

SOUTH AFRICA / JUDGMENT

Itanex CC v Legal Practitioners' Fidelity Fund (Leave to Appeal) (15043/2020) [2025] ZAWCHC 109 (17 March 2025)

[2025] ZAWCHC 109

COURT

Western Cape High Court, Cape Town

BEFORE

Nuku

CASE / FILE NUMBER

15043/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

Case No.15043/2020

In

the matter between:

ITANEX
CC
Plaintiff
and
LEGAL
PRACTITIONERS' FIDELITY FUND
Defendant

Coram:

NUKU J
Heard

on:

12 March 2025
Delivered

on:

17 March 2025

JUDGMENT**ON THE APPLICATION FOR LEAVE TO APPEAL**

NUKU, J

- [1] The judgment that is the subject of this application for leave to appeal was handed down just over a month after the Supreme Court of Appeal (SCA) delivered its judgment in Smith^[1], where in giving what it considered an uncontroversial example of entrustment within the meaning of section 26 (a) of the now repealed

Attorneys Act 53 of 1979 (the Attorneys Act) said “If for example, a person is in the process of purchasing an immovable property and paid, in terms of the deed of sale, the purchase price into the trust account of a seller’s attorney, there can be no doubt that the purchaser entrusted the money to the seller’s attorney.”^[2]

- [2] In the judgment that is the subject of this application this Court found that monies that were paid by Green Spice Investments (Pty) Ltd (Green Spice), who were in the process of purchasing a petrol service station and a convenience store (the business) and Rebel Star Trading (Pty) Ltd (Rebel Star) who were in the process of purchasing an immovable property known as erf 4[...] Reservoir Hills, Durban (the property) both of whom paid, in terms of the respective deeds of sale, the purchase prices into the trust account of a seller’s attorney, Naushad Gattoo Incorporated (Gattoo Inc) were not entrusted within the meaning of section 26 (a) of the Attorneys Act.

- [3] The defendant, who takes no issue with the above example used by the SCA suggests that there are reasonable prospects of another court coming to a different conclusion that the monies that were paid by Green Spice and Rebel Star into the trust account of Gattoo Inc, which were misappropriated by Mr Naushad Gattoo (Mr Gattoo) were not entrusted within the meaning of section 26 (a) of the Attorneys Act.

- [4] In respect of the monies paid by Green Spice, the defendant suggests that the first requirement of entrustment has not been met because “the funds were not paid into the trust on behalf of and for the benefit of the plaintiff” but were paid for the benefit of Le Mini Project Management and Consulting CC (Le Mini) which had sold the business to Green Spice. The plaintiff having failed to establish the first requirement of entrustment, the

argument goes, that dispenses with the need to consider the second requirement of entrustment in respect of monies paid towards the purchase price of the business.

- [5] In respect of the monies paid by Rebel Star, the defendant suggests that it is the second requirement of entrustment that has not been met because the monies “were paid into the trust account of Gattoo Inc in circumstances where Mr Moosa, the plaintiff’s sole member, was still negotiating a transaction on behalf of the plaintiff. As no transaction had materialised, so the argument goes, there was accordingly no obligation where the firm was

bound to hold and apply the monies for and on behalf of some other person or persons or for the accomplishment of some special purpose.

- [6] The defendant prefaced its argument in relation to the second requirement of entrustment by stating that “the issue of entrustment must be judged in light of the intention of the person who placed the money or property in the possession of the receiver.”
- [7] On the facts of this matter the receiver of the money is Gattoo Inc and the persons who placed the money in the possession of the receiver, that is Gattoo Inc, are Green Spice and Rebel Star. The purpose for which the monies were placed in the possession of Gattoo Inc was to pay for the purchase price of both the business and the property for the benefit of the plaintiff as the seller of the property and Le Mini, as the seller of the business. That in my view, establishes the second requirement of entrustment and this should be the end of the matter in so far as concerns the monies paid in respect of the sale of the property where there is no dispute as to the first requirement of entrustment.
- [8] The mistake that the defendant makes, is to regard the monies paid in respect of the purchase price of the property as having been paid by the plaintiff. That is factually incorrect because the monies in respect of the sale of the property were deposited into the trust account of Gattoo Inc by or on behalf of the purchaser, Rebel Star.
- [9] The defendant, proceeding from that incorrect premise, then looks to the plaintiff to establish the purpose for which the monies were placed in the possession of Gattoo Inc and finds the plaintiff wanting in that regard. Had the defendant heeded its own statement that “the issue of entrustment must be judged in light of the intention of the person who placed the money or property in the possession of the receiver” and correctly located the identity of the person who placed the monies in the possession of the receiver (Gattoo Inc), it would have realised that the argument that the second requirement of entrustment has been dispensed with is a non-starter.
- [10] Turning to the argument that the first requirement of entrustment has not been met in respect of monies paid by Green Spice, the argument that this requirement has not been met, conflates the issues and seems to address a different issue, namely the identity of the person for whose benefit Gattoo Inc was required to deal with the money. Incidentally, this is the issue raised as a second ground of appeal, namely that the plaintiff does not have the legal standing to claim in respect of the loss arising from the misappropriation of the proceeds of the sale of business because those monies belong to a separate entity, Le Mini. I turn to that issue after dispelling any notion that Gattoo Inc was not placed in possession of the proceeds of the sale business.

- [11] Green Spice, as the purchaser of the business, paid the sum of R10 000 000.00 into the trust account of Gattoo Inc in terms of a deed of sale for the sale of the business. It is therefore self-evident that Green Spice placed the money in the possession of Gattoo Inc and no evidence has been led to contradict that. That puts paid to any notion that the first requirement has not been established. Any issue regarding the claim by the plaintiff and not Le Mini, is the issue I turn to next.
- [12] As is apparent from above, there were two transactions that were concluded simultaneously for the sale of the business and the sale of the property. The purchase price for both these transactions were paid into the trust account of Gattoo Inc, the attorneys acting for the sellers in both transactions. This was R5 000 000 in respect of the sale of the property and R10 000 000 in respect of the sale of business.
- [13] The evidence of Mr Moosa, the sole director of both the plaintiff and Le Mini was that he instructed Mr Gattoo to allocate everything into the plaintiff's file. Having so instructed Mr Gattoo, Mr Moosa would from time to time instruct Mr Gattoo to pay certain disbursements from the funds that were held in the trust account of Gattoo Inc. In fact, prior to the discovery of Mr Gattoo's misappropriation, Mr Gattoo had paid a sum of R10 243 894.90 on Mr Moosa's instructions.
- [14] In submitting the claim to the fund, Mr Moosa, on behalf of the plaintiff regarded the monies in the trust account as belonging to the plaintiff hence only the plaintiff submitted the claim and not both plaintiff and Le Mini.
- [15] The defendant advanced a defence that the plaintiff has no locus standi to claim the loss relating to the R10 000 000.00 paid in respect of the business. This, however, cannot assist the plaintiff because there is no separate claim for R10 000 000 but one claim by the plaintiff for the sum of R4 756 105.10 which is well within the amount that was paid in respect of the sale of the property. But that was not the plaintiff's case, because Mr Moosa regarded the entire R15 000 000 which he had instructed Mr Gattoo to allocate into the plaintiff's file, as plaintiff's property. And of that R15 000 000.00, R4 756 105.10 was misappropriated by Mr Gattoo. In my view, the defendant's ground of appeal based on the lack of locus standi is bad in law and enjoys no reasonable prospects of success.
- [16] The third and final ground of appeal relied upon by the defendant, is that there is a compelling reason why leave to appeal should be granted as the order's practical implications for the public arises from its potential abuse of attorneys' trust accounts being used as transactional accounts to settle clients' liabilities and expenses.

- [17] This ground of appeal, in my view, proceeds from the same erroneous factual basis of regarding the monies that were paid into the trust account of Gattoo Inc, as having been paid by either the plaintiff or Le Mini for no purpose other than to enable Mr Moosa to pay liabilities unrelated to the transactions on which Mr Gattoo had been advising. As already stated above, that is factually incorrect as the monies were paid by the two purchasers who were in the process of purchasing the business and the property.
- [18] For all the above reasons, I am not satisfied that the appeal would have a reasonable prospect of success, or that there is some other compelling reason why the appeal should be heard. The application for leave to appeal must, therefore fail.

Order

- [19] In the result I make the following order:

The application for leave to appeal is refused and defendant shall pay the costs of suit on scale B and such costs shall include the costs of one counsel.

L.G. Nuku

Judge of the High Court

APPEARANCES

For plaintiff: N Cassim SC and M Karolia

Instructed by: Shaheed Dollie Inc, Johannesburg

For defendant: H Cassim

Instructed by: Abrahams Kiewitz Inc, Cape Town

- [1] Smith v Legal Practitioners' Fidelity Fund Board (541/2023) [2024] ZASCA 170 (11 December 2024)
- [2] Smith v Legal Practitioners' Fidelity Fund Board (541/2023) [2024] ZASCA 170 (11 December 2024)

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Prepared on 10 October 2026 · Esheria