



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

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Status: Immediate

The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal

Smith v The Legal Practitioners' Fidelity Fund Board (541/23) [2024] ZASCA 170 (11 December 2024)

Today the Supreme Court of Appeal (SCA) upheld an appeal in part from the Gauteng Division of the High Court, Pretoria (the high court) and substituted the order of the high court by dismissing the appellant's first, third and fourth claims, upholding the second claim by the appellant and ordering the Legal Practitioners' Fidelity Fund (the Fund) to pay R900 000 to the appellant, with interest thereon at the rate of 10.25% per annum *a tempore morae*, from the date of service of the summons and the parties to each pay their own costs.

The issues on appeal are first whether the appellant, Mr Smith 'entrusted' the money in each of the claims to the firm, represented by Mr Andruw Stephens, as contemplated in s 26(a) of the Attorneys Act (the Act). The second issue is, to the extent that it might become necessary to determine, whether the Fund's liability was excluded because of the operation of s 47(1)(g) of the Act.

The high court dismissed Mr Smith's claims. It found that he did not entrust the money that he paid into the trust account to the firm or Mr Stephens. Mr Smith appealed to this Court against that finding, with the leave of the high court. He also appealed against the finding that the Fund is not liable to reimburse him in respect of the loss that he suffered as a result of the theft of the money. The high court made that finding on the basis that Mr Smith instructed the firm, represented by Mr Stephens, to invest the money on his behalf.

The SCA held that to find the Fund liable to reimburse a person in terms of s 26(a) of the Act, a claimant has to show that he or she (i) may suffer or has suffered pecuniary loss; (ii) as a result of; (iii) theft; (iv) committed by a practising practitioner, his or her candidate attorney or employee; (v) of money or other property; (vi) entrusted by such person to such practising practitioner, candidate attorney or employee; (vii) and that such entrustment was made to the practising practitioner, candidate attorney or employee 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.

The SCA held further that in each of the claims Mr Smith suffered pecuniary loss as a result of theft committed by Mr Stephens, of money that Mr Smith paid or caused to be paid into the trust account and that such payment was made to Mr Stephens in the course of his duties at the firm.

The question to be answered is whether Mr Smith entrusted the money to the firm or Mr Stephens when he paid or caused it to be paid into the trust account. Subject to s 47(1) of the Act, the Fund must reimburse Mr Smith if he entrusted those payments to the firm or Mr Stephens. The SCA found that to 'entrust', for purposes of s 26(a) of the Act, means that a person, like a client of a practising practitioner, candidate attorney or employee, must deal with the money or property in accordance with the intention of the client who placed the money or property in his or her possession.

The SCA confirmed that the high court was correct in dismissing Mr Smith's first, third and fourth claims as Mr Smith failed to prove that he entrusted the money to Mr Stephens or the firm. With regards to the second claim, the high court found that it was not in dispute that the R900 000 was entrusted to the firm. It however found that the entrustment came to an end when Mr Smith allowed Mr Stephens to use the R900 000 for a loan transaction, from which Mr Smith received a benefit of R1 260 000 as interest on that loan.

The SCA found that the entrustment did not come to an end in June 2017 when Mr Smith agreed to become involved in the loan transaction. This is so because, by then the money which had been entrusted to the firm had already been stolen by Mr Stephens. The evidence shows that Mr Stephens stole the money in late-March 2015, certainly by 12 June 2015. When he stole the money, it had been entrusted to him, representing the firm. The loan transaction was proposed and concluded only in 2017. Mr Smith has established an entitlement to be reimbursed, because he suffered pecuniary loss as a result of theft committed by Mr Stephens of the R900 000 that he entrusted to him in the course of his duties at the firm. The factual finding that the money was stolen before the loan transaction in 2017, renders the defence raised by the Board, that the Fund was excluded from liability in terms of s 47(1)(g) of the Act, irrelevant.

In the result, the SCA upheld the second claim by Mr Smith and ordered the Fund to pay R900 000 to Mr Smith, with interest and each party to pay their own costs.

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