

SOUTH AFRICA / JUDGMENT

Leysath v Legal Practitioners' Fidelity Fund Board of Control (770/2021) [2022] ZASCA 115 (28 July 2022)

[2022] ZASCA 115

COURT

Supreme Court of Appeal

BEFORE

Petse, Zondi, Mabindla-Boqwana, Smith, Savage

CASE / FILE NUMBER

770/2021

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case No: 770/2021

In the matter between:

LINDON CLIFFORD LEYSATH

APPELLANT

and

LEGAL PRACTITIONERS' FIDELITY FUND

BOARD OF CONTROL

RESPONDENT

Neutral Citation: Leysath v Legal Practitioners' Fidelity Fund Board of Control (770/2021) [2022] ZASCA 115 (28 July 2022)

Coram: PETSE DP, ZONDI and MABINDLA-BOQWANA JJA and SMITH and SAVAGE AJJA

Heard: 31 May 2022

Delivered: 28 July 2022

Summary: Claim for reimbursement in terms of s 26 of the Attorneys Act 53 of 1979 – appellant alleging that deposits paid by clients to instructing attorneys’ firm as cover for counsel’s fees constitute an entrustment in terms of s 26 – alleged payment disputed - onus on claimant to establish that money had been entrusted on his behalf to the attorney –onus not discharged – appeal dismissed with costs.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Van Nieuwenhuizen AJ, sitting as court of first instance):

The appeal is dismissed with costs.

Smith AJA (Petse DP, Zondi and Mabindla- Boqwana JJA and Savage AJA concurring)

Introduction

- [1] This is an appeal against the judgment of the Gauteng High Court, Pretoria (the high court), dismissing the appellant’s, Mr L C Leysath’s, application for an order compelling the respondent, the Legal Practitioners’ Fidelity Fund Board of Control, to reimburse him a sum of R472 666, in terms of s 26(a) of the Attorneys Act 53 of 1979 (the Attorneys Act).
- [2] The appellant, a practising advocate, contended that the money was held in trust on his behalf by the attorneys’ firm, M F Martins Costa Attorneys (Costa Attorneys), as cover for his fees and had been misappropriated by the firm. The high court granted leave to appeal to this Court on the ground that s 17(1)(a)(ii) of the Superior Courts Act 10 of 2013 may be applicable since the appellant contended that the high court had impermissibly overturned binding legal precedent.
- [3] Although the Attorneys Act was repealed by the Legal Practice Act 28 of 2014 (the Legal Practice Act), which came into effect on 1 November 2018, the latter statute has no retroactive application. Because the facts which gave rise to the appellant’s claim occurred before 1 November 2018, the matter must be decided in terms of the provisions of the Attorneys Act.
- [4] The respondent is the successor in title of the Attorneys Fidelity Fund Board of Control, which ceased to exist on 1 November 2018. It was established in terms of s 61 of the Legal Practice Act and is responsible for the management and administration of the Legal Practitioners’ Fidelity Fund.

The

facts

[5] On 17 July 2018, the appellant lodged his claim with the respondent. After extensive correspondence between the parties, the respondent repudiated the claim on the grounds that the appellant had failed to establish that the funds had been entrusted to Costa Attorneys on his behalf and that his claim consequently did not fall within the ambit

of s 26(a) of the Attorneys Act.

[6] The appellant's claim comprised 51 of unpaid tax invoices that he had allegedly rendered to Costa Attorneys in respect of professional services performed by him for various clients during February to June 2018. He claimed that clients had paid funds to Costa Attorneys as cover for his fees and that those funds had been entrusted to the latter on his behalf, as contemplated by s 26(a). He further alleged that the managing partner, Mr Manuel Fernando Martins Costa (Mr Costa), misappropriated the monies, causing him to suffer pecuniary loss in the claimed sum.

[7] Mr Costa absconded after the Legal Practice Council (the Council) established that there was a deficit exceeding R30 million in the firm's trust account. The appellant first became aware of the misappropriation of the funds by Mr Costa on 9 July 2018, when Mr Wayne Teich, an attorney employed by Mr Costa told him about it. Mr Costa's estate has since been sequestered.

[8] The appellant claims that he has had a long professional relationship with Costa Attorneys, spanning over 10 years. Throughout this period, his accounts were paid within 97 days. He was aware of the firm's policy to the effect that it would only engage counsel once a client had paid sufficient funds into its trust account. He was present on

several occasions when clients were advised to provide cover for counsel's fees.

[9] In support of this assertion, he relied on the confirmatory affidavit of Ms Glynis Wall, who was, at all material times, employed by Costa Attorneys as Mr Costa's personal assistant. Although Ms Wall was able to confirm that she had on many occasions contacted clients prior to the appellant's engagement to secure funds, she could not verify how much was paid prior to the appellant's engagement because she did not have direct access to Costa Attorneys'

accounts and systems, 'such being tightly controlled by [Mr Costa]'.

[10] The appellant attached, to his founding affidavit, the tax invoices on which he had based his claim. He conceded that in seven of those matters, there was no proof that clients had paid the claimed amounts to Costa Attorneys, and that he was consequently not entitled to reimbursement in respect thereof. In respect of one of the matters, he asserted that a reduced amount was paid. As a result, his initial claim of some R537 475 was reduced to R472 666.

- [11] In respect of the rest of the invoices, he asserted that in each of those matters clients had informed him that they had made payments to Costa Attorneys as cover for his fees. He also attached copies of proof of payments by clients and provided the respondent with the respective clients' cellular phone numbers. He explained that he was constrained to follow that route since he was unsuccessful in his attempts to obtain the relevant information from the Council.
- [12] The appellant also relied on an affidavit that Mr Teich had deposed to, in order to assist the Council with the investigation into the affairs of Costa Attorneys. The affidavit was neither made in support of the appellant's founding affidavit nor was it a confirmatory affidavit. In any event, Mr Tiech stated that he worked mostly on conveyancing matters and had no access to any of the firm's records or books of account. The affidavit accordingly does not support either the appellant's or Ms Wall's assertions regarding the firm's briefing policy, nor does it shed any light on monies that clients paid as cover for counsels' fees. It appears that the affidavit was primarily intended to assist the Council in establishing the extent of the embezzlement by Mr Costa.
- [13] In addition, the appellant relied on affidavits filed by Mr Gary Abkin and Mr Richard Vaz behalf of their respective companies, who were both clients of Costa Attorneys. Mr Abkin made his affidavit in support of a charge of theft against Mr Costa, lodged on behalf of Norman and Gary Abkin Dunswart Properties (Pty) Ltd (the company). He stated that the company had paid R13 800 to Costa Attorneys as cover for the appellant's fees and a further R23 000 as cover for his fees in respect of drafting of heads of argument, as well as cover for Costas Attorneys' own fees. Mr Abkin also mentioned that the company had paid R240 000 to Costa Attorneys with instructions to hold the money in trust for attorneys' and counsel's fees. However, no mention is made of the appellant in regard to this payment.
- [14] Mr Abkin alleged that the company entrusted the sum of R276 800 to Costa Attorneys and that the company had suffered pecuniary loss because of Mr Costa's misappropriation of the funds. The company accordingly sought reimbursement of that amount.
- [15] In his affidavit, Mr Vaz, in his capacity as a director of Annsden Property Holdings (Pty) Ltd, stated that during May 2018 he had caused a sum of R100 000 to be transferred from his company to Costa Attorneys' trust account. Mr Vaz stated that these funds were for the 'specific and sole purpose of payment of the invoices of the two advocates', namely the appellant and Mr Ralph Kujawa, 'whose services had been utilised in litigation against a third party'. He stated, further that he had expressly made it known to Mr Costa that the payment was for that purpose only. The money was therefore not paid as cover for counsels' fees, but to settle the appellant's and Mr Kujawa's accounts in respect of services rendered by them. However, Mr Vaz did not specify what amount his company paid in respect of the appellant's fees and claimed that it was his company that suffered the pecuniary loss.

The findings of the high court

[16] Despite the respondent's unequivocal assertion that the appellant had failed to establish that clients paid deposits to Costa Attorneys as cover for his fees, the high court, nevertheless, decided the matter based on that assumption. It furthermore assumed that Mr Costa had committed theft in the course of his practice. The high court then embarked on an extensive discussion regarding the question whether monies paid by a client to a practising attorney as cover for counsel's fees in respect of services to be rendered, constituted an entrustment as envisaged in s 26.

[17] It found that the monies deposited by clients to ensure that there were sufficient funds available to pay counsel's fees were 'entrusted' to Costa Attorneys as envisaged by s 26. However, it reasoned that since the appellant did not deposit the money 'it can never be said that the money entrusted as deposits by Costa's clients was so entrusted on the [appellant's] behalf'. It reasoned that:

'It may well be that its purpose was to ensure that counsel's fees were covered, but it would be farfetched to suggest that deposits were paid with the sole purpose only of covering counsel's fees as a disbursement and not other disbursements, such as sheriff's costs, correspondent's fees, messenger's fees and the like, (including at least part of the attorney's own initial fees).'

[18] The high court concluded that an advocate's claim for outstanding fees lies against the attorney and not the client. If the attorney's estate was sequestrated, the claim lay against his or her insolvent estate. It followed, the court held, that the appellant did not suffer pecuniary loss due to the alleged theft of any monies paid by clients to Costa Attorneys. The appellant's loss, as indicated, arises due to Mr Costa's breach of the agreement between him and the appellant.

The appellant's submissions

[19] A substantial portion of the appellant's heads of argument focused on the criticism that the high court misconstrued the dispute between the parties. He submitted that the high court therefore decided the matter on a wrong basis and failed to deal with the real dispute between the parties. In this regard, the appellant contended that the respondent had accepted that the monies paid by clients to Costa Attorneys as cover for his fees constituted entrustments as envisaged by s 26. The only issue, according to him, that was still alive before the high court was the respondent's contention that the appellant had failed to prove that clients had in fact paid the monies to Costa Attorneys as cover for services rendered by him.

[20] In any event, so contended the appellant, in pronouncing on the issue of entrustment, the high court ignored the fact that there was a tripartite contractual relationship between counsel, client and the attorney, and erroneously found that there existed a debtor and creditor relationship between him and the instructing attorney. In doing so, the high court impermissibly overturned binding precedent that established that a client is contractually liable for counsel's fees, and that there is no 'hardened rule' that an attorney 'stands in' for counsel's fees. Those cases confirmed that funds held by an attorney in respect of counsel's

fees are in not held by the attorney as his or her own funds or in respect of services to be rendered by him or her, and they are held on behalf of counsel.[1]

- [21] In addition, the appellant submitted that the high court was wrong in refusing to follow the dictum in *Serrurier and Another v Korzia and Another*,^[2] to the effect that in the event of a client paying an attorney for counsel's fees and the attorney failing to pay counsel, 'the fidelity fund would in all probability pay the counsel'.
- [22] Regarding the adequacy of the proof of payments into Costa Attorneys' trust account, the appellant contended that the respondent had, in correspondence between the parties, set out the frame of reference and parameters in which information in support of the claim was to be relayed to it. In terms of that frame of reference, the respondent indicated that it required generic information and supporting documents, and to the extent that they were insufficient, it would request further information. The respondent did not challenge the supporting documents that he submitted to it nor did it request any further information or documents. Therefore, the respondent was estopped from challenging the adequacy of the evidence that the appellant had submitted in support of his claims. Consequently, the respondent impermissibly raised that issue for the first time in its answering affidavit, so the argument went.

Discussion

- [23] Section 26(a) of the Attorneys Act reads as follows:

'Subject to the provisions of this Act, the fund shall be applied for the purpose of reimbursing persons who may suffer pecuniary loss as a result of –

- (a) theft committed by a practising practitioner, his candidate attorney or his employee, of any money or other property entrusted by or on behalf of such persons to him or to his candidate attorney or employee in the course of his practice or while acting as executor or administrator in the estate of a deceased person or as a trustee in an insolvent estate or in any other similar capacity.'

- [24] The appellant was thus required to prove that: (a) he had suffered pecuniary loss; (b) by reason of theft committed by Mr Costa; (c) of money entrusted by or on the appellant's behalf; (d) in the course of Mr Costa's practice.

- [25] In *Industrial and Commercial Factors (Pty) Ltd v The Attorneys' Fidelity Fund Board of Control (Industrial and Commercial Factors)*,^[3] this Court held that not all monies paid into an attorney's trust account constitute an entrustment as envisaged by s 26. The term is also not limited to cases where the money or property was subject to a 'trust' in the legal technical sense of the word. The court further explained that '[i]f money is simply handed over to an attorney by a debtor who thereby wished 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'.

- [26] The court cited with approval, the dictum in *British Kaffrarian Savings Bank Society v Attorneys, Notaries and conveyancers Fidelity Gaurentee Fund Board of Control*,^[4] to the effect that entrustment comprises two elements namely: ‘(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 . . .’.
- [27] In the context of the factual matrix of this case, it is logical that the starting point must be whether the appellant has established, on a balance of probabilities, that clients paid money to Costa Attorneys as cover for his fees. This was also the main ground on which the respondent had joined issue with the appellant in its answering affidavit. The respondent stated, upfront, that its main reason for rejecting the appellant’s claim was that he was unable to discharge the onus of proving that the funds were entrusted to Costa Attorneys on his behalf.
- [28] The appellant has correctly submitted that the high court did not have any grounds for deciding the matter on the assumption that the funds were paid by Costa Attorneys’ clients as cover for his fees, since the respondent unambiguously denied that assertion in its answering affidavit. Moreover, as I have mentioned earlier, where a client’s payment to an attorney has been put in issue, the court must, as a first step, resolve that dispute. It is only once that issue has been determined that it becomes necessary to consider the other requirements mentioned in s 26, namely, the issues of entrustment and theft of the funds. The appellant’s assertion that the respondent conceded the issue of entrustment is misplaced. The appellant’s submissions in this regard were not factual in nature, but were legal conclusions without a factual foundation. In any event, the question as to whether the payments to Costa Attorneys constituted entrustments as contemplated by s 26 is a legal issue which must be determined by this Court – if and when it becomes necessary – and any concessions made by the respondent in this regard are of no moment.
- [29] Before I turn to consider the adequacy of the proof submitted by the appellant in support of his claims, it is necessary to emphasise that s 26 provides for reimbursement in respect of pecuniary loss suffered by victims of theft by an attorney in the course of his or her practice. It was therefore incumbent on the appellant to prove, on a balance of probabilities, the exact amounts that clients had paid to Costa Attorneys in respect of each of the matters in which he had rendered tax invoices and had sought reimbursement. In my view, this Court is not bound by an agreement between the respondent and the appellant that has the effect of relieving the latter of the obligation to prove the factors mentioned in s 26 on a balance of probabilities.

- [30] As I have indicated earlier, the appellant relies only on hearsay evidence in support of his assertion that clients paid money to Costa Attorneys as cover for his fees. In this regard, he stated that the relevant clients had informed him that they made payments to Costa Attorneys in respect of his fees. However, he did not obtain confirmatory affidavits from them, but merely provided the respondent with their contact details, expecting the latter to verify his claims.
- [31] In this regard, the affidavits of Ms Wall, or Messrs Abkin, Tiech and Vaz were of no assistance to the appellant. Ms Wall merely confirmed that Costa Attorneys had a policy to brief counsel upon receipt of funds by clients. It is common cause, however, that she was unable to shed any light on actual payments made by clients in respect of the appellant's fees. In any event, the existence of such a policy does not take the matter any further in the absence of sufficient proof that the relevant clients actually paid money to Costa Attorneys as cover for the appellant's fees.
- [32] Mr Abkin's affidavit also did not shed any light on specific amounts paid in anticipation of services to be rendered by the appellant. Instead, it concentrated on proving pecuniary loss suffered by his company.
- [33] Mr Tiech's affidavit also does not refer to any specific amounts paid to Costa Attorneys on behalf of the appellant. It was only proffered to establish that Mr Costa had misappropriated trust funds.
- [34] The appellant submitted that it would be in the interests of justice to admit the hearsay evidence. He argued that in considering whether to admit the hearsay evidence in terms of s 3 of the Law of Evidence Amendment Act 45 of 1988 (Law of Evidence Amendment Act)[5], the court must have regard to the following facts. First, he is a practising advocate and since he has conceded claims in respect of which he was unable to provide proof, there is no reason why the respondent should doubt the probity of his claims. Second, the respondent has chosen the frame of reference in respect of the evidence it required in support of the claims. Third, he did not have access to Costa Attorneys' trust account records and it would have been relatively easy for the respondent to access Costa Attorney's books of account in order to confirm whether the payments were made. And last, he has provided the respondent with the contact details of the respective clients, placing it in a position to confirm the veracity of his assertions.

Findings and order

- [35] The appellant's recourse to s 3 of the Law of Evidence Amendment Act is misguided. As a practicing advocate, he could not have been oblivious to the fact that references in his affidavits to what he had been told by Mr Costa's clients constituted inadmissible hearsay evidence. Thus, it behoved him to introduce such evidence properly, if he sought to rely on it, assuming that such an avenue was open to him. He apparently knew of the identities of the persons who, according to him, provided him with this information.

- [36] In my view, the established facts militate against the admission of the hearsay evidence. As I have mentioned earlier, the purpose of s 26 is to reimburse victims of theft by a practising attorney in respect of specific amounts entrusted to the attorney. The first hurdle a claimant relying on the section must therefore overcome is to prove that the monies were in fact paid to an attorney on his or her behalf. Since attorneys are by law required to keep proper books of account and records of trust ledgers, this is usually not a difficult hurdle for a claimant to surmount. This is so because the relevant receipt or trust ledger would invariably establish whether the funds were entrusted to the attorney. In a case such as this, where the claimant does not rely on the attorney's trust records but on the say-so of a client, the latter must file a confirmatory affidavit setting out the relevant information that would enable the respondent to determine whether the money had indeed been entrusted to the attorney. The appellant has failed to produce any such evidence.
- [37] He has instead relied on bald statements by clients to the effect that they had paid money to Costa Attorneys in respect of his and the attorneys' fees. However, he provided no details of the exact amounts that have allegedly been entrusted to Costa Attorneys on his behalf. While the appellant lamented about the 'arduous' task he was compelled to undertake in order to obtain the relevant information from clients, he did not explain why he was unable to procure supporting affidavits from the latter.
- [38] The further difficulty facing the appellant is that the hearsay evidence is in any event of doubtful probative value. For the reasons that I have set out above, I am of the view that even if the hearsay evidence were to be admitted, it would not assist the appellant in proving that clients paid specified sums of money to Costa Attorneys as cover for his fees.
- [39] The appellant also complained that he was hamstrung by the Council's unreasonable refusal to allow him access to the relevant records. However, even if the Council has unfairly refused him access to documents that he required to sustain his claim, that does not necessarily entitle him to reimbursement in terms of s 26. At best, he would be entitled to an order compelling production of the relevant documents in such circumstances.
- [40] Apart from all else, the respondent would be seriously prejudiced if the hearsay evidence were allowed. The respondent is a statutory body, whose powers to reimburse victims of theft by practising attorneys are carefully circumscribed by s 26. The section requires the respondent to reimburse affected persons in respect of specific amounts entrusted to an attorney and stolen by him or her in the course of practice. If the hearsay evidence were allowed, it would put undue pressure on the respondent to consider general allegations relating to unspecified amounts paid to and misappropriated by Mr Costa. I am therefore of the view that it would not be in the interests of justice to allow the hearsay evidence.

[41] This finding effectively means that the appellant has failed to overcome the first hurdle in order to place himself within the purview of s 26, namely to establish that clients entrusted specified sums of money to Costa Attorneys as cover for his fees. In the light of this finding, it is not necessary for us to decide whether any of the payments constituted entrustments as envisaged by s 26 or whether Mr Costa has misappropriated the funds in the course of his practice. The appeal must therefore fail.

[42] Regarding the issue of costs, the appellant contended that the principle enunciated in *Biowatch Trust v Registrar, Genetic Resources and Others*[6] is applicable since the matter required consideration of an important issue of public interest, namely the legal nature of the relationship between attorneys, advocates and clients. He submitted that the court should accordingly make no order as to costs if the appeal fails. I disagree. The appellant launched the proceedings to compel reimbursement of pecuniary loss that he allegedly suffered in respect of his unpaid tax invoices. He was thus clearly pursuing a personal financial interest. The matter accordingly does not raise any issues that are constitutional in nature; neither does it have any impact on the public interest.[7] Costs must therefore follow the result.

[43] In the result, I make the following order:

The appeal is dismissed with costs.

J E SMITH

ACTING JUDGE OF APPEAL

APPEARANCES

For appellant: L C Leysath

Instructed by: Gishen-Gilchrist Inc, Benoni

Symington De Kok Attorneys, Bloemfontein

For respondent: G Oliver

Instructed by: Brendan Muller Inc, Cape Town

Van Der Merwe & Sorour Attorneys, Bloemfontein

[1] See *Bertelsmann v Per* 1996

(2) SA 375 (T), at 381E-F; *Minister of Finance and Another v Law Society, Transvaal*

[1991] ZASCA 88; 1991 (4) SA 544 (A) at 556I – 557B.

[2] *Serrurier and Another v Korzia and Another* 2010

(3) SA 166 (W) para 17.

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- [3] Industrial and Commercial Factors (Pty) Ltd v The Attorneys' Fidelity Fund Board of Control 1997
- (1) SA (A) 136 at 143-144.
- [4] British Kaffrarian Savings Bank Society v Attorneys, Notaries and Conveyancers Fidelity Gaurentee Fund Board of Control [1978] 3 All SA 522 (E); 1978 (3) SA 242 (E).
- [5] In terms of s 3 of the Law of Evidence Amendment Act, a court has discretion to allow hearsay evidence if it is of the opinion that such evidence should be admitted in the interests of justice, having regard to the following factors: (a) the nature of the proceedings; (b) the nature of the evidence; (c) the purpose for which the evidence is tendered; (d) the probative value of the evidence; (e) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depend; (f) any prejudice to a party which the admission of such evidence might entail; and (g) any other factor which should, in the opinion of the court, be taken into account.
- [5] In terms of s 3 of the Law of Evidence Amendment Act, a court has discretion to allow hearsay evidence if it is of the opinion that such evidence should be admitted in the interests of justice, having regard to the following factors:
- (a) the nature of the proceedings;
 - (b) the nature of the evidence;
 - (c) the purpose for which the evidence is tendered;
 - (d) the probative value of the evidence;
 - (e) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depend;
 - (f) any prejudice to a party which the admission of such evidence might entail; and
 - (g) any other factor which should, in the opinion of the court, be taken into account.
- [6] Biowatch Trust v Registrar Genetic Resources and Others [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).
- [7] Mkhathswa and Others v Mkhathswa and Another [2021] ZACC 15.

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