

SOUTH AFRICA / JUDGMENT

Probest Projects (Pty) Ltd v The Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund (20761/2014) [2015] ZASCA 192 (30 November 2015)

[2015] ZASCA 192

COURT

Supreme Court of Appeal

BEFORE

Cachalia, Shongwe, Tshiqi, Swain, Baartman

CASE / FILE NUMBER

20761/2014

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 20761/2014

In the matter between:

PROBEST PROJECTS (PTY) LTD

APPELLANT

and

THE ATTORNEYS, NOTARIES AND

CONVEYANCERS FIDELITY GUARANTEE FUND RESPONDENT

Neutral citation: Probest Projects (Pty) Ltd v The Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund (20761/2014)

[2015] ZASCA 192 (30 November 2015)

Coram:

Cachalia, Shongwe, Tshiqi and Swain JJA and Baartman AJA

Heard:

19 November 2015

Delivered: 30 November 2015

Summary: Theft of trust funds by attorney – s 48(1)(a) of the Attorneys Act 53 of 1979 – when claimant became aware of theft – stated case in terms of Rule 33(1) of the Uniform Rules of Court – status of evidence agreed upon – drawing of inferences from agreed facts as to when claimant became aware of theft.

Order

On appeal from: Western Cape Division of the High Court, Cape Town (Mantame J, Hlope JP and Weinkove AJ concurring) sitting as court of appeal.

The appeal is upheld with costs and the order of the full court is set aside and substituted with the following:

‘The appeal is upheld with costs and the order of the court a quo is set aside and substituted with the following:

Judgment

Shongwe et Swain JJA (Cachalia and Tshiqi JJA and Baartman AJA concurring):

- [1] In this matter the appellant Probest Projects (Pty) Ltd (Probest) instituted proceedings before the Western Cape Division of the High Court (Irish AJ) (the trial court) for payment of the amount of R9 100 000 by the respondent, the Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund (the Fund). The claim was based upon the theft of these funds by an attorney, Mr Izak Minnie, to whom they had been entrusted.
- [2] The central issue before the trial court and in this appeal is the time when the representatives of Probest became aware of the theft of the funds by Mr Minnie, or when Probest by the exercise of reasonable care, should have become aware of the theft in terms of s 48(1)(a) of the Attorneys Act 53 of 1979 (the Act).
- [3] These issues were the subject of a special plea which was successfully raised by the Fund in answer to the claim of Probest for payment in terms of s 26(a) of the Act. It was alleged that Probest had failed to institute action within a period of three months of becoming aware of the theft in terms of s 48(1)(a) of the Act. An additional special plea that there was no entrustment of the funds to Mr Minnie, was dismissed by the trial court and is not the subject of a cross-appeal by the Fund. Leave was subsequently granted by the trial court to Probest to appeal to the full court of the Western Cape Division of the High Court (the full court), on 20 September 2013. The appeal was dismissed with costs on 15 August 2014 and it comes before this court as a result of special leave having been granted.

[4] In order to place the issues in context, it is necessary to briefly set out the historical background. This evidence was common cause between the parties as a result of an agreement concluded in terms of Rule 33(1) of the Uniform Rules of Court, before the commencement of proceedings in the high court.

[5] This agreement provides as follows:

‘1. The parties hereby agree upon a written statement of facts in the form of a special case for the adjudication of the court, as follows:

- a) The contents of the documents and record of evidence in bundle A constitute the correct factual position of what occurred between the parties inter se and between the parties and Mr Izak Minnie and be accepted as evidence thereof.
- b) The only issues to be adjudicated are the two special pleas by defendant, as contained in paragraphs 1 and 2 of defendant’s

plea.’

The ‘record of evidence’ consisted of the transcript of the inquiry held at the offices of the Law Society of the Northern

Provinces on 23 September 2010, into the claim of Probest at which Mr William Annandale, the representative of Probest, as well as Mr Minnie gave evidence under oath. Affidavits by them also formed part of the agreed evidence. The Fund accepted that it bore the onus to prove the factual basis for the special pleas.

[6] Mr Annandale stated that he had known Mr Minnie for almost ten years and that at the beginning of January 2009, Mr Minnie told him that in his capacity as a conveyancer, he had come across developments in which clients of his were having difficulty in reselling units, that had been built and sold. The purchasers were unable to obtain mortgage bond financing, or had their bond approvals withdrawn because of the banking crisis. Mr Minnie said he would be able to assist Probest in purchasing various units at bargain prices, which would be good investments. Probest accordingly transferred funds into the trust account of Mr Minnie. The amounts transferred were intended to cover the prices of the units together with transfer costs by Mr Minnie. Mr Minnie indicated he would handle all of the administration and identify the properties to be purchased.

[7] Mr Annandale stated that he trusted Mr Minnie as he had handled Probest’s affairs very competently over the years. Mr Minnie

had to prepare the documentation for the transfer of these properties to Probest. He stated he was waiting for this documentation and pressured Mr Minnie for it, but Mr Minnie said there were delays in getting rates clearance certificates from the municipalities. Mr Annandale accepted this explanation, because he had experienced similar delays. In response to this pressure in April 2009, Mr Minnie said that he would finalise the transactions, or pay the money back, if he did not.

- [8] In June or July 2009, Mr Minnie told Mr Annandale that the delay was caused by his books of account being behind, and whilst they were being sorted out, he would furnish security. The security that was furnished was an acknowledgment of debt signed by Mr Minnie on 23 July 2009, as well as suretyships from three companies and a trust, all of which he said he controlled. None of this documentation was however placed before the high court. Thereafter, Mr Minnie signed an Agreement and Option to Purchase on 4 August 2009, which was referred to during the inquiry. The chairman requested Mr Minnie to produce this document which then formed part of the documents before the high court.
- [9] The option recorded that in terms of the acknowledgment of debt signed by Mr Minnie on 23 July 2009, and the suretyships signed by certain named companies securing the indebtedness of Mr Minnie, various properties would be transferred to Probest by these companies, in part settlement of their surety obligations to Probest. This document described Probest as care of Attorneys Viljoen, French and Chester. Mr Annandale said he had engaged the services of these attorneys for this purpose. Mr Annandale stated that problems arose when he was advised by these attorneys at the end of October, that there were caveats registered against these properties, so they could no longer be used as security. Mr Minnie stated that the object was for these properties to stand as security and then be sold to Probest, as value for the money received. He told Probest that although there were bonds over the properties, there was sufficient equity in the properties. At that stage the properties were not subject to any caveats and could be transferred. Mr Minnie stated that it was due to the actions of other creditors, that caveats were subsequently registered against these properties. Mr Minnie stated that 'the bubble burst' when third parties laid claim to these properties, which forced him to confess to Mr Annandale and admit that there was a trust deficit.
- [10] The evidence of Mr Annandale and Mr Minnie at the inquiry as to their interaction during this period, as well as the time when Mr Annandale became aware that Probest's money had been stolen, has to be considered against this background.
- [11] Mr Annandale said he only became concerned at the end of October when the firm of attorneys he had engaged, advised him of the caveats

registered against the properties and that there was something wrong. He was only informed in November that Mr Minnie's firm had been liquidated; and when he asked Mr Minnie about this, he replied there was no problem as he was now acting independently as an attorney, 'Izak Minnie Attorney' and it had all been sorted out. Until he found out the funds had been stolen, he was

reassured by Mr Minnie that he was busy sorting everything out. Mr Minnie at no stage admitted he had stolen the money. Even when Mr Minnie furnished him with an affidavit to advance his claim against the Fund, Mr Minnie only said that he did not have Probest's consent to use the funds for his own benefit.

[12] Mr Minnie said that he only told the representatives of Probest during October or November that he had misappropriated their money. He never told them this when he offered them security and denied that he had confessed to them at this stage. It was only when the problems he faced became clear that he told them. He agreed with the evidence of Mr Annandale that he only heard in December, that there was a specific problem. He stated that Probest was not aware of any financial problems until the end of 2009.

[13] The evidence of Mr Annandale and Mr Minnie was that Probest only acquired knowledge that Mr Minnie had stolen the funds at the end of November or December 2009, because that is when Mr Minnie told Mr Annandale. The terms of the stated case were that it was agreed between the parties that the record of evidence was 'the correct factual position of what occurred between the parties'. The parties accordingly agreed that the evidence of Mr Annandale and Mr Minnie as to when Mr Annandale heard and Mr Minnie told him that the money had been stolen, was at the end of November or December.

[14] The crucial inquiry accordingly is whether there is other evidence falling within the ambit of the evidence agreed upon by the parties,

which is sufficiently reliable and cogent, to enable a court to find on a balance of probabilities, that the Fund has proved that both Mr Annandale and Mr Minnie have not told the truth. It would have to be demonstrated that other evidence proved that Mr Annandale to the knowledge of Mr Minnie, knew about it at an earlier stage.

[15] The high court concluded that 'the only reasonable inference to be drawn from the evidence set out above is that, by 23 July 2009, the plaintiff's directors knew that their money was gone from the trust account where it ought to have been'. This was the date when Mr Minnie furnished the acknowledgment of debt to Probest.

[16] The evidence relied upon by the high court was the following:

- a) The explanation by Mr Minnie that the funds could not be paid back immediately because his firm's accounting records were behind and had been seized by the Law Society.
- b) The furnishing of security by Mr Minnie in the form of immovable properties that Probest would acquire from companies, which were unknown to Probest.
- c) By 23 July 2009 Probest had engaged another firm of attorneys through whom the initial offer of security from Mr Minnie was made.

[17] Certain inferences were then drawn by the high court from these facts. It was inferred that it was extraordinary and unacceptable that Probest's directors believed that the money could not be paid out simply because Mr Minnie's books were behind. If they did believe this, why

enter into the arrangement to acquire immoveable properties in lieu of repayment? A reasonable director would have contacted the Law Society to find out whether the release of the funds could be expedited. Accordingly, so the reasoning went, it was improbable that the true nature of the misappropriation would not have been established very quickly. As regards the role of Probest's other firm of attorneys, the high court reasoned it was inconceivable that they would have accepted Mr Minnie's explanation for being unable to pay. They would have advised Probest of the unlikelihood of this. The full court endorsed the reasoning of the trial court.

[18] A distinction, must be drawn between inferences and assumptions. As stated in *S v Naik* 1969 (2) SA 231 (N) at 234C-D:

'If the court, on the evidence before it, were to come to that conclusion, it would be making an assumption rather than drawing an

inference, for the facts necessary for the drawing of an inference are lacking.'

In addition, as Lord Wright observed in *Caswell v Powell Duffryn Associated Collieries Ltd* 1939 (3) All ER 722 at 733:

'Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. . . . But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.'

As noted, the facts agreed upon by the parties included the evidence under oath of Mr Annandale and Mr Minnie, that Mr Annandale only acquired knowledge of the theft at the end of November or December

2009. The trial court as well as the full court, however, ignored this evidence and the status it held, which the parties had conferred upon it by agreement. It must be emphasised that it was agreed that it constituted 'the correct factual position of what occurred between the parties inter se and between the parties and Mr Izak Minnie and be accepted as evidence thereof'.

[19] In the face of this direct evidence under oath by Mr Annandale and Mr Minnie, the conclusion drawn by the high court amounts to an assumption, conjecture or speculation and not a valid inference. In addition, when the fact in issue (which in this case is knowledge by Mr Annandale, that Mr Minnie had stolen Probest's money), is sought to be proved by the use of circumstantial evidence (as set out in para 16), then the inference sought to be drawn (ie knowledge by Mr Annandale), must be consistent with all of the proved facts[1]. In addition, the inference sought to be drawn in favour of the Fund (which bears the onus to prove Mr Annandale's knowledge of the theft), must be the most likely of the probable inferences[2]. The inference drawn that Mr Annandale had knowledge of the theft by 23 July 2009, is not consistent with all of the proved facts and not the most likely of the probable inferences, to be drawn on all of these agreed facts.

[20] Insofar as the assumption made by the high court that Probest should have become aware of the theft by the exercise of reasonable care, by contacting the Law Society, this is contradicted by the evidence of Mr Annandale. He said he was told by Mr Minnie he was busy sorting out his books, he offered security for them to relax and assured him that everything was in order. According to Mr Annandale's evidence he believed Mr Minnie. Again the parties agreed this evidence constituted the correct factual position of what occurred between Mr Annandale and Mr Minnie.

[21] In the result both the trial court and the full court erred in finding that the Fund had discharged the onus of proving that Probest had knowledge of the theft by 23 July 2009. On the evidence of Mr Annandale and Mr Minnie, Probest only acquired this knowledge by the end of November 2009. It is common cause that the Fund was advised of the theft by way of a letter dated 20 November 2009. The provisions of s 48(1)(a) of the Act, were accordingly complied with.

[22] In the result the trial court and the full court erred in upholding the special plea in favour of the Fund.

[23] We accordingly make the following order:

The special plea is dismissed with costs'.

J B Z Shongwe

Judge of Appeal

K G B Swain

Appearances:

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[1] R v Blom 1939 AD 188 at 202-203.

[2] Govan v Skidmore 1952 (1) SA 732 (N) at 734C-D; Joel Melamed & Hurwitz v Cleveland Estates 1984 (3) 155 (A) 164G-165C.

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