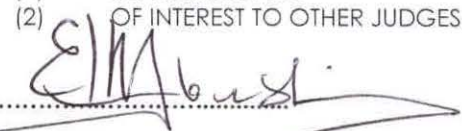




**IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)**

**Case Number:** 26539/2016

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
	
E.M. KUBUSHI	DATE: 01 FEBRUARY 2023

In the matter between:

**IAN JULIAN SMITH** (Identity No.: [REDACTED])

Plaintiff

and

**THE LEGAL PRACTITIONERS' FIDELITY FUND BOARD**

Defendant

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**JUDGMENT**

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**KUBUSHI J**

**Delivered:** This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on 01 February 2023.

## INTRODUCTION

[1] This matter turns on the narrow issue of whether the Defendant, the Legal Practitioner's Fidelity Fund ("the Fund"), is liable for the amounts claimed in terms of section 26(a) of the Attorneys Act, as amended ("the Attorneys Act").<sup>1</sup>

[2] The Attorneys Act has been repealed by the Legal Practice Act ("the Legal Practice Act"),<sup>2</sup> which came into operation on 1 November 2018. The Legal Practice Act does not have retroactive effect, and claims against the Fund, arising before 1 November 2018, are to be determined in terms of the Attorneys Act. The claims in this case arose prior to the commencement of the Legal Practice Act. Therefore, inasmuch as such claims arose prior to the commencement of the Legal Practice Act, they are to be dealt with substantively in terms of the provisions of the Attorneys Act.

[3] There are four claims in this case that the Plaintiff, Ian Julian Smith, has instituted against the Fund. The claims pertain to the theft of monies which the Plaintiff alleges were entrusted and paid into a particular trust account of one attorney David Dadic ("Mr Dadic") who practised under the name and style Dadic Attorneys. Specifically, the Plaintiff dealt with one Andruw Stephens ("Mr Stephens"), an employee of the particular practitioner. And the Plaintiff asserts the said claims for a pecuniary loss, suffered as a result of the theft of the monies.

[4] The Fund is defending the claims and has in its plea raised a special plea of excussion and a plea over in respect of the four claims instituted against it, alleging that the Plaintiff has failed to establish some of the requirements of section 26(a) of the Attorneys Act, more specifically the requirement of entrustment.

[5] At the end of the proceedings, it was argued on behalf of the Plaintiff that the evidence proffered by the Plaintiff in Court has established the requirements of section 26(a) of the Attorneys Act. Conversely, on behalf of the Fund, it was

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<sup>1</sup> Act No. 53 of 1979.

<sup>2</sup> Act No. 28 of 2014.

submitted that the special plea of lack of excussion ought to succeed, failing which the plea over, should succeed.

[6] The claims are to be decided on the evidence of the Plaintiff only, as the Fund closed its case without tendering any evidence and limited its case to the cross examination of the Plaintiff's witnesses. The Plaintiff's evidence comprises of the testimony of the Plaintiff and that of one Charles Henry Parsons ("Mr Parsons") a director of Flake Ice Investments (Pty) Limited ("Flake Ice"), who gave evidence about the fictitious nature of what is referred to as the Flake Ice transactions.

### **THE EVIDENCE**

[7] The evidence to the claims is not seriously in dispute, and is gleaned from the claims affidavit lodged with the Fund by the Plaintiff, which claims the Fund rejected, and the oral evidence of the Plaintiff in Court. The facts in the claims affidavit on which the Plaintiff relied when he lodged the claims, are the Plaintiff's own facts and are common cause between the parties. The Plaintiff during his cross-examination in chief, confirmed the correctness thereof.

[8] Before this Court, the Plaintiff's testimony is that he has been an insurance broker for 50 years and is currently a director and 50% shareholder of Interglobe (Pty) Ltd ("Interglobe"), which operates from Sandton. Through Interglobe, the Plaintiff provides financial and insurance advice to clients.

[9] The Plaintiff's testimony is that he concluded all the transactions pertaining to the four claims with Mr Stephens. He met Mr Stephens for the first time in 2012, as a member of the Houghton Golf Club, and got to know him socially. Through their social interaction the Plaintiff learnt that Mr Stephens worked as the Financial Officer of a firm of attorneys, being Dadic Attorneys, and in which Mr Dadic was the principal attorney.

[10] The Plaintiff confirmed during his testimony that he always knew that Mr Stephens was not an admitted attorney in South Africa, but worked at Dadic Attorneys as an employee and Financial Officer, and that Mr Stephens' job involved the collection of clients' book debts. Mr Stephens is said to have built a

successful collections business at Dadic Attorneys, and when Mr Dadic emigrated from South Africa to Sydney, Australia, in 2015, Mr Stephens was left in charge of the firm, despite the latter not being an admitted attorney in South Africa.

[11] The Plaintiff testified, further, with the passage of time, a friendship was struck between him and Mr Stephens, as a result of which the Plaintiff was invited by Mr Stephens to many parties that Mr Stephens hosted. Through this social interaction the Plaintiff got to know Mr Stephens as someone who "was larger than life" and lived an extravagant lifestyle. As time went and the friendship grew, the Plaintiff became Mr Stephens insurance broker and procured home and vehicle insurance, as well as, life insurance and medical aid for him.

[12] On one occasion, when he was having coffee with Mr Stephens, the Plaintiff mentioned to him that he, the Plaintiff, was having some difficulty collecting a debt owed to him by a firm in the United Kingdom ("UK"), Skelwith (Leisure) Limited of Bootham York ("Skelwith"), for work that he and his firm, Interglobe had done for them. Mr Stephens offered the services of Dadic Attorneys to assist him to recover the debt. In due course, and with the assistance of solicitors appointed by Dadic Attorneys in the UK, the matter was settled, and Skelwith agreed to pay an amount of £50 000 (the equivalent of which in South Africa was R900 000), to the Plaintiff and Interglobe, along with £15 000 for their legal costs. Although these amounts were paid into the trust account of Dadic Attorneys, Dadic Attorneys or Mr Stephens, never paid over the amount of R900 000 which was due to the Plaintiff and Interglobe, Mr Stephens always finding some excuse not to have done so.

[13] Through the Plaintiff's evidence it is learnt that the four claims originated as follows:

#### Ad Claim 1

[14] Sometime early in October 2015, Mr Stephens informed the Plaintiff that Flake Ice was in the process of purchasing immovable property and needed R5 million as bridging finance. Mr Stephens told the Plaintiff that Flake Ice was

obliged to produce guarantees in the amount of R6 814 333 to the seller of that immovable property.

[15] Mr Stephens informed the Plaintiff further that Dadic Attorneys held the sum of R7 846 543,40 in trust on behalf of Mr Parsons which would be utilised for the purchase of the property, but which could not be released until the mortgage bond in relation to another property was cancelled. Mr Stephens asked the Plaintiff to invest in the transaction and offered him interest at 5% *per* month payable in advance on any amount the Plaintiff would loan to Flake Ice.

[16] As proof that there really was such a transaction, the Plaintiff was shown a copy of a duly executed Consent to Cancellation of a bond that had been passed by Mr Parsons over that property, as well as a letter to Mahlangu Attorneys confirming the transaction. It was, then, agreed between the Plaintiff and Mr Stephens that the Plaintiff would make a loan of R1 million, and a loan agreement to that effect was prepared by an attorney in the employ of Dadic Attorneys, (the first Flake Ice transaction). The Plaintiff paid the R1 million into the trust account of Dadic Attorneys. Emanating from this loan, the Plaintiff received various payments of R50 000 *per* month in interest as agreed, for the period from 27 October 2015 to 02 February 2018, that is, 24 payments of R50 000 and one payment of R100 000 amounting to R 1,3 million.

#### Ad Claim 2

[17] Mr Stephens approached the Plaintiff, again in 2017, and informed him that the aforementioned Mr Parsons wished to borrow R7,5 million which would be repaid over a period of time together with interest at 3% *per* month. Mr Stephens suggested to the Plaintiff that the R900 000 which Dadic Attorneys held in trust from the Skelwith settlement, and the R4,95 million that Dadic Attorneys also held in trust for the Plaintiff (from an earlier transaction), be loaned to Sun Down Red (Pty) Ltd, ("Sun Down Red"), a company that Mr Stephens proposed would be formed by Mr Stephens and the Plaintiff to be registered with an equal shareholding between them, and of which they would both be directors. The company would then be used as a vehicle for further transactions in which

they would be involved. Mr Stephens proposed that the Plaintiff's loan account in Sun Down Red would be credited the amount so loaned.

[18] Mr Stephens proposed that he would himself lend an amount to Sun Down Red to make up the R7,5 million needed by Mr Parsons, such amount would, also, be credited to Mr Stephens' loan account in Sun Down Red. The total sum was to be lent to Flake Ice under a loan agreement to be drawn up by Dadic Attorneys (the second Ice Flake transaction). A mortgage bond over certain property owned by Flake Ice was to be registered in favour of Sun Down Red, as security for the loan. To verify this transaction, Mr Stephens showed the Plaintiff copies of a covering mortgage bond, a title deed and a power of attorney signed by Mr Parsons. The Plaintiff indicated that he was prepared to be a party to the proposed transaction, and in time Mr Stephens furnished the Plaintiff with a copy of the loan agreement in respect of the proposed loan, prepared by Dadic Attorneys.

[19] The loan agreement was duly concluded between Flake Ice and Sun Down Red on 11 September 2017. Subsequently, Mr Stephens informed the Plaintiff that Dadic Attorneys had given effect to the loan agreement and that R7,5 million had been transferred to Flake Ice as a loan from Sun Down Red. Mr Stephens informed the Plaintiff that Flake Ice was complying with the agreement and, consequently, the Plaintiff received various amounts from Dadic Attorneys, purportedly as interest repayments due to him on his loan account in Sun Down Red, amounting to R1,26 million.

#### Ad Claim 3

[20] The transaction in claim 3 occurred during early June 2016, when Mr Stephens advised the Plaintiff that an entity known as CP Crane Hire CC, ("CP Crane"), had a claim against a company called Lubbe Construction (Pty) Ltd, ("Lubbe Construction"), in the sum of R7,5 million. Mr Stephens informed the Plaintiff that Dadic Attorneys had instructions from CP Crane to collect the sum of R7,5 million at the rate of R750 000 *per* month over 10 months. To certify this deal, Mr Stephens showed the Plaintiff a copy of the draft Acknowledgment of

Debt that Dadic Attorneys were preparing for confirmation of the debt owed by Lubbe Construction to CP Crane in the amount of R7,5 million.

[21] Mr Stephens also told the Plaintiff that CP Crane needed cash at the time and was prepared to cede the whole claim of R7,5 million for a sum of R6,1 million. Mr Stephens further told the Plaintiff that he, Mr Stephens, was attempting to purchase the claim and he showed the Plaintiff a draft Cession Agreement to that effect. Mr Stephens asked the Plaintiff if he was interested in purchasing a share of the claim. The Plaintiff was interested, and indicated that he was prepared to buy 66% of the claim for an amount of R4 million and that he would pay the monies into Dadic Attorneys trust account to be paid to CP Crane for the purchase of the said claim. The Plaintiff, also, stipulated that he would pay over the money on condition that he would be entitled to R4,95 million of the amount to be recovered from Lubbe Construction. Mr Stephens informed the Plaintiff that an appropriate written agreement would be drawn up by Dadic Attorneys to give effect to the proposed transaction. On 23 June 2016, the Plaintiff duly transferred R4 million into the trust account of Dadic Attorneys. He sent an e-mail to Mr Stephens on the same date wherein he advised Dadic Attorneys that he was transferring R4 million into their trust account. That e-mail set out his condition that the money was only to be used *"in accordance with a legal agreement still to be drawn up by ... [Dadic Attorneys] and approved and signed by ...[Plaintiff]"*. An agreement was thereafter drawn up by Dadic Attorneys and signed by Mr Stephens and the Plaintiff.

#### Ad Claim 4

[22] At the beginning of July 2017, Mr Stephens informed the Plaintiff that a business opportunity had arisen whereby Trudon, Dadic Attorneys' biggest client for collections, was putting out to tender, a book debt totalling R44 million which Mr Stephens could acquire for R4 million. The Plaintiff was told that Dadic Attorneys had been able to collect about 30% of all debt that Trudon had instructed them to collect. The Plaintiff was shown various agreements on Mr Stephens' computer, which had been concluded between Trudon and its clients and which were the grounds of the book debt.

[23] Mr Stephens suggested that he and the Plaintiff each put R1 million into Sun Down Red, and that they borrow R2 million from a third party which would make up the R4 million needed to purchase the book debt. Mr Stephen further suggested that they would be able to offer a decent rate of interest to a third party who wished to participate. E-mails were sent to potential third-party investors, but no one was interested. The Plaintiff then decided that he would himself make an additional R2 million available to acquire Trudon's book debt. He was presented with a draft Cession of Debtors Agreement from Trudon to Sun Down Red that had been drawn up by Dadic Attorneys and he was advised that all was in order. Thereafter, the Plaintiff made three payments into the trust account of Dadic Attorneys on: (a) 11 July 2017 R500 000; (b) 19 July 2017 R200 000; and (c) 26 July 2017 R2 million, amounting to R2,7 million. Mr Stephens was supposed to pay in R1 million on his own behalf and an additional R300 000 which he agreed to pay on the Plaintiff's behalf as he owed the Plaintiff that amount from another transaction that had taken place between them.

[24] On 11 July 2017, the same day as the first payment of the R500 000, the Plaintiff sent an email to Mr Stephens which read as follows: *"Hi Andy, I am sending R500 000 to your trust account as a deposit for the purpose of securing the purchase of a R44 000 000 book debt from TRUDON. I acknowledge that we still require to formalize an agreement related to this purchase. Please confirm your acceptance of this money for the purpose which I am paying into Dadic Attorney's [sic] Trust Account."*

[25] The Plaintiff was on a golf tour in Durban when he received a phone call from one, Trevor Swartz ("Mr Swartz"), an attorney with Dadic Attorneys, who told him that he, Mr Swartz, had heard that Mr Stephens had a day before, been admitted to a psychiatric facility in Cape Town, and had absconded from the facility and could not be found. The Plaintiff immediately flew back to Johannesburg and attended at the offices of Dadic Attorneys where he spoke to a bookkeeper who informed him that the monies that he believed to be held on his behalf in Dadic Attorneys trust account could not be found in that trust account. The Plaintiff, also, spoke to a representative of Trudon whom he encountered there and who informed him that Trudon had never sold, or intended



to sell, any book debt to Mr Stephens or anyone else. He subsequently learned that all the transactions proposed to him by Mr Stephens were fictitious. In evidence towards the end of his testimony the Plaintiff detailed his telephonic communications with Mr Dadic in Australia, as well as his extensive attempts to find Mr Stephens. He subsequently learnt that Mr Stephens had been operating under a false Ghanian passport, and that his real name was Andrew Steven Rapport. Mr Stephens has since moved around the United States of America ("USA") and took various jobs under various aliases.

[26] During or about June 2018, the Plaintiff submitted to the Fund, a set of four claims in terms of section 26(a) of the Attorneys Act. The Plaintiff's claims were ultimately repudiated by the Board.

[27] In addition, Mr Parsons gave evidence of the fictitious nature of the two Flake Ice transactions referred to in claims 1 and 2 of the Particulars of Claim. In brief, Mr Parsons testified that he had no knowledge of the transactions and that he never asked for bridging finance or borrowed money from Mr Stephens and/or Dadic Attorneys.

## **THE PLEADINGS**

### **The Plaintiff's Claims**

#### *Ad Claims 1, 3 and 4*

[28] The Plaintiff claims an amount of R1 million in claim 1, R4 million in claim 3 and R2,7 million in claim 4, which amounts he alleges were entrusted to Dadic Attorneys, duly represented by Mr Stephens, as contemplated by the provisions of section 26(a) of the Attorneys Act, by effecting payment of the said monies in the trust account of Dadic Attorneys.

#### *Ad Claim 2*

[29] The Plaintiff claims an amount of R900 000 (Nine Hundred Thousand Rand), being the equivalent of £50 000 which he alleges Dadic Attorneys, duly represented by its employee Mr Stephens, received on his behalf in its trust account in respect of the Skelwith settlement. It is alleged that the said amount

was received by Dadic Attorneys and entrusted in its trust account as contemplated by the provisions of section 26(a) of the Attorneys Act, and in Dadic Attorneys' capacity as the Plaintiff's appointed correspondent attorney in respect of litigation between the Plaintiff and Skelwith, and in the course of Dadic Attorneys' practice and in its capacity as agent on behalf of the Plaintiff.

[30] The Plaintiff alleges further that during March 2018 it came to his knowledge that Mr Stephens has stolen the monies so entrusted, and because of that theft, the Plaintiff suffered pecuniary loss in the following amounts: R1 million in claim 1, R900 000 in claim 2, R4 million in claim 3 and R2,7 million in claim 4.

[31] The Plaintiff avers further that he attempted to recover the said monies from Dadic Attorneys and exhausted all his remedies but was unable to do so. Despite demand and the giving of the requisite notice in terms of the Attorneys Act, the Fund has failed and/or refused to pay the Plaintiff the following amounts: of R1 million in claim 1, R900 000 in claim 2, R4 million in claim 3 and R2,7 million in claim 4, as it was obliged to do.

[32] Consequently, the Plaintiff claims payment of the said amounts of R1 million in claim 1, R900 000 in claim 2, R4 million in claim 3 and R2,7 million in claim 4, plus interest on the respective amounts at the rate of 10.25% *per annum a tempore morae* and costs of suit.

### **The Defendant's Plea**

[33] Initially, the Fund had raised two special pleas together with a plea over, denying its liability for the payment of the monies claimed by the Plaintiff. The first special plea, that of the incorrect citation of the Fund has since been abandoned by the Fund. Only the second special plea, that of lack of excussion, stands to be adjudicated.

#### *Lack of Excussion re Claims 1, 2, 3 and 4*

[34] The Fund pleads that section 49(1) of the Attorneys Act, which found application in respect of all four of the Plaintiffs claims, provides that no person shall without leave of the Fund institute a claim against the Fund unless the

claimant has exhausted all legal remedies against the practitioner in respect of whom the claim arose, and against all other persons liable in respect of the alleged loss suffered by the claimant.

[35] It was, further, pleaded that the Plaintiff made no attempt to exhaust any legal remedy against the practitioner in respect of whom the claim arose or against any other person(s) who may be liable in respect of the alleged loss suffered by the Plaintiff.

#### *Plea Over*

[36] The Fund admits that the Plaintiff paid the amounts claimed in the Plaintiff's Particulars of Claim being R1 million in claim 1, R4 million in claim 3 and R2,7 million in claim 4, and that Dadic Attorneys received an amount of R900 000 for the Plaintiff and Interglobe, into the trust account of Dadic Attorneys, represented by Mr Stephens, but denies that the said amounts were entrusted to Dadic Attorneys as contemplated in section 26(a) of the Attorneys Act.

[37] The Fund, further, denies that it came to the Plaintiff's knowledge during or about March 2018 that Mr Stephen had stolen the said amounts claimed and, also, denies that because of the theft, the Plaintiff suffered pecuniary loss in the amount of R1 million in claim 1, R900 000 in claim 2, R4 million in claim 3 and R2,7 million in claim 4 or any other amount. It is, furthermore, denied that the Plaintiff attempted to recover the amounts as claimed in claims 1, 2, 3 and 4 of the Plaintiff's Particulars of Claim or that he exhausted all his remedies.

[38] The Fund admits, also, that the Plaintiff lodged the said claims with the Fund and that the claims were rejected, but denies that it was obliged to make payment in respect of the amounts claimed by the Plaintiff or any other amount.

[39] In amplification of the denials in respect of the Plaintiff's claims, the Fund alleges that in terms of section 47(1)(g) of the Attorneys Act, the Fund is not to 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. And

that the said section entails that money had to be put in financial schemes, shares or property with the expectation of receiving profit.

[40] In the premises, it is pleaded that the Fund cannot be held liable and that all the Plaintiff's claims stand to be rejected on the grounds that the liability of the Fund is excluded by the operation of section 47(1)(g) of the Attorneys Act, in that:

40.1. In respect of claim 1, the Plaintiff paid the said amount in circumstances where he was informed by Mr Stephens, that Flake Ice was in the process of purchasing immovable property, and needed R5 million as bridging finance. The Plaintiff was offered interest of 5% *per* month payable in advance on any amount he would loan to Flake Ice. The Plaintiff paid the R1 million into the trust account of Dadic Attorneys on 13 October 2015, and he in return received various payments of R50 000 *per* month in interest as agreed, for the period from 27 October 2015 to 02 February 2018, that is, 24 payments of R50 000 and one payment of R100 000 which in all amounted to R 1,3 million.

40.2. In respect of claim 2, it is pleaded that before Dadic Attorneys could pay out the R900 000 which they held in trust for the Plaintiff, the Plaintiff instructed Dadic Attorneys through Mr Stephens to take that money together with another amount of R4,95 million which Dadic Attorneys held in trust for the Plaintiff for another transaction, and invest it in a loan scheme devised by Mr Stephens. The said amount, together with another loan from Mr Stephens, which together amounted to R7,5 million, was loaned to Sun Down Red. The total amount of R7,5 million which, according to Mr Stephens, Flake Ice wished to borrow, would in turn be loaned by Sun Down Red to Flake Ice and was to be repaid over time at an interest of 3% *per* month. In return the Plaintiff received sums of money amounting to R1,26 million from Dadic Attorneys, purportedly as interest repayments due to him on his loan account in Sun Down Red.

40.3. In respect of claim 3, Mr Stephens had proposed to the Plaintiff that they acquire CP Crane's claim against Lubbe Construction which was valued at R7,5 million at a discounted price of R6,1 million. The Plaintiff indicated that he was prepared to purchase 66% of the claim for an amount of R4 million on condition that he made a profit of R950 000. The Plaintiff duly transferred an amount of R4 million into the trust account of Dadic Attorneys. An agreement was thereafter drawn by Dadic Attorneys and signed by Mr Stephens and the Plaintiff.

40.4. In respect of claim 4, Mr Stephens had proposed to the Plaintiff that they acquire Trudon's book debt of R44 million for R4 million, The Plaintiff and Mr Stephens intended to engage in a financial scheme where they would purchase Trudon's book debt of R44 million against an expectation that they would be able to recover 30% of the R44 million, which would be equal to R13,2 million, leaving them with a realisable profit of R9,2 million.

[41] In the premises, it is pleaded that the Plaintiff must be deemed to have instructed and/or had instructed Dadic Attorneys, to utilise all the monies referred to in the claims in this matter, held in Dadic Attorneys' trust account, for the purposes of investing in the various schemes proposed to him by Mr Stephens.

[42] Furthermore, as regards claims 1 and 2, it is pleaded that section 47(5)(b) of the Attorneys Act, provides that for the purposes of subsection (1)(g) thereof, a practitioner must be regarded as not having been instructed to invest money if he or she is instructed by a person 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.

[43] In the premises, it is pleaded that the Fund cannot be held liable in respect of claims 1 and 2 which stand to be rejected on the grounds that the liability of

the Fund is excluded by the operation of section 47(5)(b) of the Attorneys Act, in that:

- 43.1. In claim 1, Mr Stephens raised the matter with the Plaintiff, specified the borrower, by introducing Flake Ice as the borrower, and specified a term of the loan agreement, that is, the 5% return on investment.
- 43.2. In claim 2, Mr Stephens raised the matter with the Plaintiff, specified that Sun Down Red would be specially created to be the borrower, and would in turn lend the monies to Flake Ice as another borrower introduced by Mr Stephens, and specified a term of the loan agreement, that is, the 3% return on investment.

### **The Plaintiff's Replication**

[44] In replication to the Fund's plea the Plaintiff denies the special plea of excussion raised by the Fund. The Plaintiff pleads specifically that the rights and interests of the Plaintiff had become vested/accrued in terms of the repealed provisions of the Attorneys Act, and that the Fund's obligation to make payment to the Plaintiff continues to enjoy force in terms of the procedure provided for in section 79 of the Legal Practice Act, and not section 49(1) of the Attorneys Act which does not apply. Consequently, it is pleaded that there is no portion of the Plaintiff's claim which could reasonably be recovered from any other person liable.

[45] As regards the Plea Over, it is pleaded that section 47(1)(g) of the Attorneys Act does not automatically become applicable in the event that none of the exceptions contained in section 47(5)(b) of the Attorneys Act are applicable. In the premises it is denied that the Plaintiff is deemed to have instructed Dadic Attorneys to invest the monies on his behalf in claims 1 and 2.

[46] It is, further, denied that the Fund may rely on the statutory exception provided for in section 47(1)(g) of the Attorneys Act in respect of all the claims.

[47] It is, specifically, pleaded in respect of all the claims that Mr Stephens, in soliciting the funds from the Plaintiff and receiving the funds in trust, had theft of

the monies as the sole objective. The funds were not received by Mr Stephens as an investment or for any other legitimate purpose. As such, the Fund has failed to plead a sustainable defence to all the Plaintiff's claims.

### **ISSUES TO BE DETERMINED**

[48] The main issue to be determined in this case is whether the Plaintiff has established all the requirements of section 26(a) of the Attorneys Act.

[49] Before this issue is dealt with, it is imperative that the special plea raised by the Fund be dealt with first, as it might be dispositive of the whole case.

#### **Special Plea of Excussion**

[50] As indicated earlier in this judgment, the Fund has raised a special plea of excussion. The issue that this Court ought to decide on this aspect, is which of the two statutes is applicable in this case, that is, whether section 49(1) of the Attorneys Act or section 79(1) of the Legal Practice Act finds application in the circumstances of this case.

[51] The parties appear to be in agreement that it is not necessary for this Court to revisit the issue of the applicability of the two sections. The parties are, also, in agreement that whether it is section 49(1) of the Attorneys Act or section 79(1) of the Legal Practice Act, that is applicable, the test is the same. What is required is that reasonable steps must be taken in order to recover from either the errant attorney or whoever else is liable, and those reasonable steps are dependent on the facts of each particular case.

[52] In the specifics of this case, the parties are in agreement that the Plaintiff is obliged to plead, and bears the *onus* to prove through leading evidence that he has taken reasonable steps to recover from the attorney and his employee before turning to the Fund for compensation. It is that question that this court will then have to determine. That is, in the circumstances of this case, can it be said that the evidence tendered by the Plaintiff establishes that he has taken reasonable steps to recover the monies lost, from the attorney, Mr Dadic or his employee, Mr Stephens.

[53] It is, also, common cause that when it comes to reasonableness, each matter turns on its own facts. What is reasonable is determined by the facts of the particular case. It follows, therefore, that what is reasonable insofar as exhausting legal remedies is concerned, is fact dependent.

[54] It was accepted on the Fund's behalf that the Plaintiff had established that neither Mr Dadic nor Mr Stephens owns any immovable property, or hold any beneficial interest in a juristic person registered, in South Africa. It appears also to be not in dispute that both Mr Dadic and Mr Stephens do not own movable property in South Africa on which the Plaintiff could lay claim in discharge of the monies appropriated by Mr Stephens. The unchallenged evidence of the Plaintiff is that Mr David had disposed of any movable assets he could not take with to Australia, whilst Mr Stephen is said to have abandoned his movable assets some of which were found in the streets. He also abandoned his high flying lifestyle that he had in South Africa.

[55] What now becomes an issue is whether the Plaintiff took reasonable steps to find out whether Mr Dadic has assets in Australia and whether Mr Stephens has assets in the USA, which the Plaintiff could have attached to assert his claim.

[56] In order to establish that he, the Plaintiff, took reasonable steps against Mr Dadic and Mr Stephens to recover the monies he lost, the Plaintiff tendered evidence to the effect that he prosecuted a claim in Australia against Mr Dadic to the point where he obtained default judgment for recovery of the monies stolen by Mr Stephens. The Plaintiff had several telephonic discussions with Mr Dadic in Australia and that Mr Dadic had told him that he holds no appreciable assets in Australia – he (Mr Dadic) is renting and runs a small immigration practice for South Africans wishing to make their home in Australia, and would not be able to satisfy the judgment that the Plaintiff had obtained against him.

[57] As regards Mr Stephens, the Plaintiff had through a number of enquiries established that before coming to South Africa, Mr Stephens, had been a fugitive from justice in the USA. During his stay in South Africa he used a Ghanian passport under a false name of Andruw Stephens whilst his real name was Andrew Steven Rapport. The Plaintiff, also, established that Mr Stephens had



somehow managed to leave South Africa in April 2018 and returned to the USA where he continued to live under various assumed identities. The Plaintiff pursued Mr Stephens through many contacts he (the Plaintiff) had made in the USA, all of whom had legal issues with Mr Stephens. The Plaintiff testified that he had no reasonable means of pursuing Mr Stephens or recovering any monies from him. He instead tried to initiate criminal proceedings against Mr Stephens in both South Africa and the USA but had not been met with a sympathetic response from the South African or American authorities.

[58] Based on this evidence it is the Plaintiff's submission that he has satisfied the test of reasonableness, that is, he has, in fact, taken all reasonable steps to recover the monies lost either from Mr Dadic or Mr Stephens, and that he did not believe that he could reasonably take any further steps to recover the monies lost from either Mr Dadic or Mr Stephens.

[59] To the contrary, the Fund's contention is that the steps taken by the Plaintiff in this particular matter were not reasonable. This, according to the Fund is so because of the admissions made by the Plaintiff under cross-examination, that he had not taken any steps at all to establish through any agency whether Mr Dadic owned any assets in Australia which could satisfy the judgment that he had obtained; or whether Mr Stephens had any assets in the USA, which would allow the Plaintiff to recover his losses against Mr Stephens.

[60] It is this Court's view that the reliance by the Plaintiff on the decision by the Full Court of the then WLD in *Azevedo*,<sup>3</sup> is misplaced. The Court in that judgment when dealing with the provisions of section 19(1) of the Estate Agency Affairs Act,<sup>4</sup> the provisions of which are similar to the those dealt with in this case, held as follows:

*"[9] The wording of the proviso is peremptory. An aggrieved party is obliged to take reasonable steps to exhaust his rights of action and pursue other legal remedies against the person responsible for the theft. This includes instituting legal action against the estate agent and bringing such action to a conclusion, by obtaining*

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<sup>3</sup> Estate Agency Affairs Board v Azevedo 2007 (2) SA 5 (WLD) para 9.

<sup>4</sup> Act No 112 of 1976.

*judgment, followed by execution against the judgment and all other steps which will complete the relevant remedies, including if need be, applying for sequestration or liquidation of the estate agent.*

[10] *There is no excuse for the claimant to assume the thief has no assets or has absconded."*

[61] *Azevedo* is clearly distinguishable from the present case, in that in *Azevedo*, the claimant took no steps at all to exhaust his legal remedies. Whereas, the evidence in this case makes it clear that the Plaintiff took a number of steps in an attempt to exhaust his legal remedies.

[62] The difference is, also, that this case is concerned with individuals, both the attorney and his employee, who have left the country and gone overseas, one in Australia the other in USA. Litigation against the said individuals is certainly going to be protracted and expensive.

[63] From the evidence tendered by the Plaintiff, it is evident as regards Mr Dadic that the Plaintiff instituted legal action to the extent that he obtained judgment against Mr Dadic. The Plaintiff could, however, not pursue the execution of that judgment because he was informed by Mr Dadic that he does not have assets. The Plaintiff did not just assume that Mr Dadic had no assets to satisfy the judgment. He took steps and made enquiries. Mr Dadic was in a foreign country, was renting and had just set up practice, the circumstances were such that the probabilities were that even if the Plaintiff were to pursue the execution, he will find no assets to attach.

[64] Similarly, with Mr Stephens, the Plaintiff could not pursue legal action against him because Mr Stephens was illusive. Mr Stephens operated under different assumed identities depending on his situation, he had no fixed place of abode or employment where he could be served. The Plaintiff did not merely assume that Mr Stephens has no assets, he made enquiries. He searched for Mr Stephens and found out that he was in the USA. He did not just stop there, he went further and searched for contact details of people he could reach to enquire about the whereabouts of Mr Stephens and made contact with them. The Plaintiff phoned several people in the USA who would know about the whereabouts of

Mr Stephens, going even to the extent of contacting Mr Stephens' father. From the information he received during these searches it was evident that to pursue Mr Stephens would have been an exercise in futility.

[65] This Court agrees with the Plaintiff that it can never be the requirement of either section 49(1) of the Attorneys Act or section 79(1) the Legal Practice Act that exhausting legal remedies or the extent to which an amount is reasonably recoverable means that the wronged party must actually follow the errant attorney in another country where there is significant cost and expense to be incurred and in regard to what will be protracted litigation with the aggrieved party having to travel there, as well. Even if there may well be assets, it is hidden somewhere in that foreign country, Mr Dadic having already informed the Plaintiff that he has no assets. There was no reason, none was proffered, why the Plaintiff would not believe Mr Dadic when he told him that he (Mr Dadic) has no assets. This in the backdrop of Mr Dadic having recently immigrated and started an immigration practice, from scratch, in a foreign country. It would, in this Court's opinion have been arduous for the Plaintiff to travel to a foreign country to go looking for the assets purported to be there.

[66] Based on the unchallenged evidence that Mr Dadic has no assets, the Plaintiff's evidence that it would have been of no value for him to sequestrate Mr Dadic as there was obviously no assets, is to be believed. In any event, no Court in South Africa would have any jurisdiction to entertain a sequestration application in light that more than twelve months had passed since Mr Dadic left the country, and there would be no benefit to creditors because of the lack of assets.

[67] Similarly, to institute legal proceedings against Mr Stephens in California where he was last sighted, would be protracted and expensive. For the Plaintiff to pursue litigation against this person who has various names, does not have a fixed place of abode or fixed employment and who is already a fugitive from justice, would indeed, be challenging and arduous. The unchallenged evidence on record is to the effect that the likelihood of Mr Stephens having any assets in the USA is negligible and even if he has some money hidden away somewhere

there, given his persona it goes without saying that the litigation will be protracted and expensive.

[68] The recovery of the money that he misappropriated in South Africa, even if it could amount to millions of Rands as suggested by the Fund's counsel, will suffer the same fate. It cannot be said for certain that the money is still there. Even if it can be accepted that it is still available, it cannot be readily found. The Plaintiff will have to go to the USA to look for it. It would be ridiculous to expect that Mr Stephens would deposit that money into a bank where it could be found. If the suggestion is that the money could be found on him, he first have to be found. Mr Stephens is a fugitive from justice and uses different names. There is evidence that the Plaintiff's attempt to reach Mr Stephens through his father's contact details drew a blank.

[69] This Court is satisfied that the Plaintiff has, in the circumstances of this case, taken reasonable steps to recover his loss, and the *onus* on him has been discharged. Consequently, the special plea falls to be dismissed. Having come to such a conclusion, this Court will now have to deal with the merits of the case.

### **The Merits**

[70] As already stated, the Plaintiff's respective claims are founded on section 26(a) of the Attorneys Act, the provisions of which state that –

#### ***“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 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;”*

[71] In order to succeed in his case, the Plaintiff had to lead evidence to establish the requirements of section 26(a) of the Attorneys Act, namely, (a) theft

committed by a practising practitioner, his or her candidate attorney or his or her employee; (b) of any money or other property entrusted by or on behalf of such person to him or her or to his or her candidate attorney or employee; (c) 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.

[72] It is common cause that in respect of all the claims, the following has been established: Mr Dadic was a practising attorney and that Mr Stephens was an employee of Mr Dadic; there was theft committed by Mr Stephens; except for the money claimed in claim 2, it is common cause that the Plaintiff suffered pecuniary loss as a result of the theft by Mr Stephens of the monies in claims 1, 3 and 4. It is, also, common cause that the monies in question were paid or received into the trust account of Dadic Attorneys.

[73] What remains at issue is whether the said amounts paid and/or received into the trust account of Dadic Attorneys were entrusted and whether the Plaintiff suffered pecuniary loss in regard to the money in claim 2. The issue of entrustment is dealt with immediately hereunder.

#### Entrustment

[74] As, already stated, it is common cause that all the monies in question were paid by the Plaintiff and/or received by Dadic Attorneys, represented by Mr Stephens, into the trust account of Dadic Attorneys. The question is, were these monies entrusted to Dadic Attorneys as contemplated by the provisions of section 26(a) of the Attorneys Act.

[75] At first blush there might appear to have been entrustment where a client pays money into the trust account of the attorney. However, it is trite that where money is paid into the trust account of an attorney, it does not follow that such money is in fact trust money. The Supreme Court of Appeal in *Industrial &*

*Commercial Factors*,<sup>5</sup> dealing similarly with the question of entrustment, remarked as follows:

*"When an attorney misappropriates money in his trust account, more often than not he is stealing money which he had received to hold for or on behalf of clients. It would be startling indeed if no liability on the part of the fidelity fund arose in such circumstances. Yet such liability can arise only if it can be found that the money stolen was entrusted by or on behalf of the client."*

[76] It is trite that the test to prove entrustment comprises two elements, namely (a) to place in the possession of something, (b) subject to a trust. As to the latter element, that of trust, this connotes that the person entrusted is bound to deal with the property or money concerned for the benefit of others.<sup>6</sup>

[77] The first element of entrustment, that of placing in possession, has been satisfied. It is common cause that, in respect of all the claims, the practising attorney, Mr Dadic, as represented by his employee Mr Stephens, received the monies into the trust account. As such, there had been a handing over or placing in possession of the monies in question.

[78] What requires to be established is the second element of 'trust', which as it has been held, connotes that the person entrusted is bound to deal with the property or money concerned for the benefit of others. That is, the person entrusted is bound to hold and apply the property [money] for the benefit of some person or persons or for the accomplishment of some special purpose.<sup>7</sup>

[79] It has been, further, held that the issue of entrustment has to be judged in the light of the intention of the person making the payment to the attorney or the attorney's employee, not the intention of the attorney or the attorney's employee.<sup>8</sup> Hence, in an attempt to establish this element of entrustment, the Plaintiff testified that he made the monies available in the trust account of Dadic Attorneys with

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<sup>5</sup> *Industrial & Commercial Factors v Attorneys Fidelity Fund* 1997 (1) SA 136 (SCA) p150B-C.

<sup>6</sup> See *Industrial and Commercial Factors (Pty) Ltd v Attorneys Fidelity Fund Board of Control* 1997 (1) SA 136 (A) at 144B-D; *Attorneys Fidelity Fund Board of Control v Mettle Property Finance (Pty) Ltd* 2012 (3) SA 611 (SCA) at 614, 615.

<sup>7</sup> *Estate Kemp and Others b McDonald's Trustee* 1915 AD 491 at 499.

<sup>8</sup> See *Rodel Finance Services (Pty) Ltd v Attorneys Fidelity Fund* (16833/2007) [2010] ZAWCHC 407 (24 May 2010) para [22].

the intention to entrust. He, further, testified that Mr Stephens dealt with the monies for his (the Plaintiff's) benefit.

[80] The Fund submits, correctly so, that it is the purpose for which the Plaintiff deposited the money in Dadic Attorney's trust account that is key to determining whether or not there has been an entrustment. Similarly, the intention of the Plaintiff can be determined from the purpose for which he made the monies available to Dadic Attorneys or Mr Stephens.

[81] The evidence on record establishes the purpose of the Plaintiff as being:

81.1. In claim 1, after Mr Stephens informed the Plaintiff about the proposed scheme of lending money to Flake Ice, the Plaintiff paid the amount of R1 million into the trust account of Dadic Attorneys and the only reason he made such payment was as *per* his agreement with Mr Stephens, that is, the purpose was to loan that money to Flake Ice. In effect he was giving effect to the agreement between him and Mr Stephens. In return for paying this amount he received payments of R50 000 *per* month which effectively amounted to R1.3 million, as interest.

81.2. In claim 2, it is not in dispute that the amount of R900 000 that was received into the trust account of Dadic Attorneys from the attorneys in the UK was an entrustment. The entrustment, however, came to an end when the Plaintiff allowed Mr Stephens to use that money plus a further R4 95 million, which he had entrusted to Dadic Attorneys, for the purposes of the Flake Ice loan. He, in fact, instructed Mr Stephens to invest the money in Sun Down Red, which in turn would loan the money to Flake Ice with an investment return of 3% *per* month. In return, the Plaintiff received a benefit of R1.26 million paid to him as interest.

81.3. So, the purpose of using this money was, for nothing else, but to make it available to Sun Down Red for a loan to Flake Ice. The Plaintiff told Mr Stephens that he will participate in the scheme,

which is effectively his instructions to Mr Stephens to make use of the money and make the loan on his behalf.

- 81.4. In claim 3, Mr Stephens having informed the Plaintiff about the scheme, the Plaintiff, on his own accord, indicated to Mr Stephens that he was prepared to purchase 66% of the CP Crane Hire claim for an amount of R4 million, on condition that he would be entitled to an amount of R4 95 million of the amount recovered from Lubbe Construction. When he transferred the R4 million into the trust account of Dadic Attorneys it was for no other purpose but to invest in the scheme proposed by Mr Stephens.
- 81.5. The Plaintiff sent an email to Mr Stephens setting out a condition that the money was only to be used in accordance with the legal agreement still to be drawn up by Dadic Attorneys and approved and signed by him. The legal agreement was to be drawn for nothing else but as an instrument to purchase CP Crane Hire's book with the intention to make profit.
- 81.6. In claim 4, the Plaintiff undertook to participate in the scheme proposed to him by Mr Stephens of acquiring Trudon's book debt, by borrowing Sun Down Red an amount of R2.7 million, and with that money Sun Down Red would then purchase the book. The Plaintiff stood to make a profit of 66% of the 30% of Trudon's book debt which Mr Stephen said it was valued at R44 million. That is, 30% of the realisable profit of R13,2 million.
- 81.7. In addition, the Plaintiff sent an email informing Mr Stephens that he had made a deposit of R500 000 into Dadic Attorneys trust account and further requested confirmation of acceptance of that money for the purpose of which he was paying it into the trust account of Dadic Attorneys. The confirmation that the Plaintiff expected from Mr Stephens was that the money so deposited will be used for the purpose of purchasing Trudon's book. The money



as agreed with Mr Stephen was to invest in Sun Down Red, the intention being to make profit.

[82] It is quite clear from the above summation that the Plaintiff's intention when he paid the money into the trust account of Dadic Attorneys was for those monies to be invested on his behalf for profit.<sup>9</sup> The emails sent in claim 3 and claim 4 are telling. The conditions therein were for the money to be used for the purpose agreed to with Mr Stephens, that is, to invest for profit. Even if it can be said that the above circumstances do not establish entrustment, it is this Court's view that the Fund's defence in terms of sections 47(1)(g) and 47(5)(b) of the Attorneys Act exonerates the Fund from liability in respect of any pecuniary loss which the Plaintiff alleges to have suffered in this case.

Sections 47(1)(g) and 47(5)(b) of the Attorneys Act

[83] Section 47(1)(g) of the Attorneys Act provides that

*"The 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 ..."*

[84] The subsection is a statutory exception to the Fund's general liability in terms of section 26 of the Attorneys Act.<sup>10</sup>

[85] As it was held in *King*,<sup>11</sup> the term 'invest' is not defined in the Act. It must accordingly be given its ordinary grammatical meaning as defined in *The Concise Oxford English Dictionary*, namely, to 'put money into financial schemes, shares or property with the expectation of achieving profit.' Consequently, section 47(1)(g) of the Attorneys Act, entails that money has to be put into financial schemes, shares or property with the expectation of receiving profit. This is what, actually, happened in this case.

[86] This Court aligns itself with the reasoning in *King*, that when the Plaintiff made money available through payment into the trust account of Dadic Attorneys,

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<sup>9</sup> See *King v Attorneys Fidelity Fund 2010 (4) SA 185 (SCA)* para 33.

<sup>10</sup> See *Michael Yeats NO and Others v Attorneys Fidelity Fund Board of Control*, unreported decision of the Cape of Good Hope Provincial Division, delivered 6 May 2003.

<sup>11</sup> *King v Attorneys Fidelity Fund 2010 (4) SA 185 (SCA)* para 33.

or when he instructed Mr Stephens to use the money that was already in the trust account, he did so in the expectation, indeed the assurance, that he will receive a return on investment. It is, thus, manifest that the Plaintiff knew when he deposited the monies into the trust account or allowed Mr Stephens to use the money that was already in the trust account, that the moneys were for the purpose of being invested in the various schemes Mr Stephens informed him about, and intended for the said monies to be so applied.

[87] The scenarios alluded to in paragraph [81] of this judgment, illustrate the manner in which it can be said that the Plaintiff instructed Dadic Attorneys through its employee Mr Stephens to invest the monies on his behalf with the intention to make profit.

[88] This Court is satisfied that the Plaintiff's evidence establishes that even though the monies were paid and/or received into the trust account of Dadic Attorneys, they were paid with an instruction to be eventually invested in the transactions proposed to the Plaintiff by Mr Stephens – and that is what actually happened. It is, thus, evidently clear that such monies in claims 1, 3 and 4 were never entrusted to Dadic Attorneys as is contemplated in section 26(a) of the Attorneys Act. The entrustment of the money in claim 2 ended when the Plaintiff instructed Mr Stephens to invest it in the transaction proposed by Mr Stephens which instructions exonerated the Fund from liability.

[89] Consequently, it is this Court's view that the transactions pertaining to the four claims fall foul of the provisions of section 47(1)(g) of the Attorneys Act, and excludes the liability of the Fund for the loss of the money claimed.

[90] Moreover, the provisions of section 47(5)(b) of the Attorneys Act do not avail the Plaintiff as exceptions to the ambit of the provisions of section 47(1)(g) of the Attorneys Act. Section 47(5)(b) of the Attorneys Act which provides that

*"For the purposes of subsection (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) .. ..
- (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;”*

[91] The Fund cannot be held liable in respect of claims 1 and 2 which stand to be rejected on the grounds that the liability of the Fund is excluded by the operation of section 47(5)(b) of the Attorneys Act, in that:

91.1. In respect of claim 1, in his own words the Plaintiff testified that Mr Stephens raised the matter with the Plaintiff, introduced Flake Ice as the borrower, and specified a term of the loan agreement as 5% return on investment. Under cross-examination, the Plaintiff specifically confirmed that - a. the Plaintiff himself had no knowledge of the prospective transaction until Mr Stephens brought it up; b. the Plaintiff did not know about Flake Ice until Mr Stephens mentioned it; c. Mr Stephens introduced the Plaintiff to Flake Ice; d. Mr Stephens advised the Plaintiff about how the deal was to be structured; e. Dadic Attorneys, at Mr Stephens behest, drew up the loan agreement; and Mr Stephens advised the Plaintiff regarding the interest to be earned.

91.2. When it comes to claim 2, the Fund pleaded that, in effect, the Plaintiff had instructed Dadic Attorneys, through Mr Stephens, to take the monies that were held in the trust account of Dadic Attorneys on his - the Plaintiff's, and Interglobe's behalf, and invest it in a loan scheme devised by Mr Stephens. The allegation was confirmed by the Plaintiff under cross-examination, when he admitted that- a. the Plaintiff did not know about Flake Ice until Stephens mentioned it; b. Stephens introduced the Plaintiff to Flake Ice; c. Mr Stephens advised the Plaintiff about how the deal was to be structured, namely through the involvement of Sun Down Red Investments; d. Dadic Attorneys, at Mr Stephens' direction, drew up

the loan agreement; e. Mr Stephens advised the Plaintiff regarding the interest to be earned.

[92] Accordingly, in terms of section 47(5)(b) read with section 47(1)(g) of the Attorneys Act, the Plaintiff must be deemed to have instructed Dadic Attorneys or Mr Stephens to invest the monies in claim 1 and 2 on his behalf. The Fund, can therefore, not be held liable for the Plaintiff's claims 1 and 2.

#### The Fictitious Nature of the Claims

[93] It is this Court's view that the argument by the Plaintiff that there could have been no intended investments because the transactions proposed by Mr Stephens in respect of all the claims were fictitious or that the money had already been stolen, is inconsequential. What matters, is the purpose for which the monies were paid into the trust account, or for which Mr Stephens was instructed to use the money for, which was for investing in the various schemes proposed by Mr Stephens. There is no doubt that the Plaintiff himself, instructed Mr Stephens to use the money to invest in the schemes.

[94] The reliance by the Plaintiff on *Prevance*,<sup>12</sup> does not assist his case either. In this Court's understanding, *Prevance* is no authority to the proposition that where the transaction is fictitious or bogus there can be no instruction to invest, or that the Plaintiff is relieved of the burden to prove entrustment. The Plaintiff in this case does not have the benefit that is entailed in *Prevance*, that is, the benefit that gives a person to say that there is entrustment simply because the transactions involved are fictitious. The Court in *Prevance* came to the conclusion it did merely on the basis that there were undertakings given by the attorney concerned and that the attorney admitted in the agreement with the lender that the monies are received as an entrustment. This is not the situation in this case.

[95] Moreover, in regards to claims 3 and 4 there is no admissible evidence on record that the said transactions were fictitious. The evidence of the Plaintiff that

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<sup>12</sup> See *The Attorneys Fidelity Fund v Prevance Capital (Pty) Ltd (917/17) [2018] ZASCA 135 (28 September 2018)*

a representative of Trudon informed him that Trudon had never sold, or intended to sell, any book debt to Mr Stephens or anyone else, is inadmissible as hearsay.

[96] As a result, all the Plaintiff's claims stand to be dismissed on the ground that the liability of the Fund is excluded by operation of section 47(1)(g) read with section 47(5)(b) of the Attorneys Act.

### **CONCLUSION**

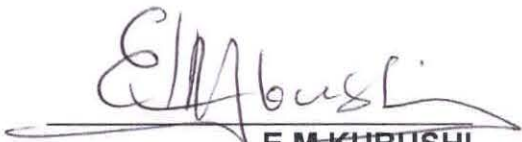
[97] This Court concludes therefore that the Plaintiff has failed to establish all the requirements of section 26(a) of the Attorneys Act, in particular the requirement of entrustment. It is not necessary to consider the requirement of pecuniary loss. The Plaintiff's case falls to be dismissed.

### **COSTS**

[98] As is trite the order for costs follow the successful party. The Fund being the successful party in this case, is entitled to the costs of suit.

### **ORDER**

[99] Consequently, the Plaintiff's four claims are dismissed with costs.

  
**E.M KUBUSHI**  
**JUDGE OF THE HIGH COURT**  
**GAUTENG DIVISION, PRETORIA**

### **APPEARANCES:**

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