

THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

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CASE NO: 342/02

In the matter between :

**T J LOUW NO
THE REGISTRAR OF BANKS
THE SOUTH AFRICAN RESERVE BANK**

**First Appellant
Second Appellant
Third Appellant**

and

**S J COETZEE
MICROZONE TRADING 709 LIMITED
E J KOEN INC
ELIZABETH BENDER**

**First Respondent
Second Respondent
Third Respondent
Fourth Respondent**

Coram: HOWIE, STREICHER, MPATI JJA, JONES et LEWIS AJJA

Heard: 18 NOVEMBER 2002

Delivered: 29 NOVEMBER 2002

**Summary: Moneys in attorneys trust accounts; Meaning of Trust Property:
Financial Institutions Act (Protection of Funds) Act 28 of 2001; s 78(2A) of
Attorneys' Act 53 of 1979.**

J U D G M E N T

LEWIS AJA/

[1] During the past few years a number of banks have run into financial difficulties, and the question has arisen as to the fate of money deposited by attorneys, who have accepted from their clients money in trust, in specially designated bank accounts in terms of s 78 of the Attorneys Act 53 of 1979. This appeal arises from the placing of Saambou Bank Limited ('the bank') under curatorship in February 2002.¹ The first appellant (to whom I shall refer as 'the curator') is the curator of the bank. The second and third appellants played no part in this appeal. The first and third respondents are attorneys' firms that deposited clients' trust funds with the bank. The second and fourth respondents are clients who had paid moneys in trust to the respective firms.

[2] The curator refused to pay to the respondents on demand any deposits made with the bank in terms of s 78(2A) of the Attorneys Act² except in so far as the deposits were linked to guarantees furnished by the bank. The respondents successfully applied to the Pretoria High Court for various forms of relief. Shongwe J ordered *inter alia* that:

1 The curator's decision to refuse to pay out deposits made after 23 November 2001 be set aside by virtue of s 5(8)(a) of the Financial Institutions (Protection of Funds Act) 28 of 2001 (to which I shall refer as the '2001 FI Act').³

¹ See the discussion by Dirk Verkuil in *De Rebus* May 2002 (411) 31.

² The subsection reads: 'Any separate trust savings or other interest-bearing account –
(a) which is opened by a practitioner for the purpose of investing therein, on the instructions of any person, any money deposited in his trust banking account; and
(b) over which the practitioner exercises exclusive control as trustee, agent or stakeholder or in any other fiduciary capacity,
shall contain a reference to this subsection.'

³ This Act came into operation on 23 November 2001.

2 All moneys deposited by the attorneys after that date did not form part of the assets of the bank.

3 All deposits made by the respondent attorneys on behalf of their clients in terms of s 78(2A) of the Attorneys Act were repayable, with interest, on demand.

[3] It is against these orders that the curator now appeals with the leave of the court below. It is noteworthy, however, that the respondents did not appear at the appeal hearing, and that the court did not have the benefit of heads of argument submitted on their behalf.

[4] The basis of the decision of the court below is an interpretation of certain provisions of the 2001 FI Act, coupled with a comparative assessment of provisions in the predecessor to that Act, the Financial Institutions (Investment of Funds) Act 39 of 1984 (the '1984 FI Act').⁴ It is accordingly necessary to examine the relevant provisions in order to determine whether they do apply to moneys placed in an attorney's trust account in terms of s 78(2A) of the Attorneys Act. It was not contended, however, that the 1984 FI Act applied to such trust funds. The change, the respondents successfully argued in the court below, was wrought when the 2001 FI Act came into operation, precluding funds deposited by an attorney in terms of s 78(2A) of the Attorneys Act from becoming part of the bank's assets in the event of its insolvency. The redefinition of 'trust property' and the more detailed provision (s4(5) in both Acts) in the 2001 FI Act dealing with the exclusion of trust property from the assets of a financial institution, the court below held, were such as to render the 2001 FI Act applicable to moneys deposited by an attorney who in turn holds it in trust

⁴ The judgment is reported in 2002 (5) SA 602 (T).

for a client.

[5] Under the 1984 FI Act, the purpose of which was 'to consolidate the laws relating to the investment, safe custody and administration by financial institutions of funds and trust property', trust property was defined as

'any corporeal or incorporeal, movable or immovable asset kept in trust'.

Section 4 of the 1984 FI Act dealt generally with the investment of trust property and the obligations of a financial institution in this regard. The definition of a financial institution under both FI Acts is to be found in s 1 of the Financial Services Board Act 97 of 1990, and includes a bank 'which deals with trust property as a regular feature of its business'. (The curator argued, in the alternative to the argument that the funds in issue were not trust property, that if the funds were found to constitute trust property, then the bank was not one that dealt with trust property as a regular feature of its business. There is no need to decide this issue in view of the conclusion to which I come. In any event, the argument seems to be circular since if attorneys' trust moneys were regarded as trust property in the hands of the bank, the bank would indeed, on its own averments, have been a financial institution as defined.)

[6] Section 4(5) of the 1984 FI Act provided:

'Notwithstanding anything to the contrary in any law or the common law contained, trust property which is expressly registered in the name of a financial institution in its capacity as administrator, trustee, curator or agent, as the case may be, shall not under any circumstances form part of the assets of the financial institution.'

[7] It was apparently common cause in the court below that money deposited in

an attorney's trust account in terms of s 78(2A) of the Attorneys Act did not constitute trust property under the 1984 FI Act, and was accordingly not protected under the then s 4(5). However, the court concluded that the changes in wording in the corresponding provisions of the 2001 FI Act warranted the conclusion that moneys deposited in terms of s 78(2A) of the Attorneys Act did become trust property under the 2001 FI Act, and as such did not constitute part of the bank's assets.

[8] The definition of trust property in the 2001 FI Act is:

'any corporeal or incorporeal, movable or immovable asset invested, held, kept in safe custody, controlled, administered or alienated by *any person, partnership, company or trust for, or on behalf of, another person, partnership, company or trust*, and such other person, partnership, company or trust is hereinafter referred to as the principal' (my emphasis).

[9] This wording was found to be sufficiently wide to embrace funds held in trust by an attorney (as trustee for a client) and deposited in a financial institution, even though the institution is not itself the trustee of the funds.

[10] Section 4 of the 2001 FI Act, like its predecessor, deals with the investment of trust property by financial institutions, and with their obligations to the principal.

Section 4(5) provides:

'Despite anything to the contrary in any law or the common law, trust property invested, held, kept in safe custody, controlled or administered by a financial institution or a nominee company under no circumstances forms part of the assets or funds of the financial institution or such nominee company.'

[11] It followed from Shongwe J's finding that trust moneys deposited by an attorney in the bank constituted trust property that this subsection protected such

moneys by keeping them notionally separate from the assets of the bank. The common law, and the position under the 1984 FI Act, had been altered, the court found, by the broadening of the definition of trust property and by the more detailed wording of s 4(5). Support for this view was found in the different name of the 2001 FI Act: whereas the title of the 1984 FI Act referred to the investment of funds, the 2001 FI Act title refers to the protection of funds. This was regarded as an indication that there has been a change in the emphasis of the legislation – more protection being afforded to investors than previously.

[12] The curator's argument before us is that one cannot infer from some minor changes in wording an intention radically to change the common law and a previous statutory regime in so far as trust moneys deposited by attorneys are concerned. It is trite that when a customer of a bank deposits money in an account the money becomes the property of the bank, which in turn, as debtor of the customer, has an obligation to pay the customer as creditor the amount deposited. The bank does not hold the money for the customer as agent or trustee: it becomes the owner and has only a personal obligation to repay the amount together with interest if agreed.⁵ Accordingly, where a bank is liquidated the customer has only a concurrent claim against the estate. These principles, the curator argues, have not been changed by the enactment of the 2001 FI Act. He contends further that it would be impossible to keep moneys deposited in terms of s 78(2A) of the Attorneys Act separate from other moneys of the bank because of the principle that money becomes the property of the

⁵ For recent restatements of the principle see *Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd* 1995 (4) SA 510 (C) at 530G--532D, and *ABSA Bank Bpk v Janse van Rensburg* 2002 (3) SA 701 (SCA) at 709A—B. See also Edwin Cameron et al *Honore's South African Law of Trusts* 5th ed 293.

borrower as soon as it takes possession by virtue of *commixtio* (commingling of fungibles that cannot be separately identified). The borrower's obligation is to return not the exact money deposited, but an equivalent amount.⁶ In my view, the inability of a bank to keep particular moneys of a customer held in trust separately identified from other funds is not of any consequence. As long as the records of a bank show that a particular amount is designated as being due to a particular customer, there would appear to be no difficulty in finding that a bank holds money that is deposited or invested in trust for that customer.

[13] The more fundamental difficulty with the decision of the court *a quo* is the finding that the 2001 FI Act changes well-established principles of the law relating to deposits made by a trustee in a bank, and precludes money that would at common law be an asset of the bank from being treated as such. The ramifications of such a change would be extensive, the curator argued. One of the consequences would be that the bank as trustee would not be able to invest the customer's money in the ordinary course of business, in the process making some profit for itself. On this basis no bank, it was submitted, would be willing to open a trust account for an attorney. Accordingly, if the legislature had intended to place the bank in the position of a trustee to the attorney's client (in effect thus superimposing another trustee over the attorney as trustee) it would have said so expressly.

[14] In my view, there is no indication in the 2001 FI Act of an intention to change

⁶ See generally on the banker/customer relationship F R Malan and J T Pretorius *Malan on Bills of Exchange, Cheques and Promissory Notes* 4th ed 335ff.

the position as it was under the 1984 FI Act, or under the common law, such as to impose on a financial institution the role of trustee to an attorney's client. The definition of trust property is certainly more detailed, as is s 4(5) dealing with the separation of trust property from the assets of the institution. If one looks at the definition of trust property in isolation it could, linguistically, be read to include property held in trust by a person other than the financial institution itself. But the definition must be read in the context of the Act as a whole. The 2001 FI Act, like its predecessor, provides for and *consolidates* 'the laws relating to the investment, safe custody and administration of funds and trust property by financial institutions'⁷ and in addition gives greater powers of enforcement to the registrar. It does not expressly provide for changes to the laws regulating attorneys' or other trust moneys, and such provision cannot be inferred from anything other than the definition of trust property.

[15] Furthermore, s4 (5) must be looked at in the context of s 4 as a whole. Subsection 1 requires that trust property (that is, property in relation to which the financial institution itself stands in a fiduciary relationship) be invested in accordance with an instruction from the principal, or in terms of an agreement. In the absence of an instruction or agreement, trust property must be invested in the name of the principal; or of the financial institution in its capacity as a trustee, curator or agent; or in the name of a nominee company (subsec 2). When the articles of association of a company prohibit registration of shares or debentures in the name of a trust or financial institution then the shares or debentures must be registered in the name of an officer of the institution who must furnish security to the satisfaction of the Master

⁷ Citation from the long title to the Act.

of the High Court (subsec 3). Trust property must be kept separate from assets belonging to the institution itself, and the books of account must reflect the name of the principal (subsec 4). Section 4 applies also where a financial institution is a joint trustee (subsec 6). None of these provisions is apposite to the deposit by an attorney, acting as trustee, of a client's money in a bank in an account that will be conducted in the ordinary course of the bank's business. The instruction to the bank given by the attorney in terms of s 78(2A) of the Attorneys Act cannot possibly be construed as an instruction by the client to the bank, nor as an agreement between the attorney's client and the bank, as to the manner of investing trust money. There is no trust relationship between the bank and the attorney's client. The instruction is given in order to comply with the provisions of s 78(2A) of the Attorney's Act.

[16] The examination of s 4 as a whole, together with a consideration of the general ambit of the 2001 FI Act and of s 78(2A) of the Attorneys Act, thus lead to the conclusion that the meaning of 'trust property' is not changed by the more detailed wording of the definition and of s 4(5). There is no suggestion in any of these enactments that the dispensation governing moneys held in trust by attorneys is changed expressly, implicitly, by design or through inadvertence. The purpose and effect of the 2001 FI Act are, as indicated earlier, to provide for and consolidate the investment and administration of trust property by financial institutions – not to introduce a substantial change to the principles dealing with funds held by an attorney in trust, and deposited by him or her in a bank account pending the transfer of property or the performance of work.

[17] Accordingly, the curator was entitled to refuse to pay the amounts claimed by the respondents and his decision should not have been set aside. No costs order in respect of this appeal was sought by the curator.

[18] The appeal is upheld.

C H Lewis
Acting Judge of Appeal

Howie JA)
Streicher JA)
Mpati JA)
Jones AJA)
concur