> *'[17] It must be remembered that:*
> *"The indemnity against loss for which the Act provides is not unlimited in its scope. It does not provide indemnification against any kind of loss suffered as a consequence of any conceivable kind of knavery in which an attorney might indulge in the course of his or her practice."*
>
> *It is not an insurance policy against all ills that may befall money paid to an attorney. In this case, Mettle may well have claims in contract or delict against Langerak based on the warranties and undertakings given – and, in some instances, breached – by Langerak. But Mettle does not have a claim against the Fidelity Fund in terms of section 26(a) of the Act.'*

[48] The abovementioned considerations lead me to conclude that LBG merely served as a conduit for the money. The applicant may well have claims in contract or delict against Ganas and/or LBG based on the breach of the irrevocable undertaking, but it does not have a claim against the respondent in terms of s 26(a) of the Act. (Cf *Industrial and Commercial Factors (Pty) Ltd* (*supra)* which is distinguishable on its facts, as was set out in *Injo Investments* (*supra)* at paras 25 – 31).

Conclusion

[49] There is no reason why costs should not follow the result.

[50] **The following order is made:**

> ***'The application is dismissed with costs, including any reserved costs orders.'***

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J I CLOETE

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