

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

Case Number: 26539/2016

In the matter between:

Case No.: 26539/2019

IAN JULIAN SMITH (Identity No.: 4[...])

Plaintiff/Applicant

And

THE LEGAL PRACTITIONERS' FIDELITY FUND BOARD Defendant/Respondent

JUDGMENT: LEAVE TO APPEAL

KUBUSHI J

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on 24 May 2023.

INTRODUCTION

[1] Judgment in this matter was handed down on 1 February 2023, and an order was made to the effect that all the Applicant's four claims stand to be dismissed and the Applicant to pay the Respondent's costs of suit on the following grounds:

- a. the liability of the Respondent is excluded by operation of section 47(1)(g), read with section 47(5)(b) of the Attorneys Act 53 of 1979 ("the Attorneys Act");

b. the Applicant has failed to establish all the requirements of section 26(a) of the Attorneys Act, in particular the requirement of entrustment; and

c. that it is not necessary to consider the requirement of pecuniary loss.

[2] The Applicant has now brought an application for leave to appeal the whole of the aforementioned judgment and cost order in terms of the provisions of section 17(1)(a)(i) and/or (ii) of the Superior Courts Act 10 of 2013 (“the Superior Courts Act”), to the Supreme Court of Appeal, alternatively the full Court of this Division, save for that part of the judgment in terms of which the Respondent’s special plea is dismissed.

[3] The matter was determined on the papers as uploaded on Caselines without oral hearing, the parties having been directed to upload their respective heads of argument on Caselines.

FACTS

[4] The application for leave to appeal emanates from the action instituted by the Applicant (the Plaintiff in the main action) against the Respondent (the Defendant in the main action), in respect of four claims pertaining to the theft of monies which the Applicant alleged were entrusted and paid into the trust account of one attorney David Dadic (“Mr Dadic”) who practised under the name and style Dadic Attorneys. The Applicant, also asserted the said claims for a pecuniary loss suffered as a result of the theft of the monies involved in the transactions undertaken in the respective claims. It is common cause that during the said transactions, the Applicant dealt with an employee of Mr Dadic, one Andruw Stephens (“Mr Stephens”). It was later established that Mr Stephens operated under a false name, his real name being Andrew Steven Rapport.

[5] The Respondent in defending the said claims had in its plea raised a special plea of excussion and a plea over on the merits, alleging that the Applicant failed to establish some of the requirements of section 26(a) of the Attorneys Act, more specifically the requirement of entrustment.

[6] The claims were decided on the evidence of the Applicant only, as the Respondent closed its case without tendering any evidence and limited its case to the cross examination of the Applicant's witnesses. The Applicant's evidence comprised of the testimony of the Applicant and that of one Charles Henry Parsons, who gave evidence about the fictitious nature of transactions in claims 1 and 3.

GROUND OFS OF APPEAL

[7] The Applicant's grounds of appeal are set out comprehensively in the Notice of Application for Leave to Appeal filed of record. Nevertheless, for purposes of this application, the findings in the said judgment that the Applicant seeks to impugn are summarised hereunder as follows:

- a. The Court's assessment of the ratio of the decision of the Supreme Court of Appeal, in *The Attorneys' Fidelity Fund v Prevance (Pty) Ltd* (917/17) [2018] 135 (28 September 2018) ("*Prevance*").
- b. The Court's finding that the Applicant's evidence failed to establish all the requirements of section 26(a) of the Attorneys Act, in particular the requirement of entrustment.
- c. The Court's finding that the provisions of section 47(1)(g) or section 47(5)(b) of the Attorneys Act are applicable in the circumstances of this matter.

[8] The Respondent in opposing the application raised the following grounds, namely, that

- a. the interpretation of the judgment in *Prevance* that the Applicant contends for, is not supported by the wording of the judgment itself.
- b. the evidence in each claim, clearly establishes the applicability of section 47(1)(g) and section 47(5)(b) of the Attorneys Act; and that an

entrustment is not necessarily established if sections 47(1)(g) and 47(5)(b) of the Attorneys Act do not find application.

[9] The Respondent contends further that if the Court was inclined to grant leave to appeal, notwithstanding its opposing submissions, then it is its contention that the appropriate court for the determination of the appeal, is the Supreme Court of Appeal.

ISSUE FOR DETERMINATION

[10] As earlier indicated the Applicant has approached this Court for leave to appeal in terms of section 17(1)(a)(i) and/or (ii) of the Superior Courts Act, which provides as follows:

"17. Leave to Appeal

(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-

(a) (i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration."

[11] The test for the granting of the application for leave to appeal based on this section, is trite and need not be repeated in this judgment.

[12] This Court is of the view that having considered the grounds of appeal raised by the Applicant and the arguments for and against such application raised by the parties in their respective heads of argument, this Court is of the opinion that the Applicant has made out a case for the granting of the application for leave to appeal on the ground of some compelling reasons as envisaged in section 17(1)(a)(ii) of the Superior Courts Act. This is so because of the conflicting interpretation of the ratio in the *Prevance* judgment. Thus, the proper interpretation of the ratio in *Prevance* is a

compelling reason warranting the Applicant being granted leave to appeal.

[13] *Prevance* is a decision of the Supreme Court of Appeal, therefore, it is proper that leave to appeal be granted directly to the Supreme Court of Appeal.

ORDER

[16] In the premises, the following order is made:

- a. The Applicant is granted leave to appeal the judgment of this Court handed down on 1 February 2023, directly to the Supreme Court of Appeal.
- b. Costs to be costs in the appeal.

E.M KUBUSHI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES:

PLAINTIFF'S COUNSEL: ADV L HOLLANDER

PLAINTIFF'S ATTORNEYS: JACOBSON AND LEVY INC ATTORNEYS

DEFENDANT'S COUNSEL: ADV G OLIVIER

DEFENDANT'S ATTORNEYS: BRENDAN MULLER INC