IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Case number: 469/2012

In the matter between:

LUCAS CHRISTOFFEL VAN ZVL Plaintiff

(ID NO: [6...])

and

THE ATTORNEYS FIDELITY FUND BOARD OF

CONTROL Defendant

HEARD ON: 15 & 16 NOVEMBER 2016

JUDGMENT BY: MBHELE, **J**

DELIVERED ON: 02 February 2017

INTRODUCTION AND BACKGROUND

[1] On 27 March 2007, Kobus Le Roux (Le Roux), a practising attorney of Kobus Le Roux Attorneys , informed Plaintiff of his client who needed cash urgently. He requested Plaintiff to lend and advance the sum of R270 000 to the said client. The money would be returned within two years with interest at 15% per annum.

[2] The plaintiff paid an amount of R270 000 into Kobus Le Roux's trust account with a condition that a mortgage bond be registered against the borrower's property, in plaintiff's favour, as security.

[3] The plaintiff made an application for separation of issues in terms of Rule 33(4) which I granted at the beginning of the trial. The facts are not in dispute and the matter serves before me to determine whether the sum paid by the plaintiff into Le Roux's trust account constitutes trust funds in terms of the Attorneys Act

[4] This matter served before me simultanesously with case no 468/2012 where Hendrik Cristiaan Eksteen is the Plaintiff. The causes of action and the facts in both matters are the same. The parties agreed that the principle applied in Van Zyl will extend to Eksteen.

PLAINTIFF'S CASE

[4] The plaintiff testified in support of his case. He testified to the effect that he met Le Roux in 2005 when he had instructed him to collect arrear rental amount from one of his tenants. In 2007 Le Roux approached him and requested him to lend money to a client of his, who was in construction business at 15,5% interest per annum for a period of 2 years. He cannot remember the name of the borrower. Money had to be kept in Le Roux's Trust account pending registration of a bond in Plaintiff s favour. On 10 June 2010 Le Roux committed suicide. Upon Le Roux's death he discovered that no bond was registered. Le Roux's estate was insolvent.

[5] Before Le Roux's death he made several enquiries about repayment of his money and Le Roux paid him R20 000 as part payment.

SUBMISSIONS FOR THE PLAINTIFF

[6] Mr Rontgen submits for the plaintiff to, *inter alia,* the effect that the money paid into

Le Roux's trust account by the plaintiff, was trust monies as defined by the Attorneys' Act. He contends further that the transaction was a normal conveyancing transaction in terms of which Le Roux had to register a bond in the name of the borrower as security for monies lent. It is his submission that Le Roux stole the money before the bond could be registered. He painstakingly contends that Le Roux was not instructed to invest the money but to keep it in his trust account pending registration of a bond in favour of the plaintiff.

SUBMISSION BY THE DEFENDANT

[7] Mr Olivier on behalf of the defendant contends that, the plaintiff must be regarded as having instructed Le Roux to invest the money through an interest bearing loan to the borrower, as contemplated in section 47(1)(g).

[8] He further contends that section 47(5)(b) of the Act is not applicable in the circumstances as the plaintiff was introduced to the borrower by Le Roux.

APPLICABLE LAW

[9] Section 26(1) of the Attorneys Act 53 of 1979, provides as follows:

> "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 candidate attorney or his employee, of any money or other property entrusted by or on behalf of such persons to him or to his candidate attorney or employee in the course of his practice.
> >
> > (b) Entrustment means that the attorney has a duty to hold and apply the money or property for the benefit of sole person or for the accomplishment of a particular

purpose."

[10] The fund does not reimburse loss suffered as a result of monies handed to an attorney for investment purposes, nor loans to an attorney. (See Section 47(1)(g) of the Act) which reads as follows:

"Limitation of Liability.

The fund shall not be liable in respect of any loss suffered by any person as a result of theft of money which a practitioner has been instructed to invest on behalf of such person.

Section 47(5)(b) and (c) provide for a situation where monies should not be regarded as an investment in terms of section 47(1)(q))."

[11] Section 47(5)(b) and (c) reads as follows:

> "For the purpose of subsection (1)(g) a practitioner must be regarded as not having been instructed to invest money if he or she is instructed by a person
>
> (b) to lend money on behalf of that person to give effect to a loan agreement, where that person, being the lender
>
> > (i) Specifies the borrower to whom the money is to be lent;
> >
> > (ii) has not been introduced to the borrower by the practitioner for the purpose of making that loan; and
> >
> > (iii) is advised by the practitioner in respect of the terms and conditions of the loan agreement, or
>
> (c) to utilise the money to give effect to any term of a transaction to which that person is a party, other than a transaction which is a loan or which gives effect to a loan agreement that does not fall within the scope of paragraph (b)."

[12] The indemnity against the 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 result of any conceivable kind of knavery in which an attorney may indulge in the course of his or her practice. (See Attorneys Fidelity Fund Board of Control v Mettle Property Finance (499/2010) [2011] ZASCA 133 (16/09/2011)

APPLICATI ON OF THE LEGAL PRINCIPLE

[13] It is apparent from undisputed evidence and submissions by the parties that the money was paid into Le Roux's trust account as a result of a loan agreement to which plaintiff was a party. The underlying transaction was a loan agreement in which the borrower was specified and introduced to the plaintiff by Le Roux.

[14] The plaintiff's intention was to employ his money to generate profit through an interest bearing loan to Le Roux's client.

[15] The argument that the money was put into Le Roux's account in a normal course of a conveyancing transaction, as argued by Mr Rontgen, is misplaced. The money was placed in Le Roux's trust account to fulfil the terms of a loan agreement between the plaintiff and Le Roux's client. Bond Registration was not the underlying transaction it was a mere condition attached to the loan agreement.

[16] Section 47(1)(g) removes protection from claimants who suffered loss as a result of theft of monies which a practitioner has been instructed to invest on behalf of the person giving instruction.

[17] Section 47(5)(b) and (c) goes further to provide for situations where the money lent should not be regarded as an investment.

[18] In the current matter the money lent does not meet the conditions set out in sections

47(5)(b) and (c). The plaintiff did not specify the borrower nor introduce the borrower as contemplated by subsection (b). The underlying transaction was a loan agreement in which the plaintiff was a party, contrary to the provisions of subsection (c).

[19] It is clear from section 47(1)(g) that the legislature intended to prevent a situation where parties would burden Attorneys' trust account with risky and reckless lending schemes. The section was aimed at dealing with attorneys and clients who use attorneys' trust accounts for the purpose it was not intended for. Although the attorneys' Fidelity Fund is aimed at providing protection to people who suffered loss as a result of theft occurring in the attorney's normal course of practice, it is impossible for the fund to be made available to cover for all the ills and dishonourable acts attorneys may get up to. The section discourages attorneys from acting as loan brokers and using trust accounts to further their dishonourable acts. In the current matter the Plaintiff risked his money to generate profit and it proved to be a dangerous exercise.

[20] In view of the above, I come to a conclusion that the plaintiff's claim falls outside the claims protected by the Act and it cannot succeed.

There is no reason for costs not to follow the event.

ORDER

[21] Plaintiff's claim is dismissed with costs, including the costs of one counsel.

N M MBHELE, J

On behalf of the plaintiff: Mr. Rontgen

Instructed by: Rontgen & Rontgen Inc.

Pretoria

and

c/o Mcintyre Van Der Post Attorneys

Bloemfontein

On behalf of the defendant: Adv. Olivier

Instructed by: Cengcani & Associates Bloemfontein