IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/ NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.

(3) REVISED.

[redacted]

DATE 6.09.2024 **SIGNATURE**

Case Number: A84/2023

Heard on: 31 July 2024

Delivered on: 6 September 2024

In the matter between:

SOFT COFFEE (PTY) LIMITED Appellant

and

THE LEGAL PRACTITIONER'S FIDELITY FUND BOARD Respondent

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be

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JUDGMENT

STRIJDOM J

[1] "Soft Coffee", the appellant, appeals against the dismissal of its claim by Acting Justice Khashane Manamela. The Supreme Court of Appeal granted leave to this Court.

[2] The appellant claimed reimbursement from the respondent for pecuniary loss it had suffered as a result of theft of money by a practising attorney.

[3] The theft which gave rise to the action occurred before 1 November 2018. Accordingly, the provisions of the Attorneys Act 53 of 1979 ("the Act"), not the Legal Practice Act 28 of 2014, apply, specifically sections 26, 47(1)(g) and 47(5)(b) and (c) thereof.

[4] The appellant's case was that it had entrusted money to an attorney as contemplated in s26(a) of the Act.

[5] Section 26(a) reads 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 or while acting as executor or administrator in the estate of a deceased person or as a trustee in an insolvent estate or in any other similar capacity;..."

[6] The respondent denied liability on the ground that the money was a loan. The respondent invoked the following provisions of the Act:

6.1 Section 47(1)g) thereof provided as follows:

"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 ..."

6.2 Section 47(5) provided as follows:

"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(2)A, 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 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 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)."

[7] It was submitted by the respondent that Dadic Attorneys, through Stephens –

7.1 specified the borrowers to whom the money was to be lent; and

7.2 introduced the borrowers to the lender for the purpose of making that loan.

[8] Accordingly, two of the requirements for section 47(5)(b) of the Attorneys' Act, for that section to avail the lender are not met. The respondent also contended that section 47(5)(b) excludes transactions that are loans to which section 47(5)(b) does not apply.

[9] The following facts are common cause between the parties, that:

9.1 Mr Davor Vid Dadic ("Dadic") was a duly admitted attorney and conducted practice under the name and style of "Dadic Attorneys";

9.2 Dadic Attorneys conducted a trust account practice;

9.3 Andrew Stephens ("Stephens") was an employee of Dadic Attorneys;

9.4 Appellant had since 2011/2012 utilised the services of Dadic Attorneys in various matters;

9.5 During 2017 Dadic and Stephens; alternatively, Stephens contrived a fraudulent scheme to misappropriate monies from appellant. In this regard:

9.5.1 Dadic and Stephens; alternatively, Stephens provided appellant with two fraudulent Loan Agreements, the borrowers being described as Atomic Transport CC ("Atomic") and Flake Ice Services (Pty) Limited ("Flake Ice"). Clause 3.1 of both Loan Agreements provided that appellant undertook to advance funds to the trust account of Dadic Attorneys who will in turn advance the capital amount free of deduction/set-off to Atomic and Flake Ice upon signature of all requisite documents, enabling appellant to register a mortgage bond over a specific immovable property;

9.5.2 Dadic and Stephens; alternatively, Stephens misrepresented to appellant that the loan agreements had been prepared by Dadic Attorneys, that the loan agreements had been signed on behalf of Atomic and Flake Ice, that the loan agreements were valid, that the amounts to be advanced pursuant to the purported loan agreements would be paid into the trust account of Dadic Attorneys and thereafter advanced to Atomic and Flake Ice upon signature of all requisite documents to enable appellant to register a mortgage bond over the specified immovable properties.

9.5.3 The misrepresentations were made with the intention of inducing appellant to pay into the trust account of Dadic Attorneys the sum of R3 million pursuant to the purported loan agreement concluded with Atomic and the sum of R5 million pursuant to the purported loan agreement concluded with Flake Ice. To this end, Stephens in the course of his employment by Dadic Attorneys presented the appellant with the following:

(a) in respect of Atomic, a bogus offer to purchase and a bogus Deed of Transfer of the immovable property; and

(b) in respect of Flake Ice, a bogus signed Power of Attorney to register a mortgage bond, a bogus Covering Mortgage Bond and a bogus Deed of Transfer of the immovable property.

9.5.4 The misrepresentations by Dadic and Stephens; alternatively, Stephens to appellant were false because the loan agreements were bogus.

9.5.5 The purpose of the misrepresentations was to induce appellant to conclude the bogus loan agreements and to pay the amounts into the trust account of Dadic Attorneys.

9.6 Pursuant to the bogus Loan Agreement with Atomic, appellant paid the total sum of R3 million into the trust account of Dadic Attorneys.

9.7 Pursuant to the bogus Loan Agreement with Flake Ice, appellant paid the total sum of R5 million into the trust account of Dadic Attorneys.

9.8 Dadic and Stephens; alternatively, Stephens misappropriated the aforesaid amounts of R3 million and R5 million.

9.9 The loss suffered by appellant is the sum of R6.7 million comprising the amounts stolen, less the sum of R1.3 million which Dadic and Stephens; alternatively, Dadic, further alternatively, Stephens paid to appellant purportedly in respect of interest received on the bogus Flake Ice Loan Agreement.

[10] Mr Domenico Picone ("Picone") gave evidence on behalf of appellant at the trial in regard to appellant's Claim A. His evidence was not contested (he was not cross-examined and respondent did not proffer any evidence to the contrary).

[11] Picone's evidence can be summarised as follows:

11.1 Dadic Attorneys would render services to appellant by ensuring that the requisite security for the monies loaned to Atomic and Flake Ice in the form of mortgage bonds, was in place.

11.2 Dadic Attorneys was only entitled to disburse the loan amounts paid by appellant into its trust account to the purported borrowers (Atomic and Flake Ice) when the requisite security was in place. It was envisaged that Dadic Attorneys would charge for their services to be rendered.

[12] The core issues in this appeal are as follows:

12.1 Respondent's defence that the Fund is not liable for a loss suffered by a person as a result of money which a practitioner had been instructed to invest on behalf of such person, as contemplated in Section 47(1)(b) of the Act . (Emphasis added).

12.2 Whether appellant entrusted the loan amounts misappropriated by Dadic Attorneys. (Emphasis added).

[13] In dismissing Claim A, the Court *a quo* found as follows:

13.1 The objective evidence in terms of the written loan agreements, including clause 3.1 in both the loan agreements for Atomic and Flake Ice does not reflect nor suggest any involvement of Dadic Attorneys in respect of the monies received and subsequently stolen, other than just the use of the trust account of Dadic Attorneys.

13.2 Any work done by Dadic Attorneys had no bearing on the payment of the monies in terms of the loan agreement.

13.3 The transactions were clearly loans in respect of which neither section 47(5)(b) or 47(5)(c) of the Act avail the lender, Soft Coffee.

13.4 Despite the bogus nature of the transactions, the only viable inferences from the nature of the respective transactions are that Soft Coffee did not intend an entrustment, but that the amounts concerned be paid over to Atomic and Flake Ice, as borrowers (fictitious as they may be) as loans. Dadic Attorneys did not receive the monies concerned as entrustments, but as loans.

13.5 In this matter, the determination of whether the funds were to be invested or not, as envisaged by section 47(1)(g) of the Attorneys Act, can only be made by taking at face value what the underlying transactions were. What has to be primarily determined is the nature of the instructions and mandate given to the practitioner.

[14] The facts in this appeal are on all fours with the SCA Judgement in the matter of ***The Attorneys Fidelity Fund Board of Control v Prevance Capital (Pty) Ltd***[1] ("the ***Prevance*** Judgment").

[15] In the ***Prevance*** judgment the principal issue was whether the Board could rely on the statutory exception provided for in Section 47(1)(g). The court found that:

15.1 "the first formidable obstacle for the Board is that, objectively observed, there was never any question of an investment being made. Mr Weide, in soliciting the funds from Prevance and receiving them into his trust account had but one objective namely, theft thereof. The funds were not received as an investment or for any other legitimate purpose."

[16] I conclude that the respondent cannot rely on Section 47(5) of the Act because this is not a case of Mr Stephens being instructed to make an investment or where the Attorney was merely a bystander or conduit.

[17] It is common cause that Mr Stephen's intention was to steal the said money. The funds were not received into his trust account as an investment or for any other legitimate reason.

[18] The only remaining issue in this matter is whether the appellant had "entrusted" any money to the attorney Stephens.

[19] The Afrikaans text of the Act, which is also the signed one, provides as follows in s 26(a):

[1] (917/17) [2018] ZASCA 135 (28 September 2018)

"Behoudens die bepalings van hierdie Wet, word die fonds aangewend ten einde persone te vergoed wat geldelike verlies ly weens –

(a) diefstal gepleeg deur 'n praktiserende praktisyn van geld of ander goedere deur of namens sodanige persone toevertrou aan hom … in die loop van sy praktyk …" (Emphasis added).

[20] Die *Verklarende Handwoordeboek van die Afrikaanse Taal* (HAT) 2nd ed (1992), defines "toevertrou" as "met vertroue opdra aan, oorgee aan die sorg van …"

[21] Die *Verklarende Afrikaanse Woordeboek*, Labuschagne, Eksteen, 8th ed (1992) gives the following definition of "toevertrou":

"1. In vertroue gee. 2. In iemand se sorg laat; ter veilige bewaring gee …"

[22] It was decided in ***Industrial & Commercial Factors (Pty) Ltd v The Attorneys Fidelity Fund Board of Control***[2] that:

"The word 'toevertrou' does therefore not imply that the handing over of the money or property concerned has to be subject to a trust in the technical legal sense of the word. Moreover, the legislature appreciated that the word 'trust' has a technical meaning, and where it intended to convey that meaning it used the word 'trust' in the Afrikaans text. This appears from s 27(2) of the Act which reads as follows:

'(2) Die fonds word deur die beheerraad in trust gehou vir die doeleindes in hierdie Hoofstuk vermeld.'" (Emphasis added).

Had it been the intention of the legislature to give "entrust" the technical legal meaning of placing money or other property with an attorney subject to a trust,

[2] (690/94) [1996] ZASCA 84; 1997 (1) SA 136 (SCA); [1996] 4 All SA 295 (A) (30 August 1996); 029-85 to 029-144 (Caselines)

it would have used an expression such as "in trust aan hom gegee" in the Afrikaans text of s 26(a)."

[23] In my view the appellant has shown entrustment as contemplated in s 26(a).

[24] In order to determine whether the money was "entrusted by or on behalf of" the appellant to the respondent it is necessary to consider what the appellant's intention was when the monies were deposited into the trust account of Dadic Attorneys.[3]

[25] The court *a quo* erred in not taking into account the undisputed evidence of Picone that the loan amounts would be paid into the trust account of Dadic Attorneys who would hold same in trust and only pay same over to the purported borrowers when the mortgage bonds over the immovable properties had been registered.

[26] The court *a quo* misdirected itself in finding that the only viable inference to be drawn is that the appellant did not intend an entrustment and that the monies were to be paid over to Atomic and Flake Ice.

[27] In view of all these considerations I conclude that it has been established that the money was not invested and that it was entrusted by the appellant to Stephens in the course of his practice, as is required by s 26(a).

[28] In the result, the following order is made:

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[3] See *Industrial & Commercial Factors (Pty) Ltd v Attorneys Fidelity Fund Board of Control* 1997 (1) SA 136 (A)

1. The appeal in respect of the appellant's Claim A in the summons is upheld and the first paragraph of the order of the court *a quo* dated 5 April 2022 (Order (a)") is set aside.

2. Order (a) as referred to in paragraph 1 hereof is replaced with the following order:

   "(a) In regard to Claim A, the Defendant is directed to pay the First Plaintiff the sum of R6 700 000.00, together with interest thereon at the prescribed *mora* rate of 10.25 % per annum from the date of service of summons on the Defendant on 29 November 2019 to date of payment, as well as the costs of suit inclusive of the costs of two counsel where employed."

3. The Respondent is directed (in addition to the costs order in paragraph 2 hereof) to pay the Appellant's costs of suit in the appeal, such costs to be:

   3.1 inclusive of the costs of two counsel where so employed, one on preparation, appearance and argument at the hearing being senior counsel; and

   3.2 on Scale C in respect of all work and attendances of both counsel as engaged on or after 12 April 2024 and as contemplated by Rule 68(A) of the Uniform Rules of Court.

[redacted]

J.J. STRIJDOM

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

I agree

[redacted]

L.M. MOLOPA-SETHOSA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

I agree

[redacted]

O. MOOKI

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A84/2023

HEARD ON: 31 July 2024

FOR THE APPELLANT: ADV. S SYMON SC

ADV. J.L. KAPLAN

INSTRUCTED BY: Ian Levitt Attorneys

FOR THE RESPONDENT: ADV. G.A. OLIVER

INSTRUCTED BY: Brendan Muller Incorporated

DATE OF JUDGMENT: 6 September 2024