THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 499/2010

In the matter between:

THE ATTORNEYS FIDELITY FUND BOARD OF CONTROL **Appellant**

and

METTLE PROPERTY FINANCE (PTY) LTD **Respondent**

Neutral Citation:	*Attorneys Fidelity Fund v Mettle Property Finance* (499/2010) [2011] ZASCA 133 (16 September 2011)
Coram:	HARMS DP, VAN HEERDEN, MAYA, THERON & WALLIS JJA
Heard:	25 August 2011
Delivered:	16 September 2011
Summary*:*	*Claim against Fidelity Fund in terms of s 26(a) of the Attorneys Act 53 of 1979 – pecuniary loss suffered allegedly as a result of attorney's theft of money entrusted to him – entrustment not proved.*

ORDER

On appeal from: North Gauteng High Court, Pretoria (Tolmay J sitting as a court of first instance):

(a) The appeal is upheld with costs.

(b) The order of the court below is set aside and replaced with the following:

'The action is dismissed with costs.'

JUDGMENT

VAN HEERDEN JA (HARMS AP, MAYA, THERON AND WALLIS JJA concurring):

[1] Mettle Property Finance (Pty) Ltd, a factoring company, paid certain sums of money into an attorney's trust account pursuant to three bridging finance transactions. In terms of an agreement between Mettle and the attorney, the latter undertook to make payments to Mettle from the proceeds of the registration of a bond and two property transfers, once such proceeds were received. When the funds did not materialise and the attorney was sequestrated, Mettle sued the Attorneys Fidelity Fund Board of Control in terms of s 26(a) of the Attorneys Act 53 of 1979, claiming the

pecuniary loss that it had suffered, allegedly as a result of the attorney's theft of money entrusted to him by Mettle. These claims succeeded before Tolmay J in the North Gauteng High Court, hence the appeal by the Fidelity Fund which comes to us with the leave of the court below.

[2] The applicable provisions of s 26(a) of the Act read 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 . . . of any money or other property entrusted by or on behalf of such persons to him . . . in the course of his practice . . . .'

[3] The issues on appeal are whether Mettle succeeded in proving that the money in question had been 'entrusted' to the attorney by or on behalf of Mettle and, if so, whether the attorney had stolen such money, both being requirements for a claim in terms of s 26(a).

[4] To the extent here relevant, Mettle's particulars of claim allege:

'THE PLAINTIFF'S BUSINESS

5. The Plaintiff's business is and was at all times relevant hereto *inter alia* the factoring of immovable property transactions where-

5.1 a mortgage bond or mortgage bonds is/are to be registered over the immovable property of an owner of such immovable property; or

5.2 an owner of immovable property sells his immovable property to a purchaser of such immovable property,

and such owner requires the loan equity of the bond(s) to be registered or the equity of the sale before registration of the mortgage bond or registration of transfer to the purchaser, in which case the conveyancing attorney attending to such bond registration

or registration of transfer undertakes to counter-perform on date of registration from the proceeds of the bond or from the proceeds of the sale, as the case may be; or

. . .

MASTER AGREEMENT

6. On 23 January 2007 the Plaintiff and the Attorney concluded a written agreement titled: MASTER AGREEMENT (ATTORNEY) (PURCHASE OF SELLER'S EQUITY AND MORTGAGOR'S LOAN EQUITY) (hereinafter referred to as "the master agreement").

. . .

9. In the master agreement the Plaintiff is referred to as "Mettle" and the Attorney is referred to as "the Conveyancer".

10. Express terms of the master agreement are *inter alia* the following:

10.1 the purchase price payable by the Plaintiff in respect of each sold claim (as defined in clause 2 of the master agreement) shall be an amount equal to the sum of the initial purchase price and the additional purchase price (as defined in clause 2 of the master agreement).

(Clause 6.1)

10.2 the purchase price shall be discharged as follows-

10.2.1 the initial purchase price shall be paid into the Attorney's trust account in cash on the second business day following the date of acceptance of the offer in accordance with the provisions of Clause 5.2 of the master agreement; and

10.2.2 the additional purchase price, on the date of registration of transfer of the property in the relevant deeds office, against payment of the sale proceeds to the Plaintiff, which amount the Plaintiff authorises the Attorney to deduct from the sale proceeds, and to pay same directly to the client;

(Clause 6.2)

10.3 accordingly, on the date of registration of transfer of the property, the Attorney irrevocably undertakes to distribute the sale proceeds as follows:

10.3.1 by deducting an amount equal to the additional purchase price, and paying same to the client (or its creditors); and

10.3.2 by paying the balance to the Plaintiff in cash, without any deduction or set-off.'

[5] In this case, the attorney, Mr Langerak, approached Mettle to arrange for bridging finance on his own behalf as well as on behalf of two clients. As was Mettle's practice, it verified Langerak's standing in the legal profession and his possession of a fidelity fund certificate.

[6] Pursuant to the conclusion of the master agreement, Langerak requested Mettle to enter into three bridging finance transactions, which transactions form the basis of Mettle's three claims against the Fidelity Fund. One was a Purchase of Bond Proceeds Agreement in which the mortgagor was Langerak in his personal capacity, the second was a Purchase of Seller's Claims Agreement in which the seller was Whirlaway Trading 120 CC and the third was also a Purchase of Seller's Claims Agreement, in which the seller was Angelfish Investments 709 CC.

[7] The thrust of Mettle's case was that it had in terms of the aforesaid three agreements and pursuant to various warranties and undertakings issued by Langerak, effected payment of 'initial purchase prices' of R400 000, R560 000 and R600 000, respectively, into Langerak's trust account on behalf of the mortgagor or seller concerned. It relied on the fact that, in terms of the Master Agreement, Langerak undertook to repay

Mettle these amounts on the date of registration, from the bond proceeds or the sale proceeds, as the case may be, and that he had failed to do so.

[8] Needless to say, Langerak did not procure registration of transfer of the relevant properties in the second and third transactions and did not make any payment to Mettle in respect of any of the three transactions. While the bond was registered in the first transaction, there is no evidence that the proceeds were received in Langerak's trust account.

[9] Mettle alleged that Langerak had committed theft of the money entrusted to him and reported this to the Law Society of the Northern Provinces. Langerak was subsequently struck off the roll of attorneys following a financial investigation by the Law Society.

[10] Both Whirlaway and Angelfish have been liquidated. Mettle sued Langerak and obtained judgement against him for all three claims. However, the estate of the attorney was sequestrated on 2 October 2008. It was agreed between the parties that Mettle would receive no dividend from any of the three estates.

[11] The meaning of the word 'entrust' for the purposes of a claim in terms of s 26(a) of the Act has been dealt with in a number of cases. In *Industrial & Commercial Factors (Pty) Ltd v Attorneys Fidelity Fund* 1997 (1) SA 136 (A) at 144B-D, this court (per F H Grosskopf JA) quoted with approval the following passages of the judgment of Nicholas J in *Provident Fund for the Clothing Industry v Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund* 1981 (3) SA 539 (W) at 543E-F:

'From these definitions it is plain that "to entrust" comprises two elements: (a) to place in the possession of somebody, (b) subject to a trust. As to the latter element, this connotes that the person entrusted is bound to deal with the property or money concerned for the benefit of others (cf *Estate Kemp and Others v McDonald's Trustee* 1915 AD at 499).

"(The trustee) is bound to hold and apply the property for the benefit of some person or persons or for the accomplishment of some special purpose" (*ibid* at 508).'

[12] The first element is not contentious – the moneys, representing the initial purchase price in each case, were indeed placed in Langerak's possession. The second element is more problematic. There is no doubt that Mettle trusted the various warranties and the undertakings given by Langerak and relied upon Langerak for repayment of, inter alia, the initial purchase price on the date of registration. That does not, however, mean that Mettle 'entrusted' the money to Langerak as required by s 26(a) of the Act.

[13] As indicated above, Langerak is referred to throughout the Master Agreement as the 'Conveyancer'. The agreement provides that:

'3.1 The Conveyancer has been and will from time to time hereafter be duly authorised by a Client to conclude a transaction with Mettle for and on their behalf.

3.2 Any reference in this Agreement to a Client shall (unless the context indicates to the contrary) be a reference to that Seller, Purchaser or Mortgagor duly represented by the Conveyancer.'

[14] Importantly, 'Client' – who could be a seller, a purchaser or a mortgagor – is defined as 'the Conveyancer's Client'. 'Client's claim' is defined as a 'loan claim' or a 'seller's claim'.

[15] It follows that Mettle – in paying the initial purchase price in each transaction to Langerak as the representative of the mortgagor or seller from whom Mettle had purchased a loan claim or a seller's claim – was simply discharging its debt to such mortgagor or seller. The payment was unconditional and, the moment the initial purchase price was paid into Langerak's trust account in terms of the Master Agreement, Mettle's debt was discharged. Langerak was no more than a conduit for the money. All this was largely borne out by the evidence of both Ms Nichols, a trader employed by Mettle, and Mr Prinsloo, a director of Mettle. It also accords with the express terms of the Master Agreement and the Purchase of Bond Proceeds and of Seller's Claims Agreements in regard to the payment of the initial purchase price.

[16] This being so, there was no 'entrustment' of money by Mettle to Langerak. In the words of F H Grosskopf JA in the *Industrial & Commercial Factors* case:[1]

'Where money is paid into the trust account of an attorney it does not follow that such money is in fact trust money . . . If money is simply handed over to an attorney by a debtor who thereby wishes to discharge a debt, and the attorney has a mandate to receive it on behalf of the creditor, it may be difficult to establish an entrustment.'[2]

[17] It must be remembered that 'the indemnity against loss for which the Act provides is not unlimited in its scope. It does not provide

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[1] At 143I-144A.

[2] See also *Provident Fund for the Clothing Industry* at 544B-G.

indemnification against any kind of loss suffered as a consequence of any conceivable kind of knavery in which an attorney might indulge in the course of his or her practice.'[3] It is not an insurance policy against all ills that may befall money paid to an attorney. In this case, Mettle may well have claims in contract or delict against Langerak based on the warranties and undertakings given – and, in some instances, breached – by Langerak. But Mettle does not have a claim against the Fidelity Fund in terms of s 26(a) of the Act.

[18] In view of my finding that there was no 'entrustment' of the money paid by Mettle to Langerak, it is not necessary to decide whether Langerak was guilty of the theft of such money. Suffice it to say that, in the case where Langerak in his personal capacity was the mortgagor, the initial purchase price paid by Mettle into Langerak's trust account belonged to Langerak as the client. He could hardly be said to steal his own money. As regards Whirlaway and Angelfish, there was simply no evidence whatsoever as to what happened to the initial purchase price paid by Mettle in respect of each of these entities.

[19] It follows that the appeal should succeed.

[20] The following order is made:

(a) The appeal is upheld with costs.

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[3] *Industrial & Commercial Factors* at 146F-G (per Marais JA).

(b) The order of the court below is set aside and replaced with the following:

‘The action is dismissed with costs.’

B J VAN HEERDEN
JUDGE OF APPEAL

APPEARANCES:

APPELLANT:	Q PELSER SC
	Instructed by Petzer, Du Toit & Ramulifho, Pretoria
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