THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 917/17

In the matter between:

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

and

PREVANCE CAPITAL (PTY) LTD **RESPONDENT**

Neutral Citation: *The Attorneys' Fidelity Fund v Prevance Capital (Pty) Ltd* (917/17) [2018] ZASCA 135 (28 September 2018)

Coram: Navsa, Mathopo, Van der Merwe, Mocumie and Molemela JJA

Heard: 30 August 2018

Delivered: 28 September 2018

Summary: Attorney – theft of money from trust account – whether monies 'entrusted' to an attorney as contemplated in terms of s 26*(a)* of the Attorneys Act 53 of 1979 - Whether instruction simply to invest monies – whether liability of Attorneys Fidelity Fund Control Board excluded by the provisions of s 47(1)(g) of the Attorneys Act.

ORDER

On appeal from: The Gauteng Division of the High Court, Pretoria (Vorster AJ sitting as court of first instance):
The appeal is dismissed with costs.

JUDGMENT

Mathopo JA (Navsa, Van der Merwe, Mocumie and Molemela JJA concurring):

[1] This appeal is about whether the appellant, the Attorneys Fidelity Fund Board of Control (the Board), which owes its existence to s 25 read with s 27 of the Attorneys' Act 53 of 1979 (the Act), holds liability for the loss of monies deposited by Prevance Capital (Pty) Ltd (Prevance), a bridging finance company, into the trust account of Mr Robert Victor Weide, an attorney and conveyancer.

[2] Section 26*(a)* of the Act sets out, one of the purposes of the Fidelity Fund, which is controlled by the Board, as follows:
'[T]he 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 or her candidate attorney or his or her employee, of any money or other property *entrusted* by or on behalf of such persons to him or her or to his or her 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.' (My emphasis.)

[3] It was common cause that Prevance had suffered pecuniary loss in an amount of R3 081 926,55 due to theft committed within the offices of Mr Weide. Prevance sought reimbursement from the Board in terms of the Act.

The Board denied liability on the basis of the provisions of s 47(1)*(g)* of the Act, which read as follows:

'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 commence of this paragraph.'

[4] In short, the Board's attitude when it was faced by a claim for reimbursement by Prevance, was that since the monies were deposited with Mr Weide in terms of a finance scheme conducted by Prevance, structured as set out below, it was an investment and because of the statutory provisions set out in the preceding paragraph, it was not liable. The Board contended that the monies deposited were not 'entrusted' to Mr Weide as envisaged in s 26*(a)* of the Act.

[5] The finance scheme conducted by Prevance operated as follows:

'[Prevance] will enter into an agreement with the attorney (Weide), and the prospective seller, represented by Weide. [Prevance] agrees and [makes] available the amount needed by the seller in order to give transfer. A further amount is added by [Prevance] as a fee which is payable to it by the seller out of the purchase price on completion of the transaction. That last mentioned amount is the remuneration [Prevance] for the bridging finance which it supplied to the prospective seller represented by Weide. Upon completion of the transfer, Weide is obliged to pay to [Prevance] the remuneration amount from the purchase price paid to the seller.'

[6] It was also common cause that Mr Weide, in soliciting the finance from Prevance, had presented it with a series of fictitious immovable property transactions in respect of which he had also offered conveyancing services. The sale agreements presented to Prevance were bogus and contained 'signatures' of non-existent parties. It was all part of a fraudulent scheme to facilitate the misappropriation of the monies.

[7] The Gauteng Division of the High Court, Pretoria, (L I Vorster AJ), in adjudicating an application brought by Prevance for reimbursement, rejected

the submissions on behalf of the Board which were in line with what is set out in para 4 above. The following are the two concluding paragraphs of the judgment:

'The [Prevance] submitted that the nature of the aforesaid transaction is that of the provision of finance by the [Prevance] to the prospective seller at a discounting figure which is the amount over and above the amount made available by the [Prevance] in terms of the agreement for benefit of the seller. What is clear to me is that the nature of that transaction is not an agreement by the [Prevance] with Weide to invest any money on behalf of the [Prevance] by Weide. Weide is not required to invest any money on behalf of the [Prevance] as the agreement is that Weide would make that money available to the prospective seller to enable the transfer to take place. It is not a loan agreement as no interest rate is stipulated and no time for repayment of the amount advanced is agreed upon. It is an agreement, the fulfilment of which is contingent upon the transfer of the property taking place and the purchase price being paid by the purchaser to Weide, who is then obliged to account to the [Prevance] in respect of the remuneration stated in the contract.

For the aforesaid reasons I was of the view that the [Prevance] was successful in its application and I granted the relief claimed for. The transactions in terms of which the [Prevance] suffered its loss were bogus transactions where Weide falsely represented that he was acting on behalf of a prospective buyer which was not the case. The appropriation by Weide of these funds made available by the [Prevance] in terms of the bogus transactions is clearly theft. Consequently, I was satisfied that the [Prevance] proved its case and I granted the relief claimed in the notice of motion.'

[8] The following is the order made by the court below:

'1. Payment of the amount of R3 081 926,55.

2. Interest on the amount of R3 081 926,55 at the rate of 9 % per annum *a tempore morae* to date of payment.

3. Costs of suit.'

It is against that order, with the leave of this court, that the Board appeals.

[9] Before us, the principal issue was whether the Board could rely on the statutory exception provided for in s 47(1)*(g)*. The first formidable obstacle for the Board is that, objectively observed, there was never any question of an investment being made. Mr Weide, in soliciting the funds from Prevance and receiving them into his trust account had but one objective, namely, theft

thereof. The funds were not received as an investment or for any other legitimate purpose.

[10] In the court below the Board had admitted that monies had been entrusted to Mr Weide. Before us, because of its persistence in relying on the provisions of s 47(1)*(g)*, it sought to abandon that admission. For present purposes, I will accept that it is appropriate for it to do so.

[11] All, but one, of the finance agreements provided (in clause 3[1] under the heading 'undertakings by the attorney') that 'all monies paid by Prevance to the Attorney's Trust account have been paid by Prevance *and entrusted specifically for the benefit of the Seller*'. Significantly, the agreements under that contain, inter alia, the following 'warranties' by Mr Weide to Prevance:

'4. If the Purchase Price is being utilised by the Attorney to settle all or any transfer duty costs by the Seller for and on behalf of the purchaser then, the Attorney warrants that all documentation required and necessary for effecting same has been duly signed by all relevant parties.

5. The Attorney will not pay out any monies to any party following the registration of transfer of the Property (or upon a breach of this agreement), until such time as Prevance has been settled all amounts owing by the Seller to Prevance arising from this or any other agreement.

6. Prevance's claim shall be the first to be discharged by the Attorney from the monies held by such Attorney on behalf of the Seller.

7. The Attorney *shall act as Prevance's agent* in obtaining all information and documentation from the Seller pursuant to the Financial Intelligence Centre Act, No 38 of 2001 ("FICA") as may be required by Prevance in the execution of this agreement and further, the Attorney agrees to hold such documents to the order and for the benefit of Prevance.' (My emphasis.)

Underneath the undertakings there is, in tabular form, a space in terms of which Mr Weide would confirm that transfer duty and costs had been paid. The remaining finance agreement was in substance structured in the same way as the discounting finance agreements.

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[1] The numbering of the undertakings (warranties) differed in a few of the discounting finance agreements but they were in essence the same.

[12] In *Industrial and Commercial Factors (Pty) Ltd v Attorneys Fidelity Fund Board of Control* 1997 (1) SA 136 (AD), this court, with reference to the Afrikaans text in relation to the provisions of s 26*(a)*,[2] held that the word 'entrusted' was not meant by the legislature to imply that the handing over of the money or property concerned has to be subject to a trust in the technical sense of the word.[3] It took into account the circumstances of that case, namely, that it was only the person who had there 'entrusted the money' who would suffer pecuniary loss.[4]

[13] Mr Weide himself accepted that the funds in question were entrusted to him. In clause 7 of the undertakings, Mr Weide acknowledged that in relation to the aspects referred to therein, he would act as Prevance's agent. The warranties referred to in paragraph 11 are in respect of work to be done by Mr Weide in the course of his practice, including work on behalf of Prevance. Considering that Mr Weide had presented fictitious documentation and referred to fictitious sellers and purchasers, Prevance was the only entity that would suffer pecuniary loss. Mr Weide had made professional undertakings to Prevance. Simply put, he had undertaken to do work for Prevance in the course of his practise, including ensuring that outstanding rates and taxes were paid and that he would ensure FICA compliance on behalf of Prevance. In my view, there can, for the aforesaid reasons, be no question that the funds involved *were* entrusted to Mr Weide within the meaning of that expression in s 26*(a)*.

[14] Before us and in the court below, the Board relied on the provisions of s 47(5) of the Act, which reads as follows:

'For the purposes of subsection [47(1)*(g)*], a practitioner must be regarded as not having been instructed to invest money if he or she is instructed by a person –

(a) to pay the money into an account contemplated in section 78(2A), if such payment is for the purpose of investing such money in such account on a

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[2] Section 26 was substituted by s 3 of Act 60 of 1982 and by s 15.
[3] At 144G-I.
[4] At 145D-E.

temporary or interim basis only pending the conclusion or implementation of any particular matter or transaction which is already in existence or about to come into existence at the time that the investment is made and over which investment the practitioner exercises exclusive control as trustee, agent or stakeholder in any fiduciary capacity;

(b) to lend money on behalf of that person to give effect to a loan agreement where that person, being the lender –

(i) specifies the borrower to whom the money is to be lent;

(ii) has not been introduced to the borrower by the practitioner for the purpose of making that loan; and

(iii) is advised by the practitioner in respect of the terms and conditions of the loan agreement; or

(c) to utilise the money to give effect to any term of a transaction to which that person is a party, other than a transaction which is a loan or which gives effect to a loan agreement that does not fall within the scope of paragraph *(b)*.

It was submitted that, in the present case, since Prevance was introduced to the borrower by Mr Weide and that he, and not the former, specified the borrower, the 'presumptions' in s 47(5)*(b)* and s 47(5)*(c)* did not apply and that, therefore, s 47(1)*(g)* could be relied on by the Board.

[15] For all the reasons stated above, the reliance by the Board on s 47(5) of the Act is misplaced. The provisions of that subsection are inapplicable. As stated earlier, this was not simply a case of Mr Weide being instructed to make an investment and where the attorney was merely a bystander or conduit.

[16] The facts of this case are different than those that featured in the decision of this court in *King v Attorneys Fidelity Fund* 2010 (4) SA 185 (SCA). That case involved the discounting of estate agents' commission. In that case 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 those funds, less a certain percentage, a part of which would be paid to the participants in the scheme as interest or profit. According to the evidence presented in that case, the scheme later included also the discounting of net proceeds on sales of fixed property. In *King* the attorney involved was a mere

conduit and it was intended that the funds deposited by him would be invested with a third party. The attorneys there involved acknowledged that the amounts received were for investment purposes and that their instructions *simply* were to invest the monies in the scheme referred to at the commencement of this paragraph.

[17] In *King* the attorneys served as a mere conduit with funds destined for the third party to be paid to that party for investment purposes. It appears that the funds, instead of being invested as described in the preceding paragraph, were invested in a pyramid scheme and speculatively on the Johannesburg Stock Exchange.[5] Simply put, it was clear that the money was placed with the attorneys for investment purposes, which went awry. In *King* the Fidelity Fund had proved that the plaintiffs' claims were excluded by the provisions of s 47(1)*(g)* and this court held accordingly.

[18] The decision of the Western Cape Division of the High Court, Cape Town, in Attorneys *Fidelity Fund Board of Control v Mark Andrew Claassens* (A620/2011), was relied upon by the Board. It is true that in that case bridging finance was to be supplied to an attorney's clients in relation to the sale of immovable property and that the loans so provided would have a specified rate of return. After funds were placed in the attorney's account, the attorney misappropriated them and did not pass them on to his clients. There were no fictitious transactions as in the present case. There were no undertakings of the kind made by Mr Weide. In that case, too, the loan scheme envisaged that the attorney would be a mere conduit for the funds that would ultimately be utilised by the seller of immovable property. See also, in this regard, *Attorneys Fidelity Fund Board of Control v Mettle Property Finance (Pty) Ltd* 2012 (3) SA 611 (SCA), para 15.

[19] In light of the conclusions set out above, it follows that Prevance's claim for reimbursement is one rightly within the provisions of s 26*(a)* and that

[5] At 192H-I.

the Board has failed to show that its liability is excluded by the provisions of s 47(1)*(g)*.

[20] The following order is made:

The appeal is dismissed with costs.

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R S Mathopo
Judge of Appeal

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