



THE SUPREME COURT OF APPEAL REPUBLIC OF SOUTH AFRICA

MEDIA SUMMARY - JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

The Attorneys' Fidelity Fund Board v Prevence Capital (Pty) Ltd (917/17) [2018] ZASCA 135 (28 September 2018)

From: The Registrar, Supreme Court of Appeal

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Please note that the media summary is for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

Today, the Supreme Court of Appeal (SCA) unanimously upheld an appeal against a judgment of the Gauteng Division of the High Court, Pretoria (the high court), in the matter between The Attorneys' Fidelity Fund Board (the Board) v Prevence Capital (Pty) Ltd (Prevence).

The issue at the centre of this appeal concerned the question as to whether 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 Prevence, into the trust account of Mr Robert Victor Weide, an attorney and conveyancer (Mr Weide).

Prevence is in the business of advancing finance to prospective sellers of immovable property for purposes of assisting them to cover fees associated with the transfer of immovable property to prospective buyers. Once the transfer process is concluded and the purchasers of the immovable property have paid the purchase price to the seller, the sellers repay Prevence back for the monies it has advanced to them. Such repayment is inclusive of an added fee as remuneration for Prevence. Mr Weide, falsely presented himself to Prevence, falsely claiming that he was legally acting on behalf of what later transpired to be non-existent prospective sellers of immovable property. Prevence advanced monies to the non-existent sellers by depositing such advanced monies into the trust account of Mr Weide. Mr Weide misappropriated the money and Prevence suffered pecuniary loss.

While the Board would typically reimburse a client who may suffer pecuniary loss as result of theft committed by a practising attorney of any money *entrusted* to such practicing attorney on behalf of the client in terms of s 26(a) of the Act. A number of exceptions to the general liability of the Board to reimburse a client who has suffered pecuniary loss are set out in the Act. Section 47(1)(g) of the Act is particular, excludes the Boards general liability in instances where a client money was not merely entrusted to a practicing attorney but where there was also an instruction from the client for such monies to be invested on their behalf.

As such, the question that arose in this matter was whether the monies advanced and then deposited by Prevince to the trust account to Mr Weide were indeed entrusted to Mr Weide or whether such monies constituted investments. The Board argued that since the monies advanced by Prevince were deposited with Mr Weide in terms of a finance scheme conducted by Prevince, the monies had been invested and the liability of the Board was excluded in terms of s 47(1)(g). The Board contended that the monies deposited were as such not 'entrusted' to Mr Weide as envisaged in s 26(a) of the Act.

The high court rejected the Board's argument entirely and found that that the monies were indeed entrusted to Mr Weide and were not invested with him. The Board contends that the high court erred in finding that it was liable - hence the appeal to this Court.

On an analysis of the facts and the law, the SCA found that when objectively observed, there was never any question of an investment being made by Prevince. The Court held that Mr Weide, in soliciting the funds from Prevince and receiving them into his trust account had only the objective of theft, and as such the funds were not received as an investment or for any other legitimate purpose. As such it was the Court's view that the exception provided for in s 47(1)(g) the Act on which the Board relied on was not applicable in this matter. The court accordingly dismissed the appeal with cost.

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