

SOUTH AFRICA / JUDGMENT

Rodel Finance Services (Pty) Ltd v Attorneys Fidelity Fund (16833/2007) [2010] ZAWCHC 407 (24 May 2010) [2010] ZAWCHC 407

COURT

Western Cape High Court, Cape Town

BEFORE

Traverso

CASE / FILE NUMBER

16833/2007

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IN

THE HIGH COURT OF SOUTH AFRICA (WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 16833/2007

In

the matter between:

RODEL
FINANCE SERVICES (PTY) LIMITED
.....Plaintiff
and
THE
ATTORNEYS' FIDELITY FUND
.....Defendant

JUDGMENT

: 24 MAY 2010

TRAVERSO, DJP:

[1] In this matter the plaintiff ("Rodel") seeks reimbursement from the defendant, the Attorneys Fidelity Fund, ("the Fund") in terms of Section 26 of the Attorneys' Act, No. 53 of 1979 ("the Act"). Rodel does so as a person who has allegedly suffered pecuniary loss as contemplated in Section 26. In order to succeed in its claim Rodel must establish the following:

1.1. that theft was committed;

1.2. by a practicing attorney;

1.3. of money entrusted by or on behalf of Rodel to the attorney;

1.4. that the money was so entrusted to the practitioner in the course of his practice.

[2] It is not in dispute that theft was committed by a practicing attorney of money paid over into his Trust Account, as a result of which Rodel suffered a pecuniary loss. The only issue that remains is the question whether the money was entrusted by or on behalf of Rodel to an attorney.

[3] The claim is in respect of two transactions. The relevant facts in respect of the two claims (the Solomons and the Pedro claims

respectively) are to all intents and purposes identical and I will accordingly only deal with one the Solomons matter.

[4] The attorney in question is a certain Mr. Geduld ("Geduld"), who practiced in George under the name and style of Geduld, Wells & McCallum. He devised a fraudulent scheme, which will be outlined hereunder:

4.1. Mr. and Mrs. Solomons were the coowners of Erf 2603 George. They wanted to borrow R550 000,00 from a bank against the security of their property in order to carry out home improvements. Standard Bank had agreed to grant them a mortgage loan. The net bond proceeds would be R544 358,00.

4.2. Geduld was the attorney attending to the registration of the bond. Registration was expected to occur on 20 February 2007.

4.3. Pending the registration of the bond, Mr. and Mrs. Solomons wanted to raise bridging finance of R430 000,00.

4.4. Rodel is a "bridging finance company". Inter alia, it lends money to people who are raising mortgage bonds on their property, and bridges the time gap between the lodging of the bond and the paying out of the proceeds thereof by the bank on registration. In the normal course finance is sought from the plaintiff by his/her attorney. In this case the attorney, Geduld,

submitted the signed loan agreement together with proof that they have been instructed to register the bond to the plaintiff. It was an application for bridging finance in the amount of R430 000,00.

4.5. The following day Mr. and Mrs. Solomons ostensibly signed Rodel's standard discounting agreement relating to bond transactions. The effect of the agreement was that Mr. and Mrs. Solomons sold their right to the net bond proceeds to Rodel. Accordingly Rodel acquired the right to claim R544 358,00 from Standard Bank pursuant to the mortgage loan agreement. By signing the agreement Mr. and Mrs. Solomons ceded and transferred to Rodel their right, title and interest in the net bond proceeds. 4.6. They nominated the trust account of Geduld as the account in which Standard Bank could deposit the bond proceeds. Rodel, by virtue of the cession notified Standard Bank that the net bond proceeds had to be deposited into Geduld's trust account on its

behalf. 4.7. The "Purchase Price" for the acquisition by Rodel of the net bond proceeds was required to be paid by Rodel to the Solomons in two instalments. The "First Instalment was R430 000,00 which was the amount which Mr. and Mrs. Solomons required as bridging finance. 4.8. The practical effect of the provisions of the agreement regarding the payment of the two instalments was that Mr. and Mrs. Solomons would immediately receive R430 000,00 from Rodel (being the required bridging finance) and that on registration of the bond Rodel would recoup the said sum together with a discounting charge equal to 0.133% per day on R430 000,00 from date of payment of the initial instalment to date of registration of the bond. All other elements of the sale of the net bond proceeds would effectively be settled by setoff on registration of the bond. [5] On 16 January 2007 Rodel paid the sum of R430 000,00 into Geduld's trust account. On the same day Rodel sent Geduld confirmation of this payment, describing it as payment of the first instalment payable in terms of the discounting agreement, and stating that the sum of R430 000,00 was repayable on "transfer" (meaning, obviously, registration of the bond) together with a discounting fee of R571,90 per day (being 0.133% of R430 000,00) from date of payment (ie 16 January 2007) to date of registration of the bond. [6] What Rodel would then have expected is that against registration of the bond Rodel would receive back R430 000,00 plus the discounting fee. However, in late January 2007 Rodel became suspicious that something might be seriously amiss with its transaction with Geduld. Further enquiries confirmed this to be the case. [7] It is common cause that the transaction presented by Geduld to Rodel on 15/16 January 2007 was (unbeknown to Rodel at the time) bogus. There was no genuine bond transaction. [8] It is common cause that the account into which Rodel transferred the sum of R430 000,00 was a trust account as contemplated in Section 78(1) of the Act.

4.5. The following day Mr. and Mrs. Solomons ostensibly signed Rodel's standard discounting agreement relating to bond transactions. The effect of the agreement was that Mr. and Mrs. Solomons sold their right to the net bond proceeds to Rodel. Accordingly Rodel acquired the right to claim R544 358,00 from Standard Bank pursuant to the mortgage loan agreement. By signing the agreement Mr. and Mrs. Solomons ceded and transferred to Rodel their right, title and interest in the net bond proceeds.

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[7] It is common cause that the transaction presented by Geduld to Rodel on 15/16 January 2007 was (unknown to Rodel at the time) bogus. There was no genuine bond transaction.

[8] It is common cause that the account into which Rodel transferred the sum of R430 000,00 was a trust account as contemplated in Section 78(1) of the Act.

[9] Geduld has since been sequestrated, and that hence Rodel cannot recover any money from him. That is what gave rise to this action. [10] At the hearing, Mr. Morkel ("Morkel") was the only witness to testify. He is employed by Rodel as Operations Director. At the time of this transaction he was a credit manager. Morkel testified that Rodel received an application for bridging finance from Geduld, Wells & McCallum on behalf of their clients. The application was supported by a copy of a bond instruction from Standard Bank instructing Geduld, Wells & McCallum Attorneys to register a mortgage bond in favour of the bank for R550 000,00.

[11] On the strength hereof Rodel forwarded the Discounting Agreement and certain other ancillary documents to Geduld. These documents were faxed back to Rodel and were, on the face of it, duly signed by the relevant parties. [12] Morkel subsequently confronted Geduld who admitted that he had been running a fraudulent scheme whereby he would apply for bridging finance on behalf of people without instructions to do so. [13] According to Morkel, Rodel, in the course of its business has no difficulty if an attorney's trust account should be nominated to deposit the funds in, because as far as they are concerned, the money has been paid into the account it could only be used for the benefit of the client. [14] The issue for determination is therefore whether or not the payment of the monies into Geduld's trust account constituted entrustment as envisaged by Section 26(a) of the Attorneys' Act, No. 53 of 1979 ("the Act"). [15] Section 26(a) of the Act provides: "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 candidate attorney or his employee, or 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; and" [16] Two cases need to be considered, namely Provident Fund for the Clothing Industry v. Attorneys, Notaries & Conveyancers Fidelity Guarantee Fund, 1981(3) SA 539 (W) (the "PFC/" case) and Industrial & Commercial Factors (Pty) Ltd v. Attorneys Fidelity Fund Board of Control, 1997(1) SA 136 (A) (the "/CP case). [17] In the PFCI case an attorney (Kavin) purported to represent a client Gafin in seeking a loan of R120 000,00 from PFCI against the security of a mortgage bond. Purporting to act on Gafin's instructions, Kavin directed that the loan proceeds be paid to

certain third parties and a balance into his trust account. The loan application was bogus and the mortgage bond which Kavin purported to pass over Gafin's property in favour of PFCI was subsequently set aside at Gafin's instance. PFCI sued the Fund in terms of Section 26 of the Act. [18] In dismissing PFCI's claim, Nicholas, J (as he then was) reasoned as follows: 18.1

"Entrustment comprises two elements, namely:

- (a) to place a person in the possession of something;
- [9] Geduld has since been sequestrated, and that hence Rodel cannot recover any money from him. That is what gave rise to this action.
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- [11] On the strength hereof Rodel forwarded the Discounting Agreement and certain other ancillary documents to Geduld. These documents were faxed back to Rodel and were, on the face of it, duly signed by the relevant parties.
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[15] Section 26(a) of the Act provides:

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[16] Two cases need to be considered, namely Provident Fund for the Clothing Industry v. Attorneys, Notaries & Conveyancers Fidelity Guarantee Fund, 1981(3) SA 539 (W) (the "PFC/" case) and Industrial & Commercial Factors (Pty) Ltd v. Attorneys Fidelity Fund Board of Control, 1997(1) SA 136 (A) (the "/CP case).

[17] In the PFCI case an attorney (Kavin) purported to represent a client Gafin in seeking a loan of R120 000,00 from PFCI against the security of a mortgage bond. Purporting to act on Gafin's instructions, Kavin directed that the loan proceeds be paid to

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[18] In dismissing PFCI's claim, Nicholas, J (as he then was) reasoned as follows:

18.1 "Entrustment comprises two elements, namely:

- (a) to place a person in the possession of something;
 - (b) subject to a trust in terms whereof money will be administered for the benefit of others.
- 18.2. Nicholas, J found that the payments made by PFCI to the third parties never came into Kavin's possession and could thus not have been entrusted to him. 18.3. Although the learned Judge found that the balance that was paid into Kavin's trust account did come into Kavin's possession he remarked as follows: "It may be accepted that by their directing that the cheque of R32 238,36 be made out in favour of his trust account, Kavin represented that he would be receiving the money on behalf of Gafin. 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 obligation under the contract of loan. They believed that it was a payment made to Kavin as the duly authorised agent of Gafin." [19] Mr. Rogers contended that this passage is applicable to the facts of the present case. In that case Nicholas, J concluded that the Provident Fund has not shown that it had "entrusted the money to Kavin. [20] The same question was considered by the Supreme Court of Appeal (or Appellate Division as it then

was) in the ICF case, but the majority came to the conclusion that the money was in fact "entrusted" to the attorney. The Court did not, however, find that the PFCI case was wrongly decided. Grosskopff, JA, for the majority, found that the facts in the ICF case were materially different to those in the PFCI case. The Court further found that in considering whether money has been entrusted to an attorney, the situation must be judged in the light of the intention of the person who pays the money into the attorney's trust account. ICF was not simply making a payment in accordance with what it understood to be the directions of the borrower. ICF itself insisted that the money be paid into Mare's Trust Account. Grosskopff, JA emphasised *inter alia*, that ICF's representative believed that under its agreement with Branken, ICF had to pay Branken and nobody else, and that Mare did not profess to be receiving money as Branken's agent. He stressed that if money is 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 entrustment. The majority approved the proposition that the mere fact that money is paid into an attorney's trust account does not mean that the money was "entrusted in terms of the Act.

(b) subject to a trust in terms whereof money will be administered for the benefit of others.

18.2. Nicholas, J found that the payments made by PFCI to the third parties never came into Gavin's possession and could thus not have been entrusted to him.

18.3. Although the learned Judge found that the balance that was paid into Gavin's trust account did come into Gavin's possession he remarked as follows:

"It may be accepted that by their directing that the cheque of R32 238,36 be made out in favour of his trust account, Gavin represented that he would be receiving the money on behalf of Gafin. 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 obligation under the contract of loan. They believed that it was a payment made to Gavin as the duly authorised agent of Gafin."

[19] Mr. Rogers contended that this passage is applicable to the facts of the present case. In that case Nicholas, J concluded that the Provident Fund has not shown that it had "entrusted the money to Gavin.

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- [21] On the facts the Court was therefore satisfied that ICF had insisted on "entrusting" the money to Mare and that payment to Mare was not payment to Branken's authorised agent.
- [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 (Solomons) 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 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. [23] This distinguishes the facts of this case from the facts of the ICF case where ICF's representative, Flax, believed that under its agreement with Branken, ICF had to pay Branken and nobody else. Mare also did not say to Flax that payment into his trust account was occurring at Branken's request, and Mare did not profess to be receiving the money as Branken's agent. [24] In the circumstances, on the particular facts of this case, I am not persuaded that the money was entrusted to Geduld as envisaged by Section 26. The plaintiff's claim must therefore fail. [26] In the circumstances the plaintiff's claim is dismissed with costs. [27] The wasted costs occasioned by the postponement on 18 February 2010 will be costs in the cause. TRAVERSO, DJP
- [21] On the facts the Court was therefore satisfied that ICF had insisted on "entrusting" the money to Mare and that payment to Mare was not payment to Branken's authorised agent.
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- [26] In the circumstances the plaintiff's claim is dismissed with costs.
- [27] The wasted costs occasioned by the postponement on 18 February 2010 will be costs in the cause.

TRAVERSO, DJP

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