Case no: 690/94

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

INDUSTRIAL & COMMERCIAL FACTORS

Appellant

(PTY) LIMITED

and

THE ATTORNEYS FIDELITY FUND BOARD

OF CONTROL

Respondent

Coram: CORBETTCJ, HEFER,VIVIER,FHGROSSKOPF et

MARAIS JJA

Heard: 17 May 1996

Delivered: 30 August 1996

JUDGMENT F

H GROSSKOPF JA:

The appellant was the plaintiff in an action brought in the Witwatersrand Local Division. The appellant claimed reimbursement from the respondent as defendant for the pecuniary loss it had suffered as a result of theft of money committed by a practising attorney. The appellant's case was that the money had been duly entrusted by it to the attorney in the course of his practice, as is required by s 26(a) of the Attorneys Act 53 of 1979 ("the Act"). S 26(a) reads as follows:

> "Subject to the provisions of this Act, the fund shall be applied for the purpose of reimbursing persons who may suffer pecuniary loss as a result of-
>
> (a) theft committed by a practising practitioner, his 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;"

What the appellant was required to show was that

(1) he suffered pecuniary loss;

(2) by reason of theft committed by a practising attorney;

(3) of money entrusted by or on behalf of the appellant to the attorney;

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

(Cf Provident Fund for the Clothing Industry v Attorneys. Notaries and Conveyancers Fidelity Guarantee Fund 1981(3) SA 539(W) per Nicholas J at 542F-G.) It was common cause in the Court a quo that the requirements set out in (1) and (2) above had been established, but the respondent contended that the appellant had failed to satisfy the requirements set forth in (3) and (4) above.

The conclusion of the Court a quo (Burger AJ) was that the appellant failed to establish that the stolen money had been "entrusted by or on behalf of" the appellant to the attorney. The Court a quo ordered absolution from the instance with costs, but granted the appellant leave to appeal to this Court. The respondent still maintains that the requirements mentioned in (3) and (4) above have not been proved.

Josephus Theodorus Johannes Mare ("Mare") used to practise as an

attorney at Boksburg under the name Massel, Massel and Mare. He was the only member of that firm. It is common cause that during April 1992 Mare by fraudulent means procured a cheque ("the cheque") for R450 000 drawn by the appellant in favour of a certain Mrs Branken ("Branken"); that Mar6 deposited the cheque into his trust account; and that he then stole the proceeds thereof. These events led to Mare's conviction on a charge of fraud and to his name being struck off the roll of attorneys.

In order to determine whether the money was "entrusted by or on behalf of the appellant to Mar6 it is necessary first to consider the evidence as to how it came about that the appellant drew the cheque in favour of Branken, and what the appellant's intention was when it handed the cheque to Mar6 for deposit into his trust account.

During the latter part of 1991 Branken sold an immovable property ("the property") to a purchaser who in turn sold it to Fedlife Assurance Limited ("Fedlife"). Branken was a client of Maré and she instructed him to attend to the transfer of the property. Mare saw in a newspaper that the appellant

conducted business as factors and financiers in Johannesburg, and that it was part of its business to discount guarantees and so provide bridging finance to sellers of immovable property who needed money prior to the registration of transfer of such property into the name of the purchaser. Mare* thereupon devised a fraudulent scheme to raise bridging finance on Branken's behalf by pretending that she needed the money. He approached the appellant during April 1992 and enquired whether it would be prepared to provide Branken with bridging finance of R450 000 pending registration of transfer of the property into the name of Fedlife. The appellant agreed to do so, subject to the following documents being furnished to it: a letter of undertaking ("guarantee") from Fedlife for R500 000; a written agreement ("the agreement") providing for the sale of the guarantee by Branken to the appellant for R450 000; a deed of suretyship ("the suretyship") whereby Branken's father, Mr Carter ("Carter"), bound himself to the appellant as surety for Branken.

Carter was also a client of Maré and Mare knew that Carter held Branken's general power of attorney in terms whereof he was authorized to sign

agreements on her behalf. Maré managed to fabricate the required documents by forging Carter's signature to the agreement and the suretyship. As the attorney attending to the transfer Mare was in a position to obtain the guarantee from Fedlife, which he did. It is common cause that Maré had no authority to arrange bridging finance on behalf of Branken, and that neither Branken nor Carter knew anything about the transaction.

The appellant was represented by Mr Colin Flax ("Flax") who was the legal director of the appellant. He was also a practising attorney. He accordingly knew that an attorney was obliged in terms of s 78 of the Act to keep a separate trust banking account in which money held or received by him on account of any person had to be deposited. When Maré handed the required documents to Flax on 8 May 1992 the latter was unaware of the fact that Mare held no mandate from either Branken or Carter; that Maré had forged Carter's signature to the agreement and the suretyship; and that the whole transaction was simulated. As the appellant was obliged in terms of the agreement to pay Branken R450 000, Flax handed the cheque for that amount to Mare on 8 May

1992. The cheque was crossed and drawn by the appellant in favour of Branken "or order" and marked "not transferable". The effect thereof was that it could be paid only to Branken.

Flax testified that he understood the agreement to mean that the appellant had to pay Branken and nobody else. He therefore made out the cheque so that only Branken could receive payment thereof. When Flax handed the cheque in that form to Mare his intention was to discharge what he considered to be the appellant's obligation under the agreement. The role of Maré would have been simply that of a messenger who had to deliver the cheque to Branken or pay it into her banking account.

Mare realised that he would not be able to secure the money for himself while the cheque remained in that form and he accordingly requested Flax to furnish him with a replacement cheque drawn in favour of his firm, but Flax was not willing to do so. Mare then asked Flax to delete the words "not transferable" so as to enable him to deposit the cheque into his trust account. He explained to Flax that he had to make certain payments for the benefit of

Branken on her instructions, and that it would therefore be convenient if he could deposit the cheque into his trust account so that he could "deal with it". Mare did not pretend that the proposed payment into his trust account was at the request of Branken. Flax eventually agreed to change the marking on the cheque to "not negotiable." That enabled Mare to deposit the cheque into his trust account.

Flax was concerned that this payment would not be regarded as a payment to Branken and that he would therefore not be discharged from his obligation in terms of the agreement. He also realised that by paying the cheque into Mare's trust account the proceeds of the cheque would no longer be paid direct to Branken, but to Mare who would exercise complete control over the money. Flax therefore insisted as a safeguard that the cheque be paid into Maré's trust account on the understanding that Mare would hold the money for and on behalf of Branken. Flax's attitude is further borne out by his insistence on a trust receipt. When the receipt was later furnished to the appellant there was nothing on it to show that it was indeed a trust receipt. At the request of Flax Mare

then wrote the words "trust a/c" twice on the receipt. By insisting on payment into Mare's trust account and the furnishing of a trust receipt Flax in my view manifested his intention that Maré should keep the money for and on behalf of Branken, and that he should deal with it as instructed by her. That was also the professed intention of Mar6. Mark's real intention was of course to steal the money, but he falsely represented to the appellant that he was receiving the money in trust on behalf of Branken. Maré conceded during cross-examination that he "agreed" to "keep the money in trust for the benefit of Branken"; and that "it was intended to be trust monies" held for his client Branken. If this had been a genuine transaction that would no doubt have shown an intention on the part of Mare to receive the money in trust. I do, however, consider that the issue of entrustment in the present case should be judged in the light of the appellant's intention, and not Maré's professed intention. But Mare's concession does show that he did not pretend to receive the money as agent on behalf of Branken.

In the course of his evidence Flax at one stage suggested that the

appellant had paid the R450 000 into Maré's trust account for and on behalf of the appellant itself. I agree with the finding of the Court a quo that such a conclusion is not borne out by the proved facts, and that it is contrary to previous statements made by Flax. It seems clear that the payment was indeed made by the appellant for the benefit of Branken. Despite criticism which may, with justification, be levelled at certain aspects of Flax's testimony, it was accepted by the Court a quo that he was the one who actually insisted that the cheque be paid into Maré's trust account and that Maré should furnish a trust receipt to prove it.

I do however respectfully disagree with the finding of the Court a quo that Mare "represented to Flax that he had been instructed by Branken to accept payment on her behalf". The evidence shows that Mare told the appellant that he "had to make certain payments on the instructions of Branken". He did not pretend that Branken had given him a mandate to accept payment on her behalf, and that any payment to him would therefore discharge the appellant's obligation to Branken.

Flax obviously intended to discharge what he believed to be the appellant's obligation under the agreement, but that is not decisive of the matter. When he was asked to change the crossing on the cheque he became concerned that payment to Mare would not result in payment to Branken. Flax consequently insisted that Mare should pay the cheque into his trust account, clearly with the intention that payment to Branken would only take place when the money was paid out on behalf of Branken. The appellant's intention on the one hand to pay Branken and its intention on the other to entrust the money should therefore not be regarded as mutually exclusive.

In coming to the conclusion that the appellant did not "entrust" the money to Mare the Court a quo found that the facts in the present case were comparable to the facts in the Provident Fund case, supra, which were outlined as follows at 544B-C:

> "It may be accepted that by directing that the cheque for R32 238,36 be made out [in] favour of his trust account, Kavin [the attorney] represented that he would be receiving the money on behalf of Gafin [the ostensible client]. But it has not been shown that in complying with that request, the Provident Fund impressed

> the payment with a trust; its intention was, presumably, to discharge what it and its then attorneys considered were the Fund's obligations under the contract of loan. They believed that it was a payment made to Kavin as the duly authorised agent of Gafin"

In view of that factual finding Nicholas J held that the Provident Fund had failed to show that it had "entrusted" any money to the attorney Kavin.

In my judgment the facts of the present case differ in certain material respects from those found in the Provident Fund case, supra. The evidence shows that unlike the Provident Fund in that case, the appellant in the present case was the one who insisted on the money being paid into the attorney's trust account. Had Flax believed that payment to Maré would indeed be payment to the duly authorized agent of Branken whereby the appellant would be discharged from its obligation under the agreement, there would have been no need for Flax to insist on paying the cheque into Mare's trust account. The Provident Fund case can therefore be distinguished on the facts.

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.

After considering certain definitions of the word "entrust" - in addition to those referred to in the judgment in British Kaffrarian Savings Bank

Society v Attorneys. Notaries and Conveyancers Fidelity Guarantee Fund Board of Control 1978(3) SA 242(E) at 248B-D - Nicholas J concluded as follows at 543E-F in the Provident Fund case, supra :

> "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 (cfEstate Kemp and Others v McDonald's Trustee 1915 AD 491 at 499).
> '(The trustee) is bound to hold and apply the property for the benefit of some person or persons or for the accomplishment of some special purpose' (ibid at 508)."

I do not understand these passages, and similar remarks in the case of SVV Construction (Pty) Ltd v Attorneys. Notaries and Conveyancers Fidelity Guarantee Fund 1993(2) SA 577 (C) at 589 G, to convey that the liability of the Fidelity Fund is limited to those cases where the money or property concerned was impressed with a trust in the technical legal sense of the word. The Afrikaans text of the Act, which is also the signed one, provides as follows in s 26(a):

> "Behoudens die bepalings van hierdie Wet, word die fonds aangewend ten einde persone te vergoed wat geldelike verlies ly weens -
>
> (a) diefstal gepleeg deur 'n praktiserende praktisyn .... van geld of ander goedere deur of namens sodanige persone toevertrou aan horn .... in die loop van sy praktyk ...."
>
> (Emphasis added.)

Die Verklarende Handwoordeboek van die Afrikaanse Taal (HAT), 2nd ed (1992), defines "toevertrou" as "met vertroue opdra aan, oorgee aan die sorg van ...." Die Verklarende Afrikaanse Woordeboek. Labuschagne, Eksteen, 8th ed (1992),

gives the following definition of "toevertrou" :

> "1. In vertroue gee. 2 In iemand se sorg laat; ter veilige bewaring gee ...."

The word "toevertrou" does therefore not imply that the handing over of the money or property concerned has to be subject to a trust in the technical legal sense of the word. Moreover, the legislature appreciated that the word "trust" has a technical meaning, and where it intended to convey that meaning it used the word "trust" in the Afrikaans text. This appears from s 27(2) of the Act which reads as follows:

> "(2) Die fonds word deur die beheerraad <u>in trust gehou</u> vir die doeleindes in hierdie Hoofstuk vermeld." (Emphasis added.)

Had it been the intention of the legislature to give "entrust" the technical legal meaning of placing money or other property with an attorney subject to a trust, it would have used an expression such as "in trust aan horn gegee" in the Afrikaans text of s 26(a).

In view of the aforegoing I am satisfied that the appellant has shown a

sufficient element of entrustment to bring it within the ambit of s 26(a).

The respondent supported the following further finding of the Court a quo to the effect that the money was not entrusted "by or on behalf of" the appellant:

> "The phrase 'by or on behalf of ' as used in s 26(a) of the Act envisages
>
> (a) a person who entrusts money with a practitioner for himself; or
>
> (b) a person who entrusts money with a practitioner on behalf of another. SW Construction (Pty) Ltd v Attorneys. Notaries & Conveyancers Fidelity Guarantee Fund 1993 2 SA 557 (C), 590B-D.
>
> In the example postulated in (a) above it is the person who entrusts the money for himself who will in appropriate circumstances be entitled to reimbursement; in example (b) it will be the person on whose behalf the money was entrusted who might be entitled to reimbursement."

According to this construction of s 26(a) it is only the person on whose behalf the money was entrusted who would be entitled to reimbursement, provided the other requirements of the section have been met. This view seems to stem from the conception that in order to entrust money it has to be

impressed with a trust for the benefit of a particular person, and that only that person could possibly suffer pecuniary loss and be entitled to claim reimbursement. Such a construction seems to lose sight of the fact that in circumstances such as the present it is only the person by whom the money is entrusted, who will suffer pecuniary loss. Although the money in the present case was intended by the appellant to be entrusted on behalf of Branken the facts show that she has suffered no loss at all and that she accordingly has no right to claim reimbursement.

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

(1) the person by whom the money has been entrusted:

or

(2) the person on whose behalf the money has been entrusted;

provided such person has suffered pecuniary loss. I therefore do not, with respect, agree with the conclusion of the Court a quo that the appellant could only succeed if the money was entrusted by him for himself, i e on his own behalf. For the same reason I respectfully disagree with a similar construction

of the phrase "by or on behalf of" in the SW Construction case, supra, at 590B-D.

In view of the rinding of the Court a quo on the issue of entrustment the learned judge found it unnecessary to consider whether the money was entrusted to Mare" "in the course of his practice" as a practising practitioner. The respondent contended that the appellant did not establish that Maré in the particular circumstances acted in the course of his practice.

There are a number of considerations which in my view support the appellant's submission that the money was indeed entrusted to Maré in the course of his practice. Mare* was in fact attending to the transfer of the property in his capacity as an attorney, and he was able to defraud the appellant because he could produce his conveyancing file and the Fedlife guarantee as evidence of the genuine transaction underlying the fraudulent scheme. The raising of bridging finance was a service which Mare offered as attorney to his clients and for which he could have charged a fee. Flax insisted that the money be paid into Mare's trust account, which he was required to keep as an attorney. Mare

admitted that as far as the appellant was concerned the money was handed to him and deposited into his trust account in the course of his practice as an attorney. As the appellant saw it Mare arranged the bridging finance, received the money and paid it into his trust account in the course of his practice as an attorney. In view of all these considerations I am of the opinion that it has been established that the money was entrusted by the appellant to Mare in the course of his practice, as is required by s 26(a).

The parties have agreed that if the appeal should succeed the order set forth in paragraphs 1 and 2 below should be made.

The appeal is allowed with costs, including the costs of two counsel. The order of the Court a quo is set aside and there is substituted for it the following order:

> "1. Judgment is granted in favour of the plaintiff in the sum of R401 068,48, together with interest thereon at the rate of 18,5% per annum from 31 July 1992 to date of payment, and costs of suit.

2. The plaintiffs claims against Mr Maré and Mrs Mare are to be ceded to the defendant."

F H Grosskopf Judge of Appeal

Corbett CJ)
HeferJA)CONCUR
Vivier JA)

CASE NO. 690/94

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(APPELLATE DIVISION)

In the matter between:

INDUSTRIAL & COMMERCIAL FACTORS
(PTY) LIMITED Appellant

and

THE ATTORNEYS FIDELITY FUND BOARD
OF CONTROL Respondent

CORAM: Corbett CJ, Hefer, Vivier, F H Grosskopf et Marais JJA

HEARD: 17 May 1996

DELIVERED: 30 August 1996

J U D G M E N T

MARAIS JA/

MARAIS JA:

I have had the benefit of reading the judgment of my learned brother Grosskopf but, with respect, I am unable to concur in it. Unless it can be found on a balance of probability that there was an entmstment within the meaning of section 26 (a) by or on behalf of appellant to Mare of the money which was stolen by Mare, appellant's claim against respondent must fail. For the reasons which follow I consider that the Court a quo was correct in concluding that such a finding could not be made.

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.

Section 26 (a) is exhaustive of the circumstances in which a person is entitled to be indemnified by the fidelity fund for loss. The particular limitation upon the liability of the fidelity fund upon which it is necessary to focus is that arising from the use of the words "theft. .of any money or other property entrusted by or on behalf of such persons to him in the course of his practice" and, more specifically, the word "entrusted" (Afrikaans - "toevertrou"). Whatever the precise ambit or connotation of the word "entrusted", when related to the word "money", may be, I think it is obvious that it must be taken to mean something more than the colourless word "paid". The word "paid" is a decidedly more neutral word than the word "entrusted" and the legislature's choice of the latter word, rather than the former, shows plainly enough that some significance was intended

to be attached to the word "entrusted", and that the mere fact that money paid to an attorney in that capacity might be stolen by him or her was not intended to be sufficient in itself to render the fidelity fund liable. As I read my learned brother Grosskopfs judgment, that is accepted implicitly by him.

However deeply I may sympathise with appellant as the victim of a deliberate act of fraud by a practising attorney who cannot make good the loss, I cannot allow my sympathy to obscure what I consider to be facts fatal to appellant's claim. In "facts", I include of course the facts as they were represented by Mare to Flax to be for it is Flax's perception of those particular facts which is relevant to the characterization of the payment which appellant made to Mare, and not the true facts. The relevant facts (both those that were true and those which were thought by Flax to be true) are these. Appellant

considered itself to be Branken's debtor on 8 May 1992. It was obliged to pay to her, or to her duly authorised agent to receive payment, the sum of R450 000,00 which it had agreed to pay. What is more, the agreement was so structured that once Fedlife had paid appellant R500 000,00 appellant had to refund to Branken the balance remaining after deduction from that amount of the following sums: R450 000,00 originally advanced by appellant; a discounting fee of R22 500,00; a further sum to be calculated at the rate of 24% per annum on the sum of R450 000,00 originally advanced, as from the date of the agreement until the date of payment by Fedlife of the sum of R500 000,00 due under its guarantee. This entitlement of appellant to 24% per annum on the sum of R450 000,00 originally advanced was predicated explicitly upon the premise that appellant would pay that sum to Branken on the same day that the agreement

was concluded. The interest so payable amounted to the not inconsiderable daily sum of R295,89 and appellant obviously had a powerful financial incentive to pay Branken the sum of R450 000,00, as soon as possible so as to maximise the interest recoverable from Branken. That after all was the very essence of appellant's business.

When Mare came to collect the cheque from Flax, Flax had already caused the cheque to be drawn in favour of Branken, crossed, marked "not transferable", and signed. Flax conceded that he did so with the intention of fulfilling appellant's obligation to Branken by handing the cheque to Mare. I pause to observe that, had he done so, no question of entrustment by or on behalf of appellant could have arisen. Mare had told Flax that Branken had instructed him to utilize the proceeds of the cheque to make payments on her behalf to certain

third parties. As counsel for appellant readily and, in my view, correctly conceded, that could have been understood by Flax to mean only that Mare was authorised by Branken to receive payment and to disburse the proceeds. Indeed, Flax repeatedly made much of the fact that he had been given that assurance and that he accepted it. In an affirmation made before a commissioner of oaths on 26 June 1992 Flax said, inter alia:

> "Mare told me that the cheque should have been made payable in favour of his firm and on the instructions of Branken, the money had to be paid into his firm's trust account for the credit of Branken as he, Mare, had to make certain payments out of those moneys on the instructions of Branken
>
> ..... I was satisfied that payment to the trust account of Massel, Massel & Mare, the attorneys who acted on behalf of Branken in regard to the transfer of the property and the sale agreement, constituted payment to Branken for the purchase by the claimant of the guarantee, the original of which had been delivered by Mare to me."

In a further affirmation dated 4 February 1993 Flax sought to resile from the assertion that payment to Mare's trust account constituted payment to Branken but reiterated that he acted on Mare's assurance that he had instructions from Branken "to deal with the money and to make payments out of this money". I repeat, if Flax had done as he had originally intended to do, and had simply handed the cheque over to Mare in discharge of appellant's obligation to pay Branken R450 000,00, it could not have been claimed by appellant that there had been any entrustment of money by or on behalf of appellant to Mare within the meaning of sections 26 (a). The question is whether what was ultimately done by Flax can be regarded as such an entrustment.

I return to the facts. It was obviously as much in appellant's interest to make payment to Branken of the sum of R450

000,00 on the day in question as it was in Mare's nefarious interest to receive payment. Flax was plainly intent upon making the payment; appellant's right to interest at 24% per annum as from that date depended upon it. Entrustment of the money to Mare was not originally contemplated by Flax. Payment of appellant's debt to Branken was what he had in mind. Did any of the ensuing events bring about so fundamental a change in Flax's attitude that he no longer wished to discharge appellant's obligation to Branken by handing the cheque to Mare but wished instead to constitute Mare as appellant's agent to make payment to Branken at some undetermined time thereafter and to entrust him with the means to do so?

Even if it be assumed that an agent who has come to receive payment of a debt then due to his principal may, in accepting it, simultaneously become in law the agent of the creditor to make the

payment to the principal (a matter to which I shall return), the facts appear to me to exclude that having happened. Flax refused adamantly to alter the cheque so as to make it payable to Mare's firm. He was insistent that it remain payable to Branken. His assertion (belatedly made many months after the event) that the cheque had been entrusted to MarG by appellant, not in immediate discharge of appellant's obligation to Branken, but for payment to Branken, or for disbursement in accordance with her instructions, only after it had been deposited in Maré's trust account for the credit of appellant, is belied by his balking at making the cheque payable to Mare's firm. As an attorney, he must have known that, if he did indeed desire to entrust Mare with such a mandate, he would protect appellant's interests best by insisting upon drawing a cheque in favour of Mare's firm's trust account. The inference seems to me to be inescapable that

Flax was at all times intent solely upon discharging appellant's obligation to Branken that very day and that it was for that reason that he refused to make the cheque payable to anyone other than her. The inference is, I think, fully borne out by Flax's own statements made soon after the loss was discovered. I have already quoted his statement in his affirmation of 26 June 1992 that the payment to Mare's trust account constituted payment to Branken. On 2 June 1992 Flax had said in an affirmation in support of an application to sequestrate Mare:

> "11.1 Once I was satisfied that the agreement and suretyship had been duly signed, I drew a cheque in favour of Branken for R450 000,00.
>
> 11.2 On the instructions of Respondent (Mare), the money has to be paid into his firm's trust account for the credit of Branken, as Respondent was required to make certain payments out of those monies on behalf of Branken.
>
> 11.3 By agreement between Respondent and myself the

endorsement "not transferable" which appeared on the cheque was altered to read "not negotiable" to enable the Respondent to deposit the cheque into his trust account for the purposes aforesaid.

11.4 The aforesaid cheque was duly paid.

12 Respondent undertook to furnish me with a trust receipt in the sum of R450 000,00. I duly received the trust receipt numbered 366 dated 8 May 1992, a copy of which is annexed hereto marked "F". At the time, I did not notice that the trust receipt read for the credit of the account of Y. Salajee and not for the credit of Branken. I was however satisfied that PAYMENT (sic) was made into the trust account of Massel, Massel and Mare."

In both the evidence before the fidelity fund's enquiry and the Court a quo, and in his supplementary affirmation of 4 February 1993, Flax stressed that appellant's agreement with Branken obliged appellant to pay only Branken, and no one else, that it was for that reason that he refused to alter the cheque to make it payable to Mare's

firm, and that he expressly communicated those sentiments to Mare. The eventual alteration of the cheque from one which was "not transferable" to one which was "not negotiable" to enable the cheque to be paid into Mare's trust account for the credit of Branken did not represent a volte face in Flax's attitude. It was consistent with what he had sought all along to achieve, namely, a discharge of appellant's obligation to pay Branken R450 000,00 on that Very day when he handed the cheque to Mare. Had Maré in fact been authorised by Branken to conclude a transaction of this nature with appellant and to receive payment of the sum of R450 000,00 from appellant, there can be no doubt that appellant could not have been required to pay Branken again because she had not actually received the money which had been stolen by Mare. As between herself and appellant, she would be regarded in law as having received the money because it had

been paid to her duly authorised agent to receive it.

Further consideration of this hypothetical situation seems to me to throw some light upon the issue which arises in this case. When one reflects upon Branken's remedies in such a hypothetical situation they appear to be these. Plainly, she would have an action against Maré. If Maré could not pay, one senses instinctively that she would have a valid claim against the fidelity fund. It would be a loss which seems to fall so squarely within the mischief against which the Act was enacted to provide a remedy. It would be a pecuniary loss suffered by the attorney's own client as a consequence of the attorney having stolen money which he was authorised to collect for her in the course of his practice as an attorney. Indeed, it is no doubt one of the most frequently encountered forms of theft committed by an attorney in the course of practice. 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. At first blush there may appear to have been no entrustment in such circumstances inasmuch as a debtor who simply pays an attorney in response to a letter of demand for payment written by the attorney on behalf of his client and with his client's authority, is manifestly merely paying his debt and cannot be said to be entrusting, either for himself or on the client's behalf, money to the attorney within the meaning of section 26 (a). What the proposition overlooks, so it seems to me, is that money or property which may come into the hands of an attorney in the course of his practice may acquire the character of entrusted

money or property by reason of the understanding which exists between the attorney and his client and quite irrespective of the subjective intention of the person who pays the money, or delivers the property, in question to the attorney. It seems self-evident that when a client mandates an attorney to collect a debt owed to the client and to receive payment on the client's behalf, it is implicit in the mandate that between the time that the money is received by the attorney and the time it is actually paid to the client it will have been entrusted ex necessitate by the client, and not by the debtor, to the attorney. From the moment that the attorney receives the money from the debtor it is no longer the debtor's money and the debt is discharged. It is equally plainly not the attorney's money and the only reason why he has it in his possession is because his client engaged him to collect and receive the money on his behalf. It is inherent in that that the client is

entrusting him with the money in the sense that he looks to the attorney to receive it on his behalf and then to deal with it, not as the attorney pleases, but as he, the client, has instructed him to deal with it. That explains, I think, why the fidelity fund is indeed liable in the hypothetical circumstances I have postulated.

What emerges from this, is that it is not an accurate reflection of the facts to say that in such circumstances the debtor entrusts, either for himself or for the creditor, the money which he pays to the attorney in settlement of his debt, but that it is none the less true that the money is entrusted money by virtue of the arrangement existing between the attorney and his client. The same holds good where other property, and not money, is involved.

If that be so, what is the position where the attorney has no client and has devised a fraudulent scheme designed to induce a

member of the public to part with his money so that the attorney can use it for his own benefit? Consider this example: Attorney A is a confidante of attorney B, a sole practitioner. B confides in A that he has stolen trust money and that he has given out that he is proceeding to Europe on holiday but that in truth he is leaving for another country intending never to return. B departs. A is aware that one of B's clients is a jeweller to whom a large sum of money is owed by a prominent personality for jewellery bought for a person other than his wife. A is also aware that the jeweller is on safari elsewhere in Africa and incommunicado. A has also stolen trust money and plans to leave the country as B did. Purporting to act as the jeweller's attorney, A sends the prominent personality a letter of demand for payment, threatening him with immediate legal action if the debt is not paid at his office within 48 hours. The prominent personality responds

immediately by paying the sum in cash at A's office and declines the offer of a receipt. A pockets the money and flees the country.

I am unable to discern any entrustment of money in such a situation. The prominent personality has simply paid his debt (or, more accurately, purported to do so). There was thus no entrustment of money by him. The jeweller (the creditor) was oblivious of what was being done in his name. There was therefore no entrustment by him of money to A. In such circumstances, as I see the position, no liability attaches to the fidelity fund.

A word of caution here would not be out of place. There is no doubt an element of trust, in the broad sense of that word, in virtually every bilateral transaction. A buyer who pays a large sum of money to a seller of gemstones because he trusts the seller when the seller tells him he is buying a sapphire, is not entrusting the money

which he pays for it to the seller. The fact that the stone may in fact be a zircon cannot alter that. Equally, a debtor who believes a collection agent who represents that he is authorised by the creditor to collect and receive payment of the debt, and makes payment of the debt to him, does not entrust the agent with the money. Again the position would be no different should it emerge that the collection agent was not in fact authorised to collect and receive payment of the debt and was simply a thief.

What we have in the case before us is a situation which was bogus from very nearly its beginning to its end. Certainly the operative parts of Mare's scheme which directly involved appellant were bogus. True, Mare did have a client, Branken. True too, that Branken had sold a property and was due to receive the purchase price. All else was bogus: the need for bridging finance; the

willingness of Branken to sell a guarantee to appellant; the willingness of Carter to stand as surety for her obligations to appellant; the authority of Mare to collect and receive payment of the R450 000,00 from appellant. Branken had not given any mandate of this kind to Mare so that she cannot be regarded as having entrusted Mar6 with the money he received from appellant. For the reasons I have already given and for yet further reasons to follow, I am unable to conclude that Flax entrusted anything to Maré.

It is quite apparent from a study of Flax's behaviour and evidence that when he realised he had been duped by Mar6, he thought that an intention on his part to pay Branken by handing the cheque to Mare in a state which would enable him to deposit it in his trust account, or to hand it to Branken, was not inimical to the claim which appellant made against the fidelity fund. That is why he did not

hesitate to say, as he did when first asserting appellant's claim, that he intended his handing of the cheque to Mare in a state which would enable Mare to deposit it in his trust account to constitute payment to Branken. It explains too why, when he received subsequently the receipt which Mare gave him, he did not bother to look to see to whose account the payment had been credited. I may add that the furnishing by Mare of a trust receipt would of course not necessarily have shown that the cheque had in fact been paid into his trust account. What it undoubtedly would have shown, was that appellant had in fact paid R450 000,00 to Mare. And if Mare had in fact been Branken's agent to receive payment, as Flax believed him to be, that would have been sufficient to set Flax's mind at rest.

It was only after appellant's claim had been rejected by the fidelity fund that Flax bethought himself and sought to place a

different complexion upon certain objective facts in an attempt to alter the essential character of what had happened. The first and essential step in the process was to retract his own earlier assertion that he had intended the act of handing over the cheque to Mare in its altered state to constitute payment to Branken, He sought to attribute the earlier assertion to a mistake made by the attorney who drafted the affirmation of 26 June 1992, but he was not telling the truth. Not only did the attorney concerned testify and deny that he had made any such mistake, he also produced contemporaneous notes of his consultation with Flax which bear him out. Moreover, it is just not conceivable that Flax, a qualified attorney who was personally involved in the debacle, would have read the draft affirmation in so slipshod a manner that he failed to notice so fundamental a distortion in it of his own intention when handing the cheque to Mare.

The next step was to attempt to eke an entrustment out of the facts. By February 1993 when Flax filed his second affirmation dated 4 February 1993, appellant's case had undergone a profound metamorphosis. An attempt was made now to portray Flax, not as the discharger of appellant's debt but as an entruster of appellant's money to Maré The role now sought to be assigned by Flax to Mare was that of agent for appellant to pay Branken. Gone was Flax's originally expressed desire to ensure that payment to Mare would be payment to Branken. Upon what factual foundation was this new edifice constructed? Precisely the same as that upon which the previous edifice of payment to Branken had been erected. That in itself arouses suspicion as to its soundness. On examining the new edifice more minutely it resembles a creation in the trompe-l'oeil style: a creation which gives the illusion of reality but is not in truth real.

Thus, it is said repeatedly that it was "agreed" that the cheque would be dealt with by Mare "only according to the instructions he had received from his client (Branken)". That is hardly surprising for that is precisely what Maré had represented to Flax he was already obliged to do by reason of the instructions given to him by Branken. It took the matter no further and, as I see it, could not and did not serve to constitute Mare" as appellant's agent to make payment to Branken.

Then it is said that by altering the cheque from one marked "not transferable" to one marked "not negotiable", Flax "recognised that (he) was acting outside the ambit of the agreement and that it was at the risk of (appellant) that payment was being made in a manner other than that provided for in the agreement", and that "Mare acted as (appellant's) agent in receiving the money from

(appellant) and he owed (appellant) a duty to use and dispose of the money for the benefit of Branken and strictly in terms of his instructions he told (Flax) he had". First, he would not have been acting outside the ambit of the agreement and at appellant's risk by merely changing the cheque in that manner. The cheque remained payable to Branken; it could not be negotiated without Branken's indorsement unless it was paid into Mare trust account, and once paid into his trust account, whatever dishonest use Mare might make of the money thereafter, appellant could not be required to pay Branken again. Nor would Branken's obligations to appellant come to an end. Conceivably, Mare could of course have forged Branken's indorsement and paid the cheque into his own private bank account but as long as he was authorized to receive payment by Branken, the loss would have been Branken's and not appellant's. At no stage did

Flax or any other representative of appellant suspect that the transaction was bogus or that Mare was not authorised to receive payment. That risk was not present to Flax's or to anybody else's mind. Indeed, Flax emphatically repudiated any suggestion that he doubted Mare's authority to collect and receive payment. The risk that was present to Flax's mind was that writing a cheque in favour of Mar6's firm would not constitute payment to Branken at all. That is why he persisted to the last in reflecting Branken as the payee and in refusing to substitute Mare's firm as the payee.

Typical of the flimsy foundations upon which Flax sought to erect an entrustment is the following passage in his evidence:

> "The idea of me changing the crossing was that Mr Mare - you can take this cheque and you can put it in your trust account and you can use it. That is all that was said, that you can use it for the benefit of Mrs Branken, use it for the purpose for which you told me you are going to use it. So until he had

> used it for her benefit it was in trust, as far as I was concerned, for myself. In other words he had to hold it in trust until he had used it for Mrs Branken. Then he could pay it out of trust."

In similar vein, when during cross-examination he was challenged on his assertion that the proceeds of the cheque were to be held in trust for appellant until they were paid to Branken or disbursed according to her instruction, he said:

> "I said to him take this cheque and see that you use it as you are going to, as you say you will use it..... And I did make it clear to him in one way or the other that he was holding it for our benefit, for, on our behalf. I did."

Later still:

> "I have said in a number of times that I give a cheque to Mare for a specific purpose. He cannot go and spend this money to buy a new car for himself or do anything else. He has to use the money for a specific purpose. The purpose he tells me he is going to use it for and I tell Mr Mare he had better be sure that he does exactly that (my emphasis) because I am paying him outside the ambit of my agreement and he must be sure he takes my cheque, puts it in trust and uses it, to implement my

obligations that I had under that agreement to Mrs Branken." The duty which it was being asserted Mare owed in law to appellant was to carry out Branken's mandate faithfully. But that was a duty already owed by Mare to Branken by virtue of his acceptance of her mandate to collect and receive payment of appellant's debt to her. A promise (even if made) by Maré to Flax that he would fulfil the duty which he already owed to Branken cannot reverse the role which Mare was ostensibly playing and turn him from Branken's agent to receive payment from appellant into appellant's agent to make payment to Branken. It was not a mandate which Mare could accept without abrogating his duty to Branken to collect and receive payment. Superficially appealing analogies such as those of a stakeholder, or an attorney or estate agent who receives and holds in trust a deposit paid by the purchaser of property pending fulfilment of

suspensive conditions or transfer, will be found, on analysis, to be unsound. The insoluble dilemmas which would arise if one accepted the notion, show, to my mind, its untenability. If the payer of the debt were to be sequestrated before the creditor had actually received the money and while it was still in the hands of an agent for both of them, to whom must the agent hand over the money? The debtor's trustee or the creditor? The trustee would say that as the money was still in the hands of the insolvent debtor's agent and had not actually been paid to the creditor, it was still an asset in the debtor's insolvent estate. The creditor would say that the debtor had paid him prior to sequestration by handing the money to his (the creditor's) agent to receive payment, and that from that moment the money ceased to be an asset in the debtor's estate. One cannot resolve this dilemma by attempting to thrust the status of a stakeholder upon the agent for

neither party intended him to be such. Each intended him to be his agent to receive and to make payment respectively. It was integral to the agent's earlier acceptance of a mandate to receive payment for the creditor that he would not nullify the ordinary legal consequences of receipt by him of payment from the debtor by accepting a subsequent mandate from the debtor to make payment on his behalf to the creditor. And even if, at the debtor's insistence, he purported to accept such a mandate, I cannot see how, in law, effect could be given to it. It would entail allowing the debtor to contract with the creditor's agent to disregard the agent's pre-existing obligation to the creditor and to frustrate the consequences in law which receipt by the agent of the money from the debtor would have, and which the creditor must be taken to have intended it to have. It would amount to giving the imparimatur of the law to the inducing of a breach of contract by the

debtor. To accord to a payment of money so made by the debtor the status of money entrusted by or on behalf of the debtor within the meaning of section 26 (a) of the Act appears to me to be equally unjustifiable.

It is of course so that in the present case there was no genuine pre-existing mandate from Branken to receive payment but that cannot, as I see it, affect the issue. Flax believed that there was and appellant cannot be in a better position than that in which it would have been if there had in truth been such a pre-existing mandate. A payment made in the belief that Mare had a pre-existing mandate from Branken to receive payment and which would not have been an entrustment of money by or on behalf of appellant if Mare had in fact had such a mandate, cannot be converted into an entrustment of money by or on behalf of appellant simply because Maré did not have such

a mandate.

As I see it, there are insuperable obstacles in the way of accepting the factual foundation upon which my learned brother Grosskopf rests his finding that an entrustment by or on behalf of appellant occurred. It entails discounting the significance of Flax's own repeated and inherently probable assertion when first staking appellant's claim, that he intended the handing of the cheque in its altered state to Mare to constitute payment to Branken then and there. It also entails discounting the impact of Flax's later unsuccessful attempt to distort the facts by claiming that when Mare received the R450 000,00 he received it for appellant, and not for Branken. It entails discounting too Mare's repeated and inherently probable denials that, in accepting the cheque, he did anything more than reaffirm that he would do with it what he had told Flax he was already obligated to

his client, Branken, to do with it. They were denials which there is no reason to doubt because Mare stood to gain nothing by them and because it is so manifestly consistent with the successful execution of Mare's own fraudulent scheme that he would have sought to convince Flax that he had such instructions from Branken.

It results, to my mind, in an artificial construct which is in flat contradiction of Flax's own far more probably true earlier statements of intent and gives no effect to Mare's highly probably true denial that he did anything or said anything to Flax which would or could have led Flax to believe that he was no longer acting as Branken's agent in receiving the cheque, but was instead agreeing to act as appellant's agent to pay Branken at some unspecified future time by doing with the money what Branken had allegedly instructed him to do. Nor, as I read the evidence, was any such result (assuming for

the moment that it was achievable in law) intended by either Flax or Mare. Flax was at pains to ensure that his handing of the cheque to Mare would constitute payment to Branken and Mare was equally intent upon assuring Flax that he would faithfully execute Branken's instructions to him. Flax's insistence that the cheque be paid into Mare's trust account was not inconsistent with Flax intending the handing over of the cheque to Maré to be payment to Branken. Indeed, as Flax as a qualified attorney must have known, unless Mare handed the cheque over to Branken to deal with it herself, Mare would have been obliged by section 33 (1) of the Act to deposit the cheque in his trust account before distributing the proceeds in accordance with Branken's instructions. That would have been Mar6's obligation quite irrespective of whether or not Flax required him to do so. The cheque was in fact paid into Mare's trust account, and the proceeds thereafter

misappropriated by Mare . I am unable to accept as truthful Flax's profession of belief that, if the underlying transaction had been genuine and not bogus, the loss would have been appellant's and not Branken's. It is overwhelmingly probable that, if those had indeed been the facts, Flax would have said (and said correctly) that he had discharged appellant's obligation to Branken by paying Branken's duly authorised agent to solicit and receive payment and that the loss was therefore Branken's.

I think, with respect, that my learned brother Grosskopf s finding that Flax "insisted that Mare should pay the cheque into his trust account, clearly <u>with the intention that payment to Branken would only take place when the money was paid out on behalf of Branken</u> (my emphasis)", is contradicted by Flax's own earlier statements as to what he intended and is also contrary to the

probabilities inherent in the situation.

I am also unable, with respect, to subscribe to the proposition that "appellant's intention on the one hand to pay Branken and its intention on the other to entrust the money should therefore not be regarded as mutually exclusive". Flax could not have it both ways. If he wanted the handing over of the cheque to Mare to constitute payment to Branken then and there so that appellant could immediately commence debiting Branken with interest and avert any allegation of non-payment by Branken, he would have been frustrating the achievement of his own objective if he were to postpone payment to Branken by dissuading Mare from accepting payment then and there on Branken's behalf, and by persuading him instead to act as appellant's agent to pay Branken at some unspecified date "when the money was paid out on behalf of Branken". I repeat that the entire

tenour of Flax's original assertions as to what he sought to achieve by handing the cheque to Mare was that he intended thereby to make payment then and there to Branken. His subsequent attempts to resile from that when the unfavourable implications of his earlier assertions dawned on him were plainly self-serving and inconsistent with his earlier assertions. They were rightly rejected by the Court a quo and no attempt was made to argue the contrary before us. I do not think that appellant is entitled to ask this Court to come to its rescue by finding, despite Flax's original assertions and his later contradictory assertions as to what was intended, that it is more probable than not that he did not actually intend to discharge appellant's obligation to Branken then and there when he handed the cheque to Mare, but intended instead to constitute Mare as appellant's agent to pay Branken at some unspecified future time and to thereby entrust Mare in the

interim with the money.

I would dismiss the appeal with costs, including the costs of two counsel.

R M MARIAS