



THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

REPORTABLE
CASE NO 61/07

In the matter between

GERHARDUS JOHANNES DU PREEZ
JOHANNES PETRUS JOHST
VERSATILE CONTRUCTION CC

First Appellant
Second Appellant
Third Appellant

and

WILLEM BAREND JOHANNES ZWIEGERS

Respondent

CORAM: HOWIE P, NUGENT, CLOETE, HEHER et MAYA JJA

Date Heard: 11 March 2008

Delivered: 28 March 2008

Summary: Attorney negligent in paying out money in trust account without establishing from depositor what latter wanted done with it.

Neutral Citation: This judgment may be referred to as *Du Preez v Zwiegers* (61/2007) [2008] ZASCA 42 (28 March 2008).

HOWIE P

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[1] The respondent, a practising Johannesburg attorney, received the sum of R385 000 into his trust account. The depositor was Versatile Construction CC, a close corporation conducting a construction business. I shall refer to it as ‘the corporation’.

[2] The corporation’s sole member, Mr GJ du Preez, in partnership with Mr TP Johst, had sought to obtain a foreign loan for a project which the corporation would undertake. The loan was to be procured through an entity called DLA International Financial Services (DLA). Under a loan procurement agreement with DLA the borrowers (to whom I refer by their surnames) were liable to pay the sum in question as a refundable deposit. It had to be paid into the respondent’s trust account where it would be held pending onward payment to DLA on implementation of the loan.

[3] However, pursuant to instructions from a client, Mr Michael Louw (Louw), who himself claimed to be entitled to the amount concerned, the respondent paid the money, less a fee of R5 000 agreed with Louw, to a company designated by Louw. Before doing so the respondent did not contact the corporation or anyone representing it.

[4] When, subsequently, DLA failed to pay out the loan monies, Du Preez tried to recover the deposit. All his efforts, including an approach to the respondent, were in vain.

[5] As co-plaintiffs, Du Preez, Johst and the corporation then sued the respondent for damages in the sum of R385 000. The claim was based on contract, alternatively in delict. It was alleged that the respondent's disposal, without the corporation's consent, of the monies deposited constituted (I paraphrase) the breach either of a mandate to deal with the funds only on the corporation's instructions, or of a legal duty to deal with the funds without negligently causing the plaintiffs harm.

[6] The action was instituted in the High Court at Johannesburg and came before Marais J. The learned Judge dismissed the action but granted leave to appeal on the delictual claim.

[7] The relevant evidential material at the trial comprised the testimony of Du Preez and the respondent, and various items of documentary evidence. The salient facts, some of which have been referred to above, are not in dispute.

[8] The sole communications received by the respondent from, or on behalf of, the plaintiffs consisted in a letter faxed on 11 May 2001 by attorneys acting for Du Preez and Johst, to which was added a later handwritten subscript which Du Preez signed, for the corporation, on 16 May. The body of the letter reads:

'D.L.A. \ GJ DU PREEZ & TP JOHST

The above refers. We wish to advise that we act on behalf of Messrs du Preez & Johst. We have been advised that your client granted our clients a loan in the sum of R3 850 000.00. Your clients however require that our clients must deposit the sum of R385 000.00 into your company's trust account.

1. Our client wants your written confirmation that the monies will not be paid over to your clients without our client's written consent.
2. The only stage in fact when the money can be paid over to your client is when our client has received payment of the full R3 850 000.00. Clause 3.3 of the letter of grant must be amended.
3. Our clients want an acceptable BANK guarantee for the R3 850 000.00. When can our client expect to receive the guarantee.
4. Our clients want your written confirmation that your client is not acting as a deposit-taking institution, or in the event that your client is a deposit taking institution we want confirmation that your client is registered as such.

We await your reply at your most earliest [sic] convenience.'

[9] Alongside the writer's signature appears the subscript. It was written by one Coetzee, an agent for DLA in the transaction of the loan procurement. It reads:

'I, Mr GJ Du Preez confirm that the broker can proceed with the procurement of the funding and this letter is hereby cancelled.'

[10] Du Preez testified (and he impressed the Judge generally as being an honest witness) that subsequent to 11 May Coetzee told him that the bank guarantee requirement in clause 3 of the letter would occasion delay in the paying out of the loan monies, which payment was imminent. He therefore proposed that Du Preez sign the handwritten subscript. Du Preez did so intending, he said, to cancel no more than the guarantee provision. His evidence on this point is perfectly credible but the matter can be dealt with on the basis of the respondent's evidence that he understood the letter to be cancelled in its entirety.

[11] The respondent received the letter on or about 11 May. Despite its concluding request for a very early reply he did not answer it. This was despite the fact that he had heard from Louw both before and after its receipt. Before the letter's arrival, so the respondent testified, Louw telephoned him and said he was due some commission which would soon be

paid into the respondent's trust account. The amount, Louw said, would be 'in the vicinity of R380 000'. Louw said he would instruct the respondent 'where to pay the money to' (the respondent's words). Because the letter conflicted with this intimation from Louw, the respondent telephoned Louw and told him what the letter said. Louw said it was nonsense and undertook to 'sort it out' (again the respondent's words). That was some time before 16 May.

[12] A number of significant events occurred on 16 May. First, as mentioned already, there was the handwritten cancellation of the letter of 11 May. The respondent said he inferred that the cancellation was the result of Louw's intervention. Second, the corporation's loan deposit was paid into the respondent's trust account. Third, Louw telephoned the respondent and instructed him to pay the money (less fee) to Asset Allocation Consultants (Pty) Ltd, a Pretoria company. Fourth, the respondent prepared the necessary documentation but told Louw, so he testified, that he required written instructions from Louw before he would pay what he regarded as Louw's money to anyone else.

[13] On 17 May Louw faxed the requested instructions to the respondent. Also on that date DLA, per a director named RC Koekemoer, faxed the respondent as follows:

‘With reference to our phone conversation at 16h30 on 16 May 01, DLA hereby appoints Mr Michael Louw as our agent/representative and authorises Zwiegers Attorneys to release all funds held on our behalf to Mr Louw who will invest the funds as per agreement between ourselves and Mr Louw.’

Questioned by the trial court about this letter, and particularly the reference to the funds allegedly held on DLA’s behalf, the respondent, who had earlier testified that he all along regarded the money as being Louw’s the moment it was paid into the trust account, said he did not apply his mind to this point. He said (unconvincingly) he hoped there was some commission sharing agreement and because the letter did not direct him not to pay Louw, he paid out the funds when he got Louw’s letter of the same day. It may be observed, in any event, that DLA was not the respondent’s client. The respondent’s case is based squarely on the fact that Louw was the client and it was on his instructions that the respondent placed total reliance.

[14] The trial Judge considered that the plaintiffs had been the victims of a fraudulent conspiracy. It may be that DLA and Louw were parties to it, hence the DLA letter to the respondent of 17 May. However that may be,

there is no suggestion that the respondent was a party to it and the fundamental question is whether the reasonable person in the respondent's position would have relied exclusively on Louw's statements and instructions or taken the simple step of contacting the depositor to ascertain what the latter wanted done with the money.

[15] I should mention for the sake of completeness that the respondent testified that, at some stage which he said was before 17 May, he received a number of telephone calls from somebody who said he was Du Preez, the consistent tenor of which was that the money should be got to Louw as quickly as possible. The trial Judge accepted without hesitation that Du Preez did not make these calls. Although he considered that there was nothing to contradict the core factual allegations in the respondent's evidence, the Judge's summary of those allegations does not include the bogus telephone instructions. The latter were not part of the respondent's reasons for paying out the money, they played no part in the Judge's conclusions and counsel for the respondent did not rely on them. It is therefore unnecessary to elaborate on why this feature of the defence case impresses as bizarre and inherently improbable.

[16] Reverting to the fundamental question posed earlier, the long and short of the respondent's case is that he saw no need to make contact with the plaintiffs or their attorney in view of the cancellation of the letter of 11 May and the fact that his client, Louw, had given him unambiguous instructions as to the disposal of the money.

[17] The trial Judge's conclusions on the delictual claim may be summarised as follows. The respondent was acting for Louw throughout. Louw told the respondent that the contents of the 11 May letter were nonsense and the letter was later cancelled. Although it was 'strange' that the respondent failed to respond to the 11 May letter and although it might have been expected that he would query the handwritten cancellation of an attorney's letter, and although confronting the plaintiffs with Louw's version would immediately have exposed the fraud, the respondent was entitled to assume that the plaintiffs had no further instructions for him and did not wish to impose any duties on him in his dealing with the money. They had, in effect, in disregard for their own interests, parted with their money 'without strings' and by inference had no further concern as to how the respondent disposed of it. Having no mandate from them, he was not obliged to look after their interests. In all the circumstances the legal duty necessary for delictual liability had not been established in this case.

[18] The respondent's argument on appeal conformed very much to the trial Judge's conclusions. In essence the submission was that on the unique facts of the matter unlawfulness had not been established and any negligence on the respondent's part that there might have been before cancellation of the 11 May letter ceased to have any effect after that.

[19] I find it difficult to see what possible scope there is for the contention that there was no legal duty in this situation. An attorney is under a legal duty to deal with trust account money in such a way that loss is not negligently caused, *inter alia*, to the depositor. That was decided in *Hirschowitz Flionis v Bartlett and Another*.¹ No acceptable reasons have been advanced which take this case outside the scope of what was there found in regard to unlawfulness.

[20] The court below did not make any express finding that the respondent had been negligent but there are indications in the judgment that the court considered his failure to make certain enquiries to have been remiss. What the court went on to say, however, would mean the same even if the respondent had been found negligent. What the court in effect held was that as long as a depositor is silent as to what is to be done with the money

¹ 2006 (3) SA 575 (SCA).

deposited in an attorney's trust account the latter can, as long as there are specific instructions from the attorney's client as to that money, negligently, but still lawfully, ignore what the depositor might want done with the money. The proposition's mere articulation warrants its rejection.

[21] It was also wrong, in my view, to hold, as a corollary, that it was up to the depositor to look after its own interests. *Vis-à-vis* the depositor the attorney is not just another member of the public who is entitled to expect fellow citizens to take reasonable care to protect their own interests. An attorney into whose trust account money is paid owes a duty to the depositor even if the depositor is not an existing client of the practice. That duty, at the risk of repetition, is to deal with the money in such a way that harm is not negligently caused, to the depositor among others.

[22] Moving on to the element of fault, the test is that laid down in *Kruger v Coetzee*.² Upon receipt of the letter from the plaintiffs' attorneys of 11 May the respondent knew that at that juncture the impending deposit was to be held for the benefit of DLA, his supposed client. He did not respond that DLA was not his client. Had he made contact with the letter-writer the true picture would have emerged. Then he heard from Louw that the deposit he

² 1966 (2) SA 428 (A) at 430 E-F.

was expecting was owed on a completely different basis. The respondent made no effort to ascertain the plaintiffs' attitude to Louw's version. Later still the plaintiffs' letter was cancelled but the money was nevertheless deposited. The respondent chose to ignore – he could not simply have been inadvertent about this – what the depositor wanted done with the money. He closed his mind to the depositor's intention and confined his attention to what Louw instructed. Significantly, the respondent dealt with the money in relation to Louw as he should have dealt with it in relation to the plaintiffs. Louw said clearly enough that he wanted the money paid to Asset Allocation Consultants but the respondent refused to pay out, even though Louw was the beneficiary – or perhaps one should say because Louw was the beneficiary – without Louw putting that instruction in writing so that no later dispute would arise. Had this expedient been followed in relation to the plaintiffs no loss would have resulted. Indeed, the required care was more simply taken. It needed only a telephone call to the plaintiffs' attorney to establish exactly the purpose of the deposit and that in no circumstances was the money to go to Louw or his designated payee.

[23] Correct though the finding of the court below may have been that the respondent was given no mandate by the depositor, the respondent's essential error lay in failing to find out whether it intended to give him a

mandate and, if so, what it was. A reasonable attorney would have done so and in having omitted to do so the respondent was negligent.

[24] It is clear that the damages sustained were suffered by the corporation. It follows that its delictual claim ought to have been upheld. As to costs, the plaintiffs' heads of argument on appeal were prepared by two counsel but only junior counsel appeared at the hearing. The employment of two counsel in that regard was a precaution reasonable in the circumstances.

[25] The order of this court is as follows:

A. The appeal is allowed with costs, such costs to include the costs of two counsel in so far as two were employed.

B. The order of the court below is set aside. Substituted for it is the following:

‘Judgment is granted in the third plaintiff’s favour and the defendant is ordered to pay it -

(1) Damages in the sum of R385 000.

(2) Interest on that sum at 15,5% per year *a tempore morae*.

(3) Costs of suit.’

CT HOWIE
PRESIDENT
SUPREME COURT OF APPEAL

CONCUR:

NUGENT JA

CLOETE JA

HEHER JA

MAYA JA