

**REPUBLIC OF SOUTH AFRICA  
IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA**

CASE NO: 63838/2021

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

DATE: 3 April 2023

E van der Schyff

In the matter between:

**ONOLIA NGAKO RABALAO**

**APPLICANT**

and

**THE TRUSTEES FOR THE TIME BEING OF THE  
LEGAL PRACTITIONER'S FIDELITY FUND:**

**SOUTH AFRICA**

**FIRST RESPONDENT**

**THE BOARD OF CONTROL OF THE LEGAL  
PRACTITIONER'S FIDELITY FUND SOUTH AFRICA**

**SECOND RESPONDENT**

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**JUDGMENT**

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Van der Schyff J

**Introduction**

- [1] The applicant in this application, Ms. Rabalao, is self-represented. Counsel for the respondents highlighted that the proper respondents are the Legal Practitioner's Fidelity Fund ('the Fund') and the Legal Practitioner's Fidelity Fund Board ('the Board'). Although the applicant did not cite the respondents correctly, the respondents did not, and correctly so, in my view, place the citations in issue for the purpose of the determination of the matter.
- [2] In light of the nature of the legal issue, and the fact that the applicant, a lay person, is self-represented, I requested the General Council of the Bar of South Africa to act as *amicus curiae*. The *amicus's* valuable contribution is recognised.
- [3] The applicant seeks to have the decision taken by members of the Board on 22 September 2021, that the Fund is not liable to reimburse the applicant for pecuniary loss suffered as a result of theft of money paid in trust to a trust account advocate referred to in s 34(2)(b) of the Legal Practice Act 28 of 2014 ('the LPA'), reviewed.

### **Factual matrix**

- [4] Towards the end of September 2020, the applicant saw an advertisement of a property for sale in L[...] G[...] E[...] [...]. The property was advertised on Facebook by an estate agency named Baikanyi Moreneng ('the estate agent'). The applicant called the estate agency and spoke to a certain Collen Sithole ('Mr. Sithole'). The applicant and Mr. Sithole arranged an appointment to view the property on 3 October 2020.
- [5] On the day of the viewing, the applicant met Mr. Sithole who was accompanied by a female person who introduced herself as a lawyer by the name of Dora Rambau ('Ms. Rambau'). Ms. Rambau informed the applicant that she was working with Advocate Abram Moela ('Adv. Moela') and that they would ensure the transfer of the property in her name as soon as the purchase price of R160 000.00, together with the transfer and registration costs, were paid. The applicant signed an offer to purchase with Mr. Sithole

and was furnished with Advocate Moela's trust account details. The applicant paid the required amounts in two payments into Advocate Moela's trust account with First National Bank. The transfer and registration of the property into the applicant's name were not attended to.

- [6] In January 2021, the applicant lodged a complaint with the Legal Practice Council. During May 2021, she lodged a claim with the Fund in order to recover the money. The Fund instituted an investigation against Advocate Moela. Advocate Moela deposed to an affidavit to the effect that he transferred the R160 000.00 received from the applicant to the estate agent as he was also doing debt collections for the estate agency. Advocate Moela further alleged that he was scammed by the estate agency.
- [7] On or about 22 September 2021, the Fund dismissed the applicant's claim on the basis that the claim did not comply with the provisions of section 55 of the LPA, and more particularly because the money was not '*given in trust to a trust account practice in the course of the practice of the ... advocate referred to in section 34(2)(b).*'
- [8] The crisp issue for determination is whether it can be found that Advocate Moela received the purchase price and registration and transfer costs that were paid into his trust account, in **the course of his practice** as a trust account advocate.
- [9] Ms. Rabalao stated that she made the payment into Advocate Moela's trust account so that he could transfer the property to her name. Advocate Moela was undoubtedly not in a position to register the property in Ms. Rabalao's name because he is not a conveyancer. Does this then absolve the Fund of liability in circumstances where it is common cause that the money was paid into the advocate's trust account, and that he was in possession of a Fidelity Fund certificate at the time the money was paid into his trust account?

## The submissions

***i. The applicant's submissions***

- [10] The applicant submits that she is an innocent member of the public who lost money as a result of the alleged theft of trust fund monies by a legal practitioner as defined in s 34(2) of the LPA. She stated that it is common cause that Advocate Moela was an advocate admitted in terms of s 34(2)(b), and as such authorised to render legal services upon receipt of a request directly from a member of the public. She, as a layperson, has limited knowledge regarding, amongst others, the 'types' of legal practitioners, especially the requirement that only a legal practitioner who is an admitted attorney and conveyancer can affect the transfer and registration of immovable properties. At the time of the commissioning of the theft of the trust funds, Advocate Moela was in possession of a valid Legal Practitioner's Fidelity Fund Certificate. Since Advocate Moela was regulated by the Legal Practice Council in terms of the LPA, the Fund cannot escape liability by introducing further requirements of what services advocates with trust accounts can perform.

***ii. The respondents' submissions***

- [11] The Fund contends that the said money was not paid in trust to the trust account advocate in the course and scope of an advocate holding a Fidelity Fund certificate, and, in consequence, even if there was a theft of funds, such theft was not committed in the course and practice of an advocate holding a Fidelity Fund certificate. An advocate who is in possession of a Fidelity Fund certificate is, so the respondents' counsel submitted, not lawfully in a position to take instructions regarding conveyancing work to be done, and, accordingly, such work is not work that may be undertaken in the course of the practice of such an advocate. The respondents submit that the matter would have been no different if the applicant had given the money to a paralegal, or to someone who does not lawfully conduct a trust account practice in accordance with the LPA, in the *bona fide* but mistaken belief that the person concerned was a conveyancer. Such entrustment, the respondents contend, would not have been in the course and scope of the

practice of a practitioner holding a fidelity fund certificate, and, in consequence, even if there was a theft of funds, such theft would not have been committed in the course of the practice of a practitioner holding a fidelity fund certificate.

- [12] The respondents' counsel submitted that the presumption that statutes do not contain invalid or purposeless provisions is well established in our law, as is the principle that a statutory provision must be construed in such a way that effect is given to every word and phrase in it. Through the provisions of the LPA, the legislature created a claim in statute which would not otherwise have existed, and the terms in which it has done so must be respected and given effect to. In this context, the respondents did not exercise a discretion in the sense of making an election to reject the applicant's claim, but made a determination that the claim did not meet the requirements of s 55 of the LPA. This determination was in accordance with the applicable statutory provisions and is correct in law. Accordingly, there are no grounds as set out in s 6 of the Promotion of Administrative Justice Act 3 of 2000, to review and / or set aside the decision of the Board to reject the applicant's claim for reimbursement from the Fund.

### ***iii. The amicus's submissions***

- [13] The *amicus* submitted that on a proper interpretation of s 34(2)(b) read with rule 33 of the rules promulgated under the LPA, it becomes clear that a trust account advocate is not restricted to do only what his or her predecessors did, but may also perform functions ancillary to his or her instructions. What advocates may do, was not defined by statute. With the promulgation of the LPA, and the creation of 'Trust Account Advocates' the dividing line between the professions of attorney and advocate has become less distinct. After considering the broad scope of legal services, the *amicus* submitted that there is no prohibition against a trust account advocate receiving instructions to advise a client on the conclusion of a contract, to draw the contract, and to receive money in trust in order to execute the contract. With reference to

*Tollemache v Attorneys Fidelity Fund*,<sup>1</sup> the *amicus* contended that the fact that Advocate Moela could not himself effect transfer of the property to the applicant, does not render the entrustment of the funds an entrustment falling foul of s 55 of the LPA. The money was according to the *amicus*, entrusted to Advocate Moela in the course of his practice, as required by s 55(1) of the LPA.

### The main issue

[14] This application turns on the interpretation of s 55 of the LPA and the determination of the ambit and scope of the practice of trust account advocates relevant to the factual context of this application.

[15] Section 55 of the LPA provides as follows:

‘(1) The Fund is liable to reimburse persons who suffer pecuniary loss, not exceeding the amount determined by the Minister from time to time by notice in the *Gazette*, as a result of theft of money or other property given in trust to a trust account practice **in the course of the practice** of the attorney or advocate referred to in section 34(2)(b) as such, if the theft is committed –

(a) by an attorney in that practice or advocate, or any person employed by that practice or supervised by that attorney or advocate;

(b) by an attorney or person acting as executor or administrator in the estate of a deceased person; or

(c) by an attorney or person employed by that attorney who is a trustee in an insolvent estate or in any other similar capacity, excluding a curator to a financial institution in terms of the

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<sup>1</sup> 2003 (6) SA 664 (C).

Bank Act, 1990 (Act No. 94 of 1990) or a liquidator of a mutual bank in terms of the Mutual Bank Act, 1993 (Act No. 124 of 1993).’

## Discussion

### *Interpretational paradigm*

[16] Statutory interpretation is the process by which courts interpret and apply legislation. Professor Lourens du Plessis aptly stated that ‘the realisation of statute law depends decisively on judicial interpretation.’<sup>2</sup> The interface between ss 2 and 39(2) of the Constitution creates the foundation of the constitutional matrix within which the interpretative process should ensue. In giving effect to s 2 of the Constitution proclaiming that the Constitution is the supreme law of the Republic, every court must, when it interprets legislation, promote the spirit, purport, and objects of the Bill of Rights. In *Makate v Vodacom (Pty) Ltd*,<sup>3</sup> the Constitutional Court held that the High Court is obliged to follow s 39(2) irrespective of whether or not the parties had asked for it. This approach is further entrenched by the Constitutional Court in *Independent Institute of Education (Pty) Limited v Kwazulu-Natal Law Society and Others*,<sup>4</sup> where the court emphasised that ‘every opportunity courts have to interpret legislation, must be seen and utilised as a platform for the promotion of the Bill of Rights by infusing its central purpose into the very essence of the legislation itself.’

[17] The State has a constitutional mandate to take progressive steps in realising the rights contained in the Bill of Rights. In facilitating the realisation of the right entrenched in s 34 of the Bill of Rights, the State is obliged to endeavour to eliminate the obstructions inhibiting access to justice and, in particular, those difficulties which impede the poor, illiterate, and indigent. Since the advent of the constitutional democracy, the executive, the legislature, and the

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<sup>2</sup> LM du Plessis ‘Statute law and interpretation’ in WA Joubert, JA Faris and LTC Harms (eds) *The Law of South Africa* vol 25 2 ed (2001) para 291.

<sup>3</sup> 2016 (4) SA 121 (CC) at para [90].

<sup>4</sup> 2020 (2) SA 325 (CC) at para [2].

judiciary have combined their efforts to put in place measures with the objective of broadening access to justice.<sup>5</sup>

- [18] In *Justice Vision 2000*, the product of a long process of consultation amongst role players in the administration of justice,<sup>6</sup> it was recognised that the legal profession had to be transformed in order to be able to respond adequately to the need of all the people of South Africa.<sup>7</sup> One of the main challenges identified was to make the legal profession more accessible to the public:

‘What was clear from the outset was that the administration of justice was in need of change; not change for the sake of it but because people want a more effective and open system of *justice which is within reach of the ordinary person*. Also, the Constitution compels us to develop a system of justice which is in keeping with democracy and respect for human rights.’<sup>8</sup> (My emphasis)

- [19] The following excerpt from the ensuing Transformation of the Legal Profession: Discussion Paper<sup>9</sup> (‘the discussion paper’) is relevant to the issue to be determined:

### ‘3.2 Uniform regulation of the profession

*Justice Vision 2000* suggests the possibility of integration of the profession and the creation of a single controlling body for the profession. The inclination of the Ministry of Justice and Constitutional Development is not to force integration but to facilitate developments in this direction. It is therefore necessary to consider whether the continued regulation of the profession by way of separate statutes is justifiable and in the public interest.

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<sup>5</sup> See, amongst other, J Halbert ‘The link between the Legal Practice Bill and access to justice’ *De Rebus* October 2014

<sup>6</sup> <https://www.gov.za/documents/justice-vision-2000-executive-summary> accessed on 21 March 2023.

<sup>7</sup> C Loots Transformation of the Legal Profession: Discussion Paper <https://www.gov.za/documents/transformation-legal-profession-discussion-paper> accessed on 21 March 2023.

<sup>8</sup> *Justice Vision 2000: Executive Summary*, supra n 6.

<sup>9</sup> Supra n 7.



The following aspects of professional practice need to be regulated in the public interest:

- Standards of education and training
- Qualification for admission to the profession
- Licence to practice
- Discipline in respect of improper conduct
- *Public indemnity in respect of the misappropriation of funds*

*All except the last of these clearly apply to both professions, but even the last will become necessary with regard to the advocates' profession if the prohibition against taking instructions from members of the public without a brief from an attorney is removed. Now that attorneys have right of appearance in the High Court, it seems fair that advocates should be allowed to take instructions directly from clients and in this situation they might well find themselves handling clients' funds. It might be appropriate simply to require any legal practitioner who handles funds on behalf of a client to be in possession of a Fidelity Fund certificate and to restructure the Board of the Fidelity Fund so that it is representative of all private legal practitioners and sufficiently representative of consumers of legal services.'* (My emphasis).

#### *Legislative framework*

[20] The LPA, its Rules, and the Code of Conduct promulgated in terms of the Act, provides the legislative framework for the transformation of the legal

profession. Through its transformational character, the LPA is ‘umbilically’ bound to the Constitution. The transformational aim of the LPA, specifically as far as it is aimed at promoting access to justice to facilitate a ‘more effective and open system of justice which is within reach of the ordinary person’, provides the constitutional matrix within which the LPA, and consequently s 55, stand to be interpreted.

[21] Within the all-encompassing constitutional interpretation matrix, the preamble to the LPA sets the tone for its interpretation. The constitutional imperative of promoting access to justice, and the concomitant principle of ensuring accountability to the public, are emphasised in the preamble to the LPA where the legislature, *inter alia*, declares:

‘WHEREAS section 22 of the Bill of Rights of the Constitution establishes the right to freedom of trade, occupation and profession, and provides that the practice of a trade, occupation or profession may be regulated by law;  
AND BEARING IN MIND THAT—

- ...
- access to legal services is not a reality for most South Africans
- ...

AND IN ORDER TO

- ...
- ensure that the values underpinning the Constitution are embraced and that the rule of law is upheld;
- ensure that legal services are accessible;

- ...; and
- ensure the accountability of the legal profession to the public.

Parliament of the Republic of South Africa enacts as follows: ...'

[22] The context within which s 55 of the LPA is to be interpreted is further circumscribed if it is considered that the legislature statutorily declared in s 3 of the LPA, that the purpose of the LPA is, amongst others, to provide a legislative framework for the transformation and restructuring of the legal profession that embraces the values underpinning the Constitution and ensures that the rule of law is upheld; and includes broadening access to justice by putting in place a mechanism to determine fees chargeable by legal practitioners for legal services rendered that are within the reach of the citizenry; and to protect and promote the public interest.

[23] In pursuing the transformational objective of facilitating access to the legal profession and access to justice, the LPA provides for a category of legal practitioners generally referred to as trust account advocates, in addition to the pre-existing categories of attorneys and referral-advocates. Trust account advocates can be approached by members of the public directly. This means that attorneys don't play 'middle man' between the public and trust account advocates. The reasoning behind providing for trust account advocates is that it gives the public a choice in whom to approach as their legal representative and this direct approach could save legal fees, as the existing referral system is costly because it entails paying two lawyers to assist on one matter.

[24] Section 34(2) of the LPA provides as follows:

'(a) An advocate may render legal services in expectation of a fee, commission, gain or reward as contemplated in this Act or any other applicable law –

- (i) upon receipt of a brief from an attorney; or
- (ii) upon receipt of a request directly from a member of the public or from a justice centre for that service, subject to paragraph (b).

(b) An advocate contemplated in paragraph (a)(ii) **may only render those legal services rendered by advocates before the commencement of the Act as determined by the Council in the rules**, if he or she-

- (i) is in possession of a Fidelity Fund Certificate and conducts his or her practice in accordance with the relevant provisions of Chapter 7, with particular reference to sections 84, 85, 86 and 87;
- (ii) has notified the Council thereof in terms of section 30(1)(b)(ii).'

[25] Rule 33 of the South African Legal Practice Council Rules made under the authority of s 95(1) of the LPA,<sup>10</sup> in turn provides as follows:

'An advocate referred to in section 34(2)(a)(ii) of the Act who is in possession of a Fidelity Fund certificate may render all those legal services which advocates were entitled to render before the commencement of the Act, **and may perform such functions ancillary to his or her instructions as are necessary to enable him or her to properly represent the client.**' (My emphasis).

[26] The relevance and importance of enabling advocates to perform 'such functions ancillary to his or her instructions as are necessary to enable him or

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<sup>10</sup> NG 401 of 20 July 2018 GG No 41781, as amended.

her to properly represent the client' should, in the context of the issue that is to be determined, not be overlooked. The need for this extension is borne from the historic position where an attorney whose contract with its clients is that of mandate,<sup>11</sup> which includes the power to do everything that is incidental to the carrying out of his instruction unless specifically excluded.<sup>12</sup> Referral-advocates, on the other hand, were historically, and are currently,

'required and entitled to act only when specifically and properly briefed thereto. The brief **will indicate the particular purpose for which counsel has been briefed and his [or her] function is limited to his [or her] instructions.**'<sup>13</sup> (My emphasis).

The latter remark is made by the authors while acknowledging that counsel has 'a complete discretion in the conduct of a case' for which it is briefed,<sup>14</sup> and the explicit provision in the rules that trust account advocates are entitled to 'perform such functions ancillary' to their instructions. This denotes entitlements that exceed the powers previously attributed to advocates.

[27] In the 'Code of Conduct for all Legal Practitioners, Candidate Legal Practitioners and Juristic Entities'<sup>15</sup> ('the code') a distinction is made between the meaning attributed in the code to the terms 'advocate' and 'counsel'. The term 'advocate' is defined to mean 'a legal practitioner who is admitted and enrolled as such under the Act [LPA]', while the term 'counsel' means 'an advocate referred to in section 34(2)(a)(i) of the Act'. In the preamble to Part IV of the code, it is stated that 'counsel are independent practitioners of advocacy'.<sup>16</sup> The nature of work undertaken by counsel is circumscribed as follows:<sup>17</sup>

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<sup>11</sup> *Goodricke & Son v Auto Protection Insurance Co* 1968 (1) SA 717 (A) at 722 H, *Eksteen v Van Schalkwyk en 'n Ander* 1991 (2) SA 39 (T) 42-43.

<sup>12</sup> Mullins J and Da Silva C *Morris Technique in Litigation* 6<sup>th</sup> ed JUTA 5.

<sup>13</sup> *Supra*, 13.

<sup>14</sup> *Supra*, 9.

<sup>15</sup> GN 168 of 29 March 2019 GG No. 42337.

<sup>16</sup> Para. 22.3.1.

<sup>17</sup> Para 23.

‘23.1 Counsel undertake to perform professional legal services for a reasonable reward.

23.2 There is no closed list of subject matter about which a brief may be accepted by counsel provided the brief does not require counsel to undertake work which is properly that of an attorney. In particular, counsel may accept a brief—

23.2.1 to give legal advice orally or in a written opinion;

23.2.2 to prepare any documents required for use in any court or arbitration or other adjudicative proceedings;

23.2.4 to argue an application;

(Editorial Note: Numbering as per original *Government Gazette*.)

23.2.5 to argue an appeal;

23.2.6 to move an unopposed matter;

23.2.7 to appear in a trial or in an arbitration or in any other decision-making forum;

23.2.8 to negotiate on behalf of a client;

23.2.9 to settle a matter, whether on trial or otherwise;

23.2.10 to argue a matter on taxation before a taxing master;

- 23.2.11 to make representations to the National Prosecution Authority about whether or not to charge a person with a criminal offence;
- 23.2.12 to undertake a criminal prosecution on behalf of the State or on behalf of, or as, a private prosecutor;
- 23.2.13 to preside as an arbitrator, or as the chair of a disciplinary enquiry, or as presiding officer in any other adversarial proceedings, or to conduct any inquisitorial proceedings;
- 23.2.14 to act as an expert or as a referee;
- 23.2.15 to act as a mediator, facilitator or adjudicator;
- 23.2.16 to conduct an investigation and furnish a report with recommendations as to facts found and to make recommendations as to future action;
- 23.2.17 to act as a curator *ad litem*;
- 23.2.18 to make representations to a statutory or voluntary body or any state official;
- 23.2.19 to act as a commissioner in any enquiry.

23.3 Counsel shall comply with these rules of conduct and the rules of conduct applicable to prosecutors issued by the National Prosecution Authority whenever briefed on behalf of the State to conduct a prosecution, and in the event that any conflict might arise between the sets of rules, these rules of conduct shall prevail.'

- [28] As far as the nature of work undertaken by trust account advocates is concerned, it is stated in the code that the provisions of paragraph 23 of the code apply, with the necessary changes required by the context, to trust account advocates.<sup>18</sup> The nature of an advocate's work is also described as the performing of 'legal professional services in court-craft and knowledge of the law.'<sup>19</sup>
- [29] How does the context within which a trust account advocate practices impact on the scope of legal services that may be rendered by such an advocate? The obvious consequence of creating a category of advocates that may be approached directly by the public is that a client may, instead of approaching an attorney for services that may be rendered by an advocate, directly make use of the services of trust account advocates. A trust account advocate may be approached directly, for example, to provide a legal opinion in the area of law on which a trust account advocate is knowledgeable. Where a legal opinion is, for example, sought on the termination of a contract, a client who would ordinarily have appointed an attorney who would in turn, have appointed an advocate, can now approach a trust account advocate directly. This will result in the capping of legal fees and bring about the desired result pursued by the legislature.
- [30] It is also necessary to have regard to the purpose of the Fidelity Fund and the consequence of a Fidelity Fund certificate being issued, in the interpretative process. The Legal Practice Council issues Fidelity Fund Certificates to legal practitioners. A Fidelity Fund Certificate is a certificate that an attorney practising for own account as director or sole practitioner, and an advocate operating a trust bank account and accepting deposits from the public, must hold in terms of s 84 of the LPA. The Legal Practitioner's Fidelity Fund ('the Fund') was previously known as the Attorneys Fidelity Fund. It is a fidelity guarantee fund which exists in terms of the LPA. The primary purpose of the Fund 'is to reimburse members of the public who may suffer pecuniary loss,

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<sup>18</sup> Para 39.

<sup>19</sup> Paras 27.1 and 43.1.



not exceeding the amount determined by the Minister from time to time by notice in the Gazette, as a result of theft of any money or other property given in trust to a trust account practice in the course of the practice of a legal practitioner...'<sup>20</sup> The protection provided by the Fund encourages the public to use services provided by legal practitioners with confidence.<sup>21</sup> The mission of the Fund includes the promotion of access to, and confidence in, the administration of justice by ensuring that victims of such theft are promptly and fully compensated for their loss.<sup>22</sup>

[31] The respondents correctly submitted that the Fund owes its existence to the LPA, and that the Fund's liability is circumscribed and pre-determined by the LPA. The liability of the Fund is expressly limited through the provisions of s 56 of the LPA. Section 56 lists certain categories of persons to whom the Fund is not liable in respect of any loss suffered. Section 56 of the LPA is not relevant to the current proceedings, save for the fact that the applicant in this application, Ms. Rabalao, does not fall within any of the categories listed in s 56.

[32] Section 55 of the LPA mirrors s 26(a) of the now repealed Attorneys Act 53 of 1997 ('the AA'), save that it now includes the 'trust account advocates' in its ambit. Guidance might be provided by case law where the question as to whether funds were paid into an attorney's trust account in the course of the practice as such, was considered.

[33] In *Paramount Suppliers (Merchandise) (Pty) Ltd v Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund Board of Control*,<sup>23</sup> Kuper J said that:

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<sup>20</sup> 'Legal Practitioner's Fidelity Fund'

<https://www.fidfund.co.za/#:~:text=The%20primary%20purpose%20of%20the,executor%20or%20administrator%20in%20a> accessed on 21 March 2023.

<sup>21</sup> <https://www.fidfund.co.za/about-lpff/> accessed on 21 March 2023.

<sup>22</sup> Ibid. see also 'The Legal Practitioners Fidelity Fund – empowering South Africans to use legal services with confidence' - <https://www.iol.co.za/business-report/partnered/the-legal-practitioners-fidelity-fund-empowering-south-africans-to-use-legal-services-with-confidence-d88b7f62-80ad-422b-bb6f-f8e064780a33> accessed on 21 March 2023.

<sup>23</sup> 1957 (4) SA 618 (W).

‘It does not follow from the fact that an attorney pays a sum of money into his trust account that that sum of money is in fact either trust money held by that attorney or money paid to that attorney in the course of his practice as an attorney, or in any other capacity provided for in s 26 of Act 19 of 1941.’

This case, however, dealt with money paid to an attorney on the basis that he was to use his ‘influence’ in order to obtain a benefit that all the persons concerned knew should not be obtained, i.e. to obtain an import control permit for a dormant company. The money had been paid to the attorney for an illegal or immoral transaction.

[34] In *Tollemache v Attorneys Fidelity Fund*,<sup>24</sup> the court held that the fact that the attorney who received certain funds in trust, was not personally able to transfer the money in terms of the rules promulgated by Treasury, is not sufficient to justify a finding that the money was not entrusted to him in the course of his practice. The attorney was recognised as an expert in banking law and foreign exchange and his firm offered exchange control advice, including arranging to transfer funds to foreign countries. The fact that one aspect of the exchange control was restricted to authorised dealers was not sufficient to justify a finding that the entrustment of the funds to the attorney was not in the course of his practice.

[35] Cleaver J dealt with Fund’s submission that since the attorney was not authorised to submit exchange control applications, it cannot generally be regarded as part of an attorney’s work to prepare and submit such applications, and that the question as to whether in any given case money has been paid to an attorney in the course his practice requires, *inter alia* an enquiry into the sort of work which attorneys can and do, as an objective fact, perform in the course of their practice as an attorney.<sup>25</sup> He stated:<sup>26</sup>

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<sup>24</sup> 2003 (6) SA 664 (C).

<sup>25</sup> *Supra*, at para [13].

<sup>26</sup> *Supra*, at para [16].

‘I think it fair to say that there has been great change in attorneys’ practices since the time when the judgment in the *Paramount Suppliers* case was handed down in 1957. Whereas the work done by attorneys at that time was fairly narrowly delineated, the type and range of services offered by attorneys today is vastly different.’

- [36] In *Westley and Others v Attorneys Fidelity Fund*,<sup>27</sup> the court held that the funds in question were not entrusted to the practitioner in the course of his practice, because:<sup>28</sup>

‘There was no suggestion on the papers that the funds had been entrusted to Akritidis to enable him to employ them in the putative future transactions for a purpose which by its very nature was properly performed by an attorney...’

- [37] In *Provident Fund for the Clothing Industry v Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund*,<sup>29</sup> Nicholas J stated that it is not ‘infrequently a provision in a deed of sale of fixed property that the purchaser should pay an amount by way of deposit in trust to the seller’s attorney.’ The fact that there is no pre-existing fiduciary relationship between the purchaser of immovable property and the attorney in whose trust account the purchase price is to be deposited does not mean that the money was not entrusted to the attorney or that the Fidelity Fund would be absolved of the liability to reimburse the purchaser if the other requirements for the Fund’s liability were to be established.

- [38] In *Attorneys Fidelity Fund Board of Control v Mettle Property Finance (Pty) Ltd*,<sup>30</sup> the Supreme Court of Appeal endorsed the view expressed by Marais

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<sup>27</sup> 2004 (3) SA 31 (C).

<sup>28</sup> *Supra*, at para [42].

<sup>29</sup> 1981 (3) SA 539 (W) at 542G-H.

<sup>30</sup> 2012 (3) SA 611 (SCA) at para [17].

JA in *Industrial and Commercial Factors (Pty) Ltd v Attorneys Fidelity Fund*,<sup>31</sup> when it held that:

‘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.’

The facts in this case, lead the Supreme Court of Appeal to find that there was ‘no entrustment’ of the money paid by Mettle to the attorney in question –

‘Suffice it to say that, in the case where Langerak in his personal capacity was the mortgagor, the initial purchase price paid by Mettle into Langerak's trust account belonged to Langerak as the client. He could hardly be said to steal his own money.’

## Conclusion

[39] The money was paid over to Advocate Moela because Ms. Rabalao was under the impression that he would render legal services to her. Ms. Rabalao was informed that Ms. Rambau and Advocate Moela would attend to the transfer of the property. The money was not paid over to Advocate Moela's trust account because he was a friend or because, for instance, she wanted to keep money separate from the funds in her own account for a specific purpose or invest it otherwise, or for an immoral transaction. Had Advocate Moela not been identified as the legal practitioner in whose trust account the purchase price and transfer- and registration fees had to be paid, the money would not have been paid into his trust account. The fact that Advocate Moela

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<sup>31</sup> 1997 (1) SA 136 (A).

practised as a legal practitioner with a trust account was a *sine qua non* for the money being paid into his trust account.

- [40] The LPA changed the landscape within which legal practitioners function. With the creation of a category of trust account advocates, and by granting attorneys the right to appear in the High Court, the divide between the functions of attorneys and advocates became less distinct. The purpose of this development was, however, to facilitate access to the legal profession and access to justice.
- [41] The respondents are correct in holding that the Fidelity Fund is a creature of statute and that its liability can only be determined within the provisions of the LPA. When the relevant provisions of the LPA are, however, interpreted against the constitutional imperative of facilitating access to justice and within the legislative framework through which access to justice is enhanced by providing a category of trust account advocates, the protection afforded to members of the public, often members of vulnerable communities whom the legislature wanted to benefit from having direct access to trust account advocates, cannot unduly be limited. The scope of protection provided to members of society who entrust money to the trust accounts of trust account advocates, must correlate with the extent to which the legal services that may be rendered by trust account advocates have been extended to the public. The legislature and the Council refrained from limiting the legal services that can be rendered by trust account advocates by providing a closed, or clearly delineated list of legal services that may be rendered by trust account advocates, save for stipulating that trust account advocates may only render those legal services rendered by advocates before the commencement of the Act as determined by the Council in the rules. In addition, the Council specifically provided that trust account advocates may perform such functions ancillary to their instructions as are necessary to properly represent the client. In this context, the principle, as applied in *Tollemache*, is equally applicable to trust account advocates.

- [42] Having regard to the applicable constitutional principles, the legislative framework and existing caselaw, the *amicus curiae*, correctly in my view, contended that where a trust account advocate is briefed to negotiate on behalf of a client, or advise a client, regarding a sale of immovable property, one of the 'functions ancillary to his or her instructions as are necessary to enable him or her to properly represent the client' can include receiving the purchase price and registration and transfer fees into his trust account. The fact that a trust account advocate is not a conveyancer is of no consequence. It is trite that attorneys, who are not conveyancers, often receive the purchase price and transfer and registration fees relating to a sale of immovable property in their trust accounts, only to pay it out to the seller on registration of the property in the name of the purchaser, or to pay it over to the trust account of the conveyancer instructed by the client, on the client's instruction.
- [43] No reason exists that would justify a finding that providing clients with advice, or assistance during negotiations regarding the sale of immovable property is a function that is 'properly that of an attorney', and thus reserved for attorneys only. Where a purchaser pays the purchase price and transfer and registration fees into a trust account advocate's trust account, it is paid in the trust account within the scope of the trust account advocate's practice and received by him in his capacity as a legal practitioner with a trust account.
- [44] In light of the fact that the applicant is self-represented, no costs order is made.

## **ORDER**

**In the result, the following order is granted:**

- 1. The decision of the second respondent to disallow the applicant's claim arising out of monies deposited by her into the trust account of Advocate Moela, is hereby reviewed and set aside, and referred back to the second respondent for consideration.**

E van der Schyff

Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

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|--------------------------------|---------------------|
| For the applicant:             | In person           |
| For the respondents:           | Adv. G. Oliver      |
| Instructed by:                 | Brendan Muller Inc. |
| For the <i>amicus curiae</i> : | Adv. P Ellis SC     |
| With:                          | Adv. B Yawa         |
| Date of the hearing:           | 16 March 2023       |
| Date of judgment:              | 3 April 2023        |