THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 312/2023

In the matter between:

MICHELLE JACQUELINE SCHOLTZ	**FIRST APPELLANT**
MICHELLE JACQUELINE SCHOLTZ NO	**SECOND APPELLANT**

and

LEON DE KOCK NO	**FIRST RESPONDENT**
THE MASTER OF THE HIGH COURT	**SECOND RESPONDENT**
LEGAL PRACTICE COUNCIL	**THIRD RESPONDENT**

Neutral citation: *Scholtz & Another v De Kock NO & Others* (312/2023) [2024] ZASCA 132 (02 October 2024)

Coram: MAKGOKA, NICHOLLS, HUGHES and MOLEFE JJA and MBHELE AJA

Heard: 02 May 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 02 October 2024.

Summary: Deceased estate – whether executrix bears duty to account to beneficiaries for deceased's monies disbursed during the deceased's lifetime.

Fiduciary relationship – attorney and client – mere deposit of money into attorney's trust account does not establish fiduciary relationship.

Relationship between sisters – whether the nature of their financial arrangement established fiduciary relationship to warrant accounting – whether in fact such accounting occurred.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Saldanha, Henney and Thulare JJ, sitting as court of appeal):

1 The appeal is upheld with costs including costs of two counsel.

2 The order of the full court is set aside and replaced with the following order:
'The appeal is dismissed with costs.'

JUDGMENT

Makgoka JA and Mbhele AJA (Nicholls, Hughes and Molefe JJA concurring):

[1] The main issue in this appeal is whether the first appellant, Ms Jacquline Scholtz, (Ms Scholtz), owed her deceased sister, and by extension the latter's testamentary beneficiaries, a duty to account for an amount of R5 600 000 which the deceased had received from the Road Accident Fund (the RAF). Ms Scholtz received the amount into her attorney's trust account, and later transferred it into an investment account managed by her.

[2] The full court of the Western Cape Division of the High Court, Cape Town (the full court) held that Ms Scholtz was so obliged to account and overturned an order of a single Judge of that Division (the court of first instance), which had dismissed the application of the first respondent, Mr Leon De Kock (Mr De Kock) to account for the money. Ms Scholtz appeals with the special leave of this Court.

[3] Mr De Kock and the deceased, Mrs Nicquelette Veronique de Kock, were married to each other. Their marriage was terminated by her death on 26 September 2018. Two minor children were born of the marriage. The deceased and Ms Scholtz were identical twins. Ms Scholtz is thus Mr De Kock's former sister-in-

law and the aunt of the two minor children. The minor children are the joint heirs in the estate of the deceased (the deceased estate). In terms of the deceased's Will, Ms Scholtz is the executrix in the deceased estate. She is also a practising attorney. Although she was cited both in her personal capacity and as an executrix, relief was sought against her only in her personal capacity and as an attorney.

[4] Before the court of first instance, Mr De Kock brought the application in his nominal capacity as the guardian of his two minor children who, as mentioned, are joint heirs of the estate of their late mother. He based his right to seek the relief on the so-called *Beningfield* exception.[1] Mr De Kock sought an order compelling Ms Scholtz to render an account for the R5 600 000 and for the debatement of that account, and for the payment to the deceased estate of whatever amount was found to be due to it. The application was dismissed by the court of first instance. On appeal to it, the full court upheld Mr De Kock's appeal.

[5] The factual background is briefly this. In November 2014 the deceased was awarded R7 067 736.80 by the RAF following injuries she had sustained in a motor vehicle accident. The funds were paid into the Trust account of her attorneys. On 28 November 2014, the deceased instructed her attorneys to pay over the nett proceeds of R5 600 000 into the trust account of her twin sister, Ms Scholtz. On 2 December 2014, the funds were transferred to an investment account managed by Ms Scholtz. It is the amount of R5 600 000 that formed the basis of Mr De Kock's application in the court of first instance.

[6] Ms Scholtz denied that she had any duty to account to Mr De Kock. She nevertheless, gave the following explanation as to how she disbursed the funds that the deceased entrusted to her. In short, she stated that she too, was involved in the same motor vehicle accident which gave rise to the deceased's award from the RAF. Her injuries were less serious than those of the deceased. Both their respective claims

[1] An exception to the general rule that only an executor of an estate has locus standi in relation to estate assets and transactions was recognized. The exception has its genesis in the English decision in *Beningfield v Baxter* (1886) 12 AC 167 (PC), and accepted into our law in *Gross & Others v Pentz* 1996 (4) SA 617 (A) at 628G-H.

against the RAF were lodged by their father, also a practising attorney at the time. Their father expended professional time and defrayed their respective medical expenses.

[7] Ms Scholtz further explained that a mistake occurred when the RAF processed their claims, because of their almost similar identity numbers. The result was that her claim 'was effectively lost' and treated as that of the deceased. In view of this the twin sisters, and their parents, agreed that the deceased's claim would be pursued and Ms Scholtz's claim abandoned. Furthermore, upon payment of the award for the deceased, the award would be distributed as follows: (a) R500 000 thereof to their father as compensation for his professional services; (b) the rest to be shared equally between the twin sisters. Pursuant to this agreement, R500 000 was paid to their father and the twin sisters each received R2 550 000. The deceased invested her R2 550 000 portion into an investment venture in which both she and Ms Scholtz participated, which she managed.

[8] At the invitation of the court of first instance, Ms Scholtz explained how the deceased's award was expended. She stated that between December 2016 and December 2017, and on the instructions of the deceased, she paid a total amount of R4 144 250 to the deceased, or to persons nominated by the deceased. Ms Scholtz stated that each such payment was made on the deceased's specific instructions, and to her satisfaction. Ms Scholtz emphasised that she never acted as the deceased's attorney in relation to her RAF award.

[9] Mr De Kock disputed Ms Scholtz's explanation as being improbable. In particular, he disputed that the deceased would have donated half of her award from the RAF to Ms Scholtz. He contended that such conduct was irreconcilable with the deceased's conduct because she had created a testamentary trust for the benefit of their minor children shortly upon receipt of the award from the RAF. He further argued that Ms Scholtz provided no documentary proof evidencing the alleged donation although the facts giving rise to the deceased's generosity are all capable of objective verification. Mr De Kock demanded production of documents evidencing the nature of injuries suffered by both the deceased and Ms Scholtz, the content of their claim forms

with the RAF, the money paid to Ms Scholtz for her medical costs by the RAF and all other documents generated in the process of their claims.

[10] Mr De Kock asserted that those documents would confirm whether Ms Scholtz's injuries were indeed mistakenly attributed to the deceased. He contended that the evidence would reveal that Ms Scholtz's injuries were minor compared to those of the deceased and that it was improbable that the deceased would have agreed to share her award equally with Ms Scholtz.

[11] The court of first instance approached the matter on the basis of Mr De Kock's allegation that Ms Scholtz owed the deceased's estate R5 600 000, being the RAF payout. The court therefore proceeded on the footing that, on Mr De Kock's allegation, Ms Scholtz was a debtor of the deceased's estate. Relying on this Court's judgment in *ABSA v Janse van Rensburg*[2] the court of first instance concluded that there was no fiduciary relationship between the deceased's estate (represented by Mr De Kock) and Ms Scholtz as a debtor of the estate. As to the personal relationship between the sisters, the court was prepared to accept that there could have been a fiduciary relationship between them in relation to the deceased's monies held in the investment account. In this regard, the court accepted Ms Scholtz's explanation that she had expended the payments on the specific instructions of the deceased, and that the deceased was satisfied with how the monies were disbursed. Accordingly, the court dismissed Mr De Kock's application.

[12] The full court took a different view. It held that the court of first instance erred in its conclusion that Mr De Kock had failed to establish a duty on Ms Scholtz to account. According to the full court, that duty was two-fold. First, because there was 'statutory obligation on [Ms Scholtz] to have accounted, as an attorney into whose trust account an amount of R5 600 000 was deposited on behalf of the deceased.' Second, 'for the handling of the amounts in the Absa investment account in her name, in which she purportedly assisted the deceased; and the investments she had made.'

[2] *Absa Bank Bpk v Janse Van Rensburg* [2002] ZASCA 7; 2002 (3) SA 701 (SCA) paras 15-16.

[13] The full court held that Ms Scholtz's explanation as to what happened to the money, was 'no more than skeletal . . .', and referred to her explanation as an attempt to 'circumvent the onus which otherwise rested upon her to prove her explanation in a contested debatement process.' Consequently, the full court upheld the appeal with costs and ordered Ms Scholtz to provide a full and proper accounting of the amount of R5 600 000, supported by documentary evidence.

[14] In this Court, the parties persisted in their respective stances adopted in the two lower courts. The issue remains whether Ms Scholtz was obliged to account for the R5 600 000. It is to that issue we turn.

[15] A party who claims delivery of a statement and its debatement must assert their right to receive such an account and the basis for such an entitlement – whether through a contract, a fiduciary relationship or a statutory obligation.[3] They must establish any contractual terms or other circumstances which have a bearing on the accounting sought and a failure to render such an account.[4]

[16] In the present case, Mr De Kock predicated the duty to account on his allegation that Ms Scholtz stood in a fiduciary relationship with the deceased. The nature and basis of a fiduciary relationship was explained by this Court in *Robinson v Randfontein Estates Gold Mining Co Ltd*[5] as follows:

'Where one man stands to another in a position of confidence involving a duty to protect the interests of that other, he is not allowed to make a secret profit at the other's expense or place himself in a position where his interests conflict with his duty. . .There is only one way by which such transactions can be validated, and that is by the free consent of the principal following upon a full disclosure by the agent . . . Whether a fiduciary relationship is established will depend upon the circumstances of each case.'

[3] *Absa Bank Bpk v Janse Van Rensburg* [2002] ZASCA 7; 2002 (3) SA 701 (SCA) para 15.
[4] *Doyle and Another v Fleet Motors PE (Pty) Ltd* 1971 (3) SA 760 (A) at 762-763.
[5] *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 at 177-178.

[17] The existence of a fiduciary duty, its nature and extent, can only be determined after a thorough consideration of the facts.[6] Mr De Kock contends that the mere payment of the funds into Ms Scholtz's trust account *qua* attorney, without more, established a fiduciary relationship between her and the deceased, and thus an obligation for Ms Scholtz to account to the deceased. This contention found favour with the full court. But this is at odds with this Court's judgment in *Joubert Scholtz Inc v Elandsfontein Beverage Marketing*.[7] There, it was held that there is no general fiduciary duty on an attorney to account to her or his client merely because of payment into an attorney's trust account. Such a duty arises where there is an agreement of mandate, and its bounds are determined with reference to the terms of the mandate itself. There is no suggestion that there was such an agreement between the deceased and Ms Scholtz.

[18] Furthermore, the argument ignores the fact that the money was kept in Ms Scholtz's trust account only for four days. To the extent there might have been a fiduciary duty and an obligation to account, she had fully accounted. This is evidenced by the common cause fact that on 28 November 2014 she received R5 600 000 into her trust account and that the same amount was transferred into the investment account on 2 December 2014. Thus, the full amount and the four days during which it was in her trust account, had been accounted for.

[19] Once the money was transferred to the investment account, Ms Scholtz's mandate as an attorney, and any ancillary fiduciary relationship there might have existed, was terminated. Beyond the attorney-client relationship which existed for a short while, there remained a personal relationship between the identical twin sisters with regard to how R5 600 000 was disbursed after it was transferred into the investment account. Ms Scholtz, as the respondent, explained that as per the family agreement, the R500 000 was paid to their father, and the remainder was divided

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[6] *Bellairs v Hodnett and Another* 1978 (1) SA 1109 (A) at 1130E-F; *Phillips v Fieldstone Africa (Pty) Ltd* 2004 (3) SA 465 (SCA) para 27; *Gihwala and Others v Grancy Property Ltd and Others* [2016] ZASCA 35; [2016] 2 All SA 649 (SCA); 2017 (2) SA 337 (SCA) para 53; *National Union of Metalworkers of South Africa obo Nganezi and Others v Dunlop Mixing and Technical Services (Pty) Limited and Others* [2019] ZACC 25; 2019 (8) BCLR 966 (CC); (2019) 40 ILJ 1957 (CC); [2019] 9 BLLR 865 (CC); 2019 (5) SA 354 (CC) para 58.

[7] *Joubert Scholtz Inc and Others v Elandsfontein Beverage Marketing (Pty) Ltd* [2012] ZASCA 6; [2012] 3 All SA 24 (SCA) paras 93-94.

equally between the deceased and her. This, Mr De Kock disputed. He asserted that it was improbable that the deceased, having just established a testamentary trust for the benefit of her children, would donate half of her award to Ms Scholtz.

[20] There was clearly a dispute of fact on the papers. One of the tools available to a court when faced with disputes of fact is to apply the well-known *Plascon-Evans .*[8] The principle is to the effect that an applicant who seeks final relief on motion must in the event of conflict, accept the version set up by the respondent. That is, the respondent's version must be accepted, unless it is, in the opinion of the court, it is so far-fetched or clearly untenable that the court is justified in rejecting it merely on the papers.[9]

[21] It is so that a donation is not easily inferred. However, on the facts of the present case, regard must be had to the undeniably strong bond between the identical twin sisters and the fact that Ms Scholtz had abandoned her own claim against the RAF. There is also nothing untenable about the version that R500 000 was paid to their father for his professional services. On these bases, Ms Scholtz's version that the deceased had paid her father R500 000 for his professional services, and made an irrevocable donation to her, cannot be described as far-fetched or untenable. In all the circumstances, on the application of the *Plascon-Evans* principle, Ms Scholtz's version should have been accepted.

[22] One of the bases upon which the full court held that Ms Scholtz was obliged to account to Mr De Kock is that she received the awarded funds into her investment account. Assuming for present purposes that such a duty arose, there is nothing to gainsay Ms Scholtz's explanation of how the funds were expended. What gives credence to her explanation is that she would have managed the funds for almost four years before her death. The funds were paid into her investment account in December 2014, and the deceased passed away on 28 September 2018. The bank

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[8] Developed by this Court in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C.
[9] *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another* [2008] ZASCA 6; [2008] 2 All SA 512 (SCA); 2008 (3) SA 371 (SCA) para 12.

statements of the relevant account show that Ms Scholtz operated the relevant bank account for approximately four years.

[23] The records reveal that the bulk of the money was paid to the deceased. This is a break-down of the transactions. R2 550 000 was received into the account on 2 December 2014. For the period December 2014 and September 2018, the investment account earned R1 287 515 as interest. R3 000 000 was paid to the deceased in tranches of R1 000 000, respectively on 8 December 2016; January 2017, 19 January 2018. The last payment, of R606 735, was made to the deceased shortly before her passing, on 19 July 2018. The rest of the payments, totalling R537 515, were made to various people nominated by, or on the instruction of, the deceased. In sum, between December 2014 and September 2018, the investment account had credits of R3 837 515 and debits of R4 144 250. This left a debit balance of R306 735 as at the time of the deceased's passing, which, ordinarily, would be a debt against the deceased estate.

[24] It is common cause that the twin sisters shared a warm, close and trusting relationship. There is no suggestion that at any stage between the payment of the funds into the investment account and the deceased's death, the latter had expressed dissatisfaction about how the funds were managed. Similarly, there is no suggestion that by the time she passed away, the deceased had considered that there was any money due to her by Ms Scholtz, or that there was any accounting outstanding on Ms Scholtz's part.

[25] It must be emphasised that the funds were under Ms Scholtz's control for approximately four years before the deceased's passing. This is sufficiently long enough for the deceased to have demonstrated her dissatisfaction, if any, about Ms Scholtz's management of her funds. There is no hint of that. It is also important to bear in mind that the deceased was a person with full mental capacity. She was entitled to dispose of her assets in a manner she deemed fit during her lifetime. Her children, in whose interests Mr De Kock purports to act, have no right at law to question her financial decisions during her lifetime.

[26] Accordingly the appeal must succeed. Costs should follow the result.

[27] The following order is made:

1 The appeal is upheld with costs including costs of two counsel.

2 The order of the full court is set aside and replaced with the following order:

'The appeal is dismissed with costs.'

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T MAKGOKA
JUDGE OF APPEAL

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N M MBHELE
ACTING JUDGE OF APPEAL

Appearances:

For appellants:	R W F MacWilliam SC (with him A Van Aswegen)
Instructed by:	Spamer Triebel Inc., Belville
	Symington & De Kock Attorneys, Bloemfontein
For first respondent:	S P Rosenberg SC (with him T Tyler)
Instructed by:	Snijman & Associates Inc., Cape Town
	Honey Attorneys Inc., Bloemfontein