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Case no. 274/87

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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

THE ATTORNEYS NOTARIES AND CONVEYANCERS

FIDELITY GUARANTEE FUND

and

TONY ALLEM (PROPRIETARY) LIMITED

First Respondent

MARIE KATHLEEN ALLEM

Second Respondent.

Coram: / JOUBERT, VAN HEERDEN, NESTADT, MILNE et

F H GROSSKOPF JJA.

Heard:

Delivered.

16 August 1989

3 March 1990

J U D G M E N T

F H GROSSKOPF JA:

In an action brought in the Witwatersrand Local Division the first respondent claimed payment from the appellant of the sum of R737 000, while the second respondent claimed R60 000. There were also prayers for interest a tempore morae and costs. It was alleged by the respondents that the respective sums of money had been entrusted to an attorney, one Anthony Stein ("Stein"), in the course of his practice, as an attorney, to enable him to make loans on their behalf to various borrowers, but that he had stolen these monies. The respondents claimed that they had suffered pecuniary loss in these amounts by reason of such theft, and that the appellant was obliged in terms of the provisions of section 26 of the Attorneys Act 53 of 1979 ("the Act") to reimburse them. Section 26(a) 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 clerk or employee, of any money or other property entrusted by or on behalf of such persons to him or to his clerk 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;"

The matter was heard by Coetzee DJP, who gave judgment for the first respondent in the sum of R550 650,64 and for the second respondent in the sum of R57 383,31.

Each respondent was granted an order for interest a tempore morae at the rate of 15% per annum from the date of service of the summons until date of payment, and for costs. The appellant appealed against the judgment and order with leave of the Court a quo.

I shall first give a résumé of the facts

(together with certain comment thereon) in so far as they may be relevant to the first respondent's case. The position of the second respondent will be dealt with later.

Anthony Joseph Allem ("Allem") was the sole director of the first respondent. All the shares in the first respondent were held by A. J. Allem Holdings (Pty) Ltd ("the holding company") while the shares in the holding company were held by Allem and the Allem Children's Trust. Allem was also a director of the holding company.

Allem used to be a farmer in the Orange Free State, but he gave up farming in 1975. He sold his farms and went to live in Johannesburg where he became a money-lender. In 1976 Allem met a certain Stanley Sparks ("Sparks"), a director of a company which carried on business in Johannesburg as insurance brokers, financial consultants and financial planners. Allem told Sparks that he had money available for investment purposes and Sparks became Allem's financial adviser. Sparks later introduced Allem to Stein.

Stein practised as an attorney in Johannesburg.

He and a certain Isaacs practised in partnership from 1 December 1977 until 29 February 1980, when Isaacs retired as a partner. From 1 March 1980 Stein practised for his own account, initially under the name of Stein and Isaacs, and from 21 July 1983 as Anthony Stein. The evidence shows that Stein left the country shortly before 20 March 1984. It is common cause that his estate was sequestered very soon thereafter and that his name was struck off the roll of attorneys on 5 June 1984.

Allem was introduced to Stein in about 1977. This led to an association which lasted for a number of years and which came to an end when Stein fled the country in March 1984. It is Allem's evidence that Stein not only handled certain investments on behalf of the first respondent, but also acted as his attorney in a number of matters involving litigation. Stein was Allem's attorney when he and Mrs

Allem, the second respondent, were divorced in August 1980.

The first loan transaction arranged by Stein was a secured loan by the first respondent to Stein's mother.

Thereafter, sometime during 1978, Stein asked Allem whether the first respondent would be interested in considering loans to selected clients of his who would be requiring money from time to time. Allem first consulted his financial adviser, Sparks, who assured him that it would be quite in order to entrust monies to Stein's firm for loans to clients of his. Sparks then arranged a meeting at which the three of them discussed the proposed scheme.

According to Allem it was agreed that the first respondent would entrust money to Stein in the course of his practice as an attorney for the purpose of making loans on behalf of the first respondent to clients of his. It was part of the arrangement that Stein had to consult Allem beforehand with regard to each one of the proposed loans. Stein was also obliged to inform Allem of the amount of the

loan, the name of the borrower, the period for which the money would be required, the rate of interest, the terms of repayment and any other material provision of the loan. If satisfied, Allem would send a letter of confirmation to Stein's firm together with the first respondent's cheque drawn in favour of Stein and Isaacs trust account.

Stein was to prepare the acknowledgement of debt in respect of each loan transaction. He was also responsible for arranging security for the loans. The agreement was that Stein's firm would further be responsible for administering the scheme on behalf of the first respondent. This involved the collection of the borrower's monthly payments in respect of capital and interest and the payment of those sums of money every month from the firm's trust account to the first respondent as lender. In order to facilitate matters it was agreed that Stein's firm would hand over a series of post-dated cheques to the first respondent. These cheques would be drawn by the firm on its trust account and would

cover the monthly repayment obligations of each borrower in terms of his loan agreement. Stein assured Allem that his firm's trust cheques were covered by the appellant.

The scheme was put into operation and it was carried on successfully for a number of years without any apparent hitch.

The undisputed evidence of Allem was that he opened a separate file for each individual "borrower", and indeed it is clear that he kept a meticulous record of each and every repayment by such "borrower". (I have put borrower in inverted commas since it will become apparent that I am of the view that Stein in fact stole these monies and that accordingly there were, in truth, no borrowers. I do not intend to repeat the inverted commas hereafter.) It would have been completely unnecessary for Allem to take all this trouble if the money had indeed been borrowed by Stein personally, as contended for by the appellant. In each separate file Allem retained a copy of the first respondent's

letter to Stein confirming the particular loan and the terms thereof. The name of the borrower, the amount of the loan and the rate of interest were set out in each letter. These letters contained particulars regarding the monthly repayment instalments, the period within which the loan had to be repaid and the securities which were obtained by Stein. In some instances the letter even mentioned the purpose for which the loan was required by the borrower. Most of these particulars would have been of no interest to the first respondent if the true borrower had indeed been Stein. The name of the borrower also appeared on some of the cheques which were drawn by the first respondent in favour of Stein and Isaacs trust account.

Allem kept a cash book and ledger for the first respondent and he entered the various loans under the names of the individual borrowers. Stein personally borrowed money

from the first respondent on a number of occasions and his name was therefore also reflected in the books of account as one of the first respondent's debtors.

During November 1982 Stein persuaded Allem that a so-called consolidated account should be introduced in the books of account of Stein's firm whereby the loan accounts of the individual borrowers would be consolidated into a single account for accounting purposes. Stein told Allem that such a consolidated account would reduce his administrative work inasmuch as he would then no longer be required to deal with the borrowers separately or to account to the first respondent in respect of each individual borrower every month. According to Allem, Stein also asked him at the same time whether the first respondent would be willing to extend the period within which the debtors had to meet their commitments in terms of their loan agreements. The reason which Stein advanced for requesting the extension of time was that a number of his clients who had borrowed

money from the first respondent were experiencing financial difficulties as a result of the adverse economic conditions which prevailed in the country at the time.

A meeting was held at which Sparks was also present. Stein explained the position to Sparks who, as Allem's financial consultant, advised Allem that the proposed new arrangement would be perfectly in order. It was then agreed that a consolidated account would be drawn up and that the first respondent would grant the borrowers the required extension of time.

It appears from a letter dated 17 November 1982 which Allem wrote to Stein that Stein's bookkeeper, one Dalene Swanepoel, and Allem actually checked the individual loan accounts of the various borrowers and agreed on the total outstanding balance as at 1 December 1982. Allem testified that this exercise was carried out after Stein had asked him to verify that the first respondent's records with regard to the various borrowers coincided with the balances

set forth in the records of Stein's firm. This shows that Allem, to the knowledge of Stein, still kept a separate account for each individual borrower in the books of account of the first respondent. If Stein was the only borrower the first respondent would not have required a separate account for each debtor.

In terms of the new arrangement the total outstanding debt together with interest had to be repaid over a period of 30 months by way of 9 quarterly repayments of R101 500 each and a final payment of R100 966. Stein furnished the first respondent in advance with 10 post-dated cheques drawn on his trust account in respect of these repayments. Stein further undertook to give Allem a full account at least once a year showing the repayments by each individual borrower. Such a statement would hardly have been necessary if Stein had been the first respondent's only debtor, as contended for by the appellant.

The first post-dated cheque for R101 500 had to be

paid by 1 February 1983, but before that date Stein had already asked Allem whether the first respondent would grant a further extension to 28 February 1983, seeing that Stein was busy arranging a R120 000 guarantee, referred to as the Bifco guarantee, in favour of the first respondent in respect of his personal indebtedness. The first respondent granted the required extension, but no payment was made by 28 February 1983. Allem's evidence was that he had previously asked Stein whether he could see the acknowledgments of debt and suretyships which Stein was supposed to have drawn up in favour of the first respondent, but having been fobbed off with various excuses he eventually insisted on seeing these documents. Stein thereupon wrote a letter dated 9 March 1983 to the first respondent. This letter reads as follows:

"CONSOLIDATED ACCOUNT

I, the undersigned,

ANTHONY STEIN

do hereby confirm that the persons as set out in

the attached list which has been signed by me for purposes of identification, have completed acknowledgments of debt and suitable suretyships are held by me in respect of their indebtedness.

I further confirm that all such persons' indebtedness have now been consolidated into a single account known as the Consolidated Account and that the total amount of the Consolidated Account is the sum of R676 000,00 as at the 1st day of December, 1982."

Annexed to Stein's letter of 9 March 1983 was a list headed "Consolidated Account". It appears that the consolidated account was made up of the loan accounts of the 35 individual borrowers whose names and outstanding debts were set out in this list. It is significant that Stein's name did not appear in this list although he personally owed the first respondent a substantial amount of money in respect of loans at the time. If there had been a change in the relationship between Stein and the first respondent in November 1982, as was submitted by the appellant, and if Stein had been substituted as the first respondent's only

borrower, one would have expected only Stein's name to have featured in this list of borrowers.

The consolidated account of November 1982 eventually formed the basis of the first respondent's claim against the appellant. The first respondent's claim is therefore made up of the balance of the monies entrusted to Stein prior to 1 December 1982.

The second post-dated cheque for R101 500, which became due on 1 May 1983, was also not paid on due date. It is Allem's evidence that he then became worried, but that he had "no reason to be suspicious or alarmed". Allem sought the advice of another attorney, but Sparks told him that there was no reason to be worried. An urgent meeting was arranged which was attended by Allem, Stein and Sparks. At this meeting Stein once again explained that as a result of the economic recession his clients were experiencing difficulties in meeting their commitments on time, but he assured Allem that he had full faith in his clients. To show

his good faith Stein was prepared to sign as surety and co-principal debtor for the repayment of all the loans, together with interest, in a sum of R737 000. Stein's written undertaking to this effect was subsequently signed on 30 May 1983. It provided for the payment of this amount as soon as certain assets owned by Stein had been transferred to the purchasers thereof. Stein also undertook to provide Allem with cash or unconditional bank or building society guarantees by 1 September 1983 in respect of this amount. In addition Stein undertook to pay the R120 000 covered by the Bifco guarantee by 30 May 1983, and another R30 000 by 15 June 1983. These two amounts did not form part of the consolidated account and were in fact paid to the first respondent during June 1983.

It was further agreed at this meeting that the 10 post-dated cheques which Stein had previously issued in favour of the first respondent, would be delivered to Sparks to be held by him in trust. Sparks undertook to hand these

cheques over to Allem immediately on Stein's failure to pay in terms of his undertaking.

Stein's personal undertaking of 30 May 1983 and the payments of the respective amounts of R120 000 and R30 000 during June 1983 set Allem's mind at ease. The next payment which Stein was obliged to make in terms of his personal undertaking was the payment of the R737 000 by 1 September 1983. On 10 August 1983 Stein wrote a letter to Allem in which he referred to their recent meetings and telephone conversations. In this letter Stein confirmed that he had informed Allem that he was personally encountering financial difficulties. He further mentioned in the letter that Allem had been prepared to consider extending the period for the repayment of the outstanding amount. The appellant submitted that this letter by Stein was a further indication that Stein had indeed been the true borrower all along. Allem's evidence on the the other hand, was that Stein wrote this letter because he had by then become personally liable in

terms of his undertaking of 30 May 1983. Allem assumed at the time that Stein had not yet been able to sell or transfer his assets, as he was obliged to do in terms of his undertaking, and that he was accordingly not in a position to pay or guarantee payment of the R737 000 by 1 September 1983.

It appears from two further letters dated 19 August and 30 August 1983 respectively, that Stein informed Allem that the debtors whose names were reflected in the consolidated account had also requested an extension of time due to the economic climate. Allem testified that he received only the letter of 30 August 1983.

Stein proposed that the loans together with interest be repaid over a period of six years in instalments of R15 000 per month for the first sixty months with an additional payment of R10 000 every third month. The instalments were to increase in the sixth year. Stein further undertook to hand Sparks six post-dated cheques to

be held by him in trust, and to be released to Allem only in the event of Stein defaulting in respect of any of the monthly payments.

Stein assured Allem and Sparks that these trust cheques were fully covered by the appellant. Sparks consulted his attorneys about the cover provided by the appellant in the event of an attorney's trust cheque being dishonoured. The letter which Sparks's attorneys wrote to him thereafter on 16 August 1983 was also shown to Allem and, according to these witnesses, it set their minds at ease.

During August 1983 Allem agreed on behalf of the first respondent to the further extension on the terms proposed by Stein. It was further agreed that part of each monthly instalment of R15 000 would be used to pay the premiums in respect of an investment endowment policy, which Sparks had arranged in favour of the Allem children at the request of Stein.

In August 1983 two further steps were taken in an

attempt to secure the first respondent's position. It was agreed that Stein would hand his passport to Sparks and that Sparks would become a signatory on Stein's new bank account. Allen in fact later received the passport; he said, from Sparks, but Sparks testified that Stein must have delivered it directly to Allen.

The monthly instalments were paid from 1 September 1983 to 1 March 1984, and the portion thereof which was allocated to the insurance premiums was paid over to the insurance company for at least five of the seven months. In calculating its claim the first respondent omitted to allow the appellant any credit in respect of these premium-payments. It was agreed between the parties, after judgment had been delivered, that a total amount of R48 330 (five monthly payments of R9 666 each) had been paid to the insurance company and should accordingly have been deducted by the trial Court from the first respondent's award. The instalments of R10 000 which had to be paid every three

months were also paid on 1 November 1983 and 1 February 1984.

Before any further payments were made, Stein left the country.

I intend dealing with the appellant's argument, as presented by Mr Schutz, under a number of headings.

1. Were the loans made to Stein personally?

The appellant's main argument was that the monies which had admittedly been paid by the first respondent to Stein, constituted loans by the first respondent to Stein personally, and were never intended to be loans by the first respondent to Stein's clients.

The first respondent's case was that the monies which were entrusted to Stein in terms of their original arrangement were intended to be used by Stein for loans by the first respondent to Stein's clients as the borrowers, and that it was never contemplated that Stein himself would be the borrower, except in the few cases where the first respondent specifically agreed to lend money to Stein

personally. This is borne out by Allem's evidence of the underlying basic scheme.

In my opinion the contemporaneous documents and the probabilities lend strong support to the first respondent's version.

I have referred to the separate files kept by the first respondent for each loan, and the letters written by the first respondent to Stein in respect of each individual borrower. It was submitted on behalf of the appellant that the first respondent would in any event have required the name of the ultimate debtor and some of the other information contained in these letters in order to identify the particular loan to Stein. However, on the appellant's argument it is hard to understand why Stein would have deemed it necessary to disclose to the first respondent all the information set forth in those letters, or why the first respondent would have required all those particulars to identify its alleged loan to Stein.

The point was also made on behalf of the appellant that Allem would have been interested in the security that Stein had because Stein was his company's debtor. But Allem never had any misgivings about Stein's ability to pay. Allem's interest in the debtors and the security can, therefore, only be explained on the basis that these debtors were the first respondent's debtors.

In at least two instances Stein himself undertook to guarantee a borrower's indebtedness. Logically that could only have referred to the borrower's indebtedness to the first respondent. It is inconceivable that Stein would have guaranteed the borrower's indebtedness to Stein's own firm. I agree with Mr Trenrove, who appeared for the respondents, that these guarantees by Stein are irreconcilable with the appellant's case.

In a letter to Stein and Isaacs dated 5 October 1981 Allem enquired about outstanding securities in respect of a number of loans, and he asked Stein to attend to these

securities. On the appellant's case Allem would hardly have concerned himself with outstanding securities.

I have referred to Stein's letter of 9 March 1983 to the first respondent in which he confirmed that all the borrowers whose debts were included in the consolidated account had completed acknowledgments of debt, and that he was holding suitable suretyships in respect of their indebtedness. If all the loans had indeed been made to Stein personally, as contended for by the appellant, Stein would have had no obligation whatsoever to give such assurances to the first respondent. Stein wrote this letter after Allem had insisted on seeing the acknowledgements of debt and securities. If these debtors had not been the debtors of the first respondent Allem would have had no right to inspect such documents.

The contemporaneous entries in the first respondent's cash book and ledger reflect the individual borrowers as its debtors, while repayments were credited to

the accounts of such borrowers. These books of account therefore provide strong corroboration of Allem's version.

The first respondent's audited financial statements for the years 1980, 1981, 1982 and 1983 clearly establish that the first respondent throughout regarded all the individual borrowers as its debtors. It should be noted that even after the consolidation of the debtors' accounts in November 1982 the names of the individual borrowers were retained in the first respondent's financial statements for the year ended 28 February 1983. This is irreconcilable with the suggestion that there was a change in the relationship at the time of the consolidation of the accounts and that Stein then became the first respondent's sole debtor.

It is of some significance that Stein's name also appears in each one of these financial statements as a debtor, but then only as one of a number of borrowers. Whenever the first respondent intended to make a loan to

Stein personally, the letter confirming the loan clearly identified Stein as the borrower. This is substantiated by a number of letters written by the first respondent to Stein during the period 1981 to 1983. One such letter, for instance, was headed "A. Stein - Loan Legal Practice". It will be recalled that loans by the first respondent to Stein personally never formed part of the consolidated account or the first respondent's claim against the appellant.

It was submitted on behalf of the appellant that the arrangement in terms whereof Stein was obliged to hand the first respondent a series of post-dated cheques, clearly showed that it was indeed Stein, and not any client of his, who was liable as borrower for the repayment of the loan. It was pointed out that if anyone of Stein's clients failed to repay the debt on due date, Stein nevertheless remained liable to make repayment in terms of his post-dated cheques. The submission was that Stein's obligation was therefore independent of any payments received by him from his clients.

The legal consequence of this arrangement undoubtedly was that Stein, as the drawer of the post-dated cheques, became liable to pay the first respondent. Stein also remained liable on the post-dated cheques irrespective of whether the borrowers had in turn paid Stein. The appellant submitted that Stein's legal position, therefore, was no different in effect from that of a borrower. It does not follow, however, as a probable inference, that the parties had in fact also agreed that Stein would be the borrower. Allem's evidence is to the contrary, and the fact that Stein gave post-dated cheques is not incompatible with that version. Allem's evidence was that the arrangement was that Stein would collect the monies from the various borrowers in his capacity as the first respondent's attorney, but that Stein would give his post-dated cheques to the first respondent in advance in order to facilitate the administrative work. Viewed against that background one can understand why Allem testified that the first respondent would not have sued Stein if any of the

post-dated cheques were dishonoured. This is borne out by the fact that the first respondent indeed never instituted action against Stein on any one of the post-dated cheques which had been dishonoured.

On 30 May 1983 Stein bound himself as surety and co-principal debtor and thereby assumed personal liability for the repayment of all the loans. This undertaking would have been completely unnecessary if Stein had been the true borrower all along.

One of the main points of criticism which the appellant levelled at Allem was that his oral evidence was directly in conflict with some of the statements set forth in his affidavit of 7 June 1984. Allem's affidavit was submitted to the appellant in support of the first

respondent's claim. The background of the financial arrangement between Stein and the first respondent was described by Allem in his affidavit as follows:

"Stein came to know that I was a financier, that I had moneys available to lend and he suggested to me that I lend moneys to him which he in turn would lend to clients of his who wanted to borrow money, that he would ensure that the loans were adequately secured, that he would administer the payment of interest and capital from his clients, that I need look only to him for payment of the interest and capital arising out of the loans that the company would make to his firm and he assured me that the money was safe as loans would be paid into the trust account of the firm and would be covered by the fidelity fund. Stein furthermore told me that his firm would in turn and for its benefit lend such moneys to clients of his on such terms as he saw fit."

This statement in the affidavit cannot be reconciled with the viva voce evidence which Allem gave in the Court a quo. Yet there are certain other allegations in Allem's affidavit which are entirely consistent with his oral evidence. There is, for instance, the allegation in the affidavit that Stein assured Allem that the first

respondent's money would be safe because it would be paid into the trust account of Stein's firm and accordingly be secured by the appellant. It is also stated in the affidavit that Allem made it clear to Stein that the first respondent would be dealing with him in his capacity as an attorney, and that the loans would be paid into his trust account.

There are the further allegations in the affidavit that Stein was to ensure that the loans were adequately secured and that he had to furnish the first respondent in each case with particulars of the borrower, the rate of interest and the period of the loan. I have already pointed out that it is improbable that such arrangements would have been made if Stein was the borrower. In the last paragraph of the affidavit Allem concluded that the money had been "entrusted" to Stein whilst he was a practising attorney, but that he had "stolen" the money. This statement is also consistent with Allem's oral evidence.

When the affidavit is read as a whole and

considered in the light of the contemporaneous documents, one is driven to the conclusion that it is the product of some confusion.

On 9 April 1984, and about two months before Allem made his affidavit, his present attorneys wrote a letter on behalf of the first respondent and Allem to the appellant. The attorneys stated in this letter that their instructions were that Stein had been their client's attorney and that

"over a period of time, our clients paid moneys in trust to Stein & Isaacs to enable the said firm to make loans of money on proper security to such borrowers as the said firm will determine."

These statements are entirely consistent with Allem's oral evidence. Monies are not paid "in trust" to a person who is himself borrowing such monies. The letter proceeded to allege that Stein had stolen these monies, an allegation which is incompatible with the appellant's contention that Stein had borrowed the monies. No mention was made in the letter of any loans to

Stein personally; the letter clearly implied that the loans were made to the borrowers on behalf of the first respondent.

The contents of this letter are a further indication that Allem's affidavit did not accurately set out the terms of the arrangements between Stein and the first respondent and the true nature of the scheme; and, what is more, that the version given by Allem in his oral evidence was not one which was thought up for the first time after his claim had been rejected.

It is Allem's evidence that once he produced his books of account and other documents to his attorneys, they realised that the position had been incorrectly described in the affidavit. The attorneys thereupon wrote a letter dated 22 October 1984 to the appellant in which they recorded that their client was "amplifying" the affidavit. The corrections set forth in this letter brought Allem's version in line with his subsequent oral evidence at the trial (and the version implicit in the letter of 9 April 1984).

I agree with the first respondent's submission that there is no justification for suggesting that the allegations in Allem's affidavit should be preferred to his viva voce evidence. Allem testified that the attorney who prepared the affidavit wrote down what he told him, but that the position is, nevertheless, not correctly set forth in his affidavit. Allem's evidence was that the loans by the first respondent were indeed loans to the various individual borrowers, and not to Stein personally. Allem's version is not only consistent with, but is indeed supported by the contemporaneous documents and the probabilities to which I have referred above.

Allem was further corroborated in this regard by Sparks, whose evidence of the original meeting and the proposed scheme confirmed Allem's testimony. It is true that the evidence of Sparks was rather vague in certain respects and that he had difficulty in recalling any detail, but it should be borne in mind that Sparks had to rely on his memory

concerning meetings and events which had taken place many years before he was called upon to give evidence. The trial Court concluded that the evidence of Sparks provided "ample corroboration" of Allem's account of the scheme. Judging from the record I would not describe Sparks as an impressive witness, but, on the other hand there is no reason to believe that he was not an honest witness.

The learned Judge a quo remarked that it was beyond his understanding how these conflicting statements in Allem's affidavit came to be made. He found some of the passages in the affidavit to be unintelligible, and he described the affidavit as "an enigmatic document". Despite the differences between Allem's affidavit and his oral evidence the trial Court found Allem to be an honest and reliable witness. This assessment of Allem as a witness was attacked by the appellant on appeal. It appears from the judgment that the learned Judge a quo gave careful consideration to the relevant facts and the effect of the probabilities. In

those circumstances a trial Court's finding on credibility should not lightly be disturbed on appeal.

Mr Schutz submitted that it was strange indeed that the two Allems, who had been divorced for some years, and whose transactions with Stein had been quite separate from one another, should have made the same mistake in the words that they used in their respective affidavits when describing the history of their dealings with Stein. It is true that both the Allems testified that their attorney had written down what they had told him, but one should not lose sight of the fact that it was the same attorney who prepared both affidavits.

A further improbability which was raised by Mr Schutz is the strange coincidence that some 35 debtors, all of whom were supposedly well known to Stein and who were reputed to be men of financial standing, would simultaneously

experience financial embarrassment. Allem's testimony was that when the consolidated account was proposed in November 1982 Stein told him that a number of his clients who had borrowed money from the first respondent were unable to meet their commitments on due date as a result of the economic recession in the country. On Allem's evidence, therefore, only some of the borrowers, and not all of them, experienced financial difficulties at the time. According to Allem's testimony it was not a question of those debtors being unable to pay at all; it was only that they could not pay in time.

Allem is supported in this regard by Sparks who confirmed that Stein had also told him of borrowers who were experiencing difficulty in meeting their commitments.

According to Sparks this was the reason which Stein advanced for asking for an extension of time for the repayment of the debts. Sparks testified that Stein further mentioned to him that he was reluctant to take action against these people who were not only his clients, but also his friends.

Allem may be criticized for believing this story of Stein, but it seems clear that that was indeed the excuse which Stein used to obtain an extension of time. It is accordingly not a case of Allem being dishonest in this regard. One should also guard against judging Allem's credulity with the benefit of hindsight. Allem had implicit faith in Stein who, after all, was his attorney. Whenever Allem became worried that payment was not forthcoming, Sparks would allay his fears. Allem may have been naive, but Stein on the other hand appears to have been a very plausible character.

The appellant has not succeeded in persuading me that the trial Judge was wrong in finding Allem to be an honest and reliable witness. Allem's version of the financial arrangement between the first respondent and Stein is borne out by Sparks and supported by the contemporaneous documents and the probabilities. I conclude therefore that Allem established that the loans were to be made to

individual borrowers and not to Stein personally.

2. Were the monies entrusted to Stein in the course of his practice as an attorney?

Section 26(a) of the Act provides for the reimbursement of stolen money which has been entrusted to an attorney in the course of his practice.

The meaning of the word "entrust" was considered by Nicholas J in Provident Fund for the Clothing Industry v. Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund 1981(3) SA 539(W), in which he held as follows at 543 E-F:

"From these definitions it is plain that 'to entrust' comprises two elements: (a) to place in the possession of something, (b) subject to a trust. As to the latter element, this connotes that the person entrusted is bound to deal with the property or money concerned for the benefit of others (cf Estate Kemp and Others v. McDonald's Trustee 1915 AD 491 at 499).

'(The trustee) is bound to hold and apply the property for the benefit of some person or persons or for the accomplishment of some special purpose' (ibid at 508.)'"

On Allem's version, which was in my opinion rightly accepted by the Court a quo, there can be no doubt that the first respondent entrusted its money to Stein as an attorney.

The appellant maintained, however, that the Court a quo erred in finding that the first respondent had entrusted the money to Stein in the course of his practice as an attorney. For the purpose of its argument in this connection the appellant assumed, in favour of the first respondent, that the agreement between Stein and the first respondent had been that the first respondent would pay money to Stein and that Stein would lend such money to clients of his on behalf of the first respondent. The appellant submitted that the first respondent had failed nevertheless to show that it fell within the scope of an attorney's work in the course of his practice to assume personal responsibility for the repayment of such money together with interest, and to issue post-dated cheques in respect of his personal liability.

It is certainly not unusual for an attorney to lend money to a third party on behalf of his client who has entrusted the money to the attorney for that purpose. Such an attorney would, without doubt, be acting in the course of his practice as an attorney. On Allem's version that is exactly what Stein had been doing since 1978 with the money entrusted to him by the first respondent. Allem's evidence was that Stein and the first respondent also agreed that Stein would hand the first respondent a series of post-dated cheques in advance to cover the borrowers' monthly repayments. According to Allem the parties did not thereby intend to burden Stein with personal liability, but to facilitate Stein's administrative work. The fact that Stein issued these post-dated cheques in those circumstances did not, in my opinion, change the nature of the loan transaction which otherwise fell within the course of an attorney's practice.

I am, in any event, not persuaded that the

assumption of personal liability by Stein for his clients' debts changed the nature of the loan transaction so as to remove it from the scope of an attorney's work in the course of his practice as such. It should be borne in mind that Stein also stood surety for a number of his clients who borrowed money from the first respondent, thereby assuming personal liability for the repayment of such loans. It was never argued that Stein's suretyship would have caused the transaction to fall outside the scope of an attorney's work in the course of his practice. I do not regard it as unusual for an attorney who uses one client's money to grant a loan to another client and friend of his, to protect the interests of the lender by standing surety for the borrower. I agree with Mr Trengove's submission that Stein had in any event always assumed professional or at least moral responsibility for the debtors and their ability to pay.

Stein's assumption of personal liability in May 1983 came long after the money had been entrusted to him, and

in my judgment it could not then have changed the nature of the transaction so as to take it outside the scope of an attorney's work in the course of his practice as such. In any event, and as will appear, the money had by then already been stolen.

The appellant further relied on the following dictum of Kuper, J in Paramount Suppliers (Merchandise) (Pty) Ltd v. Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund Board of Control 1957(4) SA 618(W) at 625 F-G:

"It does not follow however from the fact that an attorney pays a sum of money into his trust account that that sum of money is in fact either trust money held by that attorney, or money paid to that attorney in the course of his practice as an attorney."

In that case money was paid into an attorney's trust account in connection with a transaction described by the learned Judge as "illegal or immoral". It appears that the money was paid to the attorney on the basis that he was to use his

"influence" in order to obtain import permits which all the persons concerned knew should not be obtained. The money was accordingly paid to that attorney in respect of work clearly falling outside the scope of an attorney's work in the course of his practice as such. The facts of the present case, on the other hand, show that Stein received the money in connection with transactions which ordinarily fall within the scope of an attorney's work in the course of his practice. I therefore agree with the finding of the Court a quo that the first respondent entrusted the monies to Stein in the course of his practice as an attorney.

3. Was the first respondent's claim time-barred in terms of section 48(1)(a) of the Act?

Section 48(1)(a) of the Act provides that written notice of any claim must be given within three months after the claimant became aware of the theft, or by the exercise of reasonable care should have become aware of the theft.

It is common cause that notice of the first

respondent's claim was given to the appellant and the Council of the Law Society of the Transvaal in writing on 9 April 1984. It was not seriously contended that Allem or the first respondent had actually become aware of the theft before 10 January 1984, and in my opinion it is inconceivable that they would have done nothing if they really knew of the theft. The appellant did however submit that by the exercise of reasonable care they should have become aware of the theft long before 10 January 1984.

I have already dealt with the appellant's argument that the alleged simultaneous financial embarrassment of some 35 debtors in November 1982 was so improbable that no reasonable man would have believed it. One should not lose sight of the fact that over the preceding four to five years Allem, acting on behalf of the first respondent, and Stein had built up a successful business relationship involving mutual trust. During that period Stein had also acted as Allem's attorney in his divorce action and in other matters

involving litigation. In those circumstances there is no reason to reject Allem's evidence that he had implicit faith and trust in Stein. Even if this trust wavered subsequently he was more easily reassured than he would have been if he had been dealing with a stranger.

It was submitted on behalf of the appellant that Allem should have asked Stein in November 1982 to ensure that all future payments received from the borrowers should be paid to the first respondent, or that the borrowers should be instructed to pay direct to the first respondent. The fact of the matter was that the first respondent after all those years had become used to receiving Stein's post-dated cheques in repayment of the loans. It should further be borne in mind that an agreement had been reached in November 1982 which provided for an extension of time and regular repayments every three months by means of Stein's post-dated cheques. In view of the extension provided for there would have been no reason for Allem to assume that any of the 35

borrowers would continue to make payments to Stein in terms of their original undertakings, or that Stein would be receiving substantial repayments from those borrowers which could be paid over to the first respondent, as was suggested by the appellant.

It was further submitted on behalf of the appellant that the first respondent should have considered claiming payment direct from the borrowers or their sureties. That would have entailed a number of court cases against debtors, some of whom were allegedly experiencing financial difficulties. The first respondent apparently decided instead to enter into the November 1982 agreement. Once this agreement had been reached the first respondent could no longer sue the borrowers or their sureties.

Stein, in breach of the provisions of the November 1982 agreement, failed to pay the two quarterly instalments due on 1 February 1983 and 1 May 1983. Stein offered a number of excuses and craved further indulgence, but Allem

became worried at that stage as no repayments had been made for a number of months. It does not follow, however, that Allem should have contemplated a theft by Stein. Allem's evidence was that he never even thought of the possibility of theft and there is no reason to disbelieve him in this regard.

It was submitted that Allem, as a reasonable man, should have become suspicious of a possible theft, but there were a number of factors which allayed his suspicion and put his mind at rest, i.e.: (i) Stein's willingness to assume personal liability in May 1983; (ii) the subsequent payments of R120 000 and R30 000 respectively, which were made in June 1983 in pursuance of Stein's undertaking; (iii) Sparks's assurances throughout to Allem that Stein was a man of integrity; (iv) the seven monthly payments of R15 000 each which were made by Stein during the period 1 September 1983 to 1 March 1984 in terms of Stein's August 1983 undertaking; (v) the further two payments of R10 000 each on 1 November

1983 and 1 February 1984 in terms of the August 1983 undertaking; (vi) Stein's repeated assurances that the first respondent's money in his trust account enjoyed the protection of the appellant.

It was submitted on behalf of the appellant that Allem was not able to give a convincing reason for impounding Stein's passport during August 1983, and it was suggested that Allem had done so because he had a suspicion that Stein had stolen the first respondent's money. A more likely reason why Allem required Stein to hand over his passport, was because Allem wanted to secure Stein's presence so that he could fulfil his personal obligations with regard to the repayment of the monies.

Section 48(1)(a) of the Act in any event requires more than a mere suspicion. The test is whether the claimant "should have become aware of the theft" if he had taken reasonable care. In my judgment the Court a quo was correct in finding that it was not established that Allem had become

aware, or by the exercise of reasonable care should have become aware of the thefts prior to 10 January 1984.

4. Did the first respondent prove that all its money was stolen by Stein?

The appellant submitted in the alternative that the first respondent had failed to show which part of its money, if any, had been stolen by Stein.

The first respondent relied on certain admissions made in this connection at the trial to establish that monies were never paid over to the alleged debtors by Stein. From these admissions it appeared that at least 15 persons shown as debtors in the consolidated account actually existed.

They were approached and it then transpired that they were all persons who knew Stein, but who had no knowledge of Allem or the first respondent and who never borrowed money from them. The Court a quo found that the combined cogency of these independent circumstances made it overwhelmingly probable that the names which Stein had given to Allem as the

so-called borrowers, were names of existing persons which Stein falsely used or just names thought up by him.

The witness Van der Westhuizen, who testified for the first respondent, was one of these so-called borrowers. He knew Stein but denied that he ever borrowed money from Stein or from the first respondent through Stein. His evidence was that the signature which purported to be his on an acknowledgement of debt, was in fact a forgery.

Stein's repeated assurances to Allem and Sparks that all monies paid into his trust account were covered by the appellant, show how his mind must have been working at the time. I also agree with Mr Trengove's submission that Stein's subsequent conduct is consistent only with his having stolen the monies. He suddenly abandoned his office and departed from South Africa, leaving insufficient funds in his trust account. Thereafter he took no steps to prevent the sequestration of his estate or the removal of his name from the roll of attorneys.

I regard it as highly unlikely that Stein would devise this elaborate fraudulent scheme, and then use it to steal only part of the first respondent's money, while faithfully investing the balance on behalf of the first respondent. There was in any event nothing to show that there had ever been a single client of Stein who had borrowed money from the first respondent.

The most probable inference in my judgment is that the monies which were entrusted to Stein, as reflected in the consolidated account, were never used for the purpose of making loans on behalf of the first respondent to clients of Stein, but were all stolen by Stein.

5. Did the first respondent suffer the full loss?

The appellant submitted that the Court a quo should have deducted a sum of R113 533 from the outstanding capital amount shown on the consolidated account inasmuch as this amount was owing to the holding company and not to the first respondent.

Allem testified that his auditors required him to show some business for the holding company as the holding company was paying him director's fees. In order to overcome this difficulty Allem advised Stein that the monies advanced to a number of specified borrowers were to be treated as loans by the holding company. The appellant submitted that Allem's evidence that the first respondent nevertheless remained the lender, cannot be accepted.

It appears that the cheques relating to these specified borrowers were always drawn by the first respondent on its banking account, and never by the holding company. The money was therefore entrusted to Stein by the first respondent and not by the holding company. The books of account of the first respondent also support Allem's version and reflect the specified borrowers as loan debtors of the first respondent. I am, therefore, of the opinion that the Court a quo was correct in refusing to deduct the sum of R113 533.

The parties have agreed, as mentioned before, that the capital sum for which judgment was given in favour of the first respondent should be reduced by the sum of R48 330, being the amount referred to above which was paid in respect of insurance premiums.

6. Is the appellant liable to pay interest a tempore morae?

The main submission of Mr Schutz was that section 47(2) precludes the payment of interest. Section 47(2) provides as follows:

"(2) A claim for reimbursement as contemplated in section 26 shall be limited, in the case of money entrusted to a practitioner, to the amount actually handed over, without interest,"

Mr Schutz pointed out in this connection that section 45(1)(a) of the Act, read with section 45(2), shows that the Board of Control may in its discretion pay an amount out of the fund as interest on the amount of any judgment obtained, provided that such interest shall not run from a date earlier than the date on which the Board received notice in writing

of the claimant's claim against the fund. Section 45(1)(a) and (2) read as follows:

"(1) Subject to the provisions of this Act, the fund shall be applied for the following purposes, namely -

(a) all claims, including costs, payable in terms of this Act, and interest as provided in subsection (2);"

" (2) The board of control may in its discretion pay an amount out of the fund as interest on the amount of any judgment obtained or of any claim admitted against the fund: Provided that-

(a) such interest shall not run from a date earlier than the date on which the board of control received notice in writing by or on behalf of a claimant of his claim against the fund; and

(b) the rate of interest shall not exceed the prevailing rate of interest prescribed under section 1(2) of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975)."

The appellant submitted that sections 45(1)(a) and 45(2), read with section 47(2), in effect provide that the fund shall not be applied for the payment of interest except in those instances where the Board of Control, in the

exercise of its discretion, decides to make an ex gratia payment in respect of interest. On the appellant's interpretation, therefore, the Court would not be entitled to order the payment of interest by the appellant at all, not even from the date of judgment.

Section 47 (2) of the Act does contain a limitation in respect of a claim for interest against the appellant. The claimant cannot claim reimbursement for the loss of interest which he may have suffered as a result of the theft; his claim is limited to the actual amount of money entrusted to the attorney, without interest. In my opinion it does not follow from these provisions that the appellant is accordingly relieved from paying mora interest where the appellant has wrongfully withheld payment due and owing to the first respondent. It is "a claim for reimbursement as contemplated in section 26" which is limited by the provisions of section 47(2). A claim for interest against the appellant which flows from the appellant's own mora is

not such "a claim for reimbursement."

The Board's power to pay interest is derived from the provisions of section 45(1)(a) of the Act, read with section 45(2). It is a discretionary power, subject to certain conditions, to pay an amount out of the fund as interest. The fact that section 45(1) of the Act grants the Board the power to apply the fund for particular purposes, as set out in that subsection, does not in my opinion release the Board from its liability to make other payments out of the fund, should it become legally obliged to do so. The obligation to pay interest a tempore morae in given circumstances is an obligation which arises ex lege, and the Board cannot avoid the liability to pay such interest in the absence of an express provision to that effect. As indicated above, section 47(2) does not contain such an express provision.

The appellant's alternative submission was that the Court a quo erred in ordering it to pay interest a tempore morae as from the date of service of the summons.

Mr Schutz argued that interest on an unliquidated claim can only run from the date of judgment according to common law, and that there was nothing in the Act to change this position.

The first respondent's claim in the present case was not an unliquidated claim. The claim was for a specific sum of money which was reflected in the consolidated account, and the fact that the claim was based on a theft did not, in my judgment, change the position. It was decided by this Court in Kleynhans v Van der Westhuizen, N.O. 1970(2) SA 742(A) that a claim based on the theft of a specific sum of money was a "liquidated claim" for the purposes of section 9(1) of Act 24 of 1936. In the course of his judgment

Wessels JA held as follows at 750 A-B:

Dit kom my as vanselfsprekend voor dat waar die skuldenaar 'n vaste som geld van 'n applikant gesteel het, die bedrag van laasgenoemde se vordering, wat op die pleging van die diefstal gegrond is, uiteraard met sekerheid bepaal is. Die bedrag behoef geen bepaling deur 'n hof of ooreenkoms met die dief nie, aangesien dit met sekerheid

'andersins' bepaal is. Waar bewys is dat die diefstal geleen is, is die bedrag van skadevergoeding eweneens bewys, en daardie bepaalde bedrag is onmiddellik na die diefstal opeisbaar. Die dief is vanaf die datum van die diefstal in mora (Wessels, Law of Contract in S.A., 2de. uitg., para 2864)."

See further Colrod Motors (Pty) Ltd v. Bhula 1976(3) SA 836(W).

In my opinion the appellant was liable to pay mora interest, and I agree with the order made by the Court a quo in this regard.

In my judgment the appeal in respect of the first respondent should accordingly be dismissed with costs, including the costs consequent upon the employment of two counsel. The capital sum for which judgment was given in favour of the first respondent should however be reduced by an amount of R48 330, as agreed.

I now propose to deal with the second respondent's claim. The second respondent ("Mrs Allem") testified that she met Stein at their home before she and Allem were

divorced in August 1980. She went to see Stein after the divorce in order to collect certain money which was due to her in terms of the settlement agreement in the divorce action. Stein then suggested to her that she should lend the money to clients of his as they would pay her a high rate of interest on her investment, while he would draw up the necessary legal documents. Mrs Allem told Stein that she intended buying a townhouse later on and that she required the money for that purpose. She was, however, willing to lend the money to Stein's clients on a short-term basis in the meantime. Thereafter Stein informed her whenever he had a client who wished to borrow money. Mrs Allem would then draw a cheque in favour of Stein and Isaacs as soon as Stein informed her that he had obtained the necessary security. In return for her cheque Stein would give Mrs Allem his firm's post-dated cheques in payment of capital and interest. Mrs Allem testified that Stein acted as her attorney in these matters.

Mrs Allem's claim is based on four cheques which she issued during 1983 in this connection, viz. a cheque for R30 000 dated 5 February 1983, a cheque for R18 000 dated 20 June 1983, a cheque for R2 000 dated 11 August 1983 and a cheque for R6 000 dated 14 December 1983. Mrs Allem testified that these monies, totalling R56 000, were entrusted to Stein in order that he could make short-term loans on her behalf to clients of his. She received post-dated cheques from Stein's firm in payment of the capital sum and interest in respect of each of these loans.

During January 1984 Mrs Allem informed Stein's office that a few of the firm's post-dated cheques for interest had been dishonoured. Stein's bookkeeper thereupon telephoned Mrs Allem and asked her to return all the post-dated cheques, and she in turn undertook to let Mrs Allem have Stein's cheque for R60 000 in respect of capital and interest. No such cheque was received.

In January 1984 Mrs Allem telephoned Stein and told

him that she needed her money since she had found a suitable townhouse to buy. She also asked Stein to let her have a document confirming that she had paid the money over to him. In response to her request Stein wrote her the following letter dated 15 February 1984:

"Your investment of R60 000,00

We refer to the above matter and wish to confirm that as per your instructions, we are holding the sum of R60 000, 00 in trust, having cashed out your investments.

Our cheque will be following shortly."

Towards the end of March 1984 Mrs Allem heard that Stein had left the country. She never received the promised cheque or any payment from Stein.

Mrs Allem's attorney, who also acted for Allem and the first respondent in the present case, later submitted an affidavit to the appellant in support of Mrs Allem's claim. The affidavit was signed by Mrs Allem on 4 June 1984. Like

Allem, Mrs Allem also stated in her affidavit that she had lent the money to Stein. There are, however, other allegations in Mrs Allem's affidavit which are consistent with her oral evidence and to the effect that she entrusted the money to Stein in the course of his practice as an attorney. As in the case of the first respondent, her attorney also wrote a letter dated 9 April 1984 to the appellant. This letter, which preceded her affidavit, stated that Mrs Allem had invested monies in trust with Stein in order to enable him to make investments. The contents of this letter are in accordance with Mrs Allem's oral testimony and lend support to her evidence that the affidavit did not correctly set out the terms of her arrangement with Stein.

Stein's letter of 15 February 1984 quoted above further corroborates Mrs Allem's evidence in this regard, irrespective of whether the letter be regarded as true or false. The Court a quo held that the letter was admissible to show the manner in which the loan had been

handled by Stein. I do not, with respect, share the view of the learned Judge a quo that this letter truly reflected Stein's handling of the money, but if true, it certainly confirmed that Stein did not personally borrow the money from Mrs Allem. In my opinion, and for reasons which will follow later, the letter was indeed false, but the fact that the lie took a form consistent with Mrs Allem's version of the arrangement, supports her oral evidence with regard to the scheme.

Mrs Allem's version of her arrangement with Stein is further borne out by the fact that Stein followed basically the same modus operandi in her case as in the case of the first respondent; and it has been established that the first respondent did not advance the money to Stein personally, but entrusted the money to Stein in the course of his practice as an attorney.

The trial Court found Mrs Allem to be an honest and reliable witness, despite the fact that certain allegations

in her affidavit were in conflict with her oral evidence.

I have considered further criticism of her evidence, but in my judgment there is no reason to disturb such finding.

The remaining question is whether Mrs Allem has proved that Stein in fact stole her money. She relied on the letter of 15 February 1984 to establish her version that Stein had invested the money on her behalf, but that letter also alleged that Stein had "cashed out" her investments and that he was holding the sum of R60 000 in trust. The submission was made on behalf of the appellant that there is no evidence at all as to the state of Stein's trust account at the time that he absconded. If the allegations in the letter were true Mrs Allem's money, or at least part thereof, may still have been in Stein's trust account when he left the country. A small dividend of R261,69 was subsequently paid to Mrs Allem, but this dividend was received from the trustees in Stein's insolvent estate and not from a curator bonis appointed to control and administer Stein's trust

account. The Court a quo did not specifically deal with this aspect of theft in the case of Mrs Allem, but gave judgment in her favour in the sum of R57 383,31.

I have indicated above that I am of the view that Stein's letter of 15 February 1984 was false. If Stein really had been holding Mrs Allem's R60 000 in trust, as alleged in his letter, he could have enclosed his firm's cheque for R60 000 straightaway. He knew that she required the money. He promised her, nevertheless, that his cheque for R60 000 would be following shortly. This he failed to do, and one can only conclude that he never intended to send her his cheque as promised in the letter. Stein eventually absconded more than a month later without paying Mrs Allem at all. In view of these circumstances it is more likely than not that Stein did not have Mrs Allem's money in his trust account, as alleged in his letter, and that he never intended to send her his cheque for R60 000, as promised in the letter. The conclusion is justified that

the letter was a mere pretence, meant to mislead Mrs Allem into believing that her money was forthcoming.

Many of the letters which Stein had written to the first respondent were proved to have been false. If that had been Stein's modus operandi in the case of the first respondent, one can more readily accept that he would have followed the same course when dealing with Mrs Allem.

Once it is accepted that Stein's letter of 15 February 1984 was false, the inference becomes irresistible that Stein had never lent Mrs Allem's money to any client of his, but had misappropriated it. Stein's failure to pay her the money, which he knew she needed, further leads to the conclusion that he had stolen her money. The first respondent has proved that Stein was a thief. Stein's arrangement with Mrs Allem was basically the same as that which existed between Stein and the first respondent, and it is more likely than not that Stein would have stolen Mrs Allem's money as well. The circumstances under which Stein left the country are consistent with his having stolen money.

All these considerations justify the conclusion that Stein also stole Mrs Allem's money. In my judgment, therefore, Mrs Allem has proved that she suffered pecuniary loss as a result of theft committed by Stein.

In view of the provisions of section 47(2) of the Act referred to above, Mrs Allem's claim for reimbursement is limited to the capital amount of R56 000 actually handed over to Stein, and she is not entitled to the R4 000 interest allegedly earned on her investment. The amount of R261,69 received by Mrs Allem from the trustees in the insolvent estate of Stein should further be deducted from her loss in terms of section 47(3), leaving a balance of R55 738,31.

The following order is made:

The appeal is dismissed with costs, such costs to include the costs of two counsel, but the capital amounts awarded by the Court a quo to the first respondent and second respondent are respectively reduced to R502 320,64 and R55 738,31.

F H GROSSKOPF JA.

JOUBERT JA

VAN HEERDEN JA

NESTADT JA

Concur.

MILNE JA
