



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case No: 702/2022

In the matter between:

LEGAL PRACTITIONERS' FIDELITY FUND

APPELLANT

and

GUILHERME CARLA MARSHALL

RESPONDENT

Neutral Citation: *Legal Practitioners' Fidelity Fund v Guilherme* (702/2022) [2023]
ZASCA 96 (13 June 2023)

Coram: DAMBUZA ADP, SALDULKER, MOTHLE and MATOJANE JJA
and DAFFUE AJA

Heard: 18 May 2023

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website, and release to SAFLII. The date for hand down is deemed to be 13 June 2023 at 11h00.

Summary: Claim against the Legal Practitioners' Fidelity Fund (the Fund) – money paid into attorney's trust account subsequently stolen – whether the money was entrusted as provided in section 26(a) of the Attorneys Act 53 of 1979 – claim dismissed by the Fund, but upheld by the high court – appeal by the Fund dismissed.

ORDER

On appeal from: The Western Cape Division of the High Court, (Savage and Kusevitsky JJ concurring and Ndita J dissenting, sitting as the full court on appeal):
The appeal is dismissed with costs.

JUDGMENT

Daffue AJA (Dambuza ADP and Saldulker, Mothle and Matojane JJA concurring):

Introduction

[1] At the heart of this appeal is the nature of a payment into the trust account of an attorney who has been struck from the roll since then, but failed to account fully for the funds deposited into his trust account. It is common cause that the attorney misappropriated the money. Ms Carla Marshall Guilherme (Ms Guilherme), the respondent in the appeal before us, suffered a loss. She unsuccessfully lodged a claim with the Legal Practitioners' Fidelity Fund (the Fund), the appellant in this appeal, for payment of the misappropriated amount whereupon litigation ensued.

Undisputed factual background

[2] It is apposite to deal with the relevant factual background before considering the parties' submissions. The following facts are common cause:

- (a) Ms Guilherme was previously married to Mr Bradley Clem Bartie (the deceased) who committed suicide on 10 May 2012; his attorney, Mr Spencer was appointed executor of the insolvent deceased estate.
- (b) Upon the death of the deceased Ms Guilherme became the sole beneficiary of the proceeds of a life policy in the amount of R5 000 000, of which she received an immediate cash payment of R50 000.
- (c) The balance of the death benefit in the amount of R4 950 000 was initially paid into Ms Guilherme's Nedbank account. Mr Spencer advised her to pay the money into

his trust account as these funds were at risk as a result of the deceased's liabilities towards his creditors. Consequently, this amount was returned to the insurer and thereafter paid into a Capitec bank account which she had opened for that purpose, where after the full amount was transferred into Mr Spencer's trust account on/about 1 June 2012.

(d) Ms Guilherme withdrew a total amount of R1.4 million over a period of time from Mr Spencer's trust account. On 1 December 2016 Mr Spencer transferred R2 750 032.76 into her Nedbank account which she believed at that stage to be the full amount owing to her.

(e) Ms Guilherme became concerned with the ineffective manner in which Mr Spencer was dealing with her matter and his advice in respect of the litigation by the bank against her. She terminated his mandate and appointed a new attorney who investigated the matter and made a reconciliation of the money held by Mr Spencer and paid back to her. He discovered that an amount of R799 967.24 was still due to her.

(f) The new attorney further discovered that Mr Spencer had already been suspended from practice in April 2017 and eventually struck from the roll in November 2017.

(g) On receipt of a letter of demand addressed to him, Mr Spencer denied that any amount was still outstanding, but Ms Guilherme believed that he had stolen her money, an aspect which is not in dispute.

(h) A claim was submitted with the Fund on 13 September 2018 on behalf of Ms Guilherme, but eventually rejected on 15 July 2019 on the ground that there was no entrustment as contemplated in s 26 of the Attorneys Act.

(i) Ms Guilherme stated in her founding affidavit:

'I would never, under any circumstances, have paid the monies to [Mr] Spencer for any other reason than that he as an attorney advised me to do so. I also felt comfortable because [Mr] Spencer was the executor of my late husband's estate and the money was paid into [Mr] Spencer's trust account. At no stage had I any reason, as a traumatised and grieving widow, not to trust [Mr] Spencer'.

This aspect was not disputed by the Fund. The Fund also did not dispute that Ms Guilherme believed that Mr Spencer was acting in her best interest.

Litigation history

[3] On 17 November 2020 the Western Cape Division of the high court found in favour of Ms Guilherme, ordering the Fund to pay to her the amount of R 799 967.24 plus interest *a tempore morae* and the costs of the application. It made a further order directing Ms Guilherme's attorneys to notify Standard Bank (the bank) upon receipt of payment from the Fund into their trust account. The bank was a creditor of Ms Guilherme's deceased husband and she allegedly stood surety for the debt. At the stage when the order was made, the litigation between the bank and Ms Guilherme was pending. An application for leave to appeal was dismissed by the court of first instance, but this Court granted leave to the appellant to appeal to the full court of the Western Cape Division. The full court in a majority judgment dismissed the appeal. Thereupon the Fund requested and obtained special leave to appeal to this Court.

Grounds of appeal

[4] Several grounds of appeal have been raised. The Fund submitted that payment by the respondent of her money to an attorney for safekeeping to hide it from the creditors of her late husband's estate did not constitute an entrustment for purposes of s 26 of the Attorneys Act 53 of 1979 (the Attorneys Act), but rather a deposit for safekeeping. Also, Parliament could never have intended that payment of money into the trust account of an attorney for such purpose would constitute an entrustment as provided for in s 26. Furthermore, entrustment entails that the attorney entrusted with the money is bound to hold it and pay it over (a) to a third person (b) upon fulfilment of a particular condition, or the occurrence of a particular event, or (c) on the instruction of the depositor upon conclusion of a particular matter or transaction which is already in place or about to come into existence. Finally, the appellant alleged that it did not seek to import a further 'element' into the concept of entrustment and the court a quo erred in this regard.

Section 26 of the Attorneys Act

[5] Ms Guilherme's claim, she being the successful plaintiff in the court of first instance, was premised on subsec 26(a) of the Attorneys Act. It needs to be recorded that at the stage when the action was instituted on 13 September 2018, the Legal Practice Act 28 of 2014 which repealed the Attorneys Act was not yet applicable.

[6] The heading of s 26 is significant, it being 'Purpose of the fund.' The relevant portion of the section, before its repeal stipulated 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, his clerk or employee, of any money or other property entrusted by or on behalf of such persons to him or to his clerk 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.'

Evaluation of the parties' submissions

[7] The Fund's main submission is that the legal concepts of 'deposit' (*depositum*) on the one hand and 'entrustment' as contemplated in subsec 26(a) of the Attorneys Act on the other are clearly separate and distinct from one another. A deposit (*depositum*), as alleged, is an agreement in terms whereof a thing is delivered for gratuitous safekeeping returnable on demand.¹ (I point out in the next paragraph that this submission is based on an improper reading of the text.) By contrast, an entrustment comprises (a) to place in the possession of something and (b) subject to a trust, which connotes that the person entrusted is bound to deal with the property or money concerned for the benefit of others and that 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. Counsel for the appellant also referred to the combined effect of several judgments in support of his submission. As I shall show, his submission must be seen in proper perspective. These judgments are fact-based and do not entail that Ms Guilherme's version does not amount to an entrustment.

[8] As mentioned in the previous paragraph, the Fund submitted that the payment into the attorney's trust account was a *depositum*, ie a deposit of monies into the attorney's trust account for safe-keeping and not an entrustment of such monies for the purposes of the Attorneys Act. It submitted that the monies were deposited for the purpose of hiding it from creditors of her deceased husband's estate and could not be regarded as an entrustment that enjoys protection of trust money in accordance with the Attorneys Act. The Fund's counsel elected to rely on a definition of 'deposit' in

¹ F Du Bois et al *Wille's Principles of South African Law* 9 ed (2007) at 962; 8 Lawsa 2 ed part at 300.

Wille's Principles of South African Law, but failed to quote the definition in proper context. The authors, relying on inter alia Grotius and Van der Linden and several other authorities, defined deposit as follows:

'Deposit (depositum or beaergeving [in Afrikaans: bewaargewing]) is a contract in which one person ('the depositor') delivers to another ('the depository') a thing for safekeeping, either gratuitously or for reward, on the understanding that the identical thing is to be returned on demand in the same condition as received.'²

The authors also state that the subject matter of the deposit is usually movable property, but may also be immovable property. This is far removed from money deposited into an attorney's trust account.

[9] As often stated a unitary exercise must be undertaken in the interpretation of contracts and legislation, taking into account text, context and purpose.³ Recourse to dictionaries to establish the ordinary meaning of words is often a good starting point, but has its limitations. Different meanings are often recorded and this may give rise to further questions and/or uncertainty. Litigants may selectively rely on a specific meaning that suits their case the best. Having recognised the pitfalls in relying slavishly on dictionary meanings given to words, it is worthwhile to consider what the dictionaries tell us about the word 'deposit' (in Latin *depositum*). The Shorter Oxford Dictionary provides three different meanings. The first two are irrelevant in casu, whilst the third is '(t)o place in a repository; to commit to the charge of any one for safe keeping or as a pledge; *spec*, to place in a bank at interest.' A '*depositorius*' is according to the same dictionary 'a person with whom anything is lodged in trust; a trustee; one to whom anything is committed or confided.' *Fowler's Modern English Usage* defines a depository as 'a person or authority to whom something is entrusted, a trustee.' If these various definitions are considered, there can be little doubt that the concepts of deposit and entrustment are not necessarily separate and distinct from one another as submitted on behalf of the appellant. The judgments referred to in the next paragraphs confirm that deposits of money into attorneys' trust accounts are, in appropriate circumstances, akin to entrustment as provided for in subsec 26(a).

² Loc cit *Wille's Principles of South African Law* at 962; 8 Lawsa 2 ed part 1 at 300; *Price NO v Allied-JBS Building Society* 1979 (2) SA 262 (E) at 270B-C.

³ *University of Johannesburg v Auckland Park Theological Seminary and Another* [2021] ZACC 13, 2021 (6) SA 1 (CC) paras 65 and 66; *Capitec Bank Holdings Limited & Another v Coral Lagoon Investments 194 (Pty) Ltd & Others* [2021] ZASCA 99, 2022 (1) SA 100 (SCA) par 25.

[10] In *Industrial and Commercial Factors (Pty) Limited v Attorneys Fidelity Fund Board of Control*⁴ (ICF) the attorney attended to a transfer of property on behalf of the seller. He arranged bridging finance in the course of his practice. The attorney devised a fraudulent scheme and pretended to the appellant that the seller needed bridging finance which was untrue. The appellant paid the money into the attorney's trust account and the court held that it was done with the intention that the attorney would keep it for and on behalf of the seller who would instruct the attorney how to deal therewith. Instead the attorney stole the money. The court held that the money was entrusted to the attorney as is required by subsec 26(a) and that the Attorneys Fidelity Fund should reimburse the appellant. Grosskopf JA, writing for the majority, dealt with the matter in some detail. I quote:

'After considering certain definitions of the word 'entrust'.... Nicholas J concluded as follows: "From these definitions it is plain that "to entrust" comprises two elements: (a) to place in the possession of something, (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 491 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."

I do not understand these passages, and similar remarks in the case of *SVV Construction (Pty) Ltd v Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund* 1993 (2) SA 577 (C) at 589G, to convey that the liability of the Fidelity Fund is limited to those cases where the money or property concerned was impressed with a *trust in the technical legal sense* of the word.⁵ (My emphasis.)

The learned judge then dealt with the Afrikaans version of the section and the dictionary meaning of 'toevertrou' (entrust) and continued:

'Had it been the intention of the Legislature to give 'entrust' the technical legal meaning of placing money or other property with an attorney subject to a trust, it would have used an expression such as 'in trust aan hom gegee' in the Afrikaans text of s 26(a). In view of the foregoing I am satisfied that the appellant has shown a sufficient element of entrustment to bring it within the ambit of s 26(a).⁶

Later on the learned judge concluded:

'In my judgment s 26(a) makes provision for reimbursement to either

⁴ *Industrial and Commercial Factors (Pty) Limited v Attorneys Fidelity Fund Board of Control* 1997 (1) SA 136 (SCA).

⁵ *Ibid* at 144A-E.

⁶ *Ibid* at 144I-J.

(1) the person *by whom* the money has been entrusted; or
 (2) the person *on whose behalf* the money has been entrusted;
 provided that such person has suffered pecuniary loss.⁷ (My emphasis.)

[11] In my view both courts a quo correctly considered the case presented to it by Ms Guilherme. The court of first instance came to the correct conclusion that there was no merit in the submission, as allegedly contended by the Fund, that a third element was applicable in respect of entrustment. The case law relied upon by the Fund and quoted in the judgment serves as proof that two elements are applicable, but that the second element may have different purposes in mind. This is confirmed in *ICF*, ie the property or money entrusted is to be held and applied for the benefit of some person or persons or for the accomplishment of some special purpose.⁸ The majority of the full court relied on *ICF* and came to the correct conclusion, to wit:

'In light of the decision in *ICF* it must follow that the concept of entrustment for purposes of s 26(a) does not connote that the person entrusted is bound to deal with the property or money concerned for the benefit of others, in the sense that it does not include monies deposited by a depositor such as the respondent who will provide instructions as to the application of such funds in trust in due course.'

[12] The full court distinguished the judgment of this Court in *Attorneys Fidelity Fund v Mettle Property Finance*⁹ (*Mettle*), followed in *Attorneys Fidelity Fund v Injo*¹⁰ (*Injo*) from the facts in this case. In *Mettle* this Court confirmed that where the attorney acted merely as a conduit in receiving money into his trust account to be paid out to another, no entrustment arises. I quote:¹¹

'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. . .

⁷ Ibid at 145E-F.

⁸ *ICF* loc cit at 144C.

⁹ *Attorneys Fidelity Fund Board of Control v Mettle Property Finance (Pty) Ltd* ZASCA 133; 2012 (3) SA 611 (SCA).

¹⁰ *Attorneys Fidelity Fund Board of Control v Injo Investments CC* [2015] ZAWCHC 112; 2016 (3) SA 62 (WCC) par 32.

¹¹ *Mettle* loc cit paras 15-16.

This being so, there was no 'entrustment' of money by Mettle to Langerak. In the words of FH Grosskopf JA in the *Industrial and Commercial Factors* case:

"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."

[13] It is reiterated that the second element of entrustment was absent in *Mettle* and *Injo*. The unique factual circumstances in these two cases distinguish them from the facts in *casu*. Here, Ms Guilherme acted on Mr Spencer's advice. He was her deceased husband's attorney and appointed as executor of the insolvent deceased estate. He used his intimate knowledge to advise her. Her money was deposited into his trust account in the course of his practice to be held in trust for her until she 'was required to withdraw monies or when the estate was finalised'.

[14] Grosskopf JA remarked in *ICF*, as quoted above, that the legislature did not have 'a trust in the legal sense of the word' in mind when s 26 was enacted. Even if one accepts for a moment the reliance on the principle applicable to trusts, the Fund's argument must also fail. 'Trust' is defined as follows in the Trust Property Control Act 57 of 1988:

"trust" means the arrangement through which the ownership in property of one person is by virtue of a trust instrument made over or bequeathed-

(a) to another person, the trustee, in whole or in part, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument; or

(b) to the beneficiaries designated in the trust instrument, which property is placed under the control of another person, the trustee, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument, but does not include the case where the property of another is to be administered by any person as executor, tutor or curator in terms of the provisions of the Administration of Estates Act, 1965.¹²

¹² Section 1 of Trust Property Control Act 57 of 1988.

[15] Mr Spencer who received the money in trust could be equated to a trustee as the money had been placed under his control for the benefit of Ms Guilherme, the beneficiary. Mr Spencer as trustee was subject to a fiduciary obligation. Every trust imports the element of holding or administering property in part for a person or object other than the trustee. Nothing prevented Ms Guilherme as the founder and depositor from being a beneficiary, or indeed the sole beneficiary.¹³ Therefore, there is no legal basis on which it can be argued that Ms Guilherme as the depositor of the money to be kept in trust may not benefit. The submission made on behalf of the appellant to the contrary has no legal foundation.

[16] In *Bic Southern Africa (Pty) Ltd v Attorneys Fidelity Fund Board of Control*¹⁴ the attorney failed to account to the client who had instructed him to invest the money in an interest-bearing account pending compliance with foreign exchange requirements. The money was not invested in accordance with the client's express instructions as envisaged in subsec 47(1)(g) of the Attorneys Act. The attorney fled and apparently left the country. The court held that the dealings were inextricably part of the attorney's practice insofar as he had held himself out as an expert in the field of foreign exchange matters. The Fund was held liable for the client's loss. This judgment supports Ms Guilherme's case and certainly not that of the Fund as submitted on its behalf. A client would be entitled to deposit an amount into his/her attorney's trust account before leaving the country for an extended overseas vacation with instructions to pay a specified amount every month into his/her bank account to ensure that debit orders charged against the account are met. This example is in line with what Ms Guilherme did as advised by Mr Spencer. Entrustment for the purpose of subsec 26(a) must be seen as an attempt by the legislature to protect the person by whom or on whose behalf money was entrusted, that being the person who stands to suffer the pecuniary loss. The proceeds of the policy fell into Ms Guilherme's own estate. She was the lawful recipient thereof and at liberty to apply it in any way she wished and/or as advised.

¹³ Cameron et al, *Honore's South African Law of Trusts* 5 ed (2017) at 11.

¹⁴ *Bic Southern Africa (Pty) Ltd v Attorneys Fidelity Fund Board of Control* 2003 (6) SA 757 (W).

[17] In *Du Preez and Others v Zwiegers*¹⁵ this Court dealt with a delictual claim and the duty of an attorney where the depositor was not an existing client. The attorney was held liable in delict in circumstances where he negligently made payment without ascertaining what the depositor wanted done with the money. The Court stated the legal principle as follows:

'It was also wrong, in my view, to hold, as a corollary, that it was up to the depositor to look after its own interests. Vis-à-vis the depositor the attorney is not just another member of the public who is entitled to expect fellow citizens to take reasonable care to protect their own interests. An attorney into whose trust account money is paid owes a duty to the depositor even if the depositor is not an existing client of the practice. That duty, at the risk of repetition, is to deal with the money in such a way that harm is not negligently caused, to the depositor among others.'¹⁶

The court of first instance referred to this dictum and concluded that money can be deposited into an attorney's trust account pending instructions while the depositor is not a client of the attorney. It held that such arrangement was not barred by law. The full court relied upon this same judgment in support of its finding that Ms Guilherme was entitled to rely on the professional advice of Mr Spencer to deposit the funds into his trust account. Ms Guilherme would be entitled to claim from Mr Spencer based on delict, but this does not affect her right to be reimbursed by the Fund for the loss suffered.

[18] The court of first instance was aware of the pending action instituted against Ms Guilherme as surety for the debt of her deceased husband. Therefore, it made a further order in terms whereof her attorneys were required to inform Standard Bank's attorneys on receipt of the amount payable by the Fund. The minority judgment held that it would be against public policy to allow Ms Guilherme to be reimbursed, the reason being that no entrustment occurred as the payment was made 'to evade liabilities and creditors of the Respondent's deceased's husband'. It must be emphasised that Ms Guilherme was the beneficiary of a policy taken out on the life of her deceased husband. She was entitled to the proceeds that became an asset in her estate. If the facts were different, there might have been room to agree with the minority judgment, but we are bound by the particular facts of this case. In the majority

¹⁵ *Du Preez and Others v Zwiegers* 2008 (4) SA 627 (SCA).

¹⁶ *Ibid* para 21.

judgment this aspect was considered. It held that it 'was not unlawful or contrary to public policy in light of the respondent's version under oath that she would withdraw the money when required to do so, which could patently have included to pay any debtor in due course'. I agree. Although there might have been a questionable motive, the Fund elected not to make proper enquiries and present sufficient facts to show that Ms Guilherme participated in a fraudulent scheme to hide her assets from her creditors.

Conclusion

[19] I conclude that the Fund was not entitled to reject Ms Guilherme's claim. Her money was entrusted to Mr Spencer in accordance with subsec 26(a). She is entitled to be reimbursed for the loss suffered consequent upon the misappropriation of the funds by the attorney. Therefore, the appeal should be dismissed with costs.

Order

[20] The appeal is dismissed with costs.

J P Daffue
Acting Judge of Appeal

Appearances:

For appellant: G Oliver

Instructed by: Brendan Muller Inc, Cape Town
Van der Merwe & Sorour, Bloemfontein

For respondent: G Van Rhyn Fouche

Instructed by: David Bayliss Attorneys, Johannesburg
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