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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO. 2024/091303
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES
DATE: 19/09/2025
SIGNATURE

In the matter between:

LINDIWE BUSANGANI NKOSI	Applicant
and	
LEGAL PRACTITIONERS FIDELITY FUND	First Respondent
LEGAL PRACTICE COUNCIL	Second Respondent
THE ROAD ACCIDENT FUND	Third Respondent

JUDGMENT

H G A SNYMAN AJ

INTRODUCTION

[1] The applicant ("*Ms Nkosi*") is a 54 year old widow residing at an informal human settlement situated at Orange Farm, Johannesburg. During argument before me, Mr Makholwa on behalf of Ms Nkosi, described her as an indigent widow.

[2] The first respondent ("*the fund*") is the fund established in terms of Chapter 6 of the Legal Practice Act 28 of 2014 ("*the Legal Practice Act*"). The second respondent ("*the LPC*") is the council established in terms of section 4 of the Legal Practice Act. The LPC exercises jurisdiction over all legal practitioners and candidate legal practitioners as contemplated in the Legal Practice Act. The third respondent ("*the RAF*") is established in terms of section 2 of the Road Accident Fund 56 of 1996 ("*the RAF Act*"). Only the fund opposes the application. There was no appearance on behalf of the LPC or the RAF.

[3] Ms Nkosi claims compensation in terms of section 55 of the Legal Practice Act against the fund. Her claim is based thereon that the compensation she received from the RAF for injuries she sustained because of a motor vehicle accident, was stolen by her erstwhile attorneys, namely Chueu Inc Attorneys ("*Chueu Attorneys*").

MATERIAL BACKGROUND

[4] Ms Nkosi was involved in a motor vehicle accident and sustained bodily injuries on or about 29 July 2015, i.e. more than 10 years ago. At the time she retained the services of Chueu Attorneys and instituted action against the

RAF in terms of the RAF Act. The matter was settled on 30 April 2019. In terms of the agreed court order, the RAF was ordered to pay the settlement amount to Chueu Attorneys. Ms Nkosi does not say in her affidavit exactly what the settlement amount was. It appears from an unsigned draft order dated 30 April 2019 attached to the founding affidavit, that it reflects the amount of R217,968.00. However, it appears from the correspondence attached to the papers, that the total amount the Sheriff Centurion East ("*the Sheriff*") actually paid over to Chueu Attorneys in respect of Ms Nkosi's claim, was the amount of R617,115.91. This amount less 25% is R462,837. I will use this amount for purposes of this judgment.

[5] Chueu Attorneys never paid the award over to Ms Nkosi. Ms Nkosi says that she suffered pecuniary loss due to "*the theft*" of the money entrusted to her legal practitioners in the course of their practice.

[6] Ms Nkosi lodged a claim with the fund on 31 October 2022. From the correspondence it appears that this was in the form of an affidavit. The fund acknowledged receipt of Ms Nkosi's claim on 1 December 2022. Unfortunately, only the first page of the fund's letter of that date is attached to the founding affidavit. It is accordingly not clear who the author of that letter was. It appears from the first page of the letter that the fund requested Ms Nkosi to provide the following:

[6.1] The original office file (both cover and contents) of Chueu Attorneys in relation to her claim; and

[6.2] A copy of her bank statements for the period from 1 July 2019 up to

and including 31 October 2021.

[7] The fund recorded in the letter that they noted from the proof of payment of the RAF, that it indicates that the money was paid to the Sheriff. The fund stated that they would be grateful if Ms Nkosi could furnish the fund with proof from the Sheriff that he actually paid the money over to Chueu Attorneys. It was also said that the fund noted from Ms Nkosi's affidavit that she states that she was advised by the LPC to lodge her claim with the fund. The fund asked Ms Nkosi to advise the exact date when that occurred.

[8] Ms Nkosi states in her founding affidavit that she could not get hold of Chueu Attorneys and did know how to retrieve the proof of payment from the Sheriff's office. She says she instructed her current attorneys of record ("*Setaka Inc*") in 2024 to follow up on the claim with the fund on her behalf. She says Setaka Inc also assisted her in opening a criminal case against Chueu Attorneys and to retrieve court documents from the RAF, which information was furnished to the fund.

[9] Setaka Inc first made contact with the LPC who referred them to the fund. Setaka Inc contacted the fund on 25 January 2024. The fund responded on 7 February 2024 by way of an email from the fund's Mr Jerome Losper ("*Mr Losper*"). Attached to the email was a copy of the fund's letter to Ms Nkosi of 1 December 2022 referred to above. Mr Losper requested Setaka Inc to submit the information and documentation requested in the letter of 1 December 2022 "*to finalise the claim*". Nothing was said about her first having to excuss her former attorneys or anyone else.

[10] Setaka Inc directed a query to the Sheriff on 12 February 2024. It seems that a query was also directed to the LPC on this date.

[11] The LPC responded by email on 13 February 2024. The LPC confirmed to Setaka Inc that the LPC took curatorship over the matter in December 2021, with claims of duplicate payment from the RAF to the total of R29 million, plus against the trust account of Chueu Attorneys.[1] It was stated that Chueu Attorneys' trust account had a balance of R5 million and many other trust creditors. The LPC confirmed that Ms Nkosi's money was not in the trust account. The LPC advised that in terms of section 56(3) of the Legal Practice Act, the fund is only liable for the balance of any loss suffered by any person after deductions of benefits received by that person from any source other than the fund. The LPC stated that this simply means that a claimant must sue Chueu Attorneys' former directors in their personal capacity and recover from that action. The fund will cover any balance remaining. The LPC advised that Setaka Inc should report this matter to the law enforcement agencies.

[12] The Sheriff responded on 23 February 2024, advising that they received instructions from Chueu Attorneys to execute two writs of execution in relation to Ms Nkosi's claim against the RAF. The first one was executed on 13 June 2019. They paid the amount of R217,968.00 over to Chueu attorneys on 2 July 2019. The second was executed on 18 September 2019. They paid the amount of R390,101.38 over to Chueu Attorneys on 1 October 2019. These

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1 Background to the matter appears from the judgment of Naudé J in the Limpopo Division, Polokwane in the matter of *Limpopo Provincial Council of the South African Legal Practice Council v Chueu Inc Attorneys* 2021 JDR 2678 (LP) (25 October 2021). This judgment was overturned on appeal to the Supreme Court of Appeal. See the judgment of *Limpopo Provincial Council of the South African Legal Practice Council v Chueu Inc Attorneys and others* 2023 JDR 2704 (SCA) (26 July 2023).

amounts total the amount of R617,115.91 referred to above. The Sheriff provided Setaka Inc with all the necessary proofs of payment and returns of service in this regard.

[13] Ms Nkosi was not immediately available to Setaka Inc at the time since she lost her husband and requested some time off to mourn him.

[14] On 5 April 2024 Setaka Inc furnished the fund with the SAP case number, the proof of payments and information received from the Sheriff and Ms Nkosi's bank statements.

[15] The fund informed Setaka Inc on 9 April 2024 that the documents will be referred to the fund's Ms Pumeza Ndima ("*Ms Ndima*"). On 16 April 2024, Setaka Inc followed up with Ms Ndima. Her response on 17 April 2024 was to request the file contents of Chueu Attorneys including clarification in relation to the amount of R395,756.58 referred to above.

[16] On 17 April 2024, Setaka Inc requested the file contents from the LPC. The LPC confirmed on 23 April 2024 that they could not locate the file.

[17] On 23 April 2024, Setaka Inc requested the file contents from the RAF. The RAF advised that Setaka Inc should follow a request for information in terms of the Promotion of Access to Information Act 2 of 2000 ("*PAIA*"). It is not clear from the papers whether Setaka Inc followed this route. From what is stated below, it appears that they did subsequently obtain the RAF's file.

[18] On 2 May 2024 Setaka Inc submitted Ms Nkosi's affidavit to the fund. The fund only provided feedback on 16 May 2024. The fund stated that it was

awaiting feedback from the RAF. Thereafter, Ms Ndima will investigate the claim further.

[19] On 19 June 2024 Setaka Inc, received proof of payment from the RAF and shared the contents with the fund. They also shared the file contents they received from the RAF as per the fund's request.

[20] Setaka Inc inquired on 19 June 2024 when they could expect to receive a response from the fund in order to avoid multiple follow ups. Five business days later, Setaka Inc had still not received a response to their email dated 19 June 2024. Setaka Inc therefore directed a letter of demand to the CEO of the fund on 25 June 2024. In the letter, Setaka Inc recorded the history of the matter as set out above. Setaka Inc placed on record that according to their knowledge, Chueu Attorneys is no longer in business. Also that the LPC confirmed in writing that Ms Nkosi's money is not in the trust account. As such, under the circumstances, Ms Nkosi has no recourse to the firm. Setaka Inc further placed on record that the delay in processing Ms Nkosi's claim is prejudicing Ms Nkosi, hence their reasonable query: "*How long will your office take to consider the claim?*" It was stated that this is a reasonable question because Ms Nkosi literally stays in a shack without running water and electricity. The letter concluded by Setaka Inc stating that if they do not receive a response to their email dated 19 June 2024 by 28 June 2024, "*in order to manage our client's expectations*", Setaka Inc held instructions to launch a High Court application compelling the fund to expedite the claim.

[21] Ms Ndima responded on 11 June 2024. She recorded that according to Ms Nkosi's claim documents the LPC sent her forms with the procedure on how

to lodge claims with the fund on 25 April 2022. Ms Nkosi only lodged her claim with the fund on 31 October 2022, which is six months later. Ms Ndima stated that Ms Nkosi's claim was therefore lodged late as the LPC requires that a claimant should lodge his or her claim within three months of becoming aware of the misappropriation. Ms Ndima requested reasons as to why the late lodgement should be condoned. The fund further advised that the fund proposes that in view of the fact that the Chueu Attorneys' office file is not available, the attorney and client fees be estimated as equal to 25% of the payment received from the RAF. Setaka Inc was requested for their views in this regard. As I see it, it is significant to note that nothing was said in this letter about Setaka Inc stance that Ms Nkosi has under the circumstances no recourse against Chueu Attorneys.

[22] Setaka Inc responded to the fund's letter on 12 July 2024. They stated that the query, which relates to the late submission of the documents is "*rather mischievous*" at such an advanced stage of the claim. Setaka Inc said that the fund had an opportunity to raise it in the previous correspondences, but failed to do so. Setaka Inc placed on record that they furnished the fund with documents, or information requested in their letter dated 16 April 2024. As such, Setaka Inc was of the view that the fund's query in relation to why the claim was only submitted on 31 October 2022 is a mute query.

[23] Setaka Inc also proceeded to state in the letter that the claim against the RAF was settled five years ago and to date "*the poor widow*" has not received a cent either from the fund, or Chueu Attorneys. Instead, she was sent from pillar to post until Setaka Inc got involved. It was stated that Ms Nkosi is

unemployed and has no formal education. From inception, Chueu Attorneys took advantage of this sad fact, hence the reason she was not furnished with any documentation or proof in relation to her RAF claim. Setaka Inc expressed the hope that this clarifies why her claim was submitted late. It stated that Setaka Inc furnished the fund with the proofs of payment of the amount to R617,115.91. Setaka Inc inquired whether the fund was suggesting deducting 25% from this payment, which means the client will receive a possible payment of R462,837 if the fund approves the claim.

[24] Ms Ndima responded on 17 July 2024. She again inquired if Setaka Inc was agreeable to the fund's proposal in relation to fees due to Chueu Attorneys as set out in the last paragraph of the fund's letter dated 11 July 2024 (that was a reference to the 25%).

[25] Setaka Inc responded on 18 July 2024. They confirmed that Ms Nkosi accepted a deduction of 25% from the total of R617,115.91 paid to Chueu Attorneys. Setaka Inc once again confirmed that Ms Nkosi lost her husband earlier in the year and was evicted from her marital home, hence the reason she currently stays in a shack. Stated that if the fund approves her claim, she will be able to build a small house.

[26] When by 29 July 2024 no response was received from the fund, Setaka Inc sent a follow up letter to the fund. Reference was made to the previous correspondence. The request was made for the fund to please:

[26.1] Repudiate the claim and furnish reasons, or explain the reasons behind the delay and when Setaka Inc can expect a final response

from the fund; or

[26.2] Approve the claim, which "*we highly doubt that will be the case*".

[27] Setaka Inc fixed 2 August 2024 as a date by when Ms Nkosi will institute the necessary legal action without further notice if there was no response.

[28] The fund did not respond and by 13 August 2024 Ms Nkosi launched the present application. It is important to note that during none of the engagements with the fund referred to above, did the fund express the view that Ms Nkosi must first excuss against Chueu Attorneys before she can lodge a claim with the fund. It was only the LPC who said in its email of 13 February 2024 referred to earlier herein, that Ms Nkosi must sue the former directors of Chueu Attorneys. LPC obviously accepted that a claim against Chueu Attorneys would be futile in view of their financial predicament.

[29] In terms of the notice of motion, Ms Nkosi moved for relief that the fund be compelled to approve her claim, or provide reasons for the repudiation of the claim.

[30] The fund filed a notice of intention to oppose on 12 September 2024. The fund filed its answering affidavit on 19 November 2024 deposed to by Mr Losper. In paragraph 4 of the answering affidavit, the fund recorded that in considering a claim there are normally two main hurdles for the applicant. The first would be whether the claim falls within the ambit of section 55 of the Legal Practice Act. Mr Losper stated that the fund is satisfied that in this instance that Ms Nkosi's claim complies with the requirements of the Legal

Practice Act. In so far as the "*second hurdle*" is concerned, Mr Losper stated the following:

> "*The second hurdle is whether excussion of the attorney had occurred. In this regard the previous Act (Act 53 of 1979) had required, that an applicant had to have exhausted all available legal remedies against the practitioner before the claim can be approved.*
>
> *In terms of [the Legal Practice Act] the requirement is less stringent in that the Fund is not liable for payment of the money which could reasonably be received by the claimant from the attorney.*" (emphasis added)

[31] The fund stated that Ms Nkosi had not complied with the above requirement, whether it be in terms of "*the old Act*", or the Legal Practice Act. Mr Losper stated that Ms Nkosi's claim has been approved subject to compliance with the excussion of Chueu Attorneys. He stated that as the file of Chueu Attorneys could not be found, the parties have already agreed that the fees of Chueu Attorneys be estimated as 25% of the payment received from the RAF.

[32] In addition to the above, Mr Losper recorded in the answering affidavit that the fund has received 116 claims in respect of Chueu Attorneys, which has a total value of R82,721,575.48. He stated that Ms Nkosi has not furnished any documentation or evidence of steps taken to recoup the money misappropriated from Chueu Attorneys. The fund can in light thereof not finalise the claim. It was stated that finalisation of the claim was dependent on this.

[33] Ms Nkosi filed her replying affidavit on 5 December 2024. She denied that payments of the funds due to her could reasonably be received from Chueu Attorneys, or its directors who "*stole my funds*". She said that this was

because the LPC confirmed in their email dated 13 February 2024 referred to above, that the firm is under curatorship and owed the LPC R29 million. She also referred to the fact that it was confirmed in the answering affidavit that the fund received the 116 claims against Chueu Attorneys to the value of R82 million. She stated that this is further proof that it is unreasonable to reasonably expect payment from such a debtor.

[34] Ms Nkosi stated that she did not take any steps to recoup the money misappropriated by Chueu Attorneys for the reasons stated above. She stated that the law firm that misappropriated her funds has liabilities to the tune of R29 million and is literally insolvent. She stated that pursuing the firm's directors would be a futile exercise and wasteful expenditure. In any event, she does not have funds to embark on such an expensive legal process. Under the circumstances she denied that she did not comply with the Legal Practice Act.

DISCUSSION

[35] The Legal Practice Act, which came into operation on 1 November 2018, repealed the Attorneys Act 53 of 1979 ("*the Attorneys Act*"). The Legal Practice Act does not have retroactive effect and claims arising against the fund before 1 November 2018 are to be determined in terms of the Attorneys Act.

[36] Before its repeal, the Attorneys Fidelity Fund referred to in section 25 of the Attorneys Act provided for reimbursement of clients who suffered pecuniary loss due to theft by their attorneys.

[37] Section 49 of the Attorneys Act limited those claims as follows:

> *"**49 Actions against fund***
>
> *(1) No action shall without leave of the board of control be instituted against the fund unless the claimant has exhausted all available legal remedies against the practitioner in respect of whom the claim arose or his or her estate and against all other persons liable in respect of the loss suffered by the claimant.*
>
> *(2) Any action against the fund in respect of any loss suffered by any person as a result of any theft committed by any practitioner, his or her candidate attorney or his or her employee, shall be instituted within one year of the date of a notification directed to such person or his or her legal representative by the board of control informing him or her that the board of control rejects the claim to which such action relates.*
>
> *(3) In any action against the fund all defences which would have been available to the person against whom the claim arose, shall be available to the fund.*
>
> *(4) Any action against the fund may, subject to the provisions of this Act, be brought in the High Court or a magistrate's court having jurisdiction within the area of jurisdiction of which the cause of action arose."* (emphasis added)

[38] Upon coming into force of the Legal Practice Act, the fund took over the Attorneys Fidelity Fund. Section 55 of the Legal Practice Act provides that the fund is liable to reimburse persons who suffered pecuniary loss because of the theft of any money or other property given in trust to a trust account practice in the course of the practice of the attorney.

[39] Section 79 of the Legal Practice Act limits the claims against the fund as follows:

> *"**79 Actions against Fund***
>
> *(1) The Fund is not obliged to pay any portion of a claim which could*

reasonably be recovered from any other person liable.

(2) The Fund may pay all reasonable expenses and legal costs incurred by a claimant in exhausting his or her rights of action against another person.

(3) The Fund may, in its discretion, before deciding whether to make full payment of a claim or any part of it, make an interim payment to the claimant of a portion of the amount for which his or her claim has been admitted.

(4) Any action against the Fund in respect of loss suffered by any person as a result of theft committed by a legal practitioner referred to in section 84 (1), candidate attorney or employee of any such legal practitioner or juristic entity, must be instituted within one year of the date of a notification directed to that person or his or her legal representative by the Fund, informing him or her that the Fund rejects the claim to which the action relates.

(5) In any action against the Fund all defences which would have been available to the person against whom the claim arose, are available to the Fund.

(6) Any action against the Fund may, subject to the provisions of this Act, be brought in any court having jurisdiction in respect of the claim." (emphasis added)

[40] As appears from the authorities discussed later herein, it has been accepted by some courts, without following the process of statutory interpretation, that the limitation provisions of the Attorneys Act and the Legal Practice Act are the same. I do not agree. I agree with Mr Losper as quoted above that the requirements of the Legal Practice Act are "*less stringent*".

[41] Section 49(1) of the Attorneys Act in mandatory terms provided that no action shall be instituted against the Attorneys Fidelity Fund "*unless the claimant has exhausted all available legal remedies against the practitioner in respect of whom a claim arose*". Section 79(1) of the Legal Practice Act is not phrased in mandatory terms. It provides the fund with a discretion in the case of non-

compliance. It provides that the fund "*is not obliged*" to pay out a claim "*which could reasonably be recovered from any other person liable*". Put otherwise, if the claim could not be reasonably recovered from any other person liable, the fund may, but is not obliged to, pay out the claim.

[42] As I see it, it is also significant that the legislator did not copy the requirements from the Attorneys Act of "*all available legal remedies*". The section provides instead for a reasonability test, namely whether a portion of the claim could be recovered from someone else. However, considering the view I take in this matter it is not necessary for me to find whether the limitation of the Attorneys Act and the Legal Practice Act are the same. The fact is that the test to be applied in terms of the Legal Practice Act is whether any portion of Ms Nkosi's claim could reasonably be recovered from any other person liable. I will apply this test.

[43] In their respective heads of argument filed in this Court the parties both relied on the judgment of Kubushi J in *Smith v Legal Practitioners Fidelity Fund Board* 2023 JDR 0338 (GP) (dated 1 February 2023). The Smith matter concerned the issue whether the fund is liable for the amounts Mr Smith claimed from it in respect of four claims in terms of section 26(a) of the Attorneys Act. The Attorney's Act was applicable since Mr Smith's claims arose before 1 November 2018.

[44] Mr Smith's four claims were based thereon that he alleged that he entrusted and paid amounts into the trust account of his attorneys, namely Dadic Attorneys. The fund defended the claim and raised a special plea of excussion and a plea over in respect of the four claims. The fund alleged that

Mr Smith failed to establish some of the requirements of section 26(a) of the Attorneys Act, more specifically the requirement of entrustment. In so far as the special plea of excussion is concerned, Kubushi J recorded that the issue that she had to decide, was which of the two statutes was applicable in that case, i.e. whether it was section 49(1) of the Attorneys Act, or section 79(1) of the Legal Practice Act. However, she held that it was not necessary for her to revisit the issue of the applicability of the two sections. This was as the parties agreed that whether it is section 49(1) of the Attorneys Act, or section 79(1) of the Legal Practice Act that is applicable, "*the test is the same*".[2] (Kubushi J did therefore not decide the issue, the parties agreed on it).

[45] She held that what is required, is that reasonable steps must be taken to recover from either the errant attorney, or whoever else is liable and those reasonable steps are dependent on the facts of each particular case. She proceeded to hold in this regard as follows at paragraphs 52 and 53:

> "*[52] In the specifics of this case, the parties are in agreement that the Plaintiff is obliged to plead, and bears the onus to prove through leading evidence that he has taken reasonable steps to recover from the attorney and his employee before turning to the Fund for compensation. It is that question that this court will then have to determine. That is, in the circumstances of this case, can it be said that the evidence tendered by the Plaintiff establishes that he has taken reasonable steps to recover the monies lost, from the attorney, Mr Dadic or his employee, Mr Stephens.*
>
> *[53] It is, also, common cause that when it comes to reasonableness, each matter turns on its own facts. What is reasonable is determined by the facts of the particular case. It follows, therefore, that what is reasonable insofar as exhausting legal remedies is concerned, is fact dependent.*" (emphasis added)

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[2] See paragraph 51 of the judgment.

[46] The court then proceeded to analyse exactly what Mr Smith did in relation to recovering the claim amounts from the firm of attorneys and the individuals. The court held in this regard that Mr Smith had established that the attorneys did not own immovable property, or hold any beneficial interest in a juristic person registered in South Africa. With reference to the steps that Mr Smith took, without action being instituted, but only based on the evidence that he presented that he could not pursue legal action against the attorneys, the court held as follows at paragraph 65:

> "*[65] This Court agrees with the Plaintiff that it can never be the requirement of either section 49(1) of the Attorneys Act or section 79(1) the Legal Practice Act that exhausting legal remedies or the extent to which an amount is reasonably recoverable means that the wronged party must actually follow the errant attorney in another country where there is significant cost and expense to be incurred and in regard to what will be protracted litigation with the aggrieved party having to travel there, as well. Even if there may well be assets, it is hidden somewhere in that foreign country, Mr Dadic having already informed the Plaintiff that he has no assets. There was no reason, none was proffered, why the Plaintiff would not believe Mr Dadic when he told him that he (Mr Dadic) has no assets. This in the backdrop of Mr Dadic having recently immigrated and started an immigration practice, from scratch, in a foreign country. It would, in this Court's opinion have been arduous for the Plaintiff to travel to a foreign country to go looking for the assets purported to be there.*
>
> *[66] Based on the unchallenged evidence that Mr Dadic has no assets, the Plaintiff's evidence that it would have been of no value for him to sequestrate Mr Dadic as there was obviously no assets, is to be believed. In any event, no Court in South Africa would have any jurisdiction to entertain a sequestration application in light that more than twelve months had passed since Mr Dadic left the country, and there would be no benefit to creditors because of the lack of assets.*
>
> *[67] Similarly, to institute legal proceedings against Mr Stephens in California where he was last sighted, would be protracted and expensive. For the Plaintiff to pursue litigation against this person who has various names, does not have a fixed place of abode or fixed employment and who is already a fugitive from*

> *justice, would indeed, be challenging and arduous. The unchallenged evidence on record is to the effect that the likelihood of Mr Stephens having any assets in the USA is negligible and even if he has some money hidden away.*" (emphasis added)

[47] The court therefore dismissed the fund's special plea. In so far as the merits of the four claims are concerned, the court concluded that Mr Smith had failed to establish all the requirements of section 26(a) of the Attorneys Act. In particular, the requirement of entrustment. She therefore dismissed Mr Smith's application. Mr Smith, with the leave of Kubushi J, appealed to the Supreme Court of Appeal. The Supreme Court of Appeal's judgment is reported as *Smith v Legal Practitioners Fidelity Fund Board* 2025 (3) SA 476 (SCA).

[48] The Supreme Court of Appeal did not express any views regarding Kubushi J's findings in the course of her dismissing the special plea. Instead, the SCA focussed on the issue of entrustment. It held that only Mr Smith's second claim complied with the requirement of entrustment. The appeal was upheld to that extent. The parties were ordered to pay their own costs.

[49] As I see it, the important takeaway from the *Smith* judgment is that when it comes to reasonableness, each matter turns on its own facts. Moreover, that prospects of success that a claimant has against his former attorneys as part of the reasonability test, is an important consideration.

[50] A further judgment that the fund relied upon before me, was Kubushi J's judgment in this Court dated 29 January 2020 in the matter of *Louis Adriaan Bouwer v Attorneys Fidelity Fund and the LPC* under case number

88030/2018.

[51] In that matter, an official of the fund, Mr Losper (I do not know whether this is the same Mr Losper referred to above, probably it is), who was charged with dealing with the claim arising from funds being misappropriated, phoned the applicant's attorneys of record on 12 June 2018. Mr Losper confirmed that he had approved the applicant's claim and that he had already given instruction for the payment to be made to the applicant's attorney. Despite repeated reminders for the fund to make payment, this did not happen. In the result, Mr Bouwer launched his application.

[52] In its answering affidavit in that matter, the fund admitted that Mr Losper informed the applicant that the claim had been investigated and found to be valid and that the fund would pay the amount claimed. However, the fund alleged that Mr Losper informed the applicant that the amount could only be paid out, if it could not be recovered from the insolvent estate of the attorneys in question. There was therefore, according to the fund, a dispute of fact on the papers, which had in terms of the rule formulated in *Stellenbosch Farmers' Winery Limited v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235E-G to be resolved in favour of the fund.

[53] In considering the above, Kubushi J held that there was no dispute of fact on the papers as they stand. She held in this regard that the fund admitted liability and that it would pay, before Mr Losper informed the applicant in a later letter that the fund admitted the applicant's claim on condition that the insolvent estate of the attorney first be excussed. She accordingly held that the letter only introduced the defence of non-compliance with section 49 of the

Attorneys Act after the fact. Kubushi J then proceeded to hold that section 79(1) of the Legal Practice Act and not the Attorneys Act applied in that matter. The applicant in that matter argued that section 79(1) of the Legal Practice Act, other than section 49(1) of the Attorneys Act, does not provide for mandatory excussion. Kubushi J did not agree. She held that except that it is no longer a requirement that the applicant seek and obtain leave from the fund to institute a claim against it, the legislative bar that applied to legal proceedings before the commencement of the Legal Practice Act, that is, that the applicant must first exhaust all legal remedies against the practitioner, has been retained in the Legal Practice Act. She accordingly held that for a claimant to be successful in view of section 79(1) of the Legal Practice Act, he or she must allege and prove that he or she could not reasonably recover any portion of the claim from any other person liable. Without such allegation and proof, the fund is not obliged to pay a claim.

[54] Kubushi J then pointed out that Mr Bouwer has not complied with the requirement of section 79(1) in that he has not alleged in his papers that there is no portion of the claim which could reasonably be recovered from his former attorney, or any other person liable. As such, she held that the claim should ordinarily not succeed.

[55] However, notwithstanding the above finding, Kubushi at paragraph 38 of the judgment, held that there was no need, under the circumstances of that case, for the applicant to first exhaust the legal remedies of section 79(1) of the Legal Practice Act before claiming payment. This was since the fund had already admitted liability and undertaken to pay the amount claimed, before

the excussion defence was introduced. Kubushi J accordingly granted Mr Bouwer's claim.

[56] As I see it, it is clear from Kubushi J's two judgements referred to above, that in neither of the two instances the applicants' claims were disallowed for the lack of the applicants first excussing against their former attorneys.

[57] A further judgment the fund relied upon before me was the judgment of Baqwa J in *Resilient Properties (Pty) Ltd and others v Legal Practitioners Fidelity Fund and another* (54987/2020; 64872/2020) [2025] ZAGPPHC 269 (20 March 2025) ("*Resilient Prop*"). In that matter Resilient Prop sought to consolidate two actions. The first was an action against the fund for the recovery of R28 million, which Resilient Prop entrusted to its former attorney. This funds were due for payment to the Madibeng local municipality ("*Madibeng*") in respect of municipal charges. Resilient Prop's attorneys stole these monies. The second action was against Madibeng also for the recovery of the stolen funds. Madibeng opposed the consolidation application. The fund supported it.

[58] One of the defences the fund pleaded was that the money the attorney stole, was in cohesion with an employee of Madibeng, one Trevor Mkateko Mokhawana ("*Mr Mokhawana*"). The pleaded case was that Mr Mokhawana did this acting in the course and scope of his employment with Madibeng. Resilient Prop's claim against Madibeng was based on the vicarious liability of Madibeng for damages suffered because of Mr Mokhawana's involvement in the fraudulent scheme.

[59] In describing the link between the pending actions, Baqwa J held as follows at paragraphs 11 to 13:

> "*[11] Section 79 of [the Legal Practice Act] directs a plaintiff against [the fund] to first seek recovery of the amount claimed from any other person liable for such recovery. Section 49 of [the Attorneys Act] contains a similar provision regarding the exhaustion of all remedies at the plaintiff's disposal as a precondition to recovery of damages from [the fund].*
>
> *[12] The applicants therefor, by statutory prescript, have an obligation to first attempt recovery of damages from third parties that may also be liable with the logical implication that the vicarious liability of Madibeng will have to be canvassed in both actions against [the fund] and the action against Madibeng.*
>
> *[13] Consequently, should the action not be consolidated, all of the evidence relevant to the vicarious liability of Mukhwana would have to be led separately in both actions, and witnesses testify and be cross-examined twice on the same issues with the resultant inconvenience, wastage of resources, unnecessary repetition of evidence, the possibility of contradictory outcomes and duplication of costs.*"(emphasis added)

[60] However, based on other considerations the court considered, it dismissed the applicants' case for the consolidation of the actions. As I see it, what was at stake before Baqwa J was accordingly not whether a claim against the fund should succeed and what a claimant must allege and prove in that instance. The matter concerned whether two actions should be consolidated. As I see it, the Resilient Prop matter is therefore no authority that an applicant must first excuss against his former attorney, to successfully claim against the fund.

[61] In the heads of argument on behalf of Ms Nkosi reference was made to the judgment in *Leysath v Legal Practitioners Fidelity Fund Board of Control* 2022 JDR 2135 (SCA) (28 July 2022). In that matter the court held as follows in paragraph 24 of the judgment:

"*The appellant was thus required to prove that:*

(a) He had suffered pecuniary loss;
(b) By reason of theft committed by Mr Da Costa;
(c) Of money entrusted by or on the appellant's behalf;
(d) In the course of Mr Da Costa's practice."

[62] In the present matter that Ms Nkosi complied with the above, is conceded by the fund. Why payment is not made, is based solely on the provisions of section 79 of the Legal Practice Act and the defence that she has not excussed against Chueu Attorneys.

CONCLUSION

[63] As I see the matter, save for the side reference by the LPC in the email of 13 January 2024, the fund never informed Ms Nkosi and her attorney that she must first excuss against Chueu Attorneys. This is notwithstanding the fact that numerous opportunities presented itself for the fund to have done so. Even when Setaka Inc pertinently raised the inability to claim against Chueu Attorneys, the fund remained silent. It rather focussed its efforts on agreeing with Setaka Inc on the claim amount.

[64] The fund raised the issue of excussion for the first time, nearly two years after Ms Nkosi lodged her claim. This was only when it filed its answering affidavit in November 2024.

[65] By then it would have been common cause that Ms Nkosi would not have been successful with any claim against Chueu Attorneys. Chueu Attorneys were by then already under curatorship. From the fund and the LPC's correspondence, it was clear that Chueu Attorneys were hopelessly insolvent.

In fact, it appears in paragraph 2 of the Supreme Court of Appeal's judgment in *the Chueu Attorneys matter*, that Chueu Attorneys was on 25 October 2021 already facing a final liquidation application.

[66] Ms Nkosi did say in her affidavit that she attempted to make contact with Chueu Attorneys without any success. The fund criticises her for not saying more. As I see it, however, it was not expected for Ms Nkosi to say more in the founding affidavit. Up to until the answering affidavit was filed, the fund simply did not raise the requirement of excussion. When this was raised in the answering affidavit, Ms Nkosi explained in detail in her replying affidavit why she did not take any steps against Chueu Attorneys. She simply had no prospects of success in recovering anything from them in view of what is stated above. She also said that she does not have funds to embark on such expensive legal process.

[67] In so far as Ms Nkosi's contention that she did not have funds to embark on such an expensive exercise is concerned, Mr van Wyk on behalf of the fund argued before me that section 79(2) of the Legal Practice Act provides that the fund may pay all reasonable expenses and legal cost incurred by a claimant in exhausting his or her rights of action against another person. He therefore argued that Ms Nkosi's excuse that she did not have the necessary funds is of no moment. I do not agree. The fund did not raise this as part of it answering affidavit. In any event, no such tender was ever made. In fact, before the answering affidavit was filed, the fund did not even inform Ms Nkosi that it expected from her to institute action against Chueu Attorneys and their former directors.

[68] As appears from the Supreme Court of Appeal judgment in *the Chueu Attorneys matter*, Chueu Attorneys before their demise, handled approximately 6,000 files with an estimated gross value of R6,2 billion. Based on what transpired in that matter, Mr Makholwa submitted that it is clear that Chueu Attorneys, and its former directors, "*was willing to fight all the way up to the SCA*". I agree.

[69] Considering all of the above, I find that to have expected Ms Nkosi, also taking her personal circumstances into account, to have instituted an action against Chueu Attorneys and it former directors is not reasonable.

[70] Under the circumstances I find that Ms Nkosi could not reasonably recover her loss from any other person liable and her application ought to succeed.

[71] As I see it, the claim amount is the total amount paid out by the RAF to Chueu Attorneys, less their 25% fees.

[72] There is no reason why costs should not follow the event. During argument counsel for the fund asked for costs at scale B, if I dismiss the application. As I see it, this equally applies if I grant the application. This is the appropriate scale.

[73] In the result I make the following order.

ORDER

[1] The first respondent must pay an amount of R462,837 to the applicant.

[2] Payment of the amount set out in paragraph 1 shall be made within seven days into the applicant's attorneys' trust account, the details of which are as follows:

Name of account holder: MK SETAKA INC

Bank Name: FNB

Account number: 6[…]

Type of account: Trust

Branch code: 23732

[3] The first respondent is ordered to pay the applicant's costs on scale B.

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H G A SNYMAN
Acting Judge of the High Court of
South Africa, Gauteng Division,
Pretoria

Heard in court: 19 August 2025

Delivered and uploaded to CaseLines: 19 September 2025

Appearances:

For the applicant:	Adv Zandile Makholwa Instructed by Setaka Inc
For the first respondent:	Adv ASL van Wyk Instructed by Stegmanns Inc Attorneys