

**IN THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG DIVISION, PRETORIA**

- |     |                                     |
|-----|-------------------------------------|
| (1) | REPORTABLE: NO                      |
| (2) | OF INTEREST TO OTHER JUDGES: NO     |
| (3) | REVISED: YES                        |
| (4) | Signature: _____ Date: 10 June 2024 |
| (5) | Signature: _____ Date: _____        |

In the matter between:

**SEAL A DEAL CC t/a MAKHAFOLA KHAFLINS TRANSPORT**      **1<sup>st</sup> Applicant**

**TAU DANIEL MAKHAFOLA**      **2<sup>nd</sup> Applicant**

**AND**

**ATTORNEY FIDELITY FUND BOARD**      **1<sup>st</sup> Respondent**

**LEGAL PRACTICE COUNCIL**      **2<sup>nd</sup> Respondent**

*This judgment is handed down electronically by circulation to the parties' representatives by email, publication on the CaseLines System and release to SAFLII. The date for hand down is 10 June 2024.*

**JUDGMENT**

ERASMUS AJ

**INTRODUCTION**

1. At first glance of the matter, it seems as if the matter turns on a narrow issue of whether the first and/or second Respondents are liable for the amount claimed by the first and second Applicants.

2. During March 2021 the first and second Applicants approached the Court for relief in terms of which they, in summary, are seeking an order that: -

2.1 The first and second Respondents are ordered to make payment in the amount of R1 126 401.27;

2.2 Interest on the said amount at the rate of 11.27% from 30 September 1999 to date of payment; and

2.3 That the first and second Respondents be ordered to pay the costs of this application on the scale as between attorney and own client.

3. The claim by the Applicants pertains to the alleged entrustment of monies which the Applicants allege were entrusted and paid into the trust account of Snijman and Mullen Attorneys over the span of three payments during 1999. Attorney Martin Louis Barnard ("*Barnard*") was the sole practitioner of the firm at the time in question. The monies were allegedly kept in a trust bearing account for the purposes of a sale agreement. The sale agreement did not materialise. They are now reclaiming the amount that was allegedly entrusted to Barnard.

4. The claim in this case therefore arose prior to the commencement of the Legal Practice Act<sup>i</sup> ("*the Legal Practice Act*").

5. The first and second Applicants indicated that the matter should be decided under the provisions of the Attorneys Act<sup>ii</sup> ("*the Attorneys Act*"), read together with the provisions of section 39 (2) of the Constitution, 1996 ("*the Constitution*"). The Attorney's Act has been repealed by the Legal Practice Act, which came into operation on 1 November 2018.

6. The Legal Practice Act does not have retroactive effect, and claims against the Legal Practitioner's Fidelity Fund ("*the LPFF*") arising before 1 November 2018, are to be determined in terms of the Attorneys Act. This is not a contentious issue.

7. Therefore, since the claim by the first and second Applicants arose prior to the commencement of the Legal Practice Act, the claim is to be dealt with substantively in terms of the provisions of the Attorneys Act. This, again, is not disputed by the first and/or second Respondents.

8. Both the Attorney Fidelity Fund Board (the first Respondent) and the South African Legal Practice Council (the second Respondent) opposed the claim. The first and second Respondents dispute the factual and legal premises underpinning the relief sought by the first and second Applicants. I will later herein deal with the basis of opposition by the respective Respondents.

9. This is in a nutshell the case before me. As stated, it seems like a crisp issue.

10. There are, however, several point *in limine* arguments raised by the first and/or second Respondents that first need to be addressed. In consideration of these issues, it is clear that the questions before me are not crisp. I intend to deal with these points *in limine* first.

### **ISSUES TO BE DETERMINED**

11. The first question that needs consideration and determination is the nature and form in which this application is brought as. The second Respondent, relying on the case number, this seems to be an interim application.

12. The second point *in limine* that needs consideration is the juristic personality of the first Applicant. Does the first Applicant still exist and can it proceed with the claim.

13. The third point *in limine* that needs to be determined, which argument is closely knitted to the second point *in limine* is the question of the first and second Applicants *locus standi*.

14. The fourth point *in limine* that needs determination is the claim by the first Respondent that the claim by the first and second Applicants prescribed.

15. The fifth aspect that needs attention, it needs to be determined whether the Applicant has established all the requirements of section 26 (a) of the Attorneys Act.

### **FACTUAL MATRIX ON WHICH THE FIRST AND SECOND APPLICANTS APPROACH THE COURT**

16. Attorney Martin Louis Barnard ("*Barnard*") practised as a single attorney under the name and style of Snijman and Mullen Attorneys. This firm was situated in Vereeniging.

17. According to the Applicants, an amount of R1 000.00 was paid into the trust account of Snijman and Mullen Attorneys on 22 June 1999. In an attempt to proof that the payment was indeed made, a receipt dated 22 June 1999 was attached to the founding affidavit ("*the 22 June 1999 receipt*"). The details on the 22 June 1999 receipt, in summary, are as follows: The receipt number of the 22 June 1999 receipt is 037016. An amount of R1 000.00 was received from Makhafola Kaflins Transport in re "*Makhafola Khaflins A3 Seal A Deal CC*".

18. The Applicants further stated that on 23 June 1999 a further amount of R500 000.00 was paid into the trust account of Snijman and Mullen Attorneys. The Applicants attached a further receipt ("*the 23 June 1999 receipt*") and the 23 June 1999 receipt (Receipt Number 037062) reflects that monies were received from FNB VNG in re "*FNB A3 Seal A Deal CC*".

19. The instruction to the attorney was that the money should be invested in terms of Rule 78 of the Attorneys Act.

20. On 31 July 1999 a statement was issued, and the total invested amount was R908 476.67, with the balance brought forward of R501 288.72. Reliance is placed on a NBS Statement dated 31 July 1999 (*“the 31 July 1999 statement”*) in order to prove that the amount was indeed paid to Snijman and Mullen Attorneys. On the proper consideration of the 31 July 1999 statement it is clear that the Account Number reflected on this statement is 9001662324. The statement reflects *“Mnr K M Makhafole KM – Rule 78 c/o HELEEN VAN BILJON”* as the client. On further consideration of the 31 July 1999 statement, it was clear that the balance brought forward was an amount of R501 288.72 and on 31 July 1999 a deposit was made by Snijman & Smullen in the amount of R400 000.00. The Call Interest is reflected as R7 187.95 and the closing balance was an amount of R908 476.67.

21. The first and second Applicants in their founding affidavit then stated that a further deposit in the amount of R400 000.00 was made on 15 September 1999. In substantiation of this allegation, reliance is placed on a receipt of 15 September 1999 (*“the 15 September 1999 receipt”*). On consideration of the receipt, it is indicated that the amount of R400 000.00 were received from FNB VNG (Receipt Number 040423) in re *“FNB A3 Seal a Deal CC”*.

22. In substantiation of the allegation of the total amount that was allegedly entrusted to Snijman and Mullen Attorneys by 30 September 1999 by the Applicants, reliance is placed on a statement dated 30 September 1999 (*“the 30 September 1999 statement”*). The total amount that is reflected on the statement is an amount of R1 126 401.27. This again is a NBS statement. On the 30 September 1999 statement the account number is reflected as 4[...]and the account is in the name of Snijman and Mullen Attorneys. The date of the investment is further reflected as 28 September 1999.

23. The first and second Applicants indicate that an amount of R80 000.00 was withdrawn from this account as per the handwritten note of 19 November 1999. This note is indeed reflected in the statement of 30 September 1999. No further evidence is provided as to the purpose of this withdrawal.

24. It is alleged by the first and second Applicants that these amounts were entrusted to Snijman and Mullen Attorneys for purposes of purchasing an immovable property that was rented by the Applicants at the time (1999). As it is already stated above, it is alleged that the attorney, Barnard, was instructed to invest the whole amount in terms of Rule 78 of the Attorneys Act. The first and second Applicants failed to attach a copy of the lease agreement and the sale agreement to the founding papers. No evidence is placed before me regarding these two contracts save for what I have already stated.

25. Barnard passed away on 2 September 2006. The first and second Applicants indicated that the passing of Barnard was on a date prior to the immovable property being purchased.

26. On 27 September 2006 (*“the 27 September 2006 court order”*) the Court appointed Johan van Staden (*“Van Staden”* or *“the curator bonis”*) as the curator *bonis* for Barnard’s practice and trust banking account. The curator *bonis* executed his duties in terms of the 27 September 2006 Court order.

27. Several claims were received by the curator *bonis* against Barnard’s trust banking account and the amount available in trust was not enough to satisfy the trust creditor’s claims. In this process, the curator *bonis* established that at the time of Barnard’s death a substantial trust deficit existed in his bookkeeping.

28. At the time, the curator *bonis* did not receive a claim from the first and/or second Applicants.

29. As a result of the obvious trust deficit in Barnard’s trust banking account, and on 15 May 2013, the amount that was available in the trust account, the amount of R1 104 902.53, was paid to the LPFF.

30. According to the Applicants they were never contacted by the curator *bonis*. It was left to the attorney of the Applicants to contact the first and second Respondents. On 14 January 2013 a letter was sent to the Law Society of Northern Provinces indicating that an amount of R900 000.00 was invested in terms of Rule

78 of the Rules of the Law Society and an enquiry was made if the money is still in trust.

31. Subsequent to the aforementioned enquiry, and on 25 January 2013, the Law Society of Northern Provinces, and under the hand of Mrs E Veldsman, informed the attorneys of the Applicants that a curator *bonis* was appointed. They were also advised that a claim need to be submitted against the Attorneys Fidelity Fund. The process was set out in the correspondence and proof of the payment was requested.

32. The second Applicant proceeded to take the necessary steps to claim the amount from the Attorneys Fidelity Fund. The affidavit that was provided in substantiation of the claim is attached to the founding affidavit. The annexures to this affidavit, however, is omitted from the application.

33. This application for the payment was faxed to the first Respondent on 1 February 2013.

34. On 21 February 2013 it was communicated to the attorneys for the Applicants that the claim is rejected. The basis for the rejection is recorded as follows in the correspondence dated 8 February 2013: *"Kindly be advised that your client's claim cannot be sustained by the Fund as it is excluded by virtue of the provisions of Section 47(1)(g) of the Attorneys Act 53 of 1979."*

35. On 27 February 2013 the Law Society of Northern Provinces also informed the attorney for the Applicants as follows: *"We could not find record of a Section 78(2A) account held for your client, and will suggest that you consider your clients remedies herein."*

36. Various further correspondence was exchanged between the parties. For the purposes of this claim it is not necessary that I deal with the contents of these letters in this judgment. It does not really take the matter any further and does not assist the Applicants in proving their alleged claim against the Respondents.

#### **FIRST POINT IN LIMINE - INTERLOCUTORY APPLICATION BEFORE COURT**

37. The first point *in limine* raised by the second Applicant is that the application seems to be as an application that is brought at an intermediate stage, setting or giving directions with regard to some preliminary or procedural question that has arisen in the main dispute between the parties.

38. This point does not really take the matter any further and it does not assist the parties in resolving the dispute that exist between them. If the application is determined on this point *in limine*, the Applicants may approach the Court on the same papers only with a new case number. The matter will therefore only be dragged out.

39. The rule of law rests on the principle of finality. This point will not bring any finality to the litigation.

40. In order to rather bring finality in the litigation in this Court, I will entertain the application on the other points *in limine* and merits. These aspects will bring finality to the matter in this Court. With this I do not find that the point was incorrectly brought. It will only delay the finalisation of the application.

## **SECOND POINT IN LIMINE – THE JURISTIC PERSONALITY OF THE FIRST APPLICANT**

41. The first point taken by the first Respondent is that the first Applicant lacks juristic personality in light of the fact that it is liquidated. It therefore follows that the first Applicant cannot bring this application.

42. The founding affidavit is silent in the status or any further detail of the first Applicant.

43. In its answering affidavit, the second Respondent raises the question of the juristic personality of the first Applicant. The first Respondent states that:



43.1 According to the records of the Company and Intellectual Property Commission ("CIPC"), no closed corporation with the name Seal a Deal exists;

43.2 CIPC have a record of a similar closed corporation with the name Seal A Deal Seven CC;

43.3 Seal a Deal Seven CC is, according to the records of CIPC, a closed corporation in liquidation.

44. The first Respondent also emphasised this point in its opposing affidavit.

45. On closer inspection of the CIPC search attached to the Answering Affidavit of the second Respondent, and with reference to Seal A Deal Seven CC: -

45.1 This closed corporation was registered on 7 May 1999;

45.2 The second Applicant became a member of Seal A Deal Seven CC on or about 15 July 2002;

45.3 Seal A Deal Seven CC is placed in Voluntary Liquidation on 21 January 2011.

46. It is only once the Respondents placed before the Court the necessary evidence that the first Applicant (even though some dispute exist about the correct name of the entity) is in liquidation that the Applicants deal with this aspect. The aspect of the liquidation is something, in my view, the second Applicant had to address in the founding affidavit.

47. I have to add that the explanation in the Replying Affidavit is far from satisfactory as to the exact circumstances for the voluntary liquidation and the process that was followed subsequent to the voluntary liquidation.

48. The importance of this aspect is in light of the fact that liquidation is a process in which the company is brought to an end. Also, the assets and property of the company are redistributed to the creditors and owners. The purpose of liquidation is to ensure that all the company's affairs have been dealt with and all its assets realised. When this has been done, the liquidator will apply to have the company removed from the registered. This means that it ceases to exist.

49. What is troublesome is the fact that no evidence is placed before me regarding the process of liquidation. The best evidence that was placed before me is the fact that no liquidator has been appointed.

50. The fact that the process was voluntary and the fact that no liquidator has been appointed does not mean that the Close Corporation retains its juristic personality.

51. I agree with this point raised by the Respondents. This brings an end to the matter for the first Applicant. The only issue is the issue of costs with which I will deal herein later.

### **THIRD POINT /IN LIMINE - APPLICANTS BEFORE THE COURT: THE LACK OF LOCUS STANDI**

52. The further point *in limine* raised by the first and second Respondents is that of *locus standi* of the first and second Applicants.

53. I have already dealt with the status of the first Applicant. It ceased to exist. The question arises who can act on behalf of the first Applicant. The argument goes much wider than the mere signing of a resolution confirming that the second Applicant can proceed with the matter. The Closed Corporation does not fall in the hands of the members any longer.

54. The argument by the second Applicant that he can sign affidavit for his own personal claim is also misplaced in as far as it relates to his response to the point *in limine* raised. The point raised is not the authority to sign an affidavit, but the *locus*

*standi* of the Applicants. The authority to sign an affidavit is something that stands to be challenged with Rule 7. That is not the argument.

55. I therefore have to return to the basics.

56. *Locus standi in iudicio* concerns the sufficiency and directness of a litigant's interest in proceedings which warrants his or her title to prosecute the claim asserted. In ***Four Wheel Drive Accessory Distributors CC v Lesheni Rattan NO***<sup>iii</sup> the SCA scrutinised the *locus standi* of the Appellant. The SCA again considered the requirements for *locus standi*. The SCA confirmed the requirements being that the party approaching the Court must have adequate interest in the subject matter of the litigation; the interest must not be to remove; the interest must be actual and the interest must be current (not hypothetical).

57. It is for the applicant to allege and prove *locus standi*. The second Respondent correctly referred to the matter of ***Gross v Pentz***<sup>iv</sup> where it was held that it is for the party instituting proceedings to allege and prove that he / she has the necessary *locus standi*. The question arises if the second Applicant did enough in his founding affidavit to convince me that the Applicants have the necessary *locus standi* to proceed with the claim.

58. In his founding affidavit the second Applicant describes himself as "*I am the applicant and a former member of the 1<sup>st</sup> applicant and currently residing at ....*". No further particulars of the first Applicant are provided. Later in his founding affidavit, the second Applicant makes mention of the first Applicant and himself as "*The 1<sup>st</sup> and 2<sup>nd</sup> applicants are as appear hereinabove.*"

59. The status of the first Applicant is not disclosed in the founding affidavit. This is an important aspect and the status of the first Applicant and its *locus standi* to bring this application had to be canvassed in the Founding Affidavit.

60. The Respondents argue that the second Applicant has no *locus standi* to act on behalf of the first Applicant.

61. The second Applicant on its turn argued that in light of the fact that it was a voluntary liquidation, that he can still act on behalf of the first Applicant.

62. I do not agree with the argument of the second Applicant. On the liquidation of the Closed Corporation the members lost any and all control over the Closed Corporation, except to the extent authorised, in the case of members' winding up, by the liquidator or by the members. <sup>v</sup>

63. The second Applicant did not place any proof before the Court that there is compliance with this exception. Such exception is not even alleged. The argument that he retained the necessary *locus standi* based on the fact that it was a voluntary liquidation and that no liquidator was appointed, is misplaced.

64. The second Applicant takes the stance that neither the first Applicant nor himself is required to provide the Court or the Respondents with such a resolution for the simple reason that the first Applicant has been liquidated and secondly as the witness of the Court and further having an interest in the matter he (the second Applicant) it is not required that he be authorised his deposition of any legal document. I am of the view that the second Applicant is correct in this contention in as far as it relates to his own application – in order to sign an affidavit on his own behalf. This, however, does not mean that he has the necessary *locus standi*. He, however, is in my view incorrect in as far as it relates to the authority of the first Applicant. Something more is needed.

65. It is also striking that the liquidator is not before me proceeding with the claim on behalf of the first Applicant. I have already dealt with the fact that no liquidator is appointed for the first Applicant.

66. The question, however, arises, what should happen with the application by the first Applicant. Adv Kwinda who acted on behalf of the first and second Applicants insisted that the application should be granted in favour in the first and second Applicants. Both the Respondents requested that the application be dismissed and that referred to the claim by both the first and second Applicants.

67. In the heads of argument by the first Respondent, however, reference was made to the legal position regarding the continuation or commencement of legal proceedings. Continuation is subject to the notice to the liquidator. Adv Kwindu on behalf of the Applicants confirmed that no liquidator was appointed on behalf of the first Applicant. His justification for the failure to appoint a liquidator was in light of the fact that the liquidation was voluntarily. I do not agree with the argument of the Applicants. Be it a voluntarily process, be it a liquidation as a result of a Court Order, the process is clearly stipulated in the Close Corporation Act <sup>vi</sup> read with the Companies Act. <sup>vii</sup> A liquidator must be appointed.

68. There is therefore no liquidator who can receive notice of the proceedings. No postponement of this application will rectify this issue. During the argument it was also clear that no liquidator is in the process of being appointed. It is also clear that there is not intention to appoint a liquidator. Such adjournment was also not requested.

69. I therefore agree with the first and second Respondents that the first Applicant is not before the Court. No *locus standi* has been proven.

70. This again brings and end to the claim by the first Applicant. The claim by the first Applicant therefore stands to be dismissed on this basis alone.

71. The question that goes hand in hand with the *locus standi* of the first Applicant, is the *locus standi* of the second Applicant. The second Applicant in substantiation of his right to reclaim the money, the following arguments are made:

71.1 The first Applicant was voluntarily liquidated by the second Applicant;

71.2 The second Applicant was the owner of the first Applicant;

71.3 The fact that payments were effected by the first Applicant.

72. It is common cause that the first Applicant is in liquidation. As already stated, this means that the members lost total control over the Closed Corporation. On the

consideration of the evidence that was placed before me, it is clear that the deposits that were allegedly made into the trust account was not made by the second Applicant. There are also no allegations placed before me indicating on what basis the second Applicant obtained the right to claim this amount. No such allegations were made, and no such evidence was placed before me. The fact that he was a member at the time does not mean that he is entitled to these payments. The payments had to be collected (if the liquidator could prove the claim) and all creditors had to be paid first. There is no automatic right.

73. The second Applicant therefore also failed to place any evidence before me proving that he indeed has the necessary *locus standi*. Therefore, on this basis alone, the claim of the second Applicant should fail.

### **PREScription OF THE CLAIM**

74. The second point *in limine* I am called to consider is the question of prescription. The first Respondent contends that any claim that the first and/or second Applicants may have, has become prescribed.

75. Section 10(1)(a) of the Prescription Act <sup>viii</sup> provides that a debt will be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt. In the case of other debt not provided for in section 11, the prescription for debt is three years. Section 12(1) of the Prescription Act states that prescription will commence to run as soon as the debt is due.

76. At the outset, in ***Jugwanth v Mobile Telephone Networks (Pty) Ltd*** <sup>ix</sup>, the Court stated that:

*“It is settled law that a person invoking prescription bears a full onus to prove it. In Gericke v Sack, Diemont JA explained:*

*‘[It] was the respondent, not the appellant, who raised the question of prescription. It was the respondent who challenged the appellant on the issue that the claim for damages was prescribed this he did by way of a special plea*

*five months after the plea on the merits had been filed. The onus was clearly on the respondent to establish this defence.*

*In Macleod v Kweyiya, this Court endorsed that principle in ringing tones:*

*‘This court has repeatedly stated that a defendant bears the full evidentiary burden to prove a plea of prescription, including the date on which a plaintiff obtained actual or constructive knowledge of the debt. The burden shifts to the plaintiff only if the defendant has established a prima facie case.’”*

77. It is therefore the first Respondent that bears the onus to proof that the claim has prescribed.

78. One of the aspects I need to determine, in order to place this claim in the four brackets of the Prescription Act, is to determine if monies that was deposited in a trust account is a debt.

79. In determining this question, we have to consider the position as it was set out in ***Drennan Maud & Partners v Town Board of the Township Pennington***.<sup>x</sup> Here the court described a debt as:

*“In short, the word “debt” does not refer to the “cause of action”, but more generally to the claim. In deciding whether a ‘debt’ has become prescribed, one has to identify the “debt”, or, put differently, what the “claim” was in the broad sense of the meaning of that word.”*

80. In ***Du Toit and Others v Du Toit-Smuts & Partners and Another***<sup>xi</sup> the Honourable Judge Mashile, facing almost similar facts, held that a deposit was a debt. I align myself with the view held by the Honourable Judge Mashile.

81. What now needs to be considered is when prescription started to run.

82. In ***List v Jungers***<sup>xii</sup>, the Court stated that there is a difference between when a debt comes into existence on the one hand and when it becomes recoverable on

the other, although these dates may coincide. A debt is due “...when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim.”<sup>xiii</sup>

83. The Court in **Frieslaar NO and Others v Ackerman and Another**<sup>xiv</sup> held that:

*“An obligation to do something undertaken in terms of a contract, when the contract is silent as to the time of performance, is a debt which becomes immediately claimable or eligible at the instance of the creditor. Thus prescription commences to run from the date on which the contract was concluded....”*

84. There can be no doubt that the debt started to run, on a worst case scenario for the first and second applicants, on the date which the sale agreement was cancelled. That date is not placed before me.

85. On the best case scenario for the applicants I have to consider the argument by the first Respondent. The argument is as follows: on 31 January 2013 the second Applicant lodged a claim against the first Respondent for reimbursement of the sum of R1 126 401.27 being the funds that was allegedly deposited into the trust account of Snijman and Smullen Attorneys. According to the first Respondent, the debt was therefore owing and already payable or immediately claimable or immediately eligible the will of the Applicants on 31 January 2013. The claim of the first Applicant was repudiated on 8 February 2013 on the basis that the claim was excluded by virtue of the provisions of section 47 (1) (g) of the Attorneys Act. The claim by the first and second Applicant was only instituted on 10 March 2021. There is therefore a lapse of 7 years. The argument by the first Respondent is that the three-year period of prescription applies in respect of any debt, save where an Act of Parliament provides otherwise. It is further argued that prescription has never been interrupted.



86. I cannot fault the argument of the first Respondent. There is sufficient evidence before me to prove that the claim has prescribed.

87. Based on this argument alone, the matter should end here as the claim has prescribed. The application, based on this argument alone, stands to be dismissed with costs.

### **WAS MONIES ENTRUSTED TO SNIJMAN & SMULLEN ATTORNEYS AS CONTEMPLATED IN THE ATTORNEYS ACT**

88. Even though it is not necessary in light of the fact that the application should fail on the point already dealt with above, I will not proceed and deal with the merits of the application.

89. Before I deal with the claims against the respective respondents, a good starting point will be to determine if any proof was placed before me indicating that money was indeed entrusted to the attorneys. In my view, and especially in light of the fact that it is not common cause that monies were paid into the trust account of the attorney, it is important to first determine if money was entrusted to Snijman and Smullen Attorneys as contemplated in section 26 (a) of the Attorneys Act.

90. It is trite that where money is paid into the trust account of an attorney, it does not follow that such money is in fact trust money. The Supreme Court of Appeal in ***Industrial & Commercial Factors v Attorney Fidelity Fund***<sup>xv</sup> dealing similarly with the question of entrustment, remarked as follows:

*“When an attorney misappropriates money in his trust account, more often than not he is stealing money which he had received to hold for or on behalf of clients. It would be startling indeed if no liability on the part of the fidelity fund arose in such circumstances. Yet such liability can arise only if it can be found that the money stolen was entrusted by or on behalf of the client.”*

91. It is trite that the test to prove entrustment comprises two elements, namely (a) place in possession of something, (b) subject to a trust. As to the latter element,

that of trust, this connotes that the person entrusted is bound to deal with the property or money concerned for the benefit of others.<sup>xvi</sup>

92. I will now turn and consider the evidence that was placed before me.

93. If I for a moment accept that the first and second Applicants proved that they have the necessary *locus standi* and if I for a moment accept that the claim has not prescribed, the question arises whether the Applicants achieved to place sufficient facts before me in order to prove that the amount claimed by them was indeed paid into the trust account as alleged by them. This is the first element that the Applicants need to prove. This is the possession element.

94. I have already summarised the facts the Applicants approached this Court on herein above. The question is whether these allegations are sufficient. During argument I invited Adv Kwindu who acted on behalf of the Applicants to clarify certain issues. He was unable to do so. And at this point I need to pause and state that the most basic principles of the law of evidence are not met.

95. On the careful consideration of the allegations made by the Applicants in their founding affidavit, the following aspects regarding the payments are troublesome and left without any explanation:

95.1 The Applicants alleged that three payments were made to be kept on an interest bearing account. Firstly an amount of R1 000.00, secondly an amount of R500 000.00 and lastly an amount of R400 000.00. These amounts were paid on three separate dates.

95.2 In the affidavit that was provided to the Law Society of the Northern Provinces during February 2013 no mention was made of the R1 000.00. It may be a small amount, but the amount of R1 000.00 is taken into consideration by the Applicants in the amount claimed. I cannot turn a blind eye to this discrepancy especially in light of the fact that the Applicants claimed the same amount during February 2013 than the amount that they are claiming in the proceedings before me.

This difference between the two versions were left unanswered in the founding affidavit;

95.3 What is further striking is that on 14 January 2013 when the attorneys for the first Applicant enquired about the investment, reference was made to only R900 000.00 and not the amount that was claimed in the affidavit of February 2013.

95.4 Reliance is placed on the 31 July 1999 statement. No explanation was provided for the discrepancy in the client in whose favour the investment was held as is reflected on the statement and the identity of the Applicants before me.

95.5 In further consideration of the 31 July 1999 statement, a payment of R400 000.00 is reflected. This is clearly received on 13 July 1999. Yet, the Applicants rely on a R400 000.00 payment of 30 September 1999. No explanation was provided for the difference between the dates on which the R400 000.00 was allegedly received. If two payments of R400 000.00 was then received, the claim amount would have been different. This discrepancy between the documents the Applicants are relying on is glaring.

95.6 There is a difference between the account numbers for the 31 July 1999 statement and the 15 September 1999 statement. The difference between the two account numbers is left unanswered. This is an important aspect especially if one considers the normal banking process for fixed deposits. There is no relevant documents placed before me confirming that the amount that is reflected in the 31 July 1999 statement was transferred to the account number that is reflected on the 15 September 1999 statement. I fail to understand on what basis it is alleged that these two amounts are the same amounts.

95.7 On the version of the Applicants an amount of R80 000.00 was withdrawn during November 1999. This amount is clearly not taken into consideration in the amount claimed by the Applicants. The purpose of this

withdrawal is left unexplained. The reason why this amount is not taken into account is left unexplained.

95.8 Further, the claim that was lodged during February 2013 was only in then name of the first Applicant and not in the name of both the first and second Applicants. This is striking.

96. Based on these discrepancies alone the only conclusion I can come to is that the Applicants failed to place any evidence before the Court substantiating their allegation that the monies were paid into the account of Snijman and Smullen Attorneys. This requirement therefore have not been met.

97. I also cannot turn a blind eye for the fact that the Law Society of the Northern Provinces could not find any proof of this alleged investment. This is an aspect that was addressed in the correspondence between the respective parties. No evidence is placed before me to prove the contrary.

98. I am of the view that the first and second Applicants failed to place any evidence before me substantiating the first element. It is clear that some monies were paid into the trust account of Snijman and Smullen Attorneys, but with the evidence placed before me I cannot come to the conclusion that the monies that were placed in possession of Snijman and Smullen Attorneys was first of all placed in their possession by the first Applicant and further that it was placed in the possession of Snijman and Smullen Attorneys for the purpose as alleged by them.

99. The applicants therefore fail to cross the first hurdle.

100. What requires to be established is the second element of “trust”, which as it has been held, connotes that the person entrusted is bound to deal with the property or money concerned for the benefit of others. That is, the person entrusted is bound to hold and apply the property [money] for the benefit of some person or persons or for the accomplishment of some special purpose.<sup>xvii</sup>

101. It has been further held that the issue of entrustment has to be judged in the light of the intention of the person making the payment to the attorney or the attorney's employee, not the intention of the attorney of the attorneys employee.<sup>xviii</sup>

102. The Applicants make an unsubstantiated statement that the monies were paid into the account of the attorneys to be held pending a sale agreement of immovable property.

103. No explanation is provided in the affidavits filed what happened to the sale agreement. A copy of the lease agreement and the sale agreement is not attached to the affidavits. This creates doubt as to the real purpose on which the amounts were allegedly paid into the account of Snijman and Smullen Attorneys.

104. On the version of the applicants, the payments were made in 1999. The affidavits are silent when the purported sale was to be concluded. According to the allegations by the Applicants, the amounts were paid in 1999. They only learned of the demise of Barnard during approximately January 2013. The affidavits are silent on what happened between 1999 and 2013. It is unclear if any follow ups were made by the Applicants. No explanation is given for the lapse of 14 years between the payments being made and the date on which the Applicants learned about the passing of Barnard. It is unthinkable that a party will leave money in possession of another without making the necessary follow-ups especially if the reason for the money be kept in trust has fallen away.

105. There is a big *lacuna* in the versions of the Applicants.

106. In my view, the Applicant's also failed to place sufficient facts before the Court to meet the second requirement as is required.

107. The Applicants therefore failed to meet the requirements for the repayment of monies and the application should fail.

### **THE CASE AGAINST THE ATTORNEY FIDELITY FUND BOARD**

108. At the outset, and in order to consider the claim against the first Respondent, being the Attorneys Fidelity Fund, it is important to understand the purpose of this fund. I will therefore first turn to the function of the fund and the purpose of this fund.

109. The Attorney Fidelity Fund is established in terms of section 25 of the Attorneys Act as the Attorneys Fidelity Fund and continues to exist in terms of section 53 (1) of the Legal Practice Act as the Legal Practitioners Fidelity Fund.

110. In the Heads of Argument that was filed on behalf of the first Respondent, it was emphasized that the fund was, amongst others, established for *inter alia* the following purposes and objectives:

110.1 Paying expenses incurred by the Board in investigating and establishing the validity of claims in respect of which it is liable;

110.2 Paying all expenses and legal costs incurred by the Board for the purpose of recovering money from the persons whose wrongful conduct gave rise to the claim;

110.3 Refunding the costs or any portion thereof incurred by a claimant in establishing a claim or attempting to recover the whole or a portion of the claim from the person whose wrongful conduct gave rise to the claim;

110.4 Paying legal expenses incurred in defending a claim made against the Fund, or otherwise incurred in relation to the Fund; and

110.5 Paying costs relating to the detection or prevention of theft of trust money.

111. In order to succeed in their case, the Applicant had to establish the requirements of section 26 (a) of the Attorneys Act, namely (a) theft committed by a practitioner, his or her candidate attorney or his or her employee; (b) of any money or other property entrusted by or on behalf of such a person to him or her or to his or her candidate attorney or employee; (c) in the course of his or her 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.

112. I have dealt with the aspect of entrustment herein above. The Applicants failed to meet this requirement.

113. The applicants, in the affidavit dated 29 January 2013 stated in paragraph 2.9 that the deponent could not specifically established that the fund have been stolen. A rider was added shifting the blame to the Law Society.

114. I cannot come to conclusion that this requirement have been met.

115. The first Respondent raises a defence in terms of section 47 (1) (g) of the Attorneys Act. Section 47 (1) (g) of the Attorneys Act provides that:

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

116. This subsection is a statutory exception to the Fund's general liability in terms of section 26 of the Attorneys Act.

117. I cannot find fault with this defence raised by the Fund.

118. The claim against the first Respondent therefore cannot succeed.

### **THE CASE AGAINST THE SOUTH AFRICAN LEGAL PRACTICE COUNCIL**

119. The second Respondent raises the issue that the claim against them is misplaced based on the fact that the second Respondent is not liable to reimburse monies which were paid into the an attorneys trust banking account, and which were misappropriated.

120. In substantiation of the version by the second Respondent, they again confirm that the records of Barnard did not reflect either of the Applicants as trust creditors and not were there open trust investment account on behalf of the applicants, nor was there even a file relating to the applicants.

121. The records of Barnard also speaks to the contrary as during this time the alleged amount was paid, the cumulative balance of any trust investment dropped to as low as R139 471.88.

122. There is simply no cause of action against the second Respondent and the claim against the second Respondent should fail.

## **CONCLUSION**

123. I agree with the argument by the second Respondent that the Applicants approached the Court on vague and inaccurate allegations regarding an alleged entrustment of funds.

124. As is illustrated above, the Applicants failed to place any evidence before the Court proving that the funds held by the Council belongs to them.

125. On their own version they cannot make any positive statement that the money was stolen.

126. There is not sufficient evidence to find in the favour of the Applicants.

## **ORDER**

127. The following order is therefore made:

127.1 The application is dismissed;

127.2 The first and second applicants are to pay the costs of the first respondent, jointly and severally, the one paying the other to be absolved on



the scale between attorney and client, including the costs of senior counsel where so employed;

127.3 The first and second applicants are to pay the costs of the second respondent, jointly and severally, the one paying the other to be absolved, on the scale between attorney and client.

## BY ORDER

Appearance on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Applicants : Adv T C Kwindu

Appearance on behalf of the 1<sup>st</sup> Respondent : Adv G Hulley SC

Appearance on behalf of 2<sup>nd</sup> Respondent : Mr Liam Groome

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<sup>i</sup> No 28 of 2014

<sup>ii</sup> No 53 of 1979

<sup>iii</sup> 2018 JDR 2203 (SCA)

<sup>iv</sup> 1996 (4) SA 6147 (A) at 632D

<sup>v</sup> Section 67(1) of the Closed Corporation Act read with Section 80 (8) of the Companies Act 71 of 2008

<sup>vi</sup> Act 69 of 1984

<sup>vii</sup> Act 71 of 2008

<sup>viii</sup> Act 68 of 1969

<sup>ix</sup> [2021] 4 All SA 436 (SCA)

<sup>x</sup> [1998] ZASCA 29; 1998 (3) SA 200 (SCA) at para 212F - J

<sup>xi</sup> Unreported Judgment (4748/2021) [2023] ZAMPMBHC 22 (12 April 2023)

<sup>xii</sup> 1979 (3) SA 106 (A) at 121C - D

<sup>xiii</sup> See **Truter & Another v Deyssel** [2006] ZASCA 16; 2006 (4) SA 168 (SCA) at para 15

<sup>xiv</sup> [2018] ZASCA 3 at para 31

<sup>xv</sup> [1996] ZASCA 84; 1997 (1) SA 136 (SCA) at p 1508-C

<sup>xvi</sup> See **Industrial and Commercial Factors (Pty) Ltd v Attorneys Fidelity Fund Board of Control** [1996] ZASCA 84; 1997 (1) SA 136 (A) at 114B – O; **Attorneys Fidelity Fund Board of Control v Mettle Property Finance (Pty) Ltd** 2012 (3) SA 611 (SCA) at 614 - 615

<sup>xvii</sup> **Estate Kemp and Others v McDonald's Trustee** 1915 AD 491 at 499

<sup>xviii</sup> See **Redel Finance Services (Pty) Ltd v Attorneys Fidelity Fund** (16833/2007) [2010] ZAWCHC 407 (24 May 2010) para [22]