



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 28 July 2022

Status: Immediate

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Leysath v The Legal Practitioners' Fidelity Fund Board of Control (770/2021) [2022] ZASCA 115 (28 July 2022)

Today the Supreme Court of Appeal (SCA) handed down judgment dismissing, with costs, an appeal against the decision of the Gauteng Division of the High Court of South Africa, Pretoria (the high court).

The appellant, Mr L C Leysath, a practising advocate made an application to the high court for an order compelling the respondent, the Legal Practitioners' Fidelity Fund Board of Control to reimburse him a sum of R472 666, in terms of s 26(a) of the Attorneys Act 53 of 1979 (the Attorneys Act). The appellant contends that the money was held in trust on his behalf by the firm, M F Martins Costa Attorneys (Costa Attorneys), as cover for his fees but instead, the firm had misappropriated it.

On 17 July 2018, the appellant lodged his claim with the respondent. After extensive correspondence between the parties, the respondent repudiated the claim on the grounds that the appellant had failed to establish that the funds had been entrusted to Costa Attorneys on his behalf and that his claim consequently did not fall within the ambit of s 26(a) of the Attorneys Act. Dissatisfied with this finding, the appellant made an application to the high court. The high court found that the monies deposited by clients to ensure that there were sufficient funds available to pay counsel's fees were 'entrusted' to Costa Attorneys as envisaged by s 26 of the Attorneys Act. However, it reasoned that since the appellant did not deposit the money it can never be said that the money entrusted as deposits by Costa's clients was so entrusted on the appellant's behalf. The high court concluded that an advocate's claim for outstanding fees lied against the attorney and not the client. It was based on this finding that the matter was brought before this Court.

In his submissions, the appellant contended that the high court misconstrued the dispute between the parties. In that regard, the appellant contended that the respondent had accepted that the monies paid by clients to Costa Attorneys as cover for his fees constituted entrustments as envisaged by s 26 of the Attorneys Act. The only issue, according to him, that was still alive before the high court was the respondent's contention that the appellant had failed to prove that clients had in fact paid the monies to Costa Attorneys as cover for services rendered by him. He further contended that in pronouncing on the issue of entrustment, the high court ignored the fact that there was a tripartite contractual relationship between counsel, client and the attorney, and erroneously found that there existed a debtor and creditor relationship between him and the instructing attorney. In doing so, the high court impermissibly overturned binding precedent that established that a client was contractually liable for counsel's fees, and that there was no 'hardened rule' that an attorney 'stands in' for counsel's fees. In addition, the appellant submitted that the high court was wrong in refusing to follow the dictum in *Serrurier and Another v Korzia and Another*, to the effect that in the event of a client paying an attorney for counsel's fees and the attorney failing to pay counsel, the fidelity fund would in all probability pay the counsel. Regarding the adequacy of the proof of payments into Costa Attorneys' trust account, the appellant contended that the respondent had, in correspondence between the parties, set out the frame of reference and parameters in which information in support of the claim was to be relayed to it. In terms

of that frame of reference, the respondent indicated that it required generic information and supporting documents, and to the extent that they were insufficient, it would request further information. The respondent did not challenge the supporting documents that he submitted to it nor did it request any further information or documents. Therefore, the respondent was estopped from challenging the adequacy of the evidence that the appellant had submitted in support of his claims. Consequently, the respondent impermissibly raised that issue for the first time in its answering affidavit.

The SCA, made the following findings regarding this appeal. Firstly the Court highlighted that the appellant was required, in terms of s 26(a) of the Attorneys Act, to prove that: (a) he had suffered pecuniary loss; (b) by reason of theft committed by Mr Costa; (c) of money entrusted by or on the appellant's behalf; (d) in the course of Mr Costa's practice. Secondly, the Court held that it was incumbent on the appellant to prove, on a balance of probabilities, the exact amounts that clients had paid to Costa Attorneys in respect of each of the matters in which he had rendered tax invoices and had sought reimbursement. Instead, the Court held, the appellant relied only on hearsay evidence in support of his assertion that clients paid money to Costa Attorneys as cover for his fees by stating that the relevant clients had informed him that they made payments to Costa Attorneys in respect of his fees. However, he did not obtain confirmatory affidavits from them, but merely provided the respondent with their contact details, expecting the latter to verify his claims. Thirdly the Court went on further and found that the appellant's recourse to s 3 of the Law of Evidence Amendment Act was misguided because as a practicing advocate, he should have known that references in his affidavits to what he had been told by Mr Costa's clients constituted inadmissible hearsay evidence. Thus, he was obligated to introduce such evidence properly, if he sought to rely on it. Fourthly, the SCA also held that the purpose of s 26 of the Attorneys Act was to reimburse victims of theft by a practising attorney in respect of specific amounts entrusted to the attorney. The first hurdle a claimant who relied on the section must therefore overcome was to prove that the monies were in fact paid to an attorney on his or her behalf, which was why the filing of the clients' confirmatory affidavit setting out the relevant information that would enable the respondent to determine whether the money had indeed been entrusted to the attorney was so important to the case. However, the appellant had failed to produce any such evidence. He had instead relied on bald statements by clients to the effect that they had paid money to Costa Attorneys in respect of his and the attorneys' fees. However, no details of the exact amounts that have allegedly been entrusted to Costa Attorneys on his behalf were provided. Lastly, the Court found that the respondent would be seriously prejudiced if the hearsay evidence were allowed as it would put undue pressure on the respondent to consider general allegations relating to unspecified amounts paid to and misappropriated by Mr Costa. Therefore it would not be in the interests of justice to allow such evidence. As a result, the appeal must be dismissed with costs.

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