**FREE STATE HIGH COURT, BLOEMFONTEIN**
**REPUBLIC OF SOUTH AFRICA**

Appeal No.: A155/2012

In the appeal between:

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| **SUNEL VAN DER BERG N.O.** | 1st Appellant |
| **JACOBUS PETRUS ANDRIES DU TOIT N.O.** | 2nd Appellant |

and

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| **THE ATTORNEYS FIDELITY FUND** | 1st Respondent |
| **ETIENNE HORN N.O.** | 2nd Respondent |
| **JOSEPH J MHLAMBI N.O.** | 3rd Respondent |

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**CORAM:** RAMPAI, J *et* MOLOI, J

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**JUDGEMENT:** RAMPAI, J

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**HEARD ON:** 22 APRIL 2013

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**DELIVERED ON:** 2 MAY 2013

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[1] These were motion proceedings. The applicants applied to have the findings of the committee appointed by the first respondent reviewed and set aside. That was the principal relief sought. The review proceedings were launched in terms of rule 53(1)(a) of the Uniform Rules of Court. The application was opposed by the three respondents.

[2] The first applicant is Ms Sunel van der Berg *nomine officii*. The second applicant is Mr Jacobus Petrus Andries du Toit *nomine officio*. They act in their representative capacities as co-trustees of "Dewald van der Berg Trust – IT1065 (2004)" – an entity duly established in accordance with the provisions of the Trust Property Control Act 57 of 1988.

[3] The first respondent is "The Attorneys Fidelity Fund", a statutory entity with a legal personality established in terms of section 8 Attorneys Admission Amendment and Legal Practitioners Fidelity Fund Act 19 of 1941 read with section 25 of the Attorneys Admissions Act 53 of 1957.

[4] The second respondent is Mr Ettiene Horn N.O., an attorney by profession who practises as such under the name and style Van der Merwe & Sorour Attorneys in Bloemfontein. The third respondent is MrJoseph Jamela Mhlambi N.O. also an attorney by profession who practises law as such under the name and style of Mhlambi Attorneys in Welkom. Moreover both attorneys, in other words, the second and third respondents, were cited as duly nominated and appointed members of the first respondent's board of control. The two attorneys were also factually sued in their representative capacities as members of an ad hoc committee appointed in terms of regulation 8(bis) of the Attorneys Fidelity Fund under Act No 19/1941 by the first respondent for the purpose of examining witnesses in respect of a claim in terms of section 26 Act 53 of 1977 relating to the theft of trust money by a practising attorney.

[5] The first applicant's husband is deceased. The couple have a minor child, a boy called Dewald. It was alleged that the boy nearly drowned one day. Although he was rescued, he was seemingly injured in that incident. The adverse impact of the incident was so severe that he now suffers from cerebral palsy. Subsequent to that incident the boy's mother, in other words, the first applicant, appointed Mr S.J. le Roux aka "Cobus", an attorney of Bloemfontein, to register and *inter vivos* trust for the benefit of her cerebrally palsic son. The attorney, Mr Le Roux, duly established a trust in accordance with the first applicant's mandate.

[6] The gentleman, Mr Le Roux, is not alive anymore. After he had allegedly committed suicide, it was discovered that the trust money, which had been entrusted by "Dewald van der Berg Trust" to Le Roux had been misappropriated. The trust notified "The Law Society of the Free State" in terms of section 23 Attorneys Admission Act of its intention to institute a claim against the first respondent for compensation as a result of the loss suffered through the theft attributed to Le Roux in terms of section 26. Notice of the claim was also given to the first respondent.

[7] Pursuant to that notice of the claim the first respondent appointed a committee consisting chiefly of the second and the third respondents to examine the witnesses on behalf of the first respondent's board of control – regulation 8(bis). The committee, which was seemingly co-chaired by the second and third respondent, convened in Bloemfontein on

26 October 2011 to gather evidence about the circumstances which gave rise to the claim and to generally investigate the merits of the claim by examining the witnesses.

[8] At the end of the factual examination process the committee found:

- that the Dewald Trust had not complied with the prescripts of section 48(1); and
- that the Dewald Trust had not satisfied the requirements for condonation for such non-compliance.

[9] Those then were the findings which were under attack in these proceedings and which we were urged to review and set aside. Among others, the relief was sought on the grounds

- that the committee had adopted and used an adversarial procedure contrary to the real purpose of the relative regulation;
- that the committee had exceeded the terms of its mandate by making findings and taking decisions which it was not competent to make;
- that the committee failed to appreciate that the first applicant appeared before it not as the claimant but as a witness and a co-trustee;
- that the committee erroneously found that the Dewald Trust did not give the requisite notice of the claim

within the prescribed three months period after becoming aware of the theft;

- that the failure attributed to the Dewald Trust, which the applicants denied, could not be condoned; and
- that the committee had usurped the powers of the first respondent's board of control by making the findings under attack and perhaps more.

These and some other irregularities, so the applicants contended, rendered the aforesaid findings and the ultimate decision of the board of control reviewable.

[10] The crisp question in the matter was whether or not there was a decision before us which was reviewable in terms of rule 53(1) or rule 53(4) as regards the committee or the board of control respectively.

[11] In my view the answer to that crucial question had to be in the negative, as regards both the committee and the board of control. In the first place there was no administrative action or decision taken by a public functionary in which the exercise of public power was reposited in terms of an empowering statutory provision. In the instant matter the responsible public functionary, in whom the public power was entrusted to make an appropriate administrative decision with a direct external legal effect, was the first respondent's board of control.[1]

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[1] **Registrar of Banks v Legal Treasury Private Bank** 2004 (3) SA 560 (w) at 567H. Ian Currie: **The Promotion of Administrative Act: Commentary** (2007 Siberink) 84-7.

[12] On the contrary the committee of examiners was an ad hoc internal structure of the first respondent. Its limited mandate was purely to examine the witnesses on behalf of the first respondent. Its function was nothing more than the gathering of information relevant to the alleged claim of misappropriation of trust funds. First and foremost, the committee was required in terms of regulation 8(bis) to broadly examine the witnesses. The underlying idea was that it must assist the first respondent to determine whether there were facts to beef up the allegation that trust funds had been embezzled. Therefore, its function was investigative in nature. In the second place one would have expected the committee to have examined the witness in order to assist the first respondent to determine whether the applicants had followed the correct procedure in terms of section 48(1). In my view the role of the committee was facilitative and not decisive in nature.

[13] It follows, as a matter of logic, that once the committee had established the relevant facts relative to the substantive dimension as well as the procedural dimension of the claim, it simply had to forward its report to the board of control with or without findings and recommendations, but certainly without a decision.

[14] In my view the committee could, and not should, make its findings after establishing the facts. From such findings it could, if it so wished, make certain recommendations to the first respondent. I hasten to point out that neither the making

of findings or recommendation is in terms of the regulation an obligatory term of the committee's mandate. Its sole mandate, as I have already said, was to do some spade-word, in other words, elementary investigative work on behalf of the first respondent, the statutory structure whose exclusive prerogative or imperative function it was to meet, to deliberate, to analyse and digest the facts gathered by the committee in order to make the decision to admit or to repudiate the claim.

[15] In my view the findings of the committee were just that – findings. As a court of law we had no business to concern ourselves with the deliberations of a committee of information gatherers. Whether the findings complained of were erroneously made, or not, is of no consequence; whether the procedures adopted was flawed or not, is of no consequence. What really mattered was the decision at the end of the entire exercise taken by the first respondent's board of control. In the absence of an internal record of that domestic tribunal relating to what it did or did not do in respect of the evidence placed before it by the committee, it was well impossible to me to determine precisely on what grounds "anx b" could be attacked, reviewed and nullified in terms of rule 53(4).

[16] The only critique levelled against the first respondent was that the decision of its board of control was on all fours identical to that of its ad hoc committee. It was contended that that was an indication that the board of control had done

nothing to consider the claim and that it apparently repudiated the claim merely on the strength of the decision already taken by the committee.

[17] The similarity between the findings of the committee and the decision of the board of control in itself cannot justify any inferential conclusion that the board of control did not properly apply its mind to the evidence before it. That conclusion requires careful analysis of the deliberations of the board of control leading up to the decision we are now required to set aside. The first respondent was never asked to file a record of the deliberations of proceedings before the board of control relative to the claim. This was so because according to the applicants' papers what was targeted with these review proceedings was not really the decision of the board of control but the findings of the committee. As I have already found, by so-doing the applicants lamentably identified the wrong target.

[18] It was the primary contention of the applicants that they had duly given the requisite notice of the claim to the first respondent and the responsible provincial law society. However, they urged us, in the alternative, to condone their failure if we accepted the respondents' contention that they did not comply with section 48(1).

[19] The discretion to relax the formal statutory deadlines, as set out in section 48(1), has been entrusted to the first respondent's board of control. We are not inclined to usurp

the exercise of that discretion. To do so would be tantamount to substituting our own judicial decision for that of the responsible administrative functionary – something the courts are not inclined to readily do.

[20] But even if we were inclined to do so, we could not condone the failure. To do so requires consideration of the circumstances which led to non-compliance and impelled the first respondent to refuse extension. The applicants, as the parties seeking indulgence would, at least, have to demonstrate that they have reasonable prospects on the substantive merits. Before us, there was no substantive application in which all the relevant facts were canvassed. In my view, it would only be proper to approach a trial court instead of a review court with such a remedial application.

[21] The applicants are not remediless. The section allows a claimant to apply, at any time, to the first respondent's board of control to have the lateness of their notice condoned, if so advised. Should they be unsuccessful, then, in that event they would be at liberty and wise to enforce the claim by way of action instead of motion proceedings.

[22] In the circumstances I would therefore determine the issue in favour of the respondents. The "findings" or "recom-mendations" or "decision", call it what you may, jointly made by the second and the third respondent as members of the committee, did not amount to an administrative action. Consequently it was not subject to review in terms of rule 53.

Furthermore the decision of the first respondent's board of control on the facts could not be reviewed, because firstly, the record of the relevant tribunal was not before us and, secondly, because the "Dewald Trust" has not first applied in terms of section 48(1) to the first respondent to condone their belated notice.

[23] There remains the issue of wasted costs occasioned by the postponement of the application on 18 February 2013 to deal with. Counsel for the applicant urged us to make no order in respect of the costs of that particular day. However counsel for the respondents disagreed. He urged us to saddle the applicants with a costs order for that particular day as well.

[24] Upon my perusal of the record I ascertained the following historical facts:

- that the application was launched on 22 June 2012;
- that the respondents signalled their intention to oppose the matter on 6 July 2012;
- that the respondents filed their answering affidavit on 21 August 2012;
- that the respondents withdrew an answering affidavit on 11 September 2012;
- that the respondents again served and refiled the answering affidavit on 4 February 2013;
- that the applicants then enrolled the matter for argument on 18 February 2013; and

- that on 18 February 2013 the replying affidavit by the applicants was still outstanding.

[25] It will therefore be readily appreciated that on Thursday 18 February 2013 the matter was not ripe for hearing. The replying affidavit and the heads of argument still had to be served and filed. The respondent had already reinstated the answering affidavit at the time the applicants enrolled the matter.

[26] The notice of setdown was served and filed two weeks after the answering affidavit had been reinstated. In the light of this, it was difficult for me to understand why the notice of setdown was filed before the replying affidavit. Instead of filing the required replying affidavit, the applicants set the matter down. On 18 February 2013 the m atter had to be postponed to 22 April 2013 in order to afford the applicants an opportunity of replying. The replying affidavit was eventually filed on 4 March 2013.

[27] In the light of the aforegoing historical background, it is clear and obvious firstly, that the matter was recklessly placed on the roll on behalf of the applicants when it was clearly foreseeable that it would not be ripe for hearing on 18 February 2013. According to the comments made from the bar by the counsels before us, it appeared that prior to 18 February 2013 but after the reinstatement of the answering affidavit on 4 February 2013, the applicants unsuccessfully tried to persuade the respondents to agree to a

postponement. When the request was precisely made and when it was precisely rejected, did not appear on the record. The impression I gained was that the acrimony between the legal representatives of the parties made it difficult to reach an agreement whereby the matter could have been postponed in a less expensive manner. The costs of that particular day were consequently reserved for later adjudication.

[28] On the facts I am satisfied that the conduct of the applicants was the primary cause of the wasted costs incurred on that particular day. The circumstances which prevailed before 18 February 2013 suggested that the attorney for the applicants carelessly enrolled the matter in the circumstances where a diligent attorney would have foreseen the danger of setting the matter down before the exchange of the papers had been completed. That being the case, I would therefore hold the applicants liable for the wasted costs of the particular day. As regards the rest, there was no dispute. Therefore the costs have to follow the result as usual.

[29] I have a few remarks to make in passing. Everywhere members of the public entrust their affairs to the lawyers because the honourable vocation of lawyers is built on the foundation of trust. This is the one important consideration – trust. Breach of that trust by an attorney can have catastrophic impact on the life of a client. However, the public is not naïve to think that every lawyer is trustworthy.

The public is ever mindful that some attorneys do betray their clients at times.

[30] Everywhere members of the public continue to entrust their affairs to the lawyers notwithstanding that potential risk of breach of trust. The question may be asked as to why they keep on doing so. I venture to say that they take that risk knowing that, in the rare event of an attorney succumbing to the temptation of embezzling trust money, the general body of attorneys of integrity would honourably come to their rescue to honourably make good their loss occasioned by their disgraced peer, a dishonourable member of the honourable profession. This is the other important consideration. The unshakable belief that attorneys of integrity do not want firstly, to see members of the public cheated and, secondly, to see their proud image tainted by dishonest members of their own profession.

[31] The first respondent is the public face of that body in the eyes of the general public. The esteemed public image of attorneys as a whole gets enormously damaged every time an attorney steals money from an unsuspecting client. That image gets almost absolutely devastated when "The Attorneys Fidelity Fund" shifts its focus from a dishonourable misdeed of thieving committed by its delinquent member to insignificant omissions committed by an innocent member of the public and a victim of an unscrupulous attorney.

[32] The Attorneys Fidelity Fund was created for the prime and exclusive purpose of protecting innocent members of the public from abusive and thieving attorneys. Once it has been ascertained by the first respondent that the evidence gathered establishes that the money has indeed been stolen by an attorney or his aides, then dictates of justice demand that the victim be compensated. To repudiate a clearly proven claim merely because the requisite notice in terms of section 48(1) was belated seems to be repulsive and inimical to the ethical norms which are deeply rooted in the moral and philosophical foundation of the relevant legislation.

[33] In the case of **Northern Province Development Corporation v Attorneys Fidelity Fund Board of Control** 2003 (2) SA 284 (T) at par [40] Moseneke J said the following about the ambit of the respondents' discretion:

> "Lastly, Mr *Delport* referred me to the provisions of s 48(2) of the Act and these read as follows:
>
> '(2) If a board of control is satisfied that, having regard to all the circumstances, a claim or the proof required by the board has been lodged or furnished as soon as practicable, it may in its discretion extend any of the periods referred to in ss (1).'
>
> **Clearly the board of control has a dispensatory power to be found in ss (2).** In its discretion, the board of control may condone any late filing of a claim or extend any relevant time limits prescribed by ss (1). **What is more, there is no time limit within which such power may be exercised. It is clear from ss (2) that such extension is in the discretion of the board of control. The board is obliged, however, to have regard to all the circumstances** and may call for such proof as it may

> consider necessary. Such proof must be furnished as soon as practicable."

I am in respectful agreement.

[34] Where theft is proven, the dominant inclination of the first respondent's board of control should, in my view, be the admission rather than the repudiation of the claim. If, on the substantive merits of a claim, a case has been made out that the Attorneys Fidelity Fund is factually liable, then the purpose of the law should not be frustrated by insensitive repudiation of a claim on account of minor procedural defects. The first respondent has to appreciate its dispensatory power conferred on it in terms of subsection (2). Such power gives immense discretion to the first respondent to condone the victim's procedural missteps. The board of control can, on its own accord, discretionarily extend any statutory periodic deadline missed by a victim without the victim's own initiative to apply for it in a deserving case.

[35] Moreover, the board of control must appreciate that the relatively short period of three months, as contemplated in ss (1), was primarily inserted for the purpose of enabling the first respondent to speedily take appropriate steps to prevent further thieving, to retrieve, where possible, the proceeds of thieving and to prevent an incriminated attorney from dissipating misappropriated funds or concealing such funds or assets acquired by means of such funds. This then is the evil the measure is designed to cure. In my view ss (1) was

designed to serve as a damage control measure and not as an outright punitive measure for the slightest procedural neglect by a victim of an attorney's dishonest practice. As I see it, the indiscriminate, speedy and punitive invocation of that subsection against each and every victim of attorneys' theft, lacks moral, ethical and legal foundation. However, it would not be wrong, in my view, to invoke ss (1) against a grossly negligent and grossly uncooperative victim.

[36] These remarks are *obita dicta*. I refrain from expressing any view at all on the substantive merits of this particular matter. I believe though, that every time the first respondent considers a claim lodged by a victim of an attorney's dishonourable actions, it will constantly keep in mind the restorative and curative purpose of the legislative measure concerned.

[37] I also hasten to add that I found it unnecessary to critically, analytically and comparatively deal with the conflicting factual averments. For the sole purpose of the *ratio decidendi* in this matter I assumed the averments set out in the founding affidavit to be correct. Of course, I did so without definitely deciding one way or the other on the correctness of the factual matrix of the matter as a whole.

[38] Now the final remark. The real claimant in this matter is not the first or the second applicant but Dewald, a cerebrally palsic little boy. The unfortunate incident has shattered his life. For him the future is very bleak. In the light of these

tragic circumstances of the child, I urge the respondents, on compassionate grounds, to forego the costs awarded to them in this matter.

[39] According I make the following order:

38.1 The review application is dismissed.

38.2 The applicants are directed to pay the costs.

**M. H. RAMPAI, J**

I concur.

**K. J. MOLOI, J**

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| On behalf of the applicants: | Adv M.C. Louw<br>Instructed by:<br>Du Toit Attorney<br>BLOEMFONTEIN |
| On behalf of the respondents: | Adv H.J. Benade<br>Instructed by:<br>Cengcani & Associates<br>BLOEMFONTEIN |

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