REPORTABLE

Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: A80/2014

In the matter between*:*

ATTORNEYS FIDELITY FUND BOARD OF CONTROL Appellant

V

INJO INVESTMENTS CC Respondent

Court: Justice President J M Hlophe, Justice V Saldanha *et* Justice J Cloete

Heard: 27 July 2015

Delivered: 21 August 2015

JUDGMENT

CLOETE J:

Introduction

[1] This is an appeal with the leave of the court a quo which found in favour of the respondent on certain limited issues separated in terms of rule 33(4).

[2] The respondent had sued the appellant as first defendant in its capacity as professional indemnity insurer for payment of the total sum of R1 040 000 together with interest and costs, arising from eight substantially identical claims in respect of which the respondent had already obtained default judgment against the second defendant, Phokombe & Viljoen Incorporated (*'PV'*), a company which traded as a firm of attorneys in Alberton, Gauteng. The respondent was unable to recover any part of the judgment debt from the second defendant and/or its directors and thus lodged a claim with the appellant, which in turn repudiated liability, resulting in the respondent instituting action against it.

[3] When the matter served before the court a quo the parties submitted an agreed statement of facts, to be supplemented by oral evidence, together with the issues which they had formulated for determination in terms of rule 33(4).

[4] The salient agreed facts were that:

4.1 At all relevant times PV traded as a firm of attorneys and its three directors were duly admitted and practising attorneys and holders of Fidelity Fund certificates;

4.2 PV operated a trust account in terms of s 78 of the Attorneys Act 53 of 1979 (*'the Attorneys Act'*) and through its directors conducted conveyancing;

4.3 During the period October to November 2006 PV represented to the respondent that certain of its clients, as sellers of immovable property, wished to conclude discounting agreements with it; that they had already signed these agreements and that attendant warranties provided by PV had been duly authorised by the clients concerned;

4.4 The aforementioned representations were made by PV with the intention of inducing the respondent to act on the correctness thereof, which it did, by signing the agreements and making payment of the sums comprising its claim into PV's trust account; and

4.5 PV's representations were false and it misappropriated the funds so paid.

[5] The issues to be determined were:

5.1 Whether the payments were made to PV in the course of its practice as a firm of attorneys;

5.2 Whether the funds so paid were entrusted by the respondent to PV as envisaged in s 26(a) of the Attorneys Act; and

5.3 In the event of it being found that the funds were so entrusted, whether the transactions constituted loan agreements in terms of s 47(1)(g) read together with s 47(5)(b) and (c) of the Attorneys Act.

[6] It was further agreed that in the event of the respondent not succeeding on either of the first two issues, the action fell to be dismissed.

[7] For reasons which will become apparent later in this judgment it is only necessary to deal with the second issue, namely that of entrustment.

Evidence relating to entrustment in the court a quo

[8] The only witness who testified was Mr John Swanepoel (*'Swanepoel'*), the respondent's duly authorised representative to whom the abovementioned representations had been made. I will refer only to those aspects of his evidence which are relevant to the entrustment issue.

[9] Swanepoel initially testified that the respondent conducted the business of providing bridging finance for attorneys who handled conveyancing transactions. However it emerged that in the instant matter bridging finance was not provided to PV per se but rather to "clients" of these attorneys who, it was represented to Swanepoel, had sold their immovable properties and required bridging finance pending payment to them of the proceeds of such sales upon registration of transfer to the purchasers concerned. This much is evident from Swanepoel's testimony that:

9.1 The parties to each discounting agreement were the respondent on the one hand and PV's client on the other;

9.2 Before concluding each discounting agreement the respondent required proof of what Swanepoel referred to as the *'underlying sale transaction'* [1];

9.3 The purpose of including PV's trust account details in each discounting agreement was so that:

> *'… once a transaction has been finalised and I approved the transaction, then I would pay over the money into Phokompe & Viljoen's trust account… thereafter they should actually pay the client then…'* [2] ;

9.4 The sole reason why PV's trust account was utilised was so that:

> *'…I've got security with the attorneys… If I pay the money directly over to the client, I've got no security. Once I've paid the money over into the attorney's trust account, then I've got security from the attorney that he will look after the money and make sure that the client gets paid.'* [3]

9.5 Apart from the recordal in each discounting agreement that payment was to be made by the respondent into PV's trust account, there was no specific term obliging the respondent to effect payment in this manner in order to fulfil its obligation to the "client" concerned;[4] and

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[1] Record p193 lines 19 - 21
[2] Record p194 lines 7 – 10
[3] Record p194 lines 11 - 17
[4] Record p197 lines 21 - 24

9.6 There was nothing to prevent the client from instead repaying the respondent at his or her election either before or upon receipt of the sale proceeds. [5]

[10] Swanepoel was referred to one of the discounting agreements and its attendant warrantee (given that all eight claims were substantially identical it was unnecessary to separately refer to each one).

[11] The relevant terms of the discounting agreement[6] are as follows:

11.1 The "client" sold to the respondent the surplus of the sale proceeds of the immovable property concerned. The *'surplus'* was calculated as the selling price less the client's disposal costs (inclusive of any amount owing under a mortgage bond)[7];

11.2 The purchase price payable for the surplus would be paid by the respondent into PV's trust account and then in turn by PV to the client (in one instance the respondent purchased the surplus of R275 540 for R100 000)[8];

11.3 Payment of the surplus purchased was to be made by PV to the respondent within 24 hours of registration of transfer if the client had not

[5] Record p211 line 24 – page 212 line 1 and clause 2.1 record p42
[6] Record p37
[7] Record p41 preamble
[8] Record p41 preamble

already paid it directly to the respondent; payment nonetheless remained the client's liability[9];

11.4 The client was also liable for the fees stipulated in clause 3; and

11.5 Failure by the client to make payment *'of any amount due'* would constitute a breach of the discounting agreement and the respondent would have the right to claim immediate payment *'of all outstanding amounts due by the client'.*[10]

[12] The warrantee provided by PV in each instance was a separate document and did not form part of the discounting agreement. Although clause 1 of the discounting agreement contains certain warranties on the part of the client, these do <u>not</u> include an irrevocable instruction to PV to make payment of the surplus to the respondent upon registration of transfer, and clause 1.5 of the discounting agreement provides only that *'this agreement is entered into by Injo Investments on the warranties expressed in this agreement'.*[11]

[13] Although Swanepoel repeatedly confirmed that PV was obliged to pay over the purchase price to the client concerned, he also expressly denied that PV's trust account was thus merely a conduit for purposes of payment.[12] This contradiction

[9] Record p42 clauses 2.1 and 2.2
[10] Record p42 clause 4.1
[11] Record pp41 - 42
[12] Record p212 lines 6 - 7

in his testimony is perhaps best explained by his evidence relating to how he viewed PV's role in the transactions:[13]

> *'the agreement was actually between me and Phokombe & Viljoen, not the client, although the client was a person that should have received the money.'*

And further:

> *'What agreement are you referring to?---The agreement that I would pay the money over to them, they would pay the client and as soon as the transaction is registered, that they would pay me back.'*[14]

[14] The *'agreement'* to which Swanepoel referred was not the discounting agreement, but PV's warrantee which he described as *'an undertaking'* to repay the respondent.[15] The warrantee provides at clause 4 that:

> *'The Conveyancer/Attorney has received irrevocable instructions to pay to Injo Investments the amount as recorded in this agreement.'* [16]

[15] The reference to *'this agreement'* in clause 4 purports to be a reference to the discounting agreement, although the latter in turn makes no concomitant reference to PV's warrantee.

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[13] Record p214 line 24 – p215 line 1
[14] Record p219 lines 20 - 23
[15] Record p195 lines 1 - 11
[16] Record p45

The court a quo's findings on entrustment

[16] S 26(a) of the Attorneys Act provides that:

> *'**26. Purpose of fund.**—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 or her candidate attorney or his or her employee, of any money or other property entrusted by or on behalf of such persons to him or her or to his or her candidate attorney or employee in the course of his or her 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;…'*

[17] The court a quo reasoned as follows: [17]

> *'**ENTRUSTMENT***
>
> *[30] As to the question whether the monies paid into the trust account of the second defendant by Swanepoel, it has been held in authorities such as* Industrial & Commercial Factors (Pty) Ltd v Attorneys Fidelity Fund[18]*, supra, that the intention of the person making the payment in question is the basis upon which "entrustment" is to be judged. Nicolas J, in* Provident Fund for the Clothing Industry v Attorneys, Notaries & Conveyancers Fidelity Guarantee Fund[19]*, supra, made the following observation on a question as to whether payment made into an attorney's trust account constitutes entrustment:*
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>> *"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…"*

[17] Record pp173 - 174
[18] 1997 (1) SA 136 (AD) at 142H
[19] 1981 (3) SA 539 (W) at 543E

> *'[31] Swanepoel was not a debtor of the second defendant. Thus, when he made various payments into the trust account of the second defendant, he did not do so in order to discharge a debt. In making such payments, he had intended that the second defendant, after such monies would have been deposited into its trust account, would be held in trust pending payment to what we now know were fictitious borrowers. Thus, his intention was to place the second defendant in possession of the monies so paid so that the second defendant could, in turn, pay such monies over to what we now know were fictitious borrowers. On the basis of the facts of the matter before me, I have no hesitation in concluding that the payments of the various sums of money constituting each claim against the first defendant constitute entrustment.'*

Submissions on appeal

[18] On appeal before us the appellant contended that, as a fact, the respondent made payment into PV's trust account only to discharge its obligation to PV's *'client'*. It was the client who nominated PV's trust account as the payment mechanism and there was nothing in the discounting agreement which stipulated that no other mechanism could be used. That being so, and irrespective of what Swanepoel might have asserted or thought to the contrary, the funds were not entrusted to PV as contemplated by s 26(a) of the Attorneys Act.

[19] On the other hand the respondent argued that Swanepoel's intention when making payment into PV's trust account was the determining criterion. His undisputed evidence was that, rather than payment to PV being in discharge of a debt, it was intended by him to be security for payment by PV to the client. Accordingly, his intention was sufficient to establish entrustment for purposes of s 26(a).

[20] In support of its argument the appellant relied on the following authorities. In *British Kaffrarian Savings Bank Society v Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund Board of Control*[20] it was held that:

> *'It seems to me, when an attorney steals money entrusted to him in the course of his practice, the person who "may suffer pecuniary loss" by reason of the theft is the person on whose behalf the money is held "in trust". The section refers to money entrusted "by or on behalf of such persons" to the attorney, ie by or on behalf of the person who suffers the loss. A person towards whom the attorney has a fiduciary relationship pays money to an attorney or someone else pays money to an attorney on behalf of such a one. Money has then been entrusted to an attorney by or on behalf of his client, ie the person with whom he has a fiduciary relationship. This is the situation protected by the Act. There must be a relationship of this fiduciary nature between the attorney and the person who has suffered loss before the latter can claim to be compensated in terms of s 26.'*

[21] In *Rodel Financial Services (Pty) Ltd v Attorneys Fidelity Fund*[21], where the facts were similar to the instant matter, the court found that:

> *'[22] In the matter under consideration the discounting agreement provides that Rodel purchases the right of the client to the proceeds of the mortgage bond. By paying the first instalment into Geduld's trust account, Rodel in effect paid money to the debtor's* [sic] *(Solomon's) attorney as part discharge of its indebtedness to Mr. and Mrs Solomons in respect of the purchase consideration for the proceeds of the bond. The money was paid to Geduld at the request of the client. The client nominated Geduld's trust account as the account into which payment should be made. The standard agreement contains no terms indicating that payment would only be made into an attorney's trust account. The intention*

[20] 1978 (3) SA 242 (ECD) at 249B-F

[21] Case no 16833/2007 [2010] ZAWCHC 407 at para [22]

> *of Rodel in making the payment was to discharge its obligation to the client. It mattered not that the account happened to be an attorney's trust account.'*

[22] In *Attorneys Fidelity Fund Board of Control v Mettle Property Finance (Pty) Ltd*[22] the latter paid monies into an attorney's trust account pursuant to various bridging finance transactions. The attorney in turn undertook to pay Mettle from the proceeds of a bond and two property transfers upon registration thereof. The attorney did not pay and Mettle sued the Attorneys Fidelity Fund alleging entrustment as envisaged in s 26(a) of the Attorneys Act. The Supreme Court of Appeal found that, although the attorney had irrevocably undertaken to pay, both in terms of the bridging finance agreements and various warranties and undertakings, there had in fact been no entrustment:

> *'[11] The meaning of the word "entrust" for the purposes of a claim in terms of s 26(*a*) of the Act has been dealt with in a number of cases. In* Industrial and Commercial Factors (Pty) Ltd v Attorneys Fidelity Fund Board of Control *1997 (1) SA 136 (A) at 144B-D, this court (per FH Grosskopf JA) quoted with approval the following passages of the judgment of Nicholas J in* Provident Fund for the Clothing Industry v Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund *1981 (3) SA 539 (W) at 543E-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 Trustees *1915 AD at 499).*

[22] 2012 (3) SA 611 (SCA) at paras [11] – [16]

> *'(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).' "*

*[12] The first element is not contentious – the moneys, representing the initial purchase price in each case, were indeed placed in Langerak's possession. The second element is more problematic. There is no doubt that Mettle trusted the various warranties and the undertakings given by Langerak, and relied upon Langerak for repayment of, inter alia, the initial purchase price on the date of registration. That does not, however, mean that Mettle "entrusted" the money to Langerak as required by s 26(*a*) of the Act.*

[13] As indicated above, Langerak is referred to throughout the master agreement as the "Conveyancer". The agreement provides that:

> *"3.1 The Conveyancer has been and will from time to time hereafter be duly authorised by a client to conclude a transaction with Mettle for and on their behalf.*
>
> *3.2 Any reference in this agreement to a client shall (unless the context indicates to the contrary) be a reference to that seller, purchaser or mortgagor duly represented by the Conveyancer."*

[14] Importantly, "client" – who could be a seller, a purchaser or a mortgagor – is defined as "the Conveyancer's client". "Client's claim" is defined as a "loan claim" or a "seller's claim".

[15] It follows that Mettle – in paying the initial purchase price in each transaction to Langerak as the representative of the mortgagor or seller from whom Mettle had purchased a loan claim or a seller's claim – was simply discharging its debt to such mortgagor or seller. The payment was unconditional and, the moment the initial purchase price was paid into Langerak's trust account in terms of the master agreement, Mettle's debt was discharged. Langerak was no more than a conduit for the money…

[16] This being so, there was no "entrustment" of money by Mettle to Langerak. In the words of FH Grosskopf JA in the Industrial and Commercial Factors *case:*

> *"Where money is paid into the trust account of an attorney it does not follow that such money is in fact trust money … If money is simply handed over to an attorney by a debtor who thereby wishes to discharge a debt, and the attorney has a mandate to receive it on behalf of the creditor, it may be difficult to establish an entrustment." '*

[23] During argument the respondent persisted in its reliance on *Provident Fund for the Clothing Industry v Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund* (*'PFCI'*) and *Industrial and Commercial Factors (Pty) Ltd v Attorneys Fidelity Fund* (*'ICF'*) which formed the basis for the court a quo's findings on entrustment.

[24] The respondent also argued that the appellant's reliance on *Mettle* and *Rodel* (supra) was misplaced, given Swanepoel's undisputed evidence of his intention to entrust the money with PV by making payment into PV's trust account as security.

<u>Discussion</u>

[25] Both parties accepted that where money is paid into the trust account of an attorney it does not necessarily follow that such money becomes trust money.[23] They also accepted that, as was held in ICF, if money is simply handed over to an attorney by a debtor who thereby wishes to discharge a debt, and the attorney

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[23] *Paramount Suppliers (Merchandise) (Pty) Ltd v Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund Board of Control* 1957 (4) SA 618 (W) at 625F-G

has a mandate to receive it on behalf of the creditor, it may be difficult to establish entrustment.[24]

[26] Given the foundation of the court a quo's reasoning, namely that in accordance with the ICF case, the payer's intention is determinative, it is helpful to consider the facts in that case in order to contextualise the court's findings therein.

[27] They were briefly as follows. The seller instructed an attorney to attend to the transfer of her immovable property to an end purchaser. The attorney (as in the present instance) devised a fraudulent scheme to raise bridging finance on the seller's behalf, by falsely representing to ICF (a factoring company) that the seller required the funds.

[28] ICF agreed to provide bridging finance on condition that certain underlying documents, including a suretyship executed by the seller's father as security for payment, were provided. The attorney forged the signatures on these documents. When ICF handed the attorney the cheque for the bridging finance, which in terms of the agreement had to be made out to the seller, the attorney then managed to persuade ICF to instead make it payable into his trust account, on the pretext that this would enable him *'to deal with'* the funds. Importantly, the attorney did not represent that the payment into his trust account was at the seller's instance.

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[24] ICF (supra) at 143J-144A

[29] ICF was concerned that payment into the attorney's trust account would not be regarded as payment to the seller in terms of the agreement. It thus insisted on two conditions being met. The first was that the attorney would hold the money in trust for and on behalf of the seller. The second was that the attorney would provide a trust receipt which the latter eventually did. The attorney stole the money and ICF sued the Attorneys Fidelity Fund on the basis of entrustment.

[30] It is against this factual background that the Appellate Division found as follows:[25]

> *'By insisting on payment into Maré's trust account and the furnishing of a trust receipt Flax, in my view, manifested his intention that Maré should keep the money for and on behalf of Branken, and that he should deal with it as instructed by her. That was also the professed intention of Maré. Maré's real intention was of course to steal the money, but he falsely represented to the appellant that he was receiving the money in trust on behalf of Branken. Maré conceded during cross-examination that he "agreed" to "keep the money in trust for the benefit of Branken"; and that "it was intended to be trust moneys" held for his client Branken. If this had been a genuine transaction that would no doubt have shown an intention on the part of Maré to receive the money in trust. I do, however, consider that the issue of entrustment in the present case should be judged in the light of the appellant's intention, and not Maré's professed intention. But Maré's concession does show that he did not pretend to receive the money as agent on behalf of Branken.'*

And further:[26]

> *'I do however respectfully disagree with the finding of the Court* a quo *that Maré "represented to Flax that he had been instructed by Branken to accept payment on her behalf". The evidence shows that Maré told the appellant that he "had to*

[25] At 142F-H
[26] At 143A-I

make certain payments on the instructions of Branken". He did not pretend that Branken had given him a mandate to accept payment on her behalf, and that any payment to him would therefore discharge the appellant's obligation to Branken.

Flax obviously intended to discharge what he believed to be the appellant's obligation under the agreement, but that is not decisive of the matter. When he was asked to change the crossing on the cheque he became concerned that payment to Maré would not result in payment to Branken. Flax consequently insisted that Maré should pay the cheque into his trust account, clearly with the intention that payment to Branken would only take place when the money was paid out on behalf of Branken. The appellant's intention on the one hand to pay Branken and its intention on the other to entrust the money should therefore not be regarded as mutually exclusive.

In coming to the conclusion that the appellant did not "entrust" the money to Maré the Court a quo *found that the facts in the present case were comparable to the facts in the* Provident Fund *case,* supra*, which were outlined as follows at 544B-C:*

"It may be accepted that by directing that the cheque for R32 238,36 be made out (in) favour of his trust account, Kavin (the attorney) represented that he would be receiving the money on behalf of Gafin (the ostensible client). But it has not been shown that in complying with that request, the Provident Fund impressed the payment with a trust; its intention was, presumably, to discharge what it and its then attorneys considered were the Fund's obligations under the contract of loan. They believed that it was a payment made to Kavin as the duly authorised agent of Gafin"

In view of that factual finding Nicholas J held that the Provident Fund had failed to show that it had "entrusted" any money to the attorney Kavin.

In my judgment the facts of the present case differ in certain material respects from those found in the Provident Fund *case,* supra*. The evidence shows that unlike the Provident Fund in that case, the appellant in the present case was the one who insisted on the money being paid into the attorney's trust account. Had Flax believed that payment to Maré would indeed be payment to the duly authorized agent of Branken whereby the appellant would be discharged from its obligation under the agreement, there would have been no need for Flax to insist on paying the cheque into Maré's trust account. The* Provident Fund *case can therefore be distinguished on the facts.'*

[31] It is fair to discern from the aforegoing that the Appellate Division decided the matter on the basis of ICF's intention having regard to the particular facts; and that the attorney's concession that he had never purported to represent the seller when accepting the money in trust played a significant role in establishing what ICF's true intention had been.

[32] In the appeal before us it is clear that at all material times PV purported to represent the client in accepting payment of the money into its trust account. This is borne out by the terms of the discounting agreement, the warranty, and indeed Swanepoel's own evidence. PV's obligation was <u>not</u> to retain the money in trust and to deal with it on the client's behalf, but simply to pay it straight over to the *'client'*. In other words, PV's trust account was nothing other than a conduit as was found in *Mettle* (supra) – notwithstanding the respondent's claim that it sought to obtain security by payment into that account.

[33] Further, as was pointed out in *Rodel*[27] the court in ICF did not find that the PFCI decision was wrong, but rather that its facts were materially different; and in the more recent decision of *Mettle* the Supreme Court of Appeal did not regard the payer's intention to be the overriding criterion. It too decided the matter on its own particular facts.

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[27] At para [20]

[34] To my mind the facts in the instant matter are almost on all fours with those in *Mettle* and we are (of course) bound by that decision. It thus follows that the appeal should succeed.

Conclusion

[35] **I would thus propose the following order:**

1. The appeal succeeds.

2. The order of the court a quo is set aside and substituted with the following:

'The plaintiff's claim is dismissed with costs.'

3. The respondent shall bear the costs of the appeal.

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J I CLOETE

HLOPHE JP

I agree and it is so ordered.

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J M HLOPHE

SALDANHA J

I agree.

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V SALDANHA