REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case No: 8827/2017

REPORTABLE:
OF INTEREST TO OTHER JUDGES:
JUDGE KUNY 5 September 2022

In the matter between:

AMPY INVESTMENTS 43 CC	Plaintiff
and	
MARITZ, BOSHOFF & DU PREEZ INC	First Defendant
HERMANUS DANIEL VILJOEN N.O.	Second Defendant
ATTORNEY, NOTARIES AND CONVEYANCER FIDELITY FUND	Third Defendant
THE ATTORNEYS FIDELITY FUND BOARD	Fourth Defendant

This judgment was handed down electronically by circulation to the parties' representatives by email and by being uploaded to the Caselines. The date and time of the hand-down is deemed to be 16h00 on 5 September 2022

JUDGMENT

KUNY J

1 The plaintiff, Ampy Investments 43 CC, instituted action in February 2017 against the defendants, claiming payment of R1 137 890,67 alternatively, R900 000, together with interest and costs.

2 The plaintiff carries on business as a credit provider and financier, lending money to clients *inter alia*, for the purposes of providing bridging finance in property transactions. The plaintiff is a registered credit provider in terms of the National Credit Act 34 of 2005.

3 The late attorney, Carl Johannes Bosch ("Bosch"), was the sole director of the first defendant. He passed away on 8 July 2016 and the second defendant is sued in his capacity as the executor of the Estate late Bosch. The first defendant was placed under curatorship after Bosch passed away.

4 The third and fourth defendant are respectively the Attorneys Fidelity Fund and its Board of Control ("the Fidelity Fund"). They are sued as the parties responsible in terms of the Attorneys Act, 53 of 1979 ("the Attorneys Act"), to reimburse persons who have suffered pecuniary loss in the circumstances provided for in section 26(a) of the said Act.

5 The plaintiff's claim relates to monies that were paid into the first defendant's trust account as bridging finance in respect of a property transfer that Bosch had initially been instructed to attend to. It is accepted by the parties that the

monies were misappropriated by Bosch who, some months later, committed suicide. Default judgment was granted against the second defendant on 19 July 2017. Payment on the judgment could not be obtained. Bosch was insolvent at the time of his death and the money advanced by the plaintiff could not be recovered from his estate.

6 The plaintiff therefore seeks reimbursement from the Fidelity Fund on the basis that the monies advanced were entrusted to the first defendant and Bosch in terms of section 26(a).

THE FACTS

7 On or about 24 February 2016 Bosch approached Gerhardus Havenga ("Havenga"), the sole member of the plaintiff, and solicited a bridging loan, supposedly to facilitate the transfer of a property. Bosch told Havenga that he had been instructed by a client ("New Age")[1] to undertake the transfer of an immovable property that the latter company owned and was selling. Bosch told Havenga that his client needed a loan of R900 000 to be used to obtain a clearance certificate to enable the property to be transferred.

8 Unbeknown to the plaintiff, Bosch had no instructions or mandate to obtain bridging finance. The evidence was that Bosch had neglected to deal with the matter and New Age, represented by Ivan Pretorius ("Pretorius"), instructed VDT Attorneys to take over the transfer. When this firm took over from Bosch,

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1 The full name of the company was New Age Organisation For Growth and Economic Empowerment (Pty) Ltd

New Age, of its own accord, provided the monies to VDT Attorneys necessary to pay rates and taxes and obtain a clearance certificate.

9 The plaintiff called two witnesses, namely Havenga and Johan Liebenberg ("Liebenberg"), an attorney who practiced with VDT Attorneys. The defendant did not call any witnesses.

THE PLAINTIFF'S EVIDENCE

10 Liebenberg testified that he was approached by Pretorius in March 2016 and instructed to attend to a property transfer on his behalf. Pretorius informed him that Bosch, initially instructed to do the transfer, had failed to deliver the required services and that he wished Liebenberg to take over and attend to the matter. Liebenberg agreed but insisted that Pretorius first terminate Bosch's mandate.

11 Liebenberg took over the matter in March 2016. The transfer of New Age's property was registered in April 2016. Liebenberg confirmed in evidence that he had never been instructed to obtain bridging finance. New Age paid all the money due and owing in respect of rates and taxes directly to him and he obtained the clearance certificate and completed the transfer. He also confirmed that he had never received any money from Bosch or the first defendant when he took over the matter.

12 Mr Havenga was the second witness to testify. His evidence, in summary, was the following:

12.1 He met Bosch in 2014. The plaintiff had previously provided bridging finance in respect of between five and ten other property transactions undertaken by Bosch. There was a good track record in his dealings with Bosch.

12.2 He testified that bridging finance may be used to provide funds where there is an outstanding requirement on a transfer and finances are needed to complete the transaction.

12.3 Bosch telephoned Havenga in February 2016 and told him that money was required to pay outstanding rates and taxes on a property transaction that he was attending to and his client required a bridging loan in order to obtain a rates clearance certificate. Bosch had all the necessary paper work confirming that he was indeed attending to the property transfer on behalf of New Age.

12.4 Havenga had no dealings with Pretorius or New Age at all. However, he felt secure in lending the money to New Age because payment would be made into Bosch's trust account. Havenga did not think to verify the details of New Age and that Bosch's client was in fact seeking a loan, before lending the monies. Documents were provided confirming the property transfer on behalf of New Age and Havenga had no reason to doubt Bosch. Bosch would normally keep him informed about the progress of the transaction and, upon registration

of transfer, after the guarantee had been paid out, Bosch would settle the plaintiff's account.

12.5 On 29 February 2016 the plaintiff made payment of R900 000 into an ABSA bank account held by the first defendant. There was no dispute that the ABSA account was the first defendant's trust account.

12.6 Although the credit agreement (dealt with below) did not specify that the monies advanced were to be paid into an attorneys trust account, Havenga emphasised in his evidence that he insisted that payment had to be made into Bosch's trust account. He believed that this would afford the plaintiff an assurance that the money was secure, and so he implied, would be used for the purpose for which it was intended and paid.

12.7 Havenga learned on 11 July 2016 that Bosch had passed away. He became suspicious that something was amiss. (It was common cause that Bosch died by his own hand. It is assumed that he took his life because his transgressions in relation to the mishandling of trust monies had been discovered).

12.8 Neither the capital amount advanced by the plaintiff, ostensibly to New Age, nor any interest on the capital was ever repaid. (There was no dispute at the trial that the plaintiff was unable to recover any of the monies from Bosch's estate or from the first defendant, despite

efforts to do so).

13 The defendants did not dispute that New Age had never given an instruction or a mandate to Bosch to obtain a loan on its behalf as bridging finance or for any other purpose. The soliciting of the loan from the plaintiff was a fraudulent scheme devised by Bosch to enable him to obtain payment of R900 000 and then misappropriate the monies. The email correspondence between Bosch and Havenga prior to obtaining the payment is set out below.

14 On 24 February 2016 at 10:47am Bosch sent Havenga the following email:

> *Hi Gerhard,*
>
> *Ek verwys na ons gesprekke vroeer*
>
> *Sien hierby aangeheg die Koopooreenkoms (Koper is 'n MPY op die beurs), kansellasiesyfers asook uitklaringsyfers ten opsigte van erwe 1224 & 1225 Grobler park X88*
>
> *On versoek hiermee namens die verkoper die bedrag van R850 000.00, ten einde die uitklaringsertifikaat vanaf munisipaliteit to bekom, waarna waarborge uitgreik sal work (soos ooreengekom tussen die partye) en ons kan voortgaan met registrasie van ons klient se einendom.*
>
> *Ek bevestig hiermee dat alle ander opskortende voorwaardes ingevolge die koopooreenkoms, reeds ten volle nagekom is.*
>
> *Ek vertrou jy sal bogenoemde in order [vind].*
>
> *Dokumente (onderneming, ens) vir ondertekening deur ons kantore, kan direk na my e-posadres gestuur word.*
>
> *Dankie weereens dat julle bereid is om die aansoek to oorweeg en ek verneem graat van jou.*
>
> *Groete*
>
> *MARITZ BOSHOFF & DU PREEZ INC.*
> *CARL BOSCH*

DIRECTOR

15 On 24 February 2016 at 03:28pm Bosch sent Havenga the following further email:

> *Beste Gerhard,*
>
> *Sien hierby aangeheg, getekende aansoek soos bespreek is.*
>
> *Ek bevestig dat ek reeds gedurende hierdie week die nodige ondersteunende dokumente wat dien as bewys van die transaksie en syfers, aan jou gestuur het.*
>
> *Ek vertrou jy sal hierdie so in orde vind, en verneem van jou indien jy nog verdure inligting benodig.*
>
> *Groete*
>
> *MARITZ BOSHOFF & DU PREEZ INC.*
> *CARL BOSCH*
> *DIRECTOR*

16 On 29 February 2016 Bosch sent Havenga the following further email:

> *Hi Gerhard,*
>
> *Ek verwys na ons telefoongesprek vandag I/S oorbrugging vir die uitklaringsertifikaat op ons transport vir NEW AGE ORGANISATION FOR GROWTH, en heg hierby aan die herergtekwitansie, soos aan ons uitgereik deur SARS.*
>
> *Ek bevestig hiermee dat ons kantore sal toesien tot die registrasie van die transport in die koper se naam asook dat alle opskortende voorwaardes ingevolge die koopooreenkoms (behalwe die verkryging van die uitklaringsertifikaat) ten volle nagekom is.*
>
> *Soos bespreek en versoek, onderneem ons firma hiermee onherroeplik om die oorbruggingsbedrag te betaal uit die opbrengs van die bovermelde transport (welke opbrengs 'n substansieele bedrag beloop en voldoende sal wees).*
>
> *Dankie weereens vir die hulp hierin.*

Groete

MARITZ BOSHOFF & DU PREEZ INC.
CARL BOSCH
DIRECTOR

DEFENCES RAISED BY THE FIDELITY FUND

17 The Fidelity Fund raised two procedural defences by way of special pleas as well as defences on the merits. They are dealt with below.

Fidelity Fund not properly cited

18 The Fidelity Fund contended that it had been incorrectly cited as the "Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund". It was contended that no entity by this name existed.

18.1 The citation of the third defendant as above has its origins in the Attorney's Admission Amendment and Legal Practitioners' Fidelity Fund Act, 19 of 1941. Section 8 of this Act established a fund by the above name.

18.2 Section 25 of the Attorneys Act provided that the Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund would continue to exist under the name "the Attorneys Fidelity Fund".

18.3 In terms of section 53 of the Legal Practice Act 28 of 2016 ("the

LPA"), the Attorneys Fidelity Fund established under section 25 of the Attorneys Act continued to exist as a juristic person under the name "the Legal Practitioners' Fidelity Fund".

18.4 The Fidelity Fund Board was established in terms of section 61 of the LPA. It has the power to institute or defend legal proceedings. It was referred to under the Attorneys Act as the Attorneys Fidelity Fund Board of Control.

19 On 6 September 2017 the plaintiff joined the Attorney Fidelity Fund Board in the action. The fidelity fund vests in and is administered by this entity. In my view the joinder, coupled with the fact that the Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund was properly constituted by legislation (albeit that its name changed over time), puts it beyond doubt that the Fidelity Fund has been correctly cited and is properly before court. In the circumstances I am satisfied that there is no merit in this defence.

Proper notice of claim not given

20 A defence was raised that the plaintiff did not give written notice of its claim as required by section 48(1) of the Attorneys Act within three months after it became aware of the misappropriation of trust monies. The documentation shows otherwise:

20.1 On 10 August 2016 attorneys acting on the plaintiff's behalf

addressed a letter to the Fidelity Fund setting out the facts of the matter and stating that the plaintiff looked to it for reimbursement of R900 000 together with interest thereon.

20.2 This letter was acknowledged by the Fidelity Fund and they advised the plaintiff of the procedures to be followed and documentation to be submitted in making a claim.

20.3 The plaintiff provided documents on 25 August 2016. Regular follow-ups were made by its attorneys to check that all the required documents had been submitted.

20.4 On 24 November 2016, the Fidelity Fund wrote to the plaintiff's attorneys and advised that the plaintiff's claim had been rejected.

21 Havenga became suspicious on 11 July 2016 that there was a problem when he learned of Bosch's death. He immediately set about making enquiries to find out what had happened to the property transfer and the proceeds of the sale, part of which was intended to reimburse the plaintiff for the bridging finance loan. It is clear from the chain of correspondence that the Fidelity Fund was timeously and properly notified of the plaintiff's intention to claim from it. Accordingly, the defence that the notice provision in section 48(1) was not complied with, must also be rejected.

Section 47(1)(g) - practitioner instructed to invest funds

22 The Fidelity Fund pleaded that the claim fell within the provisions of section 47(1)(g) the Attorneys Act. This section provides:

> The Fidelity Fund shall not be liable 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 said subsection.

23 The Fidelity Fund sought to rely in argument on the fact that the loan was not covered by the exceptions set out in section 47(5). These exceptions are available to a claimant who is met by a defence that a practitioner who has stolen trust funds had been instructed to invest the monies as envisaged in section 47(1)(g). If a claimant is able to bring its claim within one of the exceptions, then notwithstanding that an instruction was given to invest the funds, the claimant is still entitled to claim.

24 In my view the Fidelity Fund did not, in the first place, succeed in demonstrating that Bosch had been instructed to invest monies on behalf of the claimant as contemplated in section 47(1)(g). It is therefore not necessary to consider whether the transaction was covered by the exceptions in section 47(5). In the circumstances I find that there was no merit in this defence.

25 The Fidelity Fund denied that the money lent by the plaintiff had been entrusted as contemplated and required by section 26(a) of the Attorneys Act. In my view, this defence merits more in-depth consideration.

PRINCIPLES APPLICABLE TO THE ENTRUSTMENT OF MONEY

26 Section 26(a) provides as follows:

> 26. Purpose of fund
>
> 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; [underlining added]

27 In *Provident Fund for the Clothing Industry v Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund 1981 (3) SA 539 (W)* at p542, the court held that in order to claim reimbursement from the Fidelity Fund the following is required:

> There is nothing in the words of the sub-section which makes such a pre-existing relationship a requisite to a claim to reimbursement from the Fidelity Guarantee Fund. In terms of the sub-section all that a claimant for reimbursement is required to show is that:
> (1) He has suffered pecuniary loss.
>
> (2) By reason of theft committed after the commencement of the Act by a practising attorney, notary or conveyancer or by his clerk or servant,
>
> (3) Of any money or other property entrusted by or on behalf of such person to him or to his clerk or servant,

(4) In the course of his practice as such.

28 On the question of entrustment the court in the above case stated 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 at 499). [2]

29 In *Industrial and Commercial Factors (Pty) Ltd v Attorneys Fidelity Fund Board of Control* 1997 (1) SA 136 (A) ("*Industrial and Commercial Factors*") at p143-144 it was held:

> Where money is paid into the trust account of an attorney it does not follow that such money is in fact trust money (Paramount Suppliers (Merchandise) (Pty) Ltd v Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund Board of Control 1957 (4) SA 618 (W) at 625F-G). 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.

30 It has been held in a number of cases that payments made into trust and thereafter misappropriated by attorneys, have been payments made in the

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2 *Provident Fund for the Clothing Industry v Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund (supra)* at 543F-F

course of the discharge of a debit.[3] In such cases it has been held that the specific requirement that the money or property be "entrusted", has not been satisfied. The attorney into whose trust account payment is made, is said to act as "a conduit" for the money paid either to the attorney's client or, to some other person on the client's behalf.[4]

31 In *Industrial and Commercial Factors* it was held that notwithstanding that payment had been made in the discharge a debt, the plaintiff (ICF) had nevertheless manifested an intention that the money paid into the attorney's trust account would be held in trust for and on behalf of his client (Branken). ICF initially tendered payment directly to Branken by means of a cheque marked 'not transferable'. The attorney (Maré) persuaded ICF to alter the endorsement on the cheque to 'not negotiable' to enable him to pay the cheque into his trust account. On the facts of the case, it was found by the majority of the judges that the payment to Maré in this manner was not intended by ICF to discharge its obligation to pay Branken. The discharge of the debt was held to have occurred only once Maré had actually paid the monies deposited into his trust account, to Branken or to someone else on her behalf. It was held therefore that a sufficient element of entrustment had been shown.

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3 Provident Fund for the Clothing Industry v Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund (supra), Attorneys Fidelity Fund v Injo Investments CC 2016 (3) SA 62 (WCC), Attorneys Fidelity Fund Board of Control v Mettle Property Finance (Pty) Ltd 2012 (3) SA 611 (SCA), Rodel Finance Services (Pty) Ltd v Attorneys Fidelity Fund (16833/2007) [2010] ZAWCHC 407 (24 May 2010)

4 Attorneys Fidelity Fund v Injo Investments (supra), para [32] and Attorneys Fidelity Fund Board of Control v Mettle Property Finance (supra), para [15]

32 Marais JA dissented in *Industrial and Commercial Factors* on the factual issue of whether ICF intended to discharge its obligation to Branken by payment of the altered cheque that was deposited into Maré's trust account. He found on the probabilities that the payment by ICF had intended to discharge its obligations to Branken and, therefore, that there had been no entrustment of monies. In his dissenting judgment, Marais JA dealt with the underlying issue relating to entrustment in the following terms:

> Some preliminary observations seem appropriate. The indemnity against loss for which the Act provides is not unlimited in its scope. It does not provide indemnification against any kind of loss suffered as a consequence of any conceivable kind of knavery in which an attorney might indulge in the course of his or her practice. That much is plain. The persons who may suffer pecuniary loss at the hands of attorneys will not necessarily be clients, they may be third parties. That too is reasonably plain. Attorneys in South Africa (particularly those who practise in rural areas) conduct multi-faceted practices which may include activities which are not peculiar to the attorneys' profession and which may be engaged in by persons who are not attorneys. Attorneys conduct auctions; they value property and stock; they act as agents for building societies and insurance companies; they prepare income tax returns and arrange loans and finance. Their professional status as attorneys is no doubt calculated to inspire confidence in them in the minds of members of the public who deal with them in relation to these associated activities but the indemnity against loss for which the Act provides, does not extend to compensate the public for loss sustained merely because the party responsible for it happened to be an attorney.

33 *The Attorneys' Fidelity Fund v Prevance Capital (Pty) Ltd* [5] was also a case involving the misappropriation of monies advanced by the plaintiff, Prevance Capital, (the respondent in the appeal) as bridging finance to an attorney

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5 Neutral citation - (917/17) [2018] ZASCA 135 (28 September 2018)

(Weide). The Supreme Court of Appeal came to a different conclusion on the facts. The main issue in the appeal was whether the Fidelity Fund could rely on the statutory exception to section 47(1)(g) of the Attorneys Act. The Fidelity Fund accepted in the court below that money had been entrusted. However, on appeal, it sought and was permitted to withdraw its concession.[6] As regards section 47(1)(g) it was found that the nature of the transaction was not an agreement in terms of which money would be invested by or on behalf of Prevance Capital.[7] Mathopo JA (as he then was) found the following in relation to entrustment:

33.1 The transaction was not a loan agreement as no interest rate was stipulated and no time for repayment of the amount advanced was agreed upon.[8]

33.2 Weide himself had acknowledged that he acted as Prevance Capital's agent and that the money paid into his trust account had been entrusted to him.[9]

33.3 Weide had undertaken to do work for Prevance Capital in the course of his practise, including ensuring that outstanding rates and taxes were paid and that he would ensure FICA compliance on behalf

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6 ibid para [10]

7 ibid para [7]

8 ibid para [7]

9 ibid para [13]

of Prevance Capital.[10]

34 The Supreme Court of Appeal accordingly found that the money had been entrusted as contemplated in section 26(a).

35 It is clear from the cases referred to that the fact that monies are paid into an attorneys' trust account will not necessary impress trust on the money. Conversely, money that is not deposited into a trust account may be impressed with trust. This is evident *inter alia* from the fact that section 26(a) provides that property may be entrusted. Also consider for example, a situation where a client entrusts an attorney with cash intended to be entrusted.

36 In each case, the nature of and factual basis for the payment will play a decisive role in determining whether there has been an entrustment of money and the answer will inevitably turn on the particular facts and circumstances of each case.

ANALYSIS OF THE FACTS

37 When requested to provide finance, the plaintiff presented Bosch with an application form headed "Application for Bridging Finance Incorporating Suretyship & Co-indebtedness". This document was the basis of the agreement between the plaintiff (as lender) and New Age (as the borrower).

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10 ibid para [13]

The application form is divided into seven sections as follows:

37.1 Section 1 makes provision for the details of the borrower. All the details, including New Age's contact numbers and email address were inserted in this section. It also makes provision for a description of the transaction. *In casu* the box "Transfer duty/rates and taxes/agents commission" was checked. The other boxes in respect of the following, "Advance", "Further bond", "Switch", were not checked.

37.2 Section 2 makes provision for the details of the attorney attending to the property transaction. The first defendant's details were inserted in this section.

37.3 Section 3 makes provision for a bank account number into which the loan shall be paid. There was no requirement stated on the form that the account had to be a trust account.

37.4 Section 4 provides for the details of the property transaction.

37.5 Section 5, headed 'Quotation and Pre-Agreement Statement', is said to relate to section 92 of the NCA. The following was provided in this section:

5.1 The principal debt under this credit agreement is constituted by and repayable as follows:

5.1.1 Advanced amount: The advance required

above

5.1.2 *Initiation fee: R 150,00 (excl VAT) plus 10% of the amount of the agreement in excess of R 1000. The initiation fee will be capped at R 1150,00 (excl VAT) and may be paid upfront.*

5.1.3 *Service fee: R50,00 per month*

5.1.4 *Interest: (Interest amounts to 5% per month calculated on the amount advanced)*

5.1.5 *The interest is calculated on a month-to-month basis from the date the amount is advanced to the date of repayment.*

5.1.6 *This quotation is valid for a period of 5 business days.*

5.1.7 *The signature of the Borrower of the credit agreement will also serve as signature of this quotation.*

37.6 Section 6 is headed "Credit Agreement". It states that the Credit Provider (Ampy Investments 43 CC) will advance money to the Borrower (New Age) on the terms and conditions set out in section 6. Provision is made at the foot of this section for the signature of the borrower. On 25 February 2016 Pretorius purported to sign on behalf of New Age. It was accepted by the parties that his signature was a forgery and that New Age had no knowledge that Bosch had sought and obtained bridging finance, purportedly on New Age's behalf.

37.7 The seventh section[11] is headed "Undertaking by the Attorney".

11 Incorrectly designated Section 6

In this section Bosch warranted that he had an irrevocable mandate from New Age, had accepted such instruction and that upon transfer of the property he would pay so much of the proceeds due and owing in terms of the credit agreement, into the bank account nominated by the plaintiff. On 26 February 2016 Bosch signed at the foot of this section.

38 In terms of the credit agreement the plaintiff assumed the obligation to lend money to New Age ostensibly, to enable it to discharge its obligation to pay the rates and taxes New Age owed on its immovable property. The plaintiff was falsely led to believe that New Age had signed the credit application form.

39 The fraud however, does not detract from the fact that as far as the plaintiff was concerned, its intention was to lend money to New Age to enable it to pay the outstanding rates and taxes and obtain a clearance certificate. Bosch was mandated in terms of the loan agreement to receive the borrowed money and to pay out such money on New Age's behalf.

40 Bosch gave the following warrantee in section 7 of the credit agreement:

> 7.5 He has received an irrevocable mandate from the Borrower and has accepted such instruction, that upon the transfer of the Property or registration of the bond, he is to pay so much of the proceeds of the sale or bond that is due and owing in terms of the above credit agreement into the bank account nominated by Ampy Investments 43cc.

41 In my view Bosch's personal undertakings as to the manner in which he would deal with the bridging finance did not alter the character of the monies

paid into his firms trust account or impress the monies with trust.[12] Havenga's subjective view that, by paying the loan into a trust account the funds would be protected in the event of a theft, does not alter the position.

42 In *Industrial and Commercial Factors* the distinguishing feature was that ICF had always intended to make payment under the contract directly to Branken and had drawn a cheque marked 'not negotiable' in this regard. It was found that the monies deposit into Maré's trust account by means of the altered cheque, on the facts, were impressed with trust. *Prevance Capital* is also distinguishable on the facts dealt with in paragraph 33 above. In this matter:

42.1 The bridging transaction was facilitated by means of a loan agreement. The interest rate was stipulated and a time for the repayment of the amount advanced was specified.

42.2 The was no evidence that Bosch had acknowledged that he acted as the plaintiff's agent and that the money paid into his trust account had been entrusted to him, as was found in the case of Weide.

42.3 Bosch did not undertake to do work for the plaintiff as was found in the Prevance Capital matter.

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12 Mettle Property Finance (supra) paras [13] - [16], Injo Investments CC at para [14] & [22]

43 The LPA came into effect on 1 November 2018. It repealed the whole of the Attorneys Act. The liability of the Fidelity Fund is prescribed in section 55 of the LPA as follows:

> 55(1) The Fund is liable to reimburse persons who suffer pecuniary loss, not exceeding the amount determined by the Minister from time to time by notice in the Gazette, as a result of theft of any money or other property **given in trust to a trust account practice** in the course of the practice of the attorney or an advocate referred to in section 34(2)(b) as such, if the theft is committed .. [emphasis added]
>
> (a) by an attorney in that practice or advocate, or any person employed by that practice or supervised by that attorney the advocate;
>
> (b) .....
>
> (c) .....

44 Accordingly, it will be seen that the phrase “entrusted by or on behalf of such persons” used in section 26(a) the Attorneys Act has been replaced with the phrased “given in trust to a trust account practice*”.* I can find no decided cases dealing with section 55 of the LPA and whether the terms use in the new legislation will affect the law and legal principles in matters involving the theft of and claims for reimbursement of money under section 55.

45 However, it was common cause that the misappropriation by Bosch occurred in 2016 prior to the commencement of the LPA. Accordingly, the Fidelity Fund’s liability to reimburse the applicant must be decided under the Attorneys Act and the court must be guided by the decided cases relating to the interpretation of section 26(a) of that Act.

46 The plaintiff, so it believed, made the money available to New Age in order that Bosch could pay the rates and taxes and obtain the clearance certificate on New Age's behalf. In doing so it was discharging a debt. In my view, Bosch's trust account was a conduit to receive payment of the monies advanced, with the intention that they would thereafter be paid on New Age's behalf to obtain a rates clearance certificate.

47 In my view, had New Age given a proper mandate and instructions to Bosch to obtain bridging finance and had Bosch misappropriated the money before obtaining the required clearance certificate, there would have been an entrustment of funds insofar as New Age was concerned. It would have been prudent and easy for the plaintiff to have confirmed, by means of an email or telephone call, that New Age had given proper instructions and a mandate to Bosch in this regard. In my view this would have eased the plaintiff's path to the recovery of the money it advanced and that were ultimately lost. Unfortunately it did not do so.

48 To sum up, on the legal principles set out in the cases referred to above, the plaintiff has not established a sufficient element of entrustment. Accordingly, the Fidelity Fund's defence that the money paid by the plaintiff was not entrusted as contemplated in terms of section 26(a) must succeed.

COSTS

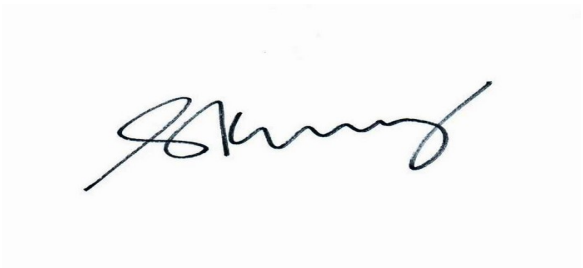
49 Costs are in the discretion of the court. Whilst the Fidelity Fund has been substantially successful, three of the defences raised have been rejected. A fair amount of the time was taken up in the preparation for and conduct of the trial on the rejected defences. Time and cost would have been save had they not been raised. I am accordingly of the view that it would be unfair to require the plaintiff to pay all the costs and the third and fourth defendant should be deprived of one third of its costs.

50 In the circumstances I make the following order:

1 The plaintiff's claim is dismissed.

2 The plaintiff is ordered to pay 66% of the third and fourth defendant's costs of suit.

3 No order of costs is made in relation to the first and second defendant.



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KUNY J

JUDGE OF THE HIGH COURT
NORTH GAUTENG DIVISION

Date of hearing: 3, 4, 5 & 6 May 2022

Date of Judgment: 5 September 2022

Counsel for plaintiff:	Adv J de Beer SC
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Counsel for 3rd & 4th defendant:	Adv M Gwala SC
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