

SOUTH AFRICA / JUDGMENT

# Rodel Financial Services (Pty) Ltd v Legal Practitioners Fidelity Fund (42693/2019)

## [2020] ZAGPJHC 238 (7 October 2020)

[2020] ZAGPJHC 238

## COURT

South Gauteng High Court, Johannesburg

## BEFORE

I Opperman

## CASE / FILE NUMBER

42693/2019

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REPUBLIC OF SOUTH

AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1)

## REPORTABLE:

NO

(2)

OF

INTEREST TO OTHER JUDGES: NO

(3)

REVISED.

Case No: 42693/2019

In the matter between: -

RODEL FINANCIAL SERVICES (PTY) LTD

Applicant

and

LEGAL

PRACTITIONERS FIDELITY FUND

Respondent

This

judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for

hand-down is deemed to be 10h00 on 7 October 2020

**JUDGMENT**

INGRID OPPERMAN J

**Introduction**

[1] In this application the applicant seeks an order directing the respondent to pay it R265 791.03 stolen by an attorney from his firm's trust account. The applicant had deposited the funds with the attorney in the circumstances outlined below. The theft is not contested, what is in issue is whether the facts of the matter match the requirements of the statute governing the respondent's obligation to pay claims. Before turning to the statutes in question it is necessary to outline certain contextual matters. The facts will then be measured against the statutes.

**Contextual Matters**

[2] The applicant's business includes the providing of funding to persons who have concluded agreements to sell fixed property. Once a seller has sold a property and is entitled to be paid the purchase price they have a prospect of receiving funds. Those funds normally only flow on registration of transfer. The bank, which holds the mortgage over the property, normally enjoys a right

to be paid before anyone else when a property is transferred. The extent to which the price to be paid to the seller exceeds the amount due to the mortgagor is what one might call 'the proceeds of the sale'. This is the phrase used by the applicant in this matter in its agreements with its clients.

[3] As is often the case in property transactions the local authority is owed or anticipates being owed municipal rates in respect of the property and unless these are paid, the sale cannot be registered, the property cannot be transferred in the office of the Registrar of Deeds from seller to purchaser. The price to be paid by the purchaser does not get paid until that moment. The seller has to provide for the payment of the rates due, or likely to fall due, to the local authority as an essential feature of most successful property transfers. The absence of a rates clearance certificate issued by the municipality can hold up the transfer and keep separate the buyer from the property and the seller from the 'proceeds of the sale'. A person who has

sold a property is obliged and incentivised to provide funding for the payment of the rates as part of the preparation of the documents

to be processed in the deeds registry for registration of transfer. This they are generally required to do by depositing the necessary

amount to the trust account of the conveyancer who is to attend on the Registrar of Deeds to give effect to the transfer.

[4] Like most people who provide funding to others the applicant expected something in return. The applicant endeavours by the terms of its agreements to secure itself against the risk of non-payment of the funds made available to the seller to get the rates clearance certificate. Before making the funds available to the seller of a property the applicant takes cession of the proceeds of the sale as collateral for the funding that it pays to the seller. Why does the seller require funding if they are expecting to receive the proceeds of the sale? It seems to be a matter of having the cash on hand to pay the expenses that need to be settled before the 'proceeds of the sale' become available. The applicant has the cash, the seller does not, so the seller cedes to the applicant the right to receive 'the proceeds of the sale' as collateral for the seller repaying the applicant the short-term funding made available by it, plus the mark-up on that sum.

[5] The sums involved to settle rates due to the local authority are often substantial from the point of view of individuals' budgets. Individual sellers of property thus sometimes, as in this case, turn to entities such as the applicant for assistance in raising the funds required to get the rates clearance certificate issued so the sale can go through the Deeds Office. The conveyancer attending to the transfer may hold the funds for this and other purposes in trust until the clearance certificate has to be paid for and may make the payment to the local authority from the funds deposited into trust by the seller, or, as in this case, by someone, like the applicant, who provided funds to assist the seller. The payment to the municipality results in it issuing the

rates clearance certificate which provides confirmation to the Registrar of Deeds responsible for registering the transfer of the

property into the name of the buyer in the Deeds Office that the local authority has been or will be settled. The applicant providing

funds to the seller in this way helps the seller clear the legal obstacle of rates clearance en route to realising their right to receive the 'proceeds of the sale'.

[6] The estate agent who has been the effective cause of the sale also stands in line for a share of the proceeds of the sale. Depending on their agreement with the seller, the estate agent entitled to commission is customarily paid out of the proceeds of the sale once these funds have been received by the conveyancer from the purchaser (or, more commonly, from the institution who provides mortgage finance to the purchaser for their own, new bond which is to be registered against the title deeds of the property simultaneously with the cancellation – on payment – of the seller's bond).

[7] As may be seen from the above outline of day-to-day fixed property transactions the conveyancer (who is also an attorney) plays an important paymaster role in the process, collecting and distributing funds to those with interests in the sale. Conveyancers operate trust accounts. These are distinct from their business accounts. Where a client wants money held in trust by the attorney for a third person, in this case the local authority, and instructs the attorney to hold the money in trust, then the moneys which the client deposits into the

attorney's trust account are generally referred to as trust monies. Whether they are deserving of protection under the statutes in question in this matter is another question.

- [8] Monies paid with the required mutual intention of the depositing client and the receiving attorney are protected by the Legal Practitioner's Fidelity Fund ('the Fund'), the respondent in this application, from the all-too frequently occurring risk of the attorney stealing trust money from the attorney's trust account. Whether the requisite mutual intention was present here is another question.

#### Requirements

- [9] The Fund is a statutory one created and designed to protect attorneys' clients from this risk of defalcation of trust monies. It is a narrowly circumscribed risk that the client enjoys protection against by operation of the statute. Not all monies paid to attorneys are covered by the Fund's mandate as set out in the Legal Practice Act 28 of 2014 ('the Legal Practice Act') which prescribes its powers and duties, in particular what types of claims to pay and what conditions have to be satisfied before the Fund is obliged to pay. The issue in this matter is whether the applicant's claim falls within those statutory parameters that result in the Fund being obliged to pay the applicant, or not.
- [10] Certain facts must be present and proved for the Fund to react positively to a claim against it, in other words, to pay the claim. The necessary facts include, in broad terms, that the recipient of the funds be an attorney, that the funds have been deposited into the attorney's trust account, that the attorney stole them and that the claimant has made proper endeavours to recover the funds from the attorney. In broad terms, and before turning to the wording of the legislation in more detail, if any of these facts are missing from the narrative of the claimant's claim, the claimant cannot succeed against the Fund.

#### Common Cause or Undisputed Facts

- [11] There was an attorney involved in this matter, Mr Makhetha, who practiced in Bloubastrand, Randburg under the name and style of Makhetha Inc, as a conveyancer. As appears from the conveyancing transactions traversed in this matter, there was a pattern of the applicant depositing funds to Makhetha Inc's trust account for onward payment to municipalities for rates clearance certificates to enable sales of properties to proceed to finality. Mr Makhetha stole the money from his trust account and has been struck off the roll of attorneys. There would thus at first blush appear to be satisfied three of the four broadly defined requirements set out above.
- [12] The fourth, the contentious, and the decisive, requirement is whether the applicant made proper endeavours to recover from the attorney before presenting its claim to the Fund. The precise content of this duty is a matter of legislation and as there are two acts of parliament potentially of application, this is a contested issue.

[13] For a decision on the facts of this matter, a number of assumptions may be made in favour of the applicant, obviating the necessity to decide many of the thorny issues debated by the counsel in their heads of argument, and still arrive at a

**conclusion.**

Excussion – the Attorneys Act or the Legal Practice Act

[15] The Attorney's Act would by application of first principles apply to the applicant's claim because it was the law at the time of the claim arising and at the time of the claim being lodged with the Fund. However, applicant contends that the conduct required by the law of a claimant trying to recover against the attorney before claiming against the Fund has changed to the new standard under the new Act, so, although applicant's conduct might have fallen short of the law at the time of the claim arising, it no longer does..

[16] This argument demands that I consider the provisions of section 49 of the Attorneys Act. The wording of the section is as follows:

49. Actions against fund.—(1) No action shall without leave of the board of control be instituted against the fund unless the claimant has exhausted all available legal remedies against the practitioner in respect of whom the claim arose or his or her estate and against all other persons liable in respect of the loss suffered by the claimant.
- (2) Any action against the fund in respect of any loss suffered by any person as a result of any theft committed by any practitioner, his or her candidate attorney or employee, shall be instituted within one year of the date of a notification directed to such person or his or her legal representative by the board of control informing him or her that the board of control rejects the claim to which such action relates.
- (3) In any action against the fund all defences which would have been available to the person against whom the claim arose, shall be available to the fund.
- (4) Any action against the fund may, subject to the provisions of this Act, be brought in the High Court or a magistrate's court having jurisdiction within the area of jurisdiction of which the cause of action arose. (emphasis provided)

[17] As is clear from the underlined part of the repealed section, a claim could not be paid by the Fund unless and until the claimant had exhausted the legal remedies (excussed) the dishonest attorney or the Fund consented to that not being done before a claim could be made against the Fund. The claimant had to have exhausted all available legal remedies against the attorney in respect of whom the claim arose or his estate before turning to the Fund for recompense.

[18] The corresponding section of the Legal Practice Act>[1] reads as follows:

‘79. Actions against Fund.—(1) The Fund is not obliged to pay any portion of a claim which could reasonably be recovered from any other person liable.

- (2) The Fund may pay all reasonable expenses and legal costs incurred by a claimant in exhausting his or her rights of action against another person.
- (3) The Fund may, in its discretion, before deciding whether to make full payment of a claim or any part of it, make an interim payment to the claimant of a portion of the amount for which his or her claim has been admitted.
- (4) Any action against the Fund in respect of loss suffered by any person as a result of theft committed by a legal practitioner referred to in section 84 (1), candidate attorney or employee of any such legal practitioner or juristic entity, must be instituted within one year of the date of a notification directed to that person or his or her legal representative by the Fund, informing him or her that

the Fund rejects the claim to which the action relates.

- (5) In any action against the Fund all defences which would have been available to the person against whom the claim arose, are available to the Fund.
- (6) Any action against the Fund may, subject to the provisions of this Act, be brought in any court having jurisdiction in respect of the claim.’ (emphasis provided)

[19] As is clear from the underlined part of the section, the Fund is not obliged to pay any portion of a claim which could reasonably be recovered from any other person liable.

What did reasonable recovery entail?

[20] What could be reasonably recovered on the facts of this case? What steps constitute reasonable efforts at recovery. And upon whom does the onus rest to show what could be reasonably recovered from the dishonest attorney or his estate?

[21] As is always the case, the overall onus to make out a case rests on the applicant to prove all elements of their case. Those elements are the requirements set out in the statute. This must, in my view, on a proper interpretation of the statute and in the light of the principles laid down in *Pillay v Krishna*, [2] place the onus on the applicant to aver facts in its founding papers that show that despite reasonable efforts on its part, it could not recover from the attorney.

[22] This, it seems to me is the appropriate approach and onus in this case should be understood as meaning the obligation to satisfy the essential elements of the statute in the founding papers. A good reason for this is that the claimant against the Fund knows what circumstances arose to give rise to its claim and what it did to recover from the attorney who stole the funds before turning its eye to the Fund. It should hence make out that case at the outset. The approach to be adopted in such cases is that outlined

by Miller J in *Hart v Pinetown Drive-In Cinema (Pty) Ltd*[3]:

‘At the hearing [counsel] for the respondent, took in limine the point that the petition and supporting affidavit and documents contained insufficient information to sustain the relief claimed. He contended that for the purposes of deciding this objection the Court would look only at the petition and supporting documents and not at all at the respondent's affidavit. It was accepted by [counsel] for the applicant, that the objection fell to be decided on the sufficiency or otherwise of the material contained in the petition [notice of motion and founding affidavit] and its annexures, the respondent's [answering] affidavit having been filed, in effect, as a plea-over in the event that the objection be over-ruled. (Cf. *Taylor v Welkom Theatres (Pty.) Ltd. and Others*, 1954 (3) SA 339 (O) at

p. 345); *Aspek Pipe Co. (Pty.) Ltd. and Another v Mauerberger and Others* 1968 (1) SA 517 (C) at p. 519).’

[23] The learned Judge accepted the correctness of this approach which has been acknowledged in subsequent cases. After examining the allegations contained in the founding affidavit Miller J concluded:

‘It must be borne in mind, however, that where proceedings are brought by way of application, the petition is not the equivalent of the declaration in proceedings by way of action. What might be sufficient in a declaration to foil an exception, would not necessarily, in a petition, be sufficient to resist an objection that a case has not been adequately made out. The petition takes the place not only of the declaration but also of the essential evidence which would be led at a trial and if there are absent from the petition such facts as would be necessary for determination of the issue in the petitioner's favour, an objection that it does not support the relief claimed is sound. For the reasons I have stated herein, I am of the opinion that there is a dearth of such facts as, if true, would support the allegations of unfair and oppressive conduct in the management of the company's affairs and the objection in limine must accordingly be upheld.’

[24] The policy objectives of both the Attorneys Act and the Legal Practice Act, appear to be the same, to oblige the claimant to recover from the dishonest attorney before turning to the Fund. Successful recovery of some money at least, if not the whole of the claim, would diminish the load on the Fund by whatever amount could be recovered from the dishonest attorney, and protect the Fund from bogus claims.

[25] A secondary policy benefit that might arise from litigation between former client and dishonest attorney is that the adversarial situation would likely flush out dubious relationships. It is regrettably not unheard of for attorneys and their clients to enter into commercial relationships, which fall short of the ethical and even the legal standards expected of the profession. To require the client to institute proceedings in cases such as this, to recover from the thieving attorney, holds the positive potential of ventilating the relationship to the open air of the forensic arena and expose to daylight such shadows as may exist in that relationship. There is no suggestion in this matter that shadowy features were to be found in the relationship between applicant and Mr Makhetha here, I merely

draw attention to the policy considerations as I consider to be served by the legislature's requirement that persons in the position of the applicant herein recover from the attorney before suing the Fund, particularly where the applicant evidently has sufficient means to engage attorneys, as it evidently did here.

[26] There is no doubt that there was co-operation between the attorney and the applicant in this matter. The applicant was able to provide funding against a secure source of recovery by taking cession of (purchasing) the proceeds of the sale and was, as the terms of the undertakings given by the attorney reveal, protected by the attorney from the risk of, for example, the seller 'taking the file away' from the attorney. Clearly, it was in the interests of the applicant to keep the seller with the attorney who had given the undertakings to look after applicant's interests. Applicant was served by preventing the client from going

to some other attorney who had not given those applicant-favouring undertakings. Quite how ethical it was for the attorney to give such undertakings is another matter. The attorney was obviously able to help sellers get their rates certificates issued by the local authority, get his transfers through and his conveyancer's fees paid. It was manifestly not a 'once off' relationship either, in this case there were at least three such transactions. It is unknown how many such transactions preceded the ones in issue. A robust recovery process would perhaps have served the purpose of revealing details which the applicant has not revealed in its papers before the Court, and in this way tied the Court's hands from determining on a more complete conspectus of the facts whether the claimant's activities here to recover from the attorney were reasonable.

[27] From the amount involved, the apparent resources of the applicant, the sophistication of the applicant in matters legal and its access to legal services, it does not seem reasonable for it to have simply accepted that the attorney could pay back nothing once he had been struck off the roll and for applicant to decide on the facts revealed in the papers not to pursue him by legal action.

[28] The statute which governed the obligation to make recovery against the attorney at the time of the claim being lodged with the Fund was section 49 of the Attorneys Act, quoted above. Nineteen months later the Fund declined the claim. By that time the Attorneys Act had been repealed and the Legal Practice Act was in force. The corresponding section of the Legal Practice Act, section 79 quoted above, serve the same purpose, and a purposive interpretation must be made. The applicant has sought to make much of the difference between the obligations imposed by the two Acts. While conceding that the obligation under the Attorneys Act bound it to excuss the attorney, applicant argues that that obligation was replaced by the corresponding section of the Legal Practice Act ie that the latter Act had retrospective operation.

[29] That would appear at first blush to be an unusual proposition because of the general principle that statutes generally do not have retrospective operation. People are entitled to expect that the law that will be applied to them, is the law as it existed at the time of their action, and that the arm of the law is not going to reach back in time to render that which

was illegal, legal, or vice versa, sowing uncertainty and injustice. However, argues the applicant, this principle is not universally true if one bears in mind the difference between substantive and procedural rights and obligations. On the applicant's case the obligation to recover from the attorney was purely procedural, so, applicant contends the later section, section 79 of the Legal Practice Act governs its claim and its conduct must be measured against that new standard (a less stringent one perhaps) because it is procedural, and procedural provisions, more so than substantive ones, submits applicant, can operate despite the presumption against retrospective operation of legislation. By this means the applicant seeks to escape the fact that it did not exhaust all its remedies against the attorney as was required by the earlier section 49 of the Attorneys Act.

- [30] The distinction would not appear to me to be merely procedural, but I do not decide this as it is unnecessary for me to do so on these facts and to venture into analyses of whether prior judgements of this Court on the subject are right or wrong is not required for a decision on this matter.
- [31] Legal steps to recover stolen monies could be framed as a breach of contract or as a claim in delict, to say nothing of the remedies available under the criminal law. Civil proceedings could be initiated by motion or action. In this case no legal proceedings whatsoever were initiated by the applicant against the attorney. I do not consider it reasonable for the applicant to have done as little as it did to recover from the attorney in this case before training its sights on the Fund. It did no more than address letters to the attorney and the Law Society. Though its attorneys were preparing to issue summons it did not institute action or motion proceedings against the attorney in the Magistrates' or High Court, it went, with barely a nod in the direction of either statute, old or new, straight for the Fund.
- [32] The Court ought to know what became of the funds defalcated? What assets does the attorney have? Would an urgent sequestration not have provided a basis for an enquiry into such questions? Why should the Fund, a fund created by the interest earned on trust accounts deposited into trust by attorneys' clients, be spared the benefit of applicant's rolling out the armoury of the legal recovery processes? The Fund is not a conventional insurer where under a contract of indemnity the insured may be insured against their own negligence. The Fund, as its statute prescribes, responds only to intentional theft of trust monies and the conditions

for recovering against it are not to be equated with simply filing a claim against a private insurance company. This is legislation

which parliament has passed with policy considerations in mind and the Court ought to look to the purpose of the legislation when

interpreting and applying it within the constitutional framework of our law.

- [33] To permit clients whose funds have allegedly been stolen by their attorneys from their trust funds to recover against the Fund without more, is contrary to both the old and the new Acts. It is not consonant with the policy of either the old or the new Act. The obligation to recover against the attorney is an important one from a policy point of view.
- [34] Nonetheless, I am prepared to assume, without deciding, that the Legal Practice Act, applies to this claim. In other words, the lighter test in regard to recovery from the thieving attorney as a pre-requisite for an action against the Fund, may be used for purposes of argument, without the point being decided by this Court in this case. The test imposed by the Legal Practice Act will thus be applied to the applicant's claim. Applicant need not, on this assumption, have demonstrated in its founding papers any more than that its claim could not reasonably be recovered from any other person liable for it. Did applicant do this? Did it show, as it was obliged to do, that its claim could not reasonably be recovered from any other person liable, such as Mr Makhetha?

What did the applicant do in relation to recovering from this thieving attorney, and could it be said to have shown that, as against him, its claim - or any part of it - could not reasonably have been recovered?

- [35] The applicant's founding affidavit makes no reference to the requirement of either section 49 of the Attorneys Act or to section 79 of the Legal Practice Act. This lacuna alone would probably provide reason enough to dismiss the application in a manner that amounts to absolution from the instance so that, if so advised, the applicant could fix up the gap in its papers and launch again once it had done what the law requires it to do to recover against the attorney. The fact that the Fund gave section 47 of the Attorneys Act as the reason for declining the applicant's claim, did not entitle the applicant to ignore its obligation to show that its claim could not reasonably be recovered from any other person liable. Only when that is proved, could the Fund be said to be obliged to pay. It is a statutory precondition imposed by section 79 of the Legal Practice Act that applicant contends should govern its claim. Yet applicant did not produce evidence in its founding papers that this statutory requirement of its claim had been met. In this it erred. It was an error that was pointed out by the Fund in its answering papers[4] and applicant endeavoured to rectify it in reply.
- [36] Applicant annexed to its replying affidavit six letters in which it and the thieving attorney were dealing with the moneys lost. The correspondence reveals that the applicant had agreed to accept payments of R10 000 per month from the attorney to settle the claim. That plainly was not honoured. We do not know why that settlement was not reduced to an acknowledgement of debt that could have been used to obtain provisional sentence or summary judgement. The correspondence also reveals that in April 2017 applicant was in the process of having summons issued against the thieving attorney. It was advised by the Law Society that the attorney had been struck off the roll in June 2017 and that seemed to put an end to all of applicant's endeavours to recover from the thieving attorney.

- [37] The question is, if one assumes in favour of the applicant that it was entitled to rely on the content of its replying affidavit, did it on this evidence prove that its claim could not reasonably be recovered from any other person liable? There is no averment as to whether a deeds search was made to establish whether any fixed property of any value was registered in the name of the attorney. There is no averment that a search was done of the Companies and Intellectual Property Register to establish whether the attorney has any directorships of any companies. If such companies had been unearthed, the applicant could have used the provisions of section 26 of the Companies Act 2008 to obtain information regarding any shareholding in the company(ies), and investigations could have been carried out to establish whether those companies had any assets in the form of fixed property or trading businesses. An action instituted, as applicant had indicated it was in the process of, could have resulted in subpoenas to unearth the attorneys' firm's bank accounts and possibly some of the attorney's own bank accounts. Whether he had a motor vehicle capable of providing value in the event of attachment and execution is a question not posed nor answered by the applicant. It has simply accepted that once the attorney has been struck off the roll that none of these steps should have been taken. Is that reasonable? The attorney is not a young man. He was born in 1968. He was a qualified attorney, notary and conveyancer. It is not inconceivable that he could have accumulated an estate sufficient to match the value of the applicant's claim herein, or at least a substantial part of it. In my view it cannot be said to have been reasonable for the applicant to have abandoned all avenues and turn to the Fund after such pathetic nods in the direction of recovering from the attorney.
- [38] I have tried to cast light on what I consider to be some of the reasons for the requirement that claimants do what is reasonable to recover from the dishonest attorney before turning to the Fund. On the papers before me the requirement of neither the repealed nor of the new Act was met. The applicant has not demonstrated on its papers that it did all that was reasonable to recover from the attorney that which was stolen. This failure is fatal to its claim against the Fund.

#### Order

[39] I accordingly grant the following order:

The application is dismissed with costs.

I OPPERMAN

Judge of the High Court

Gauteng Local Division, Johannesburg

Counsel for the applicant: Adv A Saldulker

Instructed by: Le Roux Vivier Attorneys

For the respondent: Adv G Oliver

Instructed by: Brendan Müller Incorporated

Date of hearing: Set down for 31 August 2020, by agreement between the parties, no oral submissions were made.

Date of Judgment: 7 October 2020

[1] Commencement date 1 November 2018

[2] 1946 AD 946 at 954 and 956

[3] 1972 (1) SA 464

[4] Paragraph 19 – Caselines 009-7

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