

SOUTH AFRICA / JUDGMENT

Soft Coffee (Pty) Limited v Legal Practitioner's Fidelity Fund Board (A84/2023) [2024] ZAGPPHC 887 (6 September 2024)

[2024] ZAGPPHC 887

COURT

North Gauteng High Court, Pretoria

BEFORE

Strijdom, Molopa-Sethosa, Mooki

CASE / FILE NUMBER

A84/2023

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

Case

Number: A84/2023

Heard

on: 31 July 2024

Delivered

on: 6 September 2024

(1)

REPORTABLE: YES/ NO.

(2)

OF INTEREST TO OTHER JUDGES: YES/NO.

(3)

REVISED.

DATE:

6.09.2024

SIGNATURE

In

the matter between:

SOFT

COFFEE (PTY)

LIMITED

Appellant

and

THE

LEGAL PRACTITIONER'S FIDELITY FUND BOARD

Respondent

This

judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the

Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines.

The date for

handing down is deemed to be

JUDGMENT

STRIJDOM J

- [1] This is an appeal against the dismissal of Claim A of appellant, "Soft Coffee", with costs, by this Court, per Acting Justice Khashane Manamela on 5 April 2022. (Claim B was determined in favour of the plaintiff in the action and there is no cross-appeal.)
- [2] Leave to appeal was granted to this Court by order of the Supreme Court of Appeal dated 20 February 2023, after such leave was refused by the Court a quo.
- [3] The appellant was a plaintiff in an action brought in this Court. The appellant claimed reimbursement from the respondent as defendant for the pecuniary loss it had suffered as a result of theft of money committed by a practising attorney.
- [4] The appellant's case was that the money had been duly entrusted by it to the attorney in the course of his practice, as is required by s26(a) of the Attorneys Act 53 of 1979 ("the Act"). Section 26(a) 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;..."

- [5] The Legal Practice Act, 28 of 2014, “the Legal Practice Act” came into effect on 1 November 2018, thereby superseding the Attorneys Act, 53 of 1979, “the Attorneys Act”, and all rights and obligations that vested in the Attorneys Fidelity Fund on 1 November 2018 continued as rights and obligations of the Legal Practitioners Fidelity Fund.
- [6] When the Legal Practice Act superseded the Attorneys Act on 1 November 2018, the former Attorneys Fidelity Fund Board of Control, which was established by section 27(1) of the Attorneys Act, ceased to exist.
- [7] After the Attorneys Fidelity Fund Board of Control ceased to exist, all assets, rights, liabilities, and obligations which on 1 November 2018, vested in the former Attorneys Fidelity Fund Board of Control, vested in the Legal Practitioner’s Fidelity Fund Board, “the Board”, in terms of section 61 of the Legal Practice Act.
- [9] The theft which gave rise to the action with which this appeal is concerned occurred before 1 November 2018. Accordingly, the provisions of the Attorneys Act, not the Legal Practice Act, find application in the instant matter, specifically sections 26, 47(1)(g) and 47(5)(b) and (c) thereof.
- [10] The respondent’s case is that it is not liable to appellant for the loss of money made available as loans by the appellant, as the Attorneys Act contained the following applicable provisions:

10.1 Section 47(1)(g) thereof provided as follows:

“The fund shall not be liable in respect of any loss suffered ... by any person as a result of theft of money which a practitioner has been instructed to invest on behalf of such person ...”

10.2 Section 47(5) provided as follows:

“For the purposes of subsection (1)(g), a practitioner must be regarded as not having been instructed to invest money if he or she is instructed by a person –

- (a) to pay the money into an account contemplated in section 78(2)A, if such payment is for the purpose of investing such money in such account on a temporary or interim basis only pending the conclusion or implementation of any particular matter or transaction which is already in existence or about to come into existence at the time that the investment is made and over which investment the practitioner exercises exclusive control as trustee, agent or stakeholder in any fiduciary capacity;
- (b) to lend money on behalf of that person to give effect to a loan agreement where that person, being the lender –
 - (i) specifies the borrower to whom the money is to be lent;
 - (ii) has not been introduced to the borrower by the practitioner for the purpose of making that loan; and

(iii) is advised by the practitioner in respect of the terms and conditions of the loan agreement; or

- (c) to utilise money to give effect to any term of a transaction to which that person is a party, other than a transaction which is a loan, or which gives effect to a loan agreement that does not fall within the scope of paragraph (b).”

[11] It was submitted by the respondent that Dadic Attorneys, through Stephens –

11.1 specified the borrowers to whom the money was to be lent; and

11.2 introduced the borrowers to the tender for the purpose of making that loan.

[12] Accordingly, two of the requirements for section 47(5)(b) of the Attorneys’ Act, for that section to avail the lender are not met.

[13] It was further argued by the respondent that section 47(5)(b) does not avail the lender as it excludes transactions that are loans to which section 47(5)(b) does not apply.

[14] The following facts are common cause between the parties that:

14.1 Mr Davor Vid Dadic (“Dadic”) was a duly admitted attorney and conducted practice under the name and style of “Dadic Attorneys”;

14.2 Dadic Attorneys conducted a trust account practice;

14.3 Andrew Stephens (“Stephens”) was an employee of Dadic Attorneys;

14.4 Appellant had since 2011/2012 utilised the services of Dadic Attorneys in various matters;

14.5 During 2017 Dadic and Stephens alternatively Stephens contrived a fraudulent scheme to misappropriate monies from appellant. In this regard:

14.5.1 Dadic and Stephens alternatively Stephens provided appellant with two fraudulent Loan Agreements, the borrowers being described as Atomic Transport CC (“Atomic”) and Flake Ice Services (Pty) Limited (“Flake Ice”). Clause 3.1 of both Loan Agreements provided that appellant undertook to advance the sums to the trust account of Dadic Attorneys who will in turn advance the capital amount free of deduction/set-off to Atomic and Flake Ice upon signature of all requisite documents enabling appellant to register a mortgage bond over a specific immovable property;

14.5.2 Dadic and Stephens alternatively Stephens misrepresented to appellant that the loan agreements had been prepared by Dadic Attorneys, that the loan agreements had been signed on behalf of Atomic and Flake Ice, that the loan agreements were valid, that the amounts to be loaned pursuant to the purported loan agreements would be paid into the trust account of Dadic Attorneys and thereafter advanced to Atomic and Flake Ice upon signature of all requisite documents to enable appellant to register a mortgage bond over the specific immovable properties.

14.5.3 The misrepresentations were made with the intention of inducing appellant to pay into the trust account of Dadic Attorneys the sum of R3 million pursuant to the purported loan agreement concluded with Atomic and the sum of R5 million pursuant to the purported loan agreement concluded with Flake Ice. To this end, Stephens in the course of his employment by Dadic Attorneys presented the appellant with the following:

- (a) in respect of Atomic, a bogus offer to purchase and a bogus Deed of Transfer of the immovable property;
- (b) in respect of Flake Ice, a bogus signed Power of Attorney to register a mortgage bond, a bogus Covering Mortgage Bond and a bogus Deed of Transfer of the immovable property to Flake Ice.

14.5.4 The misrepresentations by Dadic and Stephens alternatively Stephens to appellant were false because the loan agreements are bogus.

14.5.5 The purpose of the misrepresentations was to induce appellant to conclude the bogus loan agreements and to pay the amounts purportedly loaned into the trust account of Dadic Attorneys.

14.6 Pursuant to the bogus Loan Agreement with Atomic, appellant paid the total sum of R3 million into the trust account of Dadic Attorneys.

14.7 Pursuant to the bogus Loan Agreement with Flake Ice, appellant paid the total sum of R5 million into the trust account of Dadic Attorneys.

14.8 Dadic and Stephens alternatively Stephens misappropriated the aforesaid amounts of R3 million and R5 million.

14.9 The loss suffered by appellant is the sum of R6.7 million comprising the amounts stole, less the sum of R1.3 million which Dadic and Stephens alternatively Dadic further alternatively Stephens paid to appellant purportedly in respect of interest received on the bogus Flake Ice Loan Agreement.

[15] Mr Domenico Picone (“Picone”) gave evidence on behalf of appellant at the trial in regard to appellant’s Claim A. His evidence was not contested (he was not cross-examined and respondent did not proffer any evidence to the contrary.

[16] Picone’s evidence can be summarised as follows:

16.1 Dadic Attorneys would render services to appellant by ensuring that the requisite security for the monies loaned to Atomic and Flake Ice in the form of mortgage bonds, was in place.

16.2 Dadic Attorneys was only entitled to disburse the loan amounts paid by appellant into its trust account to the purported borrowers (Atomic and Flake Ice) when the requisite security was in place. It was envisaged that Dadic Attorneys would charge for their services to be rendered.

[17] The core issues in this appeal are as follows:

17.1 Respondent's defence that the fund is in accordance with Section 47(1)(b) of the Attorneys Act not liable in respect of any loss suffered by any person as a result of money which a practitioner has been instructed to invest on behalf of such person. (Emphasis added).

17.2 Whether appellant entrusted the loan amounts misappropriated to Dadic Attorneys. (Emphasis added).

[18] In dismissing Claim A, the Court a quo found as follows:

18.1 The objective evidence in terms of the written loan agreements, including clause 3.1 in both the loan agreements for Atomic and Flake Ice does not reflect nor suggest any involvement of Dadic Attorneys in respect of the monies received and subsequently stolen, other than just the use of the trust account of Dadic Attorneys.

18.2 Any work done by Dadic Attorneys had no bearing on the payment of the monies in terms of the loan agreement.

18.3 The transactions were clearly loans in respect of which neither section 47(5)(b) or 47(5)(c) of the Attorneys Act avail the lender, Soft Coffee.

18.4 Despite the bogus nature of the transactions, the only viable inferences from the nature of the respective transactions are that Soft Coffee did not intend an entrustment, but that the amounts concerned be paid over to Atomic and Flake Ice, as borrowers (fictitious as they may be) as loans. Dadic Attorneys did not receive the monies concerned as entrustments, but as loans.

18.5 In this matter, the determination of whether the funds were to be invested or not, as envisaged by section 47(1)(g) of the Attorneys Act, can only be made by taking at face value what the underlying transactions were. What has to be primarily determined is the nature of the instructions and mandate given to the practitioner.

[19] The facts in this appeal are on all fours with the SCA Judgement in the matter of The Attorneys Fidelity Fund Board of Control v Prevence Capital (Pty) Ltd[1] ("the Prevence Judgment").

[20] In the Prevence judgment the principal issue was whether the Board could rely on the statutory exception provided for in Section 47(1)(g). The court found that:

20.1 "the first formidable obstacle for the Board is that, objectively observed, there was never any question of an investment being made. Mr Weide, in soliciting the funds from Prevence and receiving them into his trust account had but one objective namely, theft thereof. The funds were not received as an investment or for any other legitimate purpose."

[21] I conclude that the respondent cannot rely on Section 47(5) of the Act because this is not a case of Mr Stephens being instructed to make an investment or where the Attorney was merely a bystander or conduit.

[22] It is common cause that Mr Stephen's intention was to steal the said money. The funds were not received into his trust account as an investment or for any other legitimate reason.

[23] The only remaining issue in this matter is whether the appellant had "entrusted" any money to the attorney Stephens.

[24] The Afrikaans text of the Attorneys' Act, which is also the signed one, provides as follows in s 26(a):

"Behoudens die bepalings van hierdie Wet, word die fonds aangewend ten einde persone te vergoed wat geldelike verlies ly weens –

(a) diefstal gepleeg deur 'n praktiserende praktisyn van geld of ander goedere deur of namens sodanige persone toevertrou aan hom ... in die loop van sy praktyk ..." (Emphasis added).

[25] Die Verklarende Handwoordeboek van die Afrikaanse Taal (HAT) 2nd ed (1992), defines "toevertrou" as "met vertroue opdra aan, oorgee aan die sorg van ..."

[26] Die Verklarende Afrikaanse Woordeboek, Labuschagne, Eksteen, 8th ed (1992) gives the following definition of "toevertrou":

"1. In vertroue gee. 2. In iemand se sorg laat; ter veilige bewaring gee ..."

[27] It was decided in *Industrial & Commercial Factors (Pty) Ltd v The Attorneys Fidelity Fund Board of Control*[2] that:

"The word 'toevertrou' does therefore not imply that the handing over of the money or property concerned has to be subject to a trust in the technical legal sense of the word. Moreover, the legislature appreciated that the word 'trust' has a technical meaning, and where it intended to convey that meaning it used the word 'trust' in the Afrikaans text. This appears from s 27(2) of the Act which reads as follows:

'(2) Die fonds word deur die beheerraad in trust gehou vir die doeleindes in hierdie Hoofstuk vermeld.'" (Emphasis added).

Had it been the intention of the legislature to give "entrust" the technical legal meaning of placing money or other property with an attorney subject to a trust, it would have used an expression such as "in trust aan hom gegee" in the Afrikaans text of s 26(a)."

[28] In my view the appellant has shown a sufficient element of entrustment to bring it within the ambit of s 26(a).

[29] In order to determine whether the money was "entrusted by or on behalf of" the appellant to the respondent it is necessary to consider what the appellant's intention was when the monies were deposited into the trust account of Dadic Attorneys.[3]

- [30] The court a quo erred in not taking into account the undisputed evidence of Picone that the loan amounts would be paid into the trust account of Dadic Attorneys who would hold same in trust and only pay same over to the purported borrowers when the mortgage bonds over the immovable properties had been registered.
- [31] The court a quo misdirected itself in finding that the only viable inference to be drawn is that the appellant did not intend an entrustment and that the monies were to be paid over to Atomic and Flake Ice.
- [32] In view of all these considerations I conclude that it has been established that the money was not invested and that it was entrusted by the appellant to Stephens in the course of his practice, as is required by s 26(a).
- [33] In the result, the following order is made:
1. The appeal in respect of the appellant's Claim A in the summons is upheld and the first paragraph of the order of the court a quo dated 5 April 2022 (Order (a)”) is set aside.
 2. Order (a) as referred to in paragraph 1 hereof is replaced with the following order:
“(a) In regard to Claim A, the Defendant is directed to pay the First Plaintiff the sum of R6 700 000.00, together with interest thereon at the prescribed mora rate of 10.25 % per annum from the date of service of summons on the Defendant on 29 November 2019 to date of payment, as well as the costs of suit inclusive of the costs of two counsel when employed.”
 3. The Respondent is directed (in addition to the costs order in paragraph 2 hereof) to pay the Appellant's costs of suit in the appeal, such costs to be:
 - 3.1 inclusive of the costs of two counsel where so employed, one on preparation, appearance and argument at the hearing being senior counsel; and
 - 3.2 on Scale C in respect of all work and attendances of both counsel as engaged on or after 12 April 2024 and as contemplated by Rule 68(A) of the Uniform Rules of Court.

J.J. STRIJDOM

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

I agree

L.M. MOLOPA-SETHOSA

O. MOOKI

CASE NO: A84/2023 HEARD ON: 31 July 2024 FOR THE APPELLANT: ADV. SIMON SC ADV. J.L. KAPLAN INSTRUCTED BY: Ian Levitt Attorneys FOR THE RESPONDENT: ADV. G.A. OLIVER INSTRUCTED BY: Brendan Muller Incorporated DATE OF JUDGMENT: 6 September 2024

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- [1] (917/17) [2018] ZASCA 135 (28 September 2018)
- [2] (690/94) [1996] ZASCA 84; 1997 (1) SA 136 (SCA); [1996] 4 All SA 295 (A) (30 August 1996); 029-85 to 029-144 (Caselines)
- [3] See *Industrial & Commercial Factors (Pty) Ltd v Attorneys Fidelity Fund Board of Control* [1996] ZASCA 84; 1997 (1) SA 136 (A)
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