THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number: 137/2008

In the matters between:

MARY PATRICIA KING & OTHERS

COLLEEN JUDITH VAN STRAATEN & OTHERS

NAMCOAST (PTY) LTD

C M TAPSON & OTHERS **THE APPELLANTS**

and

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

Neutral citation: *King v The Attorneys Fidelity Fund Board of Control* (137/2008) [2009] ZASCA 44 (12 May 2009)

CORAM: **MPATI P, BRAND, CACHALIA, MHLANTLA JJA *et* BOSIELO AJA**

HEARD: **23 FEBRUARY 2009**

DELIVERED: **12 MAY 2009**

SUMMARY: Attorneys Fidelity Fund – claims against Fund under s 26(a) of Attorneys Act 53 of 1979 – money paid into firm of attorneys' trust account and subsequently stolen – assumed money had been entrusted to practitioner in course of practice as such – money destined to be invested in factoring scheme operated by third party – claims excluded by s 47(1)(g) of Attorneys Act since, when money deposited in practitioner's trust account, instruction was to invest in factoring scheme on claimants' behalf.

ORDER

On appeal from: Plaskett J (sitting as court of first instance)

The appeal is dismissed with costs which shall include the costs of three counsel, to be paid by the appellants jointly and severally, the one paying, the other to be absolved.

JUDGMENT

MPATI P (Brand, Cachalia, Mhlantla JJA *et* Bosielo AJA concurring.)

[1] One of the functions of the Attorneys Fidelity Fund, as administered by the Attorneys Fidelity Fund Board of Control (respondent), is to reimburse persons who may have suffered pecuniary loss as a result of theft, by a practising attorney, his candidate attorney or employee, of money entrusted by or on behalf of such person to him or her in the course of his or her practice.[1] In the court below (Grahamstown High Court) a total of 103 plaintiffs instituted four separate claims against the respondent for payment of moneys allegedly entrusted to, and subsequently stolen by the partners of Van Schalkwyk's Attorneys of Port Elizabeth ('Van Schalkwyks'). The four matters were consolidated and after hearing evidence the court a quo (Plasket J) dismissed the claims, with costs. It subsequently refused leave to appeal. This appeal is with leave of this court.

[1] Section 26(a) of the Attorneys Act 53 of 1979, which reads: '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, his candidate attorney or his employee, of any money or other property entrusted by or on behalf of such persons to him or to his candidate attorney or employee in the course of his 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; and
(b) . . . '

[2] Not all the plaintiffs who were before the court below have appealed. I shall nevertheless, for convenience, refer to the parties in this appeal as in the court below without specifically excluding those plaintiffs who have not appealed. At the commencement of argument in this court, condonation was sought, and granted, for the late filing of an application for leave to appeal, to 24 plaintiffs who had not previously applied for leave to appeal. The leave sought was also granted.

[3] The plaintiffs' causes of action are pretty much the same. It was alleged, in essence, that on various dates between 1997 and May 2000 the plaintiffs, acting personally in their individual capacities, or through a duly authorised agent, deposited moneys into the trust account of Van Schalkwyks. The funds were to be held in trust on the plaintiffs' behalf until utilised, or disbursed, in what was referred to as a 'factoring scheme'.

[4] The evidence revealed that this scheme, as it was explained to some of the plaintiffs, entailed the discounting of estate agents' commission. The commission of an estate agent who did not wish to wait for the ultimate transfer of fixed property after a concluded sale would be paid out of these funds, less a certain percentage, a part of which would then be paid to the participants in the scheme as interest or profit. According to the evidence, the scheme later included also the discounting of nett proceeds on sales of fixed properties.

[5] The role allegedly played by Van Schalkwyks in the scheme is set out as follows in the particulars of claim of the first plaintiff and 92 others (the King claim) in the court below:

'98. The monies aforesaid were to be utilised solely in the factoring scheme, and were only to be disbursed by VAN SCHALKWYK ATTORNEYS against production to them of specifically relevant documents and bank guarantees in respect of each and every transaction sufficient to satisfy VAN SCHALKWYK ATTORNEYS (acting as an expert attorney in conveyancing) that the monies were properly to be disbursed into the factoring scheme such as to be utilised solely in that scheme in a bona fide

manner . . . to be recovered thereafter by VAN SCHALKWYK ATTORNEYS and returned to the plaintiffs with a stipulated amount of interest.'

It was alleged further that the plaintiffs remained owners of their individual moneys deposited into Van Schalkwyks' trust account.

[6] Van Schalkwyks, however, allegedly misappropriated the funds concerned by disbursing them to one David Halgryn, or to other entities linked to him, for purposes other than utilization in the factoring scheme. The misappropriation of the trust moneys, so it was alleged, constituted theft by conversion, alternatively theft by misappropriation, by Van Schalkwyks. It appears that the practitioners who were involved in the alleged misappropriation of the plaintiffs' moneys were Aron Joubert van Schalkwyk, who subsequently emigrated to the United States of America and, later, attorney Charl du Mont. The scheme collapsed and the estate of the latter was subsequently sequestrated in an attempt by some plaintiffs to recover their moneys. It seems common cause that Van Schalkwyk and Du Mont were partners in Van Schalkwyks.

[7] Although the defendant admitted, in its plea, that the plaintiffs, or persons purporting to represent them, paid moneys into the trust account of Van Schalkwyks, it denied that the payments were 'entrusted' to Van Schalkwyks. It also denied that the payments were effected in the course of practice of Van Schalkwyks. It pleaded further that the plaintiffs' instructions were that Van Schalkwyks receive the money in trust for the purpose of investing it on their behalf 'by the factoring of claims in general which included amongst others the discounting of bank guarantees pertaining to commissions earned by estate agents and nett proceeds of sales by sellers of immovable properties'. The defendant accordingly pleaded that the plaintiffs in effect instructed Van Schalkwyks to invest the moneys on their behalf as envisaged in s 47(1)(g), read with s 47(4) and s 47A, of the Act. Finally, the defendant raised the defence that the transactions in any event contravened s 11 of the Banks Act[2] since they constituted the conduct of the business of a bank as

[2] 94 of 1990.

defined in s 1 of that Act, whilst, to the knowledge of the plaintiffs, Van Schalkwyks were not registered as a bank, thus rendering the transactions unlawful and void *ab initio.* In consequence, the defendant pleaded that these transactions did not constitute lawful entrustments in the course of the lawful practice of Van Schalkwyks as contemplated by s 26(a) of the Act.

[8] Section 47(1)(g) provides –

'The fund shall not be liable in respect of any loss suffered –

. . .

(g) by any person as a result of theft of money which a practitioner has been instructed to invest on behalf of such person after the date of commencement of this paragraph.'

Section 47(4) states that a practitioner 'must be regarded as having been instructed to invest money for the purposes of subsection (1)(g)', where a person who entrusts money to the practitioner or for whom the practitioner holds money, 'instructs the practitioner to invest all or some of that money in a specified investment or in an investment of the practitioner's choice'. Section 47(5), to which the provisions of subsection (4) are subject, lists instances where, for purposes of subsection 1(g), a practitioner 'must be regarded as not having been instructed to invest money' entrusted to him or her. Section 47A is a transitional provision. It reads:

'The fund is not liable for loss of money caused by theft committed by a practitioner, candidate attorney, employee or agent of a practitioner where the money is invested or should have been invested on instructions given before the date contemplated in section 47(1)(g) and where-

(a) the money is to be repaid at any time after that date, to the beneficiary specified in any agreement whether with the borrower or practitioner;

(b) the theft is committed at any time after the expiration of 90 days after the investment matures or after the expiration of 90 days after the date contemplated in section 47(1)(g);

. . .'

[9] As was correctly stated by the court a quo, for them to succeed in their claims the plaintiffs were required to prove that (a) they had suffered pecuniary loss, (b) by reason of theft committed by a practitioner or

practitioners at Van Schalkwyks, (c) of money entrusted by them or on their behalf to Van Schalkwyks and (d) in the course of practice of such practitioner(s).[3] The court found in favour of the plaintiffs on (a) and (b),[4] but against them on (c) and (d). The plaintiffs thus failed to prove all the elements of s 26(a) of the Act. In dismissing the plaintiffs' actions the court also reasoned that the placement of money in the factoring scheme constituted the investing of such money as contemplated by s 47(1)(g) of the Act and that consequently the defendant was not liable to reimburse them.

[10] In this court counsel for the defendant did not challenge the finding of the court a quo that the plaintiffs suffered pecuniary loss, and accepted, for purposes of the appeal, that the theft of the moneys was not in issue. The issues for consideration by this court are, therefore, (a) entrustment, ie whether the stolen moneys were entrusted to Van Schalkwyks by, or on behalf of, the plaintiffs; (b) whether the entrustment occurred in the course of practice of Van Schalkwyk or Du Mont, or both, and (c) whether the plaintiffs' claims are excluded by s 47(1)(g) of the Act.

[11] Before the court a quo and by agreement between the parties the plaintiffs, due to their large number and the impracticality of hearing the testimony of each one of them, were divided into seven categories. It was further agreed that only selected plaintiffs would testify and that their testimony would be determinative of their claims as well as those of the remaining plaintiffs. Categories one, two and three consist of those plaintiffs who were introduced to the scheme by a Mr Andre Naude, an insurance broker from Queenstown. Categories four, five and six are plaintiffs who paid moneys to Van Schalkwyks through a trust known as Paragon Asset Management Trust ('Paragon'), which had been set up by one of the witnesses, Mr Thomas Reginald Chowles Hosking ('Hosking'). Category 7 is made up of plaintiffs who were introduced to the scheme by another witness,

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[3] Section 26(a) of the Act, footnote 1. See *Industrial and Commercial Factors (Pty) Ltd v Attorneys Fidelity Fund Board of Control* 1997 (1) SA 136 (A) at 140E.

[4] The court found, on the evidence before it, that the funds were stolen by Van Schalkwyk or Du Mont, or both, they having at all material times been practising attorneys in the firm Van Schalkwyks.

Mr Alexander John Neaves of Port Alfred. The dates on which the plaintiffs in the various categories paid moneys to Van Schalkwyks would be of relevance, so it was considered, to the question whether their claims are excluded by s 47(1)(g) of the Act. The subsection came into operation on 15 January 1999.

[12] As to categories four, five and six, ie the plaintiffs who paid moneys to Van Schalkwyks through Paragon (the Paragon plaintiffs) the defendant contended that they had no standing to claim from it. The argument was that in paying the moneys into the trust account of Van Schalkwyks, Paragon did so not as agent for the Paragon plaintiffs, but as principal. As will be seen from the evidence of Hosking, each one of the Paragon plaintiffs paid their moneys to Paragon which, in turn, issued an acknowledgment of debt to them, evidencing a debtor and creditor relationship as between each plaintiff and Paragon. It was submitted on behalf of the Paragon plaintiffs, however, that the issuing of acknowledgments of debt to them by Paragon did not detract from the fact that they were the owners of the moneys paid to Paragon and which Paragon paid over to Van Schalkwyks. It was accordingly argued that their moneys were paid by Paragon to Van Schalkwyks on their behalf.[5]

[13] Relying on *S v Moloi*[6] and *Premier Milling Co (Pty) Ltd v Van der Merwe and others NNO and another*,[7] counsel argued that the phrase 'on behalf of' in s 26(a) of the Act should be given a wide meaning, such as 'for the benefit of', 'to the advantage of' and 'in the interest of'. There may be merit in these submissions, but I consider it unnecessary to express a firm view on them. I shall accept, without deciding, that all the plaintiffs have standing to claim reimbursement of their stolen moneys.

[14] The three issues for consideration in this appeal are mentioned in paragraph 8 above. I propose to deal with the last of those issues first, which is whether the plaintiffs' claims are excluded by s 47(1)(g) of the Act. For

[5] Section 26(a) entitles a person to claim reimbursement for stolen money that was entrusted to a practitioner 'by or on behalf of' such person.
[6] 1987 (1) SA 196 (A) at 214C-216B.
[7] 1989 (2) SA 1 (A) at 8C-E and 11F-H.

purposes of this approach, however, I have to assume that the issues of entrustment, ie whether the plaintiffs' moneys were entrusted to Van Schalkwyks (Van Schalkwyk or Du Mont), and whether such entrustment occurred in the course of practice of Van Schalkwyk or Du Mont or both, have been proved by the plaintiffs.

[15] A consideration of the question whether the plaintiffs' claims are excluded by s 47(1)(g) of the Act requires me to deal with the evidence (or at least some of it) tendered before the court a quo. Before I do so, however, it may be convenient to set out certain facts which appear not to be in dispute. The factoring scheme collapsed in or about May 2000. By that time Du Mont was the sole director of Van Schalkwyks, his erstwhile senior partner, Van Schalkwyk, having left the country for the United States of America. On 13 June 2000 Mr Desmond Thurgood[8] deposed to the founding affidavit in an application, by 44 plaintiffs, for Du Mont's sequestration in which the following appears:

'The Respondent is a qualified and admitted attorney, practising in PORT ELIZABETH, and acting as such and as VAN SCHALKWYK ATTORNEYS he collected funds from the various Applicants through various brokers, trusts, and companies throughout the Republic of South Africa and NAMIBIA, for investment purposes, and these funds were paid directly into the trust account of VAN SCHALKWYK ATTORNEYS . . . The funds were subsequently contrary to Respondent's mandate paid out at the Respondent's instance and upon his instruction from VAN SCHALKWYK ATTORNEYS trust account directly to the HALGRYN FAMILY TRUST, with registration number TM5404/1, duly managed and controlled by FLORIS DANIEL DE KOCK HALGRYN, an adult male businessman, and sole director and shareholder of numerous companies and trustee of various trusts in PORT ELIZABETH.

. . .

During the last year or two, and at PORT ELIZABETH, the Applicants therefore invested the sum of R33 910 011.00 with VAN SCHALKWYK ATTORNEYS, and the Respondent for the purposes of investing in the discounting of estate agents' commission and for no other purpose whatsoever. The investments would attract interest of 22% under R100 000.00 and 28% over R100 000.00. All the Applicants

[8] He is the 77th plaintiff in the King claim.

were advised that the attorney attending to the transfer of the property would ensure that guarantees were in place, and only then would estate agents receive their commission. We were informed that the investment was extremely sound and fool proof by the various brokerage firms.'

Four of the plaintiffs who testified in the trial court deposed to confirmatory affidavits confirming the correctness of the contents of Thurgood's founding affidavit in so far as they relate to them. They are Messrs Angus Barnard, Bernard de Bruin, Stanley Wilhelm Pohlman and Pierre Johannes Scheepers.

[16] Subsequent to the collapse of the factoring scheme Van Schalkwyk, Du Mont and Halgryn were charged with fraud. At a rule 37 conference held on 13 July 2006 the defendant accepted admissions made by Van Schalkwyk in his plea to the criminal charges in so far as such admissions related to him and for purposes of the consolidated actions. The admissions may be summarised thus: Van Schalkwyk, Halgryn and the latter's father were trustees of the Halgryn Family Trust, created under a Deed of Trust dated 17 January 1994. On 1 January 1998 Van Schalkwyk set up office as Van Schalkwyk's Attorneys in Port Elizabeth, having moved there from George, where he had originally practised. Du Mont joined Van Schalkwyks as a professional assistant from 13 February 1998 and was admitted as a partner on 1 January 1999. On 1 March 1999 the partnership was terminated and Van Schalkwyk became a consultant. He emigrated to America in January 1999. During the period January 1998 to January 1999 he, through one William Voysey ('Voysey') and the entities Commercial Investments, Paragon and Paragon Western Cape, induced investors (beleggers) to place money in a factoring scheme, which he had made out to be a profitable business involving the discounting of estate agents' commission operated by Halgryn. He made investors believe that their funds would be applied only in the 'factoring scheme'; that in so far as funds paid into Van Schalkwyks' trust account were concerned, these would be controlled by him with the necessary care and diligence and paid out only for the purpose for which they had been received; that such funds were in fact not applied for such purpose but rather in what has become known as a pyramid scheme, and for speculation in the Johannesburg Stock Exchange.

[17] I turn to the evidence, which will not necessarily be dealt with in the sequence in which the witnesses testified at the trial. Ten witnesses testified on behalf of the plaintiff. Counsel for the defendant submitted that the evidence of one witness, Mr Burt Botha, a forensic investigator, who was called as an expert witness, is hearsay and thus inadmissible. Without getting involved in the issue, I shall, for present purposes, ignore Botha's testimony.

[18] Hosking is a retired insurance broker. He became aware of the scheme during 1996 when one of his clients telephoned him to advise that she wanted to discuss a letter she had received from a company called Commercial Investments, informing her about an investment opportunity. Having discussed the matter with the client, he contacted Voysey, who was the author of the letter. A meeting was arranged at which Voysey explained how the scheme operated; that he would pay an estate agent his or her commission before it was due, at a discount and take cession of the agent's right to the full amount of the commission. An investor who participated in the scheme would be entitled, at the end of a ten week investment period, to receive his or her capital back, plus a margin of the profit derived from the discounting process. Voysey assured him that the scheme was a safe investment in that the funds were paid into an attorney's trust account which afforded protection to investors. He was satisfied with Voysey's explanation and on 5 November 1996 'invested' an amount of R605 000, which he handed to Voysey. His understanding was that Voysey could not do with the money as he wished, he had to pay it to an attorney, from where it would presumably be disbursed in the scheme. Voysey provided him with an acknowledgment of debt issued in the name of Commercial Investments and another from the attorney where the money had been placed.

[19] Later, Voysey introduced him to Van Schalkwyk who, he believed, was one of the conveyancing attorneys involved in Voysey's discounting scheme. From the discussions he had with Van Schalkwyk it became quite clear to him 'that it was actually pivotal that we have an attorney to oversee and police these transactions'. (It appears that following the discussions with Van Schalkwyk, Hosking decided to pay the money he had placed with Voysey's

company to Van Schalkwyks.) After obtaining further advice from various sources on the soundness of the scheme and on his 'concern about the Banking Act area' (he was presumably concerned about the possible contravention of the provisions of the Bank's Act) he and members of his family set up Paragon. (It appears that his idea was to invite members of the public to get involved in the scheme through him, ie he would collect money which he would then pass on to Van Schalkwyks.) When his investment with Voysey matured, he paid the money, as Paragon, directly to Van Schalkwyks, who issued an acknowledgment of debt to him reflecting Van Schalkwyks as debtor and Paragon the creditor. As to the obligations of Van Schalkwyks in respect of the payments into their trust account, Hosking testified that Van Schalkwyk and Du Mont undertook to 'ensure that all transactions where they received the funds and issued an acknowledgement of debt would be properly transacted as . . . discussed'.

[20] Hosking testified that in the meantime, Voysey had also introduced him to Halgryn, who, according to Voysey, had identified the discounting business as something he would like to pursue and in fact did pursue. He met Halgryn, who explained to him that there were a number of transactions which required funding. Thereafter, substantial amounts were paid to Van Schalkwyks, through Paragon, on a regular basis. Halgryn would indicate what amount was required, after which payment would be made into Van Schalkwyks' trust account for further transmission to Halgryn. Substantial amounts of money were sourced from individuals who paid moneys to Paragon for investment purposes. One such individual was a Mr Hart who was based in Namibia and who had been invited by Hosking to participate in the scheme. For the funds received from individual investors Paragon issued an acknowledgement of debt to which was attached an investment certificate which showed the return to be received by the investor at the end of a ten week cycle. And for those investors who did not wish to withdraw their investments at the end of the investment period, Paragon would issue a fresh acknowledgement of debt for the capital and earnings received. So too did Van Schalkwyks, in respect of entities that paid funds into their trust account. The administration of Paragon

was done by Paragon Administration Services (Pty) Ltd, which kept creditors (Paragon's) informed of developments pertaining to their investments.

[21] Hosking testified further that in or about April/May 1999 Halgryn told him that the main thrust of the business was no longer only the discounting of estate agents' commission, but also actual proceeds of sales of fixed property. Under cross-examination he said that he understood that moneys advanced to Halgryn by Van Schalkwyks were for purposes of discounting; that the conveyance's (Van Schalkwyks') duty was to ensure that the transactions in respect of which moneys were paid to Halgryn were in order and that Van Schalkwyk was to make sure that funds made available to Halgryn were properly managed. He said that on the strength of the acknowledgements of debt Paragon looked to Van Schalkwyks for repayment and not to Halgryn, and that Paragon was liable to its investors as it had issued an acknowledgement of debt to each of them.

[22] Although Hosking vehemently denied that Paragon's instructions to Van Schalkwyks were to invest the funds paid into the latter's trust account – he said 'we would not allow an attorney to invest funds for us' – he testified that 'we had an arrangement with Halgryn that we would provide the funds for his discount practice, his discounting business' and further that '[t]he money was going to be invested with Halgryn'. (My emphasis). When asked whether Van Schalkwyks' role in the scheme was limited to conveyancing, Hosking answered:

'Yes his role was limited to ensuring that the funds were made available to Halgryn, were properly managed.'

[23] George Wayne Hart is the sole shareholder and director of Namcoast, a Namibian based company. He was introduced to the scheme by Hosking in 1997. Hosking explained to him how the scheme worked, ie that it entailed discounting of estate agents' commission against bank guarantees and that a controlling conveyancing attorney (whose name was not revealed to him until after the collapse of the scheme) would release funds after making sure that documents had been properly prepared. Hart's understanding of the scheme

was that the money for it would first go from Namcoast to Paragon and from there to a conveyancing attorney's trust account. On the assurance of protection for potential investors he said:

'I was told and had in my possession a copy of an insurance policy which was in favour of Paragon Asset Management Trust which protected people like myself against negligence of the directors or the trustees of Paragon, I was told that the conveyancing head attorney or the controlling conveyancing attorney had a similar insurance policy in place and I was then also told that if all else fails then we would have the Fidelity Fund which would cover any theft or loss of funds on behalf of the attorneys, the controlling attorneys.'

After studying documentation given to him by Hosking to satisfy himself of the workings of the scheme, Hart decided to participate. In a letter addressed to him from Hosking dated 18 February 1997 it was made clear to him 'that Paragon is a "Business Trust" only in so far as it serves as a conduit to the Discounting Bank Guarantees (DBG's) function between the Creditor or Investor and the Trust as the Debtor'. For moneys paid to Paragon, Hart received an acknowledgement of debt, which he signed on behalf of Namcoast, and which recorded that 'the debtor acknowledges to be truly and lawfully indebted unto and in favour of the creditor in (a specified amount) . . . being monies lent and advanced by the creditor to the debtor'. The creditor is reflected as Namcoast and the debtor as Paragon.

[24] Hart denied, however, that the moneys were loaned to Paragon. In view of the contents of the letter of 18 February 1997 the denial seems justified. He testified that when the scheme collapsed his company lost about R22.5m. Until the collapse of the scheme he had never heard of Halgryn, or of Van Schalkwyk or Du Mont.

[25] Lynette Thomen, an ex-teacher, testified that she was persuaded by Hosking to participate in the scheme after a Mr Norman Hardy had told her of an excellent scheme to which Hosking was connected. She had wanted to invest part (R250 000) of the money she had received as a package when she stopped teaching. Although she gave Hosking two cheques totalling R250 000, only R150 000 was placed in the factoring scheme. The rest was

to be used for another purpose. Thomen testified that she knew what a factoring scheme was as she had studied it. Hosking assured her that the scheme was perfectly safe because 'they had a very well-known attorney involved'. However, she said that no mention was made of an attorney's trust account. She testified that every third month after July 1997[9] she received interest of R6 000 which was paid into a trust account.

[26] Alexander John Neaves is an investment broker and general manager of Port Alfred Marine. He lives in Port Alfred. He was introduced to the scheme by Voysey in 1997/1998 and subsequently met with Van Schalkwyk and Du Mont on three occasions. He testified that the purpose of his meeting with the two – Voysey was present at the first meeting – was for him 'to investigate the circumstances of how this investment would be made up'. He understood from what he was told by Van Schalkwyk and/or Du Mont, that their role (Van Schalkwyks) would be 'to take the money in and put it into the factoring vehicle and be responsible for the looking after that particular, the legal aspect of it'. He was informed that from the attorneys' trust account the money would go into a separate entity, where the actual factoring would take place, namely Sea Factoring Services, which was run by Halgryn. Upon his asking more questions Halgryn was called in to form part of the meeting. (The meeting took place at Van Schalkwyks.) From further enquiries he discovered that Absa Bank would be involved – he was told, he said, 'that they monitored all the transactions carefully'. He subsequently invested his own money in the scheme and alerted other people 'to the fact that I was investing in this investment'. (My underlining.) He lost all the money he had invested.

[27] Angus Barnard, a retired school principal, testified that he was advised around the year 2000, by Neaves, who had previously advised him to place R200 000 in a savings account, to '[en]trust the money to Van Schalkwyk Attorneys'. Neaves explained to him how the scheme (factoring or discounting of estate agents' commission) worked, and that the entrustment of the money was over a ten week cycle, at the end of which he could draw the capital and

[9] The date of her initial deposit was 25 July 1997.

interest or leave the entire sum over for another cycle of ten weeks. His concern for the safety of his money was allayed by Neaves who assured him that placing the money in an attorney's trust account was the safest way of investing money; it could not be taken out for any other purpose unless 'it had my signature on it, so it was there just for factoring purposes, in which case there was no danger whatsoever of it disappearing'. If the money was stolen 'there was an insurance which would cover the full amount of the money in the attorney's trust'.

[28] Barnard testified that Neaves, after several calls in which the latter enquired from him about whether he had made up his mind, arranged for him to meet Voysey, who also assured him that the money would be safe. Ultimately, on 4 February 2000, he deposited R200 000 into Van Schalkwyks' trust account through First National Bank. He subsequently received an acknowledgement of debt, signed by Du Mont, dated 14 April 2000, which recorded that Van Schalkwyks received from him, as creditor, the sum of R218 405. This meant that in approximately ten weeks his capital had earned him a substantial profit of R18 405. Barnard testified that when he wanted to draw the money so as to purchase a house, he discovered that the scheme had collapsed.

[29] The evidence of Jakob Myburgh, Bernard de Bruin, Stanley Wilhelm Pohlman and Pierre Johannes Scheepers was to the effect that they were all introduced to the scheme by one André Naudé, an assurance broker from Queenstown. They testified that Naudé explained the scheme to them after which they[10] placed money in it through either direct deposits into Van Schalkwyks' trust account or by handing cheques to Naudé. Except for De Bruin, who testified that he did not know where the money was going to, they all received acknowledgements of debt from Van Schalkwyks. Like Hart, Pohlman and Barnard, they had all either never heard of, or met, or spoke to, Van Schalkwyk, Du Mont or Halgryn. André Naudé was not called as a

[10] Myburgh placed his own money as well as money from his two daughters and his wife in the scheme.

witness although it appears, from the heads of argument of counsel for the respondent, that he was available.

[30] In dismissing the plaintiffs' claims also on the s 47(1)(g) defence, the trial court said:

'There can, in my view, be no doubt that the sole reason for placing money in the scheme was to earn a return on the initial stake. The conclusion is inescapable that the plaintiffs, when they placed money in the trust account of Van Schalkwyks, intended their money to be invested in the scheme. In this sense, they can be said to have instructed Van Schalkwyks to invest the money on their behalf. Those plaintiffs who placed their money into the trust account after the commencement date of 15 January 1999, are therefore struck by s 47(1)(g).'

I have not concerned myself much with the dates on which moneys were paid into Van Schalkwyks' trust account. It is clear from the evidence of all the witnesses that no one sought to withdraw money from the scheme immediately before the section came into operation. Indeed, it appears that all entrustments would have been renewed after the date of commencement of s 47(1)(g) of the Act. Clearly then, if the finding of the trial court regarding the intention of the plaintiffs that their money be invested in the scheme is correct, then all the plaintiffs are hit by the section.

[31] It was submitted, on behalf of the plaintiffs, however, that s 47(1)(g) finds no application in this matter, because Van Schalkwyks were not instructed to use the entrusted money to make any investments 'on behalf of' the plaintiffs. Moreover, the claims that were to be bought in the discounting scheme were not bought for the plaintiffs, so the argument proceeded. In those circumstances, counsel contended, it cannot be said that the authority which the plaintiffs gave Van Schalkwyks to release the money from trust for use in discounting transactions constituted an instruction by them to Van Schalkwyks to use the money in order to make investments 'on behalf of' the plaintiffs.

[32] At the risk of repeating myself, s 47(1)(g) exonerates the Fund from liability in respect of any loss suffered 'by any person as a result of theft of

money which a practitioner has been instructed to invest on behalf of such person' after the date of commencement of the subsection. As was correctly held in *Michael Yeats NO an others v The Attorneys' Fidelity Fund Board of Control*,[11] the subsection being a statutory exception to the Fund's general liability under s 26, the defendant in this matter bore the onus of proving that its liability is excluded by the exception.

[33] The term 'invest' is not defined in the Act. It must accordingly be given its ordinary grammatical meaning. I agree with the court a quo that the legislature, when using the word in s 47(1)(g), intended it to have the ordinary meaning as defined in the Concise Oxford English Dictionary, viz to 'put money into financial schemes, shares or property with the expectation of achieving a profit'. (See also the Shorter Oxford English Dictionary which defines 'invest' as 'To employ (money), in the purchase of anything from which interest or profit is expected'.)

[34] All the plaintiffs who testified made their moneys available, either through Paragon, or through an agent such as Naudé, or through direct payment into the trust account of Van Schalkwyks, did so in the expectation, indeed assurance, that they will receive a handsome return (profit). And in his affidavit in support of the application for the sequestration of Du Mont, Thurgood stated that 'the Applicants . . . <u>invested</u> the sum of R33 910 011 with VAN SCHALKWYK ATTORNEYS . . . for the purposes of <u>investing</u> in the discounting of estate agents' commission . . . '. (My underlining.) As previously stated Barnard, De Bruin, Pohlman and Scheepers were co-applicants with Thurgood and deposed to confirmatory affidavits confirming the correctness of Thurgood's statement. Hart was also a co-applicant. Moreover, Thoman testified that she wanted to <u>invest</u> part of her 'package' and knew what a factoring scheme was. It is therefore manifest that the plaintiffs knew when they deposited funds, or handed over their moneys for payment, into Van Schalkwyks' trust account, that those moneys were for the purposes of being

[11] Unreported decision of the Cape of Good Hope Provincial Division (per Van Heerden J), delivered 6 May 2003.

invested in the factoring scheme, and indeed intended their moneys to be so applied.

[35] It is true, as counsel for the plaintiffs submitted, that the profits and losses made in the discounting transactions did not affect the amounts which Van Schalkwyks had to pay to the plaintiffs at the end of the transaction periods. This submission is obviously grounded in the acknowledgements of debt issued by Van Schalkwyks in terms of which an undertaking was given to investors that the capital and profit (or interest) will be paid. There was no condition, for example, that if there was no factoring during the investment period, then no interest will be paid. In my view, this is of no consequence. What matters is the purpose for which the moneys were paid into Van Schalkwyks' trust account, which was for investing in the factoring scheme. The fact that the claims (for commissions) which were to be bought in the scheme might not have been purchased for the plaintiffs, as counsel for the plaintiffs argued, is also of no consequence. The claims were not going to be purchased by Van Schalkwyks on behalf of the plaintiffs, but by Halgryn in the course of his operating his discounting scheme. The plaintiffs' moneys were to be invested on their behalf in Halgryn's discounting business. And Halgryn, if all had gone well, would have paid the capital and profit back to Van Schalkwyks, who would then honour its obligation towards the plaintiffs. I agree with the submission by counsel for the defendant that this was a scheme conducted by a third party or parties, in which the plaintiffs wished to put their money with the expectation of making a profit in the form of 'a stipulated amount of interest'. The plaintiffs were thus investing in the factoring scheme, through Van Schalkwyks.

[36] As to the submissions that Van Schalkwyks were not instructed to use the moneys to make any investment on behalf of the plaintiffs, the short answer is in the acknowledgements of debt issued by Van Schalkwyks after August 1998. They acknowledged receipt, in trust, of the amount paid and then went on, in the second paragraph, to say:

'The capital is received for investment purposes and the said Aren Joubert van Schalkwyk is authorised to invest the capital on behalf of the creditor by Factoring of

claims in general which includes among other the discounting of bank guarantees pertaining to commissions earned by estate agents and nett proceeds by sales by Sellers of properties.'

All the witnesses, bar De Bruin and the Paragon plaintiffs, who include Thoman and Hart, (the latter in his personal capacity and/or representing Namcoast), received the acknowledgements of debt and never queried their wording. Hosking, whether in his personal capacity or as representative of Paragon and/or the Paragon plaintiffs, as their agent, also received the acknowledgements of debt. His denial, in his evidence, that Paragon's instructions to Van Schalkwyks were to invest the funds cannot be accepted and must be rejected. After all, on his own version, he was in direct contact with Halgryn. He testified that when Halgryn required more money he (Hosking) paid that money into Van Schalkwyks' trust account. For what purpose was the money so paid into Van Schalkwyks' trust account other than for it to be invested in the discounting scheme? There can be none. In my view, on each occasion that money was paid into Van Schalkwyks' trust account, that act amounted to an instruction to invest such money in the factoring scheme. This emerges clearly from the plaintiffs' own version.

[37] Counsel for the plaintiffs also contended that the moneys paid into Van Schalkwyks' trust account were stolen virtually immediately after they were deposited therein. There could thus be no renewal of entrustments as there were no funds left to be further entrusted to Van Schalkwyks. The plaintiffs' claims, therefore, are not for payment of the moneys in terms of the acknowledgements of debt, but for moneys paid in before 15 January 1998.[12] (I assume this submission has no bearing on those plaintiffs who paid moneys into Van Schalkwyks' trust account after the relevant date.)

[38] There is no merit in this contention. The moneys paid to Van Schalkwyks by the plaintiffs became mixed with other funds kept in Van Schalkwyks' trust account. An amount equivalent to the moneys paid in by the plaintiffs would have been invested in the discounting scheme. It can never be

[12] The date on which s 47(1)(g) came into operation.

argued that the exact same, identifiable, bank notes paid in, in the case of cash payments, were passed on to Halgryn. Thus, until such time that there was no money in Van Schalkwyks' trust account to reimburse the plaintiffs, it cannot be argued that the moneys were stolen immediately or soon after they had been placed into the trust account of Van Schalkwyks. Indeed, Myburgh testified that 'when the previous acknowledgement (previous to the one issued on 11 May 2000) was due, I had asked for repayment of R500 000 which was paid to me, and that was deposited and therefore their debt to me reduced to 1 million'.

[39] In my view, the defendant succeeded in proving that the plaintiffs' claims are excluded by s 47(1)(g) of the Act. This conclusion renders it unnecessary for me to consider the very interesting questions of the alleged contravention of the provisions of the Banks Act, and whether the plaintiffs' moneys were 'entrusted' to Van Schalkwyks 'in the course of an attorneys practice'.

[40] The appeal is dismissed with costs which shall include the costs of three counsel, to be paid by the appellants jointly and severally, the one paying the other to be absolved.

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JUDGE OF APPEAL

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