THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 170/2020

In the matter between:

THE ATTORNEYS FIDELITY FUND
BOARD OF CONTROL **APPELLANT**

and

RODNEY ADRIAN LOVE **RESPONDENT**

Neutral citation: *The Attorneys Fidelity Fund Board of Control v Love* (Case No 170/2020) [2021] ZASCA 44 (14 April 2021)

Coram: ZONDI, MOLEMELA and NICHOLLS JJA, CARELSE and MABINDLA-BOQWANA AJJA

Heard: 1 March 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10:00 on 14 April 2021.

Summary: Civil procedure – lapsing of appeal – application for condonation – factors to be considered – condonation granted – Attorney Fidelity Fund – claims against the Fund under s 26*(a)* of Attorneys Act 53 of 1979 – monies paid into firm of attorneys' trust account and subsequently stolen – s 48(1)*(a)* of the Act – when claimant became aware of the theft.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Francis and Strijdom JJ and Grant AJ sitting as court of appeal):

1 The appeal succeeds with costs.

2 The order of the full court is set aside and replaced with the following order:

'(a) The plea is upheld with costs.

(b) The order of the high court is set aside and replaced with the following order:

"Condonation for the late filing of the notice of appeal is granted and the special plea is upheld with costs".'

JUDGMENT

Carelse AJA (Zondi, Molemela and Nicholls JJA and Mabindla-Boqwana AJA concurring)

[1] The issue in this appeal is whether the appellant, the Attorneys Fidelity Fund Board of Control (the Fund) is liable to pay the respondent (Mr Love) the sum of R10 million which was misappropriated after being deposited into Turnbull and Associates attorney's trust account. The Fund is a statutory body originally established in terms of the Attorneys Act 53 of 1979 (the old Act).One of the objectives of the Fund is to reimburse persons who may suffer pecuniary loss as a result of the theft of money which had been entrusted to the attorney.[1]

[1] Section 26 of the Attorneys Act 53 of 1979 provides as follows:
'**26 Purpose of fund**

The Fund is now regulated in terms of the Legal Practice Act 28 of 2014 that came into operation on 1 November 2018. Because Mr Love's claim arose before 1 November 2018 this appeal is governed by the provisions of the old Act.

[2] Section 48(1)*(a)* of the old Act requires a claimant to notify the Fund of any claim within three months of the claimant becoming aware of the theft of money paid into a trust account.

[3] On 7 October 2013, Mr Love gave the Fund notice of his R10 million claim against the Fund. On 4 September 2014, the Fund rejected the claim on the grounds that Mr Love had failed to give the Fund written notice of the claim within three months of him becoming aware of the theft of the R10 million.

[4] On 13 August 2013, Mr Love instituted proceedings in the South Gauteng Division of the High Court (the trial court) for payment of the R10 million. In a special plea, the Fund pleaded:

'2. Plaintiff's failure to comply with section 48(1)(*a*) of the Attorneys Act, 1979.

. . .

2.7 The aforesaid accounts clearly show, and the plaintiff would accordingly reasonably have known, that although no further noteworthy deposits were made to the said trust account, the entire R10 000 000.00 deposited by the plaintiff had been stripped out of that account by the end of July 2011 and large amounts had been transferred periodically to the business account of Turnbull & Associates [*sic* Incorporated] in the period between 4 April 2011 and 28 July 2011;

2.8 Accordingly, there was clearly an objective basis for the plaintiff's stated conviction that Pavoncelli had misappropriated the R10 000 000.00 that he, the plaintiff, had deposited, which

---

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. . . .'

objective basis and stated conviction establish actual knowledge of the plaintiff that the monies he had deposited, as aforesaid, had been stolen;
2.9 Consequently, the plaintiff already knew by no later than 28 November 2012, and probably as early as 15 May 2012, that his monies had been stolen by Pavoncelli but only submitted his claim to the defendant on 7 October 2013, well outside of the three months of him having acquired actual knowledge of the theft as is prescribed in section 48(1)*(a)* of the Attorneys Act, 1979 and, in the premises, the plaintiff's claim did not meet the mandatory requirements of the said section and was rightly rejected by the defendant.'

[5] The trial was heard by Mokose AJ. In an oral judgment read on 19 June 2017, Mokose AJ dismissed the special plea and granted judgment in favour of Mr Love. On 21 September 2017, the Fund applied for leave to appeal against the judgment and order of the trial court. On 26 October 2017, it applied for condonation for the late filing of its notice of appeal. On 14 December 2017, the trial court dismissed an application for condonation on the grounds that the Fund had failed to give a full explanation for the delay. It accordingly dismissed the application for leave to appeal on the ground that it was late and had no prospect of success.

[6] On 7 March 2018, on petition to this Court, leave to appeal was granted to the Gauteng Division of the High Court, Johannesburg (high court) sitting as a full court on the following limited issues:
'3.1. The refusal by the High Court to condone the late filing of the application for leave to appeal and the dismissal by the Full Court of the appeal on this issue.
3.2 The grant of para 1 of the order of the High Court and the dismissal by the Full Court of the appeal on this issue.'
Paragraph (i) of the high court's order reads:
'The Plaintiff has complied with the provisions of Section 48(1)(*a*) of the Attorneys Act 53 of 1979 in that he gave notice of his claim to the Defendant within three months of him becoming aware of the theft, and/or the exercise of the reasonable care he should have become aware of the theft.'

[7] On 22 October 2019, the full court dismissed the appeal with costs. Special leave to appeal was granted to this Court on 5 February 2020. In what follows I deal separately with the two issues on which leave to appeal was granted.

The condonation application

[8] The trial judge heard evidence from 7 until 9 November 2016. She reserved judgment, and more than 6 months later on 19 June 2017 she read out her judgment in open court. In its transcribed form it is a 15 page judgment. On 26 June 2017 the parties were given a copy of the court's order. On 29 June 2017 the Fund requested a copy of the court's judgment.

[9] During the period of 3 July to 28 August 2017 Mr Matsepane, the Fund's correspondent attorney, contacted Mokose AJ's clerk, the registrar, the appeals clerk, the court manager and the transcribers in an attempt to obtain the record including a copy of the trial court's judgment. On 25 July 2017 Mr Matsepane received a certified copy of the record. On 4 September 2017 a copy of the judgment was received. On 21 September 2017 the Fund filed its application for leave to appeal. On 12 October 2017 the registrar told the Fund's attorneys that it needed to bring a condonation application for the late filing of the application for leave to appeal. This advice was based on rule 49(1)*(b)* of the Uniform Rules of Court which provides that:

'When leave to appeal is required and it has not been requested at the time the judgment or order, application for such leave shall be made and the grounds therefor shall be furnished within fifteen days after the date of the order appealed against . . . .'

[10] It is common cause that the 15 day period referred to in the rules had to be calculated from 19 June 2017, the date on which the oral judgment was delivered

[11] A court has a discretion to grant or refuse an application for condonation. The standard to be applied is the interests of justice.[2] The principles to be followed were recently restated by Ponnan JA in *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Others*[3] in the following terms:

'Factors which usually weigh with this court in considering an application for condonation include the degree of non-compliance , the explanation therefor, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice. . . .'

He went on to say, at paragraph 15 of his judgment, that the prospects of success were a further factor to be considered by a court.[4]

[12] When Mr Matsepane attended court to note the reserved judgment he believed that Mokose AJ would, after delivering her judgment, hand down a written copy of the judgment. Based on this belief, which in my view was not unreasonable, he did not take extensive notes of what the trial judge was saying. In the absence of a written judgment, the Fund took the view that it could not rely on Mr Matsepane's notes and therefore could not reach a meaningful decision on whether to appeal, until it received a copy of the written judgment. This is, in essence, the explanation for the delay in failing to apply for leave to appeal within the 15 days required by rule 49(1)*(b)*. The trial court found that this explanation was unreasonable. I respectfully disagree. I find in the circumstances of this matter, the absence of a copy of the written reasons for the trial court's order adequately explains the delay in applying for leave to appeal. When a judgment is appealed against, written reasons are indispensable. Failure to supply them will

---

[2] *Van Wyk v Unitas Hospital and Another* [2007] ZACC 24; 2008 (2) SA 472 (CC) para 20.

[3] *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Others* [2013] ZASCA 5; [2013] 2 All SA 251 (SCA) para 11 and 15.

[4] In *Dengetenge Holdings* supra para 15 the following was said:

'. . . But, faced with some explanation, albeit one that appeared inadequate and perhaps even lacking in candour, counsel was directed to address the merits of the appeal so as to enable us to assess *Dengetenge's* prospects of success and to weigh that together with the other factors.'

be an impediment to the appeal process. In dismissing the appeal, the full court found that there was no basis to interfere with the findings of the trial court as it was not persuaded that the trial court misdirected itself on the facts or that it did not exercise its discretion judicially.[5] The explanation for the failure to note the appeal timeously was not unreasonable and there are prospects of success on appeal which I deal with hereunder.

[13] I accordingly find that the appeal against the refusal of the condonation application must be upheld.

Compliance with Statutory Requirements

[14] Section 48(1)*(a)* of the old Act provides:

'**Claims against fund: notice, proof and extension of periods of claims**.

(1) No person shall have a claim against the fund in respect of any theft contemplated in section 26 unless–

(a) written notice of such claim is given to the council of the society concerned and to the board of control within 3 months after the claimant *became aware of the theft or by the exercise of reasonable care should have become aware of the theft* . . . .' (My emphasis.)

[15] The meaning of 'become aware' and 'reasonable care' in the context of s 48(1)*(a)* of the old Act was considered in *SVV Construction (Pty) Ltd v Attorneys, Notaries and Conveyancers Fidelity Fund*[6] where King J held:

'To become aware of something involves a change of condition - the entering into a new state of condition, here awareness, from a former state or condition, here ignorance (compare *Ex Parte H J Ivens & Co Ltd; Ex parte National Engineering Ltd* 1945 WLD 105 at 110), and the state or condition of being "aware" is to have cognizance of or to know *(The Oxford English*

[5] *Dobsa Services CC v Dlamini Advisory Services (Pty) Ltd and Another; Dlamini Advisory Services (Pty) Ltd and Another v Dobsa Services CC* [2016] ZASCA 131 para14.

[6] *SVV v Construction (Pty) Ltd v Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund* 1993 (2) SA 577 (C) at 584I-585A.

Dictionary(OED)) - thus to "become aware" is to acquire knowledge of something not previously known[7]

. . .

What constitutes "knowledge" in this context? In the first instance it is personal knowledge[8]

. . .

I accordingly hold that becoming aware in the section imports the actual, personal knowledge of the claimant.[9]

. . .

What then is this "knowledge"?

It is not confined to "that mental state of awareness produced by personal participation in the theft or by information derived from the actual thieves, but includes also a *conviction or belief* engendered by the "attendant circumstances" (*per* Watermeyer CJ in *R v Patz* 1946 AD 845. . . "(o)n the other hand mere suspicion not amounting to conviction or belief is not knowledge"). What is then required is the awareness of material facts which would create in the mind of a reasonable man the knowledge, in the sense of the belief or conviction, not merely the suspicion, that a theft had been committed.[10]

. . .

The type of theft with which this case is concerned is that which has come to be known as misappropriation of trust funds (as to which see *Law Society, Cape v Koch* 1985(4) SA 379 (C) at 382); it seems to me that the material ingredients of a theft of this nature are the wrongful (in the sense of *mens rea*) dealing by an attorney with or appropriating to his own use of the moneys which have been "entrusted" to him - in the sense of having been required by the person making over the funds to be placed by the attorney in his trust account and that these remain there *until the happening of some known future event*.'[11] (My emphasis.)

[16] The Fund filed a special plea in which it pleaded that Mr Love:

'[K]new by no later than 28 November 2012, and probably as early as 15 May 2012, that his monies had been stolen by Pavoncelli but only submitted his claim to the [Fund] on 7 October 2013, well outside of the three months of him having acquired actual knowledge of the theft as

[7] *SVV* supra at 584J
[8] *SVV* fn 6 at 585B.
[9] *SVV* fan 6 at 585D.
[10] *SVV* fn 6 at 585D-F.
[11] *SVV* fn 6 at 586B-C.

prescribed in section 48(1)(*a*) of the Attorneys Act, 1979 and, in the premises, the plaintiff's claim did not meet the mandatory requirements of the said section and was rightly rejected by the defendant.'

[17] Mr Love did not file a replication. At the trial it was Mr Love's case that the claim was not time barred because it was only on 13 September 2013 when he saw the business bank accounts of Turnbull and Associates, that he had proof of the theft of the R10 million. On 7 October 2013 Mr Love notified the Fund of his claim.

[18] The trial court found that before September 2013 Mr Love 'had a suspicion that a theft had occurred and could not prove it until such time as he had had access to the bank statements. In *Probest Projects (Pty) limited v The Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund* [2015] ZASCA 192 our courts took the view that to have a suspicion of theft is insufficient'.

[19] The trial court went on to find that:

'The evidence that the plaintiff only became aware of the facts after he had received the business bank statements stands uncontradicted. It is clear that the monies were stolen not when the money was transferred from the trust account, but when the money was placed into the business account. The plaintiff could not have known this without the benefit of the information In view of the uncontradicted information of the plaintiff, I am of the opinion that this special plea is dismissed.'

[20] What the trial court and the full court failed to deal with were the background facts giving rise to Mr Love only notifying the Fund on 7 October 2013 of his claim. What the facts show is set out hereunder.

[21] In the early part of 2011 Mr Love met Mr Pavoncelli. They discussed an investment by Mr Love in a company known as Sword Fern Trading (Pty) Ltd

(Sword Fern). In April 2011 in anticipation of an agreement being reached, Mr Love paid the R10 million into Turnbull and Associates' trust account. According to Mr Love this amount was only to be released after a written agreement for the purchase of shares in Sword Fern was signed by all concerned. In anticipation of an agreement, Mr Love lent Sword Fern over R4 million. Sometime in June 2011 Mr Love and Mr Pavoncelli fell out and all negotiations for the purchase of shares in Sword Fern came to an end. Mr Love then demanded the repayment of his R4 million loan and the R10 million held in trust. Neither demand was met. On a date that does not appear from the record, Mr Love ascertains that Turnbull and Associates no longer had the R10 million in its trust account.

[22] On 31 October 2011 Mr Love brought an application to wind-up Sword Fern based on its failure to repay the loan amounting to over R4 million. He also brought an action against Turnbull and Associates claiming payment of the R10 million. His main claim is based on an allegation that the R10 million was paid out in breach of his tacit agreement with Turnbull and Associates. In an alternative claim, reliance is placed on a duty of care which was breached by Turnbull and Associates when it 'intentionally alternatively paid out the R10 million to one Lorenzo Pavoncelli and or his nominee'.

[23] In the winding-up application Sword Fern failed to timeously file its answering affidavit. Mr Love opposed its condonation application. In his affidavit dated 23 February 2012 in relation to the R10 million, he said 'I do not know when the amount of money was transferred and Pavoncelli as well as Turnbull and Associates have refused to disclose when the amount of money was paid to Pavoncelli . . . I have a strong suspicion that it occurred in April 2011'.

[24] On 15 May 2012 and to avoid Sword Fern's liquidation Mr Pavoncelli signed an undertaking in which he undertook to pay Mr Love the debt owed by

Sword Fern and the R10 million that Mr Love had paid into Turnbull and Associates' trust account. He also undertook to pay the attorney client costs incurred by Mr Love in his action to recover the R10 million from Turnbull and Associates.

[25] Mr Pavoncelli failed to make payments in terms of the undertaking. This had two results. First, on 12 June 2012 Sword Fern was wound-up. Secondly, Mr Love issued a provisional sentence summons against Mr Pavoncelli based on the undertaking to pay the R10 million. In his answering affidavit dated 28 November 2012 Mr Love *inter alia* said that:

'2.5 . . . I have only subsequently established that the defendant . . . had signing powers on the account and in fact utilised the R10 000 000.00 which was paid into the said trust account. During our negotiations I made it clear that I had had enough of the defendant's shenanigans and that I insisted on payment and an admission of liability in respect of all amounts owing to me failing which my instructions were to proceed with the liquidation application.

. . .

15.1 . . . However, the defendant undertook to make payment of the R10 000 000,00. The reason why he has undertaken to make payment of this amount, is because he *has personally misappropriated the R10 000 000,00* as will appear from I set out hereunder.

15.2 . . . I further refer the Court to the various transfers into the account of Turnbull, and respectfully submit that it is clearly demonstrated that the amount paid into the attorney's trust account, being administered by the defendant, was improperly used by the defendant. In any event, the defendant undertook to make payment of the said amount and there is no reason why he should not be held to his undertaking.

. . .

25 . . . The truth of the matter is, as far as I could ascertain and after having obtained the bank statement of the trust account is that the defendant unlawfully utilised the monies in the trust account on his own version. That is probably the reason why he undertook to make payment of the R10 000 000.' (My emphasis.)

[26] In an affidavit deposed to by Mr Love on 19 February 2013 in his action against Turnbull and Associates he said that on 22 November 2012 he met Mr Trapido, the only attorney in the firm of Turnbull and Associates, and he had given him copies of the trust account bank statements. These showed the dates on which the R10 million was paid out of the trust account.

[27] Mr Love obtained judgment against Turnbull and Associates and in the provisional sentence action against Mr Pavoncelli writs of execution were issued. In both instances *nulla bona* returns were issued.

[28] On 13 September 2013 Mr Love saw a copy of Turnbull and Associates' business account which he said showed the disbursement of money from the business account. This, he asserts, was when he first knew that Mr Pavoncelli had stolen the R10 million. On 7 October 2013 some three weeks thereafter, he notified the Fund of his claim.

[29] Having notified the Fund of his claim, he gave evidence on 24 July 2014 at an enquiry arranged by the Fund. In response to a question by the Fund's representative he said that on 15 May 2012, the date on which Mr Pavoncelli undertook to pay the R10 million as well as Mr Love's attorney and client costs in the action against Turnbull and Associates, it was quite clear to him that the R10 million was not in the trust account.

[30] At the Fund's enquiry when asked to explain what the Fund suggested was a two year delay in making a claim against the Fund, he said that he relied on legal advice and that although he had suspicions that the R10 million had been stolen, it was only on receipt of Turnbull and Associates' business bank statements that he had evidence of the theft. This was the tenor of his evidence at the trial. As appears hereafter this is a flawed explanation.

[31] Mr Love's version is that the R10 million had to remain in the trust account until signature of the agreement for the purchase of shares in Sword Fern. By June 2011 negotiations had broken down. No written agreement was ever signed. A demand to repay the R10 million was ignored.

[32] On 31 October 2011, Mr Love sued Turnbull and Associates for the R10 million. It is clear from the particulars of claim that he knew that the R10 million was no longer in trust. In his alternative claim he alleged that the R10 million had been paid to Mr Pavoncelli. There is no evidence why these allegations were made at this point in time. On 15 May 2012 Mr Pavoncelli undertook to pay the R10 million to Mr Love. The only reasonable inference to be drawn from this undertaking is that Mr Pavoncelli had misappropriated the R10 million from the trust account. At his meeting with the Fund, Mr Love said that when he got the undertaking it was clear that the R10 million was not in the trust account. On 22 November 2012 Mr Love was given copies of the trust account which confirmed that the R10 million had been paid out of the trust account in 2011. On 28 November 2012 and in the affidavit Mr Love signed in the provisional sentence proceedings he said that Mr Pavoncelli gave him the undertaking to pay the R10 million 'because he has personally misappropriated the R10 million as will appear from what is said hereunder'. At the trial Mr Love said that he gave no mandate to release the R10 million from the trust account, yet the money had been withdrawn in 2011. He also admitted that the R10 million was withdrawn from the trust account within a space of two months. This he knew from the trust account bank statements.

[33] There was no need for Mr Love to wait until September 2013 when he got the copies of the bank statements of Turnbull and Associates' business account before notifying the Fund of his claim. How the Trust money was spent is irrelevant to his claim. From what is set out above it is apparent that Mr Love

knew in October 2011 or at the latest 28 November 2012 that there had been a wrongful dealing or appropriation by Turnbull and Associates, alternatively Mr Pavoncelli, of the money entrusted to them in the sense of them having been required by Mr Love to keep the money in the trust account until the happening of some known future event.[12] This event did not occur.

[34] For the above reasons I find that the Fund's special plea on the issue of non-compliance with the old Act should have been upheld by the trial court. In the result the trial court and the full court erred in refusing to grant condonation for the late filing of the application for leave to appeal and dismissing the special plea.

[35] The following order is made:

1 The appeal succeeds with costs.

2 The order of the full court is set aside and replaced with the following order:

'(a) The appeal is upheld with costs.

(b) The order of the high court is set aside and replaced with the following order: "Condonation for the late filing of the notice of appeal is granted and the special plea is upheld with costs".'

____

Z CARELSE

ACTING JUDGE OF APPEAL

[12] See *SVV* fn 6 at 586B-C.

Appearances

For appellant:	G Oliver
Instructed by	Brendan Müller Inc, Cape Town
	Van der Merwe & Sorour, Bloemfontein
For respondent:	A P Bruwer
Instructed by	Malherbe Rigg & Ranwell Inc, Boksburg
	Symington & De Kok, Bloemfontein