IN THE HIGH COURT OF SOUTH AFRICA **REPORTABLE**
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case no.: 7778/2001

In the matter between:

LAURENCE RONALD TOLLEMACHE Plaintiff

and

ATTORNEYS FIDELITY FUND Defendant

JUDGMENT GIVEN THIS TUESDAY, 10 DECEMBER 2002

CLEAVER J:

[1] In this matter, the plaintiff seeks an order directing the Attorneys Fidelity Fund ('the Fund') to compensate him for money paid by him to a practising attorney, which was stolen by the attorney. The plaintiff's case is that payment of the money to the attorney was a payment into an account contemplated in section 78(2A) of the Attorneys Act No 53 of 1979 ('the Act'). Theft by an attorney from funds deposited to such an account will render the Fund liable. The defendant denies that the money was entrusted to the attorney within the meaning of section 26(a) of the Act which makes provision for such a claim. The defendant avers furthermore that even if the plaintiff has proved that there has been an entrustment within the meaning of the section, the claim should still fail for --

a) The money was not entrusted to the attorney in the course of his practice;

b) alternatively, if it was so entrusted, the attorney was instructed to invest the money and the Fund is accordingly not liable.

[2] Only the plaintiff testified as to the circumstances under which the money was paid to the attorney. The plaintiff is a 59-year-old businessman and director of companies. After qualifying as a chartered accountant in 1966, he was employed for some time as a financial manager of a number of companies carrying on business in the industrial field. He is now a successful businessman and for the last ten to twelve years has been running a number of family investment companies and two manufacturing companies. These manufacture electrical goods and chemical type products. His interest in these companies was at the relevant times held by an investment holding company known as Global Trading and Investment Company (Pty) Ltd ('Global'). (This company is in the process of being deregistered and replaced by another company, Dysart Investment Company (Pty) Ltd ('Dysart') in which just under 75% of the shares are held offshore.)

In the 1970's, two of the plaintiff's brothers, his sister and mother emigrated from South Africa and four or five years ago, two of his children (both sons) also left the country. In March or April 2000 one of his daughters, Sharon, left South Africa with her husband and children to join her siblings and other family in Australia. She, like her brothers and sister, each held 16,5% of the shares in Global. Although the children held shares in Global, it is clear that the plaintiff controlled the finances of his family. He testified that over the years he would pay out to the family members such amounts as they might need from time to time according to the company's resources. In particular, he would arrange for all the family members to travel overseas regularly each year. He and his wife would travel to Australia once every three months. At the end of each financial year dividends would be declared in favour of the family members to fund the expenses and appropriate book entries would be passed. None of his family members used his or her permitted off-shore investment allowance.

[3] The plaintiff says that when he visited his daughter in Australia in May 2000, she told him that she wanted to purchase a house and asked him if he could assist her in doing so. His brother in Australia told him that he had been informed by a South African friend in Australia that an attorney in Johannesburg by name of Akritidis had helped him to get funds out of the country and the plaintiff resolved to meet Akritidis when he got back to South Africa.

[4] When he returned to South Africa, the plaintiff made an appointment to see the attorney, one Spyridon Akritidis ('Akritidis'). Akritidis was a sole practitioner who operated from luxuriously appointed offices in Sandton, Johannesburg. Save for the recommendation which came via his brother, he knew nothing at all about Akritidis and met him for the first time on 19 May 2000. He says that he uplifted a business card in Akritidis' waiting room, which indicated that he was an attorney, and says that when he met Akritidis he found him to be a perfectly pleasant person. A number of certificates were to be seen on the wall or walls of his office and a witness (Bayliss) who had

been employed as a professional assistant by Akritidis testified that these were certificates recording Akritidis' admission as an attorney, notary and conveyancer. Apparently his current Fidelity Fund certificate was also on display, something which is somewhat unusual, but in the light of subsequent developments, perhaps not surprising.

[5] The plaintiff spent very little time with Akritidis, perhaps 15 or 20 minutes. He testified that he explained to Akritidis that he wished to lend R2.2 million to his daughter and wished to do so legally. This figure equates approximately to A$550 000, which he had understood from his daughter to be the selling price of a house of the type and in the area which she wished to acquire. It is clear that very little, if any, discussion ensued between him and Akritidis. He says that Akritidis took down certain basic details concerning his daughter – it is by no means clear what details were supplied – and told him that he would do everything to obtain the necessary exchange control authority for remission of the funds overseas. Akritidis then asked him to pay the sum of R2.2 million into his trust account that day. He says that he was somewhat surprised at this request and, on enquiring why this was necessary, was told that it was a requirement of the authorities that the funds which were to be exported were to be immediately available in his account. Akritidis seemed somewhat irritated with being questioned, so he left it at that and arranged for a cheque for the required amount to be sent to Akritidis' office later during the day. The cheque which was drawn by Global was made payable in favour of *"S. Akritidis attorney trust account"* and his loan account at Global was debited

with the payment.

[6] The plaintiff says that he was concerned that if the application turned out to be unsuccessful, he would have lost interest on the R2.2 million. He therefore told Akritidis that in such event he would require interest to be paid to him for the period that his funds were with Akritidis. He understood that at the time the going rate for funds invested on call was 9% and informed Akritidis that he would require interest at that rate to be paid to him, to which Akritidis agreed. Akritidis told the plaintiff that it would take about six to eight weeks to handle the matter and that he could contact him after a few weeks to find out how the matter was progressing. He says that he telephoned Akritidis once or twice only to be told that there was nothing to report. During July he telephoned Akritidis once more on the latter's cellphone and was informed by Akritidis that he was in London at the time and would be back shortly. When he phoned Akritidis' office again a few days later, a message on the answering machine informed him that he should contact the Law Society. This he did and ascertained that Akritidis had fled the country and that his practice had been closed down. It is common cause that Akritidis had stolen the funds which the plaintiff had paid into his trust account. Thereafter the plaintiff lodged a claim with the Fund for payment of the amount paid by him to Akritidis, plus interest. His claim was considered at an enquiry conducted by members of the Board of Control of the Fund, but rejected, hence the claim now brought against the Fund.

[7] The estate of Akritidis has in the meantime been finally sequestrated. There is

little prospect of the plaintiff receiving any payment in respect of his claim against the insolvent estate and the defendant has not taken the point that the plaintiff has not exhausted its remedies against Akritidis before proceeding against it. (Section 49 of the Act requires a claimant to exhaust its remedies against an attorney before claiming from the Fund.)

[8] The following emerged from the cross-examination of the plaintiff. His is clearly an experienced and successful businessman. His own view of himself is that he is meticulous and the manner in which he kept books of account for his companies confirms this. He has a sophisticated knowledge of accounting and legal principles applicable to company tax and contracts. For example, in order to enable greater dividends to be paid to himself, he arranged for Global to issue redeemable preference shares and then for these to be redeemed at a premium. He regarded himself as something of a sea lawyer and did not often use the offices of attorneys. He is aware of the fact that he could not in terms of exchange control regulations remit money standing to the credit of his daughter on her loan account with Global to her in Australia. In the earlier stages of his career, his experience included some knowledge of foreign exchange transactions. His credit worthiness was such as to qualify him as a customer of a leading private bank. He considered that there was a mystique attached to requests to banks to remit funds overseas, but conceded that this was merely a perception which he had and was not based on any direct experience. He says that he did not know that only banks were authorised to deal in foreign exchange, but accepts that this is so. He says that he did not

approach his own bank for advice as to how to get money to his daughter in Australia, for he regarded his request as something out of the ordinary. He also did not approach his own attorneys. He says that he approached Akritidis because he was under the impression that he was an expert in dealing with foreign exchange transactions.

[9] Both in his evidence before me and in his evidence at the Fidelity Fund enquiry, he testified that while he was aware of the fact that exchange control restrictions were operative, he had learnt from newspaper reports that a certain Mr Dave King had succeeded in getting money out of the country which enabled him to purchase a soccer team for some R200 million and therefore formed the view that there must have been a legal way for funds to be remitted to his daughter.

[10] He conceded that he had had no discussion with his daughter as to the details of the loan – indeed it would seem that the issue of a loan was never raised with his daughter, but was something which he conceived to be the method which ought to be used in order to remit the funds to her. He gave no details of the loan to Akritidis and the loan was not discussed in any manner. He also did not seek any advice in regard to the loan. If he gave Akritidis any details about his daughter, these would have been minimal, but it is clear from his evidence that he did not consider it necessary to give Akritidis fuller details at the time. His attitude was that once he had established what the Reserve Bank's requirements were, all the necessary details would be furnished. Although he says that he was troubled at the time by the lack of information

sought by Akritidis, he regarded Akritidis as the expert, that he was in charge and assumed that he would sort the matter out for him. He was not concerned that Akritidis did not raise with him the question of his fees and he did not discuss this aspect with him.

[11] **ENTRUSTMENT**

Section 26(a) of the Act provides that the Fund shall be applied for the purpose of reimbursing persons who may suffer pecuniary loss as a result of

> *"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..."*

Mr **Rogers**, who together with Mr **de Villiers-Jansen** appeared for the defendant, submitted that there were various unsatisfactory aspects of the plaintiff's evidence which so clouded his evidence that I could not be satisfied that the plaintiff had, on a balance of probabilities, established that the money had been paid to Akritidis for a lawful purpose. These were shortly the following:

- The plaintiff was a qualified chartered accountant, an extremely astute and successful businessman, who was intelligent and meticulous in the conduct of his financial affairs.
- Most of the plaintiff's family had emigrated from South Africa.
- At the time that he saw Akritidis he had acquired or was in the process of acquiring a five-year multiple entry visa into Australia and at some stage he certainly contemplated taking up permanent residence there. An obvious course for the plaintiff to have followed was to have gone to

the forex division of his bank to enquire whether it would be possible to remit funds to his daughter, but he did not do so, nor did he consult his own attorneys.

- The plaintiff sought to portray the proposed transaction as an extraordinary and complex one whereas in fact it was a basic and straightforward issue.
- The fact that he did not approach his bank but a supposed expert in foreign exchange, points to the fact that he was aware that what he wanted to do could not be done lawfully.
- He took no steps to establish what his own attorneys knew of Akritidis.
- The lack of detail sought from him by Akritidis, in particular in respect of the motivation for the loan, is suspicious. His acquiesence in Akritidis' unusual requirement that the sum of R2.2 million should forthwith be paid into his account is suspicious.
- The absence of any discussion between the plaintiff and Akritidis about fees is suspicious.
- Reference was also made to certain discrepancies between his evidence before me and before the Board of Control of the Fund, but these were, to my view, not material.

Mr **Rogers** submitted that the cumulative effect of these factors was such as to cast grave suspicion on the plaintiff's evidence that he went to Akritidis with the view to establishing whether the funds could legally be transmitted to his daughter in Australia and therefore, at best for the plaintiff, I should find that he had not established the entrustment on a balance of probabilities. However, there is one important aspect of the plaintiff's evidence which is not to be gainsaid. He testified before me, and also at the enquiry by the Fund, that he had read in the newspapers that a successful South African businessman had managed to purchase control of a soccer team in England by remitting a large amount of money overseas and he therefore went to the attorney with the view to establishing whether he could transfer the relatively large sum of R2.2 million out of the country legally. His unchallenged evidence was to the effect that he himself had had no dealings with banks over the years, that he and his family members had not availed themselves of the right to export funds for investment overseas subject to the limit set by the Reserve Bank from time to time, and accordingly that he had no experience whatever in the remission of funds overseas in the present climate. In the circumstances, however suspicious his actions may appear to be, I can find no reason to reject his evidence as to his reason for going to see Akritidis and for entrusting the funds to him.

[12] **IN THE COURSE OF PRACTICE**

Mr **Rogers** submitted that the plaintiff had failed to establish that the entrustment had been in the course of Akritidis' practice for the following reasons:

1. There was no evidence before me that attorneys customarily rendered a service which Akritidis rendered.
2. The legal framework governing exchange control makes such work the responsibility of banks.

These two submissions overlap to a certain extent. As to the latter, evidence was given by Mr Grassman, a section head of the Reserve Bank, who testified that only authorised dealers (these include all leading banks) may apply to the Reserve Bank for exchange control approval. Paragraph 9(a) of the Rules (being orders and rules promulgated by the Treasury) read as follows:

> "Persons who desire information or advice or exchange or currency matters governed by the regulations or who require approval or permission in respect of exchange, currency or gold transactions so governed, should apply to the Exchange Control through their bankers *in the Republic or, if they have no such bankers, through one of the banks referred to in paragraph 3 hereof."*

Attorneys may therefore not lodge applications with the Reserve Bank for permission to transfer money offshore. Mr Grassman also testified that it was not a requirement of the Reserve Bank that funds earmarked for remission overseas be held in an attorney's trust account or be immediately available.

[13] Since attorneys are not authorised by the Rules to submit exchange control applications, Mr **Rogers** submitted that it cannot generally be regarded as part of an attorneys' work to prepare and submit such applications. Basing his argument mainly on the judgment in *Paramount Suppliers (Merchandise) (Pty) Ltd v Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund Board of Control* 1957 (4) SA 618 (W), Mr **Rogers** submitted that a decision on the question as to whether in any given case money has been paid to an attorney in the course of 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. In the *Paramount* case, **Kuper** J observed at 624H-625A

> *"In certain cases such work might include the making of representations to a Government department or committee the result of which might depend upon the construction of a regulation or the tabulation of facts which an attorney would be better equipped to present than the layman.",*

but concluded that the work under discussion was "not a normal piece of work" because the payment for the work depended on the results obtained.

*[14] As to the situation where money is paid to an attorney for or in connection with work which is not by its very nature legal work, Mr **Rogers** submitted that it would be necessary to establish to what extent attorneys do in fact perform such work and thus whether such work could be regarded as part of an attorneys' practice. In this regard, Mr Julian Scher, the plaintiff's attorney in the present matter, testified. He said that if he was approached by a client who wanted advice on banking or foreign exchange requirement, he would not deal with the matter himself, but would suggest that he would consult an expert. He mentioned the name of a firm in Johannesburg who issue a so-called publicity manual and said that he would refer the client to a commercial attorney conversant with foreign exchange matters. He would also not necessarily send the client to a bank.*

[15] At the conclusion of his evidence, a "Directory of Client Services" issued by a prominent Johannesburg firm of attorneys was handed in as an exhibit. This lists the directors of the firm and also lists the various areas of law in which the firm offers services. Included amongst these areas are 'exchange control',under which the names of fourteen attorneys are listed and 'offshore structures and financing', under which the names of six attorneys are listed.

[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. The evidence of the witness Bayliss was to the effect that Akritidis was known as an expert in banking law and foreign exchange transactions and that the firm offered services in exchange control advice, including the arranging to transfer funds to foreign countries. This, supported by Mr Scher's evidence as to the manner in which attorneys advertise their services in connection with the exchange control matters, is a clear indication that attorneys deal with exchange control matters and the fact that one aspect thereof is restricted to authorised dealers is not, in my view, sufficient to justify a finding that the entrustment of the funds to Akritidis was not in the course of his practice. The fact that Akritidis would not personally have been able to tend to the transfer of the money, as he gave out that he would do, does not in my view alter or affect the position in regard to the initial entrustment.*

To sum up thus far, I find that the money in question had been entrusted to Akritidis in the course of his practice, as required by section 26(a) of the Act.

[17] ***THE INSTRUCTION TO INVEST IN TERMS OF SECTION 78(2A)***

In order to succeed, the plaintiff has to show that payment of the money in question to Akritidis was a payment into an account contemplated in section 78(2A) of the Act.

For a proper understanding of the plaintiff's case, regard should be had to various sections of the Act.

- *Section 47(1) creates certain exceptions where the Fund is not liable in respect of loss suffered, inter alia where such loss is suffered"by any person as a result of theft of the money which a practitioner has been instructed to invest on behalf of such person after the date of commencement of this paragraph." (Section 47(1)(g))*
- *Section 47(4) provides that, subject to section 47(5), a practitioner must be regarded as having been instructed to invest money for the purposes of section 47(1)(g) where the person who entrusts the money to the practitioner, or for whom the practitioner holds the money, "instructs the practitioner to invest all or some of that money in a specified investment or an investment of the practitioner's choice."*
- In terms of section 78(1), any practising practitioner is obliged to open and keep a separate trust banking account at a banking institution in the Republic and to deposit therein the money held or received by him on account of any person. This is an attorney's normal trust account and the interest earned on this account is paid to the Fund (section 78(3)).
- In terms of section 78(2)(a) a practitioner may invest in a

separate trust, savings or other interest-bearing account opened by him with any banking institution or building society any money deposited in his trust banking account which is not immediately required for any particular purpose. Interest earned on any such account is paid to the Fund (section 78(3)) and since the attorney is dealing with trust funds which have been pooled in his trust account, no authority is required from any client to open such an account. The section permits interest to be earned for the benefit of the Fund at a higher rate than would be earned on the normal trust account and attorneys have been over the years been encouraged to make use of this section so as to build up the resources of the Fund.

- Section 78(2A) makes provision for specifically identified funds to be invested for the benefit of a client. The section reads:

"(2A) Any separate trust savings or other interest-bearing account –
a) which is opened by a practitioner for the purpose of investing therein, on the instructions of any person, any money deposited in his trust banking account; and
b) over which the practitioner exercises exclusive control as trustee, agent or stakeholder or in any other fiduciary capacity,
shall contain a reference to this subsection."

If a client instructs his attorney to deposit monies to a section 78(2A) account, this would in ordinary parlance be an instruction to invest the money for the client's benefit. It follows that if the stolen money is money which the client instructed the attorney to invest in a section 78(2A) account, the Fund's liability would normally be excluded. However, liability will not be excluded if the provisions of section 47(5) apply.

- Section 47(5) reads as follows

> *5) For the purposes 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 –*
>
> *(a) to pay the money into an account contemplated in section 78(2A) if such payment is for the purpose of investing such money in such account on a temporary or interim basis only pending the conclusion or implementation of any particular matter or transaction which is already in existence or about to come into existence at the time that the investment is made and over which investment the practitioner exercises exclusive control as trustee, agent or stakeholder or in any fiduciary capacity;*
>
> *(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 give effect to a loan agreement that does not fall within the scope of paragraph (b)."*

[18] It is clear that the plaintiff relies on the exemption in section 47(5)(a) of the Act. The plaintiff's case as pleaded is:

"4.1 Plaintiff consulted with AKRITIDIS to seek professional advice on the transfer of a sum of R2,2m, which Plaintiff had agreed to loan to his daughter who was resident in Australia;

4.2 AKRITIDIS accepted the Plaintiff's instructions and advised Plaintiff to pay the sum of R2,2m to AKRITIDIS in trust, pending the taking of such steps as may be required, to transfer the amount to Australia;

4.3 Plaintiff accepted the advice and instructed AKRITIDIS to pay the said money into an account contemplated in section 78(2A) of the Act.

4.4 Plaintiff duly caused a cheque in the aforesaid sum to be issued on behalf of the Plaintiff, for payment into AKRITIDIS' trust account, being an account within the meaning of section 78(2A) of the Act, which money was to be held in such account as a temporary or interim measure until the money could be transferred to Plaintiff's daughter in Australia."

It is implicit in the pleading that plaintiff's case is that the funds in question were to be invested for his benefit. The plaintiff gave no evidence as to how his funds were to be invested. His discussion with Akritidis was extremely brief. Only after Akritidis had told him that he required the funds to be paid into his account did the plaintiff raise the question of the loss of interest that he would suffer if the Reserve Bank's approval was not obtained. He did not concern himself with the manner in which Akritidis was to deal with his money and his arrangement was simply that Akritidis would pay him 9% interest on the sum deposited.

[19] It is clear that the Fund's liability for theft of funds entrusted to an attorney for investment is limited to the circumstances described in section 47(5)(a). For this section to apply, the authority from the client to invest the money in a separate trust, saving or other interest-bearing account is required. Furthermore, on the plain meaning of the words in section 47(5)(a), the plaintiff must prove that he instructed Akritidis to pay the funds into a separate trust

savings account or other interest-bearing account.

[20] Although the allegation is made in the particulars of claim that the plaintiff instructed Akritidis to pay the money into a section 78(2A) account, his evidence was not to this effect. The allegation in the particulars that "plaintiff caused a cheque in the aforesaid sum to be issued on behalf of the plaintiff for payment into Akritidis' trust account, being an account within the meaning of section 78(2A) of the Act", is also not supported by the evidence. Payment was not made into an account specified in section 78(2A), nor was any such account discussed. The payment was made into Akritidis' normal trust account as described in section 78(1). It was not argued that because the funds were paid into the trust account and because Akritidis had promised to pay the plaintiff interest in the event of the transaction not going through, it follows that an instruction was given to Akritidis to invest the funds in accordance with the provisions of section 78(2A). That is the only basis on which it can be said that the evidence supports or establishes the case as pleaded.

> *[21] Apart from the fact that the plaintiff's case was not argued on this basis, I can find no justification for drawing any such inference. The plaintiff clearly based his case on the provisions of section 47(5)(a) and in my view there simply was not sufficient evidence put before me to establish the case as pleaded. In the circumstances, it is also unnecessary to consider whether the provisions of section 47(5)(b) and (c) are applicable.*

I therefore make the following order:

1. Absolution from the instance is granted in respect of plaintiff's claim;

2. The plaintiff is ordered to pay the defendant's costs, which costs include the *costs attendant upon the employment of two counsel.*

R B CLEAVER