

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

CASE NO: 07793/15

- | | |
|-----|--|
| (1) | <u>REPORTABLE: NO</u> |
| (2) | <u>OF INTEREST TO OTHER JUDGES: NO</u> |
| (3) | <u>REVISED.</u> |

18 January 2024

.....

DATE

SIGNATURE

In the matter between:

RODNEY ADRIAN LOVE

Applicant

and

**ATTORNEYS' FIDELITY FUND BOARD OF
CONTROL**

First Respondent

**THE MINISTER OF JUSTICE OF THE REPUBLIC
OF SOUTH AFRICA**

Second Respondent

THE LAW SOCIETY OF THE NORTHERN

JUDGMENT

S. VAN NIEUWENHUIZEN AJ**INTRODUCTION**

[1] I consider it important to refer to the exact wording of the first three paragraphs of the Notice of Motion issued on 3 March 2016 in this matter. It reads as follows:

“TAKE NOTICE that RODNEY ADRIAN LOVE (hereinafter referred to as “the applicant”) intends to apply to the above Honourable Court for an Order in the following terms:

1 The first respondent's decision rejecting the applicant's claim in terms of Section 26(a) of the Attorney's Act, Act 53 of 1979 (hereinafter referred to as “the Act”), lodged on 7 October 2013 against the Attorney's Fidelity Fund is set aside;

2 The first respondent is ordered to consider the applicant's claim in terms of Section 26(a) of the Act, on the basis that sufficient notice was given thereof in terms of Section 48(1)(a) read with Section 48(2) of the Act;

Alternatively to paragraphs 1 and 2 above and in the event of the Court finding that the applicant failed to comply with the provisions of Section 48(1)(a) of the Act:

3.1 The decision by the first respondent not to extend the period referred to in Section 48(1)(a) of the Act to and including 7 October 2013, is hereby reviewed and set aside;

3.2 The date, in terms Section 48(1)(a) of the Act, by when notice of the applicant's claim is to be given to the first respondent, in terms of which notice is to be given, is hereby extended until and including 7 October 2013, in terms of the provisions of Section 48(2) of the Act.”

(emphases supplied).

- [2] The said notice includes further alternative relief to the effect that section 48(1)(a) should be declared unconstitutional.
- [3] From the above it is abundantly clear that sections 26 read with sections 48(1)(a) and section 48(2) of the Act are invoked.
- [4] The aforesaid motion was instituted on 3 March 2015.
- [5] An unusual feature of this matter is that the original main relief initially sought in terms of section 26 read with section 48(1)(a) of the Act was not pursued in terms of the motion, but by way of an action instituted on 13 August 2015 under case number 2015/28901. I will deal with the pre-trial events and the fate of the action below.
- [6] As a consequence of the final outcome of that action in the SCA (after a trial by Mokose AJ, a further hearing by a Full Court and an abortive appeal to the Constitutional Court pursuant to the SCA hearing) two substantive issues in the motion before me have not yet been adjudicated.
- [7] The first is prayers 3.1 and 3.2 which I treat as one, and the second is the constitutionality of section 48(1)(a) of the Act.
- [8] A third related issue which arises from the papers before me is the issue of the applicant filing its heads of argument out of time. Since such enquiry involves *inter alia* determining whether it is in the

interests of justice to do so and the latter in turn includes the prospects of success in the matter, I will deal with same last.

[9] I should mention that due to an additional error (which is addressed in a supplementary affidavit) by the applicant's Johannesburg correspondent the applicant's heads of argument was even further delayed which in turn led to a consequential delay by the first respondent in filing its heads of argument. The latter delay was resolved by agreement between the parties and hence same was filed on 1 July 2022. The applicant's delays it would appear were never condoned and hence the need to consider same remains.

[10] For the sake of convenience, the applicant will be referred to as "Love", the first respondent as "the Fund", the second respondent as "the Minister. The third respondent, where necessary, as "the Law Society". Only Love, the Fund and the Minister took an active part in the litigation before me.

[11] I should point out that the Act has been superseded by the Legal Practice Act 28 of 2014 on 1 November 2018. The Fund in its earlier form ceased to exist, all assets, rights, liabilities and obligations which on 1 November 2018, vested in the former Fund, vested in the Legal Practitioners Fidelity Fund Board in terms of section 61 of the Legal Practice Act. The Fund that existed under the Act thus continued in existence as the Legal Practitioners Fidelity Fund and all rights and obligations that vested in the Fund on 1 November 2018 continued as rights and obligations of the Legal Practitioners Fidelity Fund as provided for in section 53 of the Legal Practice Act.

[12] Given that the Legal Practice Act has no retroactive application, and as the material facts that gave rise to Love's claim, which is the subject of this application, occurred before 1 November 2018, the

provisions of the Act, not the Legal Practice Act, are to be applied in the determination of that claim. The relevant provisions of the Act are section 26 read with sections 48(1)(a) and section 48(2) of the Act.

[13] This Court has jurisdiction in the matter by virtue of section 49(4) of the Act coupled with the fact that the alleged theft took place within its jurisdiction.

BACKGROUND

[14] This matter has a lengthy and tortuous background, and it is necessary to refer thereto in some detail.

[15] Love deposited an amount of R10 million into the trust account of practising attorneys Turnbull & Associates Incorporated. It practised as a firm of attorneys in terms of the provisions of the Act and kept a separate trust banking account at Nedbank, being an institution in the Republic of South Africa. Love ascertained that the name and style of the trust account operated by Turnbull & Associates Incorporated was known as "*Turnbull & Associates Trust Account*". It was a trust account opened by Turnbull & Associates Incorporated at the Nedbank Business North Rand Branch, Code 146905 with account number 1469143372. The theft, being the subject matter of the proceedings against the Fund, took place in North Rand or Bryanston, within the jurisdiction of this Court.

[16] On 7 October 2013, Love's attorneys served a notice of claim against the Fund. This notice does not refer to any of the relevant provisions in the Act. The notice itself, annexure RL1 to the founding affidavit, is in the form of an affidavit, dated 20 September 2013. As a minimum it

can be read as a notice in terms of section 48(1)(a) but that does not mean that the Fund may not have a duty to consider the applicability of section 48(2).

- [17] The purpose of the notice was to claim an amount of R10 million from the Fund by virtue of the fact that the R10 million, that was deposited into the aforesaid trust account, was stolen by a person in the employ of the said attorneys and who Love subsequently ascertained was allowed to utilise the said attorneys' trust account as if it was his own account. This was highly irregular and unlawful.

Context within which the R10 million was paid into trust and released.

- [18] Love was offered an opportunity, during February 2011, following discussions between Pavoncelli and one Keith Mountjoy ("Mountjoy") and other persons, to purchase shares in Sword Fern Trading.

- [19] The shares he was offered belonged to a company called Centrosphere and he would have purchased the shares from this company. He was presented with a written document called a memorandum of understanding setting out certain parameters of a possible agreement of purchase of the shares. Notwithstanding the fact that no agreement of sale had been concluded, he was persuaded by Pavoncelli to make payment of the purchase price of the shares into the aforesaid trust account pending finalisation of the sale of shares agreement. Love accepted the *bona fides* of the said attorneys' firm at the time and he accepted that, if the money was paid into the trust account of an attorney, it would be as safe as if in the bank and he consequently obliged the request by Pavoncelli.

- [20] The claim against the Fund is based on the fact that the R10 million was stolen. Love states in this Affidavit that during April 2011 he made

payment of the R10 million into the said trust account as he was persuaded to do by one Pavoncelli, who he subsequently ascertained was either employed by Turnbull & Associates Incorporated or was allowed by Turnbull & Associates Incorporated to operate an attorneys practice under the guise of Turnbull & Associates Incorporated. The aforesaid explanation emanated from information obtained during an insolvency enquiry into the affairs of a liquidated company called Sword Fern Trading (Pty) Limited (hereinafter referred to as Sword Fern Trading), which later changed its name to Echo Globe Lighting Solutions (Pty) Limited.

- [21] At the time, he was unaware of the fact that some or other business relationship between Pavoncelli and Turnbull & Associates Incorporated existed. He later ascertained that there was some kind of relationship when he met with an attorney, Michael Trapido (hereinafter Trapido) who was apparently an attorney in the practice. Trapido later disclosed that the attorney Turnbull, whose practice it initially was, was no longer involved in the practice and it was Trapido who was in charge of the practice. However, Trapido advised that he was doing mainly criminal work and was hardly attending to the practice and Pavoncelli was, for all intents and purposes, in control of the practice.
- [22] Apart from being persuaded to deposit R10 million into the aforesaid attorneys' trust account, Pavoncelli, in addition, persuaded Love to lend and advance an amount of R4 289 520 to the company in which he was going to purchase shares.
- [23] Love became concerned about all the business dealings due to various things that happened. More particularly, discussions that he had with Pavoncelli regarding the finalisation of the share agreement resulted in him arranging a meeting with Mountjoy who he was led to

believe was a shareholder in Sword Fern Trading. On 3 August 2011, he met with Mountjoy at the East Rand Mall and, during the meeting they had, Love advised him that he required repayment of all the monies that he had already paid. Mountjoy gave Love an undertaking to revert to him relating to a repayment plan in respect of the monies that he had paid. At that stage, he was totally unaware as to what happened to the monies that he had paid but was assured by Mountjoy that the monies would be repaid to him by the company (presumably Sword Fern Trading).

[24] Mountjoy failed to revert to him with a plan for repayment of all the monies paid by him. Love thereafter engaged attorneys in the matter and ultimately an application for the liquidation of Sword Fern Trading was issued and, at the same time, an action was instituted against Turnbull & Associates. Both these proceedings were launched on 31 October 2011. The action invoked a tacit agreement to the effect that Turnbull & Associates would deal with the R10 million in accordance with Love's instructions and mandate and alleges that it was paid out in breach of the tacit agreement. These allegations were met by a defence that the R10 million was held subject to instructions of both Centrosphere 67 and Love and was subsequently paid out in accordance with instructions of both so as to settle part payment of the shares allegedly acquired by Love in Sword Fern Trading.

[25] Love states that Pavoncelli persisted with the allegation that he did not steal Love's money and that the monies were obtained by Centrosphere 67 following the sale of shares in Sword Fern Trading. Pavoncelli even went as far as to register Love as a director of Sword Fern Trading. This Pavoncelli achieved by forging Love's signature.

The Liquidation Application and undertakings by Pavoncelli

[26] Pavoncelli, acting as a director of Sword Fern Trading, opposed the application for the liquidation and a number of affidavits were filed. Pavoncelli persuaded the Court to postpone the liquidation application on a number of occasions based on a promise to make payment of an amount of R4 289 520, being the money lent to the company. Once the promise to make payment did not materialise, Pavoncelli, in a final bid to obtain a further postponement of the liquidation application, signed a letter of undertaking on 15 May 2012 in terms whereof he undertook to personally make payment of all the amounts that Love had paid, i e the amounts that Love paid in respect of the loan that was made to the company as well as the R10 million paid into the trust account of Turnbull & Associates Incorporated. A copy of the said undertaking, RL2, is annexed to the founding affidavit.

[27] Pavoncelli bound himself personally to make payment of the following amounts to Love:

“1. ...

1.1 ...

1.2 *R10 million (Ten Million Rand) together with interest at a rate of 15.5% per annum compounded monthly in advance calculated from 1 April 2011 being in respect of monies deposited by Rodney Adrian Love into the trust account of Turnbull & Associates Incorporated Attorneys, which amount for the purposes contemplated herein, is to be regarded as being due, owing and payable, which payment shall be made against written confirmation from Love that he has no right, title or interest in any shares in Echo Globe Lighting Solutions (Pty) Limited and the signature by Love of all documents reasonably required in confirmation of the above;*

1.3 ...

2. *This undertaking does not constitute a waiver of the rights of Rodney Adrian Love to proceed with the winding up application under case number 2011/21324 or the action instituted under case number 2011/21323 in the event that I fail to make*

payment in terms of this undertaking nor does it constitute a novation of the original debt.

3. *I undertake to make payment of the amount specified in clause 1.1, 1.2 and 1.3 above by no later than Thursday 17 May 2012 and the amount specified in terms of 1.4 immediately upon taxation of the bill of costs."*

[28] Prior to offering to make payment of the amount set out in RL2, Pavoncelli persuaded Love that he was able to honour this undertaking and provided him with a statement of assets and liabilities as at 30 April 2012, a copy of which is annexed as RL3. According to this statement, his assets amounted to R64 900 000 and his liabilities were only R14 080 000, leaving a net surplus of R50 820 000. Pavoncelli reflected various luxury cars that he owns on annexure RL3. Love personally saw him riding around in a Ferrari motor vehicle and he had no reason to doubt, at that particular point in time, that the undertaking, as set out in RL2, would not be met.

[29] Following the signing of the undertaking, Pavoncelli made payment of the amount of R2 000 000 to Love in reduction of the loan to the company. He failed to honour the undertaking as set out in annexure RL2 and, as a consequence thereof, Love proceeded with the application for the liquidation of Sword Fern Trading and obtained the final winding up order of the company on 12 June 2012.

[30] Thereafter, an insolvency enquiry was held during 2013 where Trapido, Pavoncelli and Turnbull were interrogated. Due to the fact that Love was advised that the enquiry was a secret enquiry and that the contents of such an enquiry cannot be disclosed, there is no evidence about what transpired at the enquiry. Be that as it may, he had already obtained from Trapido a copy of the bank statements relating to the trust account of Turnbull & Associates Incorporated. Trapido approached him and was very concerned about what was going to happen to him and Turnbull as attorneys.

[31] Although the trust account showed that the R10 million was paid out of the trust account, it was not possible to determine what happened to the monies. The trust account indicated that the monies were paid to the business account of Turnbull & Associates Incorporated. Trapido was apparently unable to obtain copies of the business cheque account of Turnbull & Associates and hence Love could therefore not establish what happened to the monies after they were transferred out of the trust account and into the business account. He also could not determine whether Centrosphere was paid for the shares that Pavoncelli contended Love had “purchased”. Consequently, it was necessary to obtain copies of the bank statements of the business account of Turnbull & Associates Incorporated in order to see whether or not the monies that were taken out of the trust account of Turnbull & Associates were in fact stolen.

[32] On 2 September 2013, and following the insolvency enquiry and subpoenas issued by Love’s attorneys, he obtained copies of the business cheque account of Turnbull & Associates Incorporated. Once the copies of the cheque account were obtained, it became clear to him that the R10 million that he paid into the trust account was in fact stolen by Pavoncelli. By virtue of the theft, a claim was lodged with the Fund.

The inquiry by the Fund

[33] On 24 July 2014, the Fund held an enquiry in terms of the Regulations and Love was interrogated regarding the claim he had submitted. One of the aspects that was raised was whether or not the claim that he had submitted was submitted within the three-month period provided for in section 48(1)(a) of the Act. Love contended that he did submit the claim within the three-month period and pointed out, in particular,

that the theft could only have been established after he had received the business cheque account bank statements from Nedbank, which date was 2 September 2013.

- [34] The statements were provided in September 2013 with a date stamp from the bank of 2 September 2013. All the bank statements contained the Nedbank date stamp of 2 September 2013 and same is attached to the founding affidavit as RL4, being bank statements number 294 to 301. A complete set of the bank statements was provided to the Fund.
- [35] The entries in the bank statements reflected that, after the monies were transferred into the cheque account of Turnbull & Associates, it was not used to pay Centrosphere 67 but was utilised to pay Pavoncelli, third parties and to pay various other expenses of Turnbull & Associates.
- [36] In Love's view and having regard to what was said during the enquiry, he experienced the Fund enquiry as very hostile. He acknowledges that he may be incorrect, but that's how he experienced the interrogation and the questions asked and the general attitude at the enquiry. He attended the enquiry to provide the Fund with as much information as he had to assist in the claim that he had lodged. He could not understand the attitude displayed because he thought that the Fund was there to protect members of the public against attorneys who steal money from the public. He did not realise that the apparent intention of his interrogators was to find a loophole in his claim.
- [37] After receipt from the bank of the business statements of September 2013, Love contends he established that theft had in fact taken place and that his previous suspicions that he had relating to the possible misappropriation of the money were in fact correct. It was only in

September 2013 that he was able to establish that the money paid into the trust account had been stolen.

How section 48(2) became relevant

[38] Apart from the fact that the Fund in my view should from the outset have considered section 48(2) once they concluded that section 48(1) (a) was not complied with, given the nature of these sections another event brought section 48(2) into play. As a consequence of the hostile reception Love received at the Fund enquiry, he personally engaged in correspondence with the Fund and, on 3 July 2014, he requested his attorney of record to address a letter to the Fund setting out his concerns. A copy of that letter is dated 31 July 2014 and is annexed as annexure RL5.

[39] Paragraph 12 of this letter reads as follows:

“Having regard to the judgement, and that the fund is a fund of last resort, we can see no reason why our client's claim can be rejected in terms of the provisions of section 48 nor, in the event that factually our client's claim was submitted outside of the three month period (which is denied), that there exists good reason not to extend the applicable time limits, having regard to the merits of our client's case. (emphases supplied).

[40] It is contended, on behalf of Love, that, from RL5, the court will notice that he adopted the stance that notice was given to the Fund within the three-month period after he established that the theft of money had occurred. In addition, the attorney, acting on behalf of Love, requested that the Fund act in terms of the provisions of section 48(2) of the Act and to extend the period of time, as it is entitled to in terms of the provisions of section 48(2) of the Act, which reads as follows:

“If the Board of Control is satisfied that, having regard to all the circumstances, a claim or the proof required by the Board has been

lodged or furnished as soon as practical, it may in its discretion extend any of the periods referred to in subsection (1)."

(emphases supplied).

[41] Although Love's attorney did not specifically refer to section 48(2) of the Act, he could hardly have had any other section of the Act in mind when he stated that good reasons existed to extend the period of time having regard to the merits of Love's claim.

[42] On 4 September 2014, the Fund advised Love that it rejected his claim and stated as follows:

"Further to previous correspondence herein, I wish to advise that the Fund's board of control has resolved that this claim be rejected, on the grounds that the requirements of Section 48(1)(a) have not been met. The above reason for rejection may not be exhaustive and all of the Fund's rights are fully reserved in the event of it at a later stage appearing that additional grounds for rejection of other defences may exist."

[43] A copy of the aforesaid is annexed to the founding affidavit as annexure RL6.

[44] On 20 January 2015, Love's attorney addressed a letter to the Fund requesting written reasons for the Fund's rejection of Love's claim. This request was directed in terms of section 5(1) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). Although this request was made outside the 90 days provided for in section 5(1) the letter specifically states that:

"4 We appreciate that this request is made outside the 90 (ninety) days provided for in the said Section. However, we require the reasons at this point in time, failing which we will have to apply to Court for an Order that the reasons must be provided."

[45] Same is annexed as annexure RL7.

[46] On 18 February 2015, the Fund responded to the request and stated as follows:

"The reasons for rejection are as follows:

1. *In an affidavit deposed by your client on 28 November 2012, he states that: -*
 - 1.1 *Pavoncelli had personally misappropriated the R10 million which is now claimed from the Fund;*
 - 1.2 *Pavoncelli had signing powers on the trust account of Tumbull & Associates Inc (Tumbull) and that he had paid amounts of R4 million and R2 million on 2 April 2012 and a further amount of R4 million into the said trust account on 4 April 2012;*
 - 1.3 *Pavoncelli had transferred monies out of that trust account into the business account of Tumbull, beginning on 4 April 2012 in an amount of R500000.00 and had again transferred monies out of the said trust account into the said business account on 11 April 2012 in amounts of R1 million, R26 081.32, R19 000.00 and R5 490.00;*
 - 1.4 *On 12 April 2012 similarly transferred amounts of R200 000.00 and R6 550.00 respectively, and on 13 April 2012 amounts of R300 000.00, R23 800.00, R13 313.00 and finally on 16 April 2012 two amounts of R6 200.00 and R350 000.00, respectively.*
 - 1.5 *Moreover, your client attached to his aforesaid affidavit copies of the bank statements of Michael Trapido Trust which he knew to be the same account as the Turnbull trust account — account number 1469143372 held with Nedbank, dated 21 November 2012 for the period from 1 March 2011 to 31 October 2011. A perusal of those bank statements shows that the first deposit of R4 million on 2 April 2011, not 2 April 2012, and that the dates of all the other deposits referred to in the affidavit were in 2011, not 2012.*
 - 1.6 *It is clear that prior to the first deposit by your client in the amount of R4 million, the balance in the Turnbull trust account was R55 162-14 and that after the last deposit of R4 million on 4 April 2011, the balance was R'0 060 322-*

30 and that the deposits made into that trust account by parties other than your client for the period between 2 April 2011 and 4 April 2011 were negligible.

- 1.7 Furthermore it is evident that although no further noteworthy deposits were made to the account, the entire R10 million deposited by your client had been stripped out of the account by the end of July 2011 and that large amounts had been transferred periodically to the business account of Turnbull in the period between 4 April 2011 and 28 July 2011.*
- 1.8 Pavoncelli made the offer on 15 May 2012 to him because Pavoncelli had misappropriated the R10 million.*
- 2. It is clear then that your client 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. Your client's claim was therefore submitted 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, No 53 of 1979.*

Please note that that the reasons given above may not be exhaustive and that the Fund's rights are fully reserved in the event of it later appearing that additional grounds for rejection of the claim may exist."

[47] A copy of the aforesaid reasons was provided on 18 February 2015 and are annexed as RL8.

[48] It is contended that the reasons advanced by the Fund are incorrect. Love stands by his approach that it was not until he had received the bank statements in respect of the business cheque account of Turnbull & Associates that he was able to ascertain that the theft had taken place. Monies drawn out of the trust account are not, by virtue of that fact, classified as theft. Love continues that the court will recall that Pavoncelli maintained that he had paid Centrosphere 67 for the shares. All that the bank statements relating to the trust account could demonstrate was that the monies from the trust were withdrawn account. He was, however, unable to state what happened to the money subsequent to the withdrawal from the trust account and it was

only once he had obtained the business cheque accounts in September 2013 that he was able to establish that theft had taken place.

[49] Love further contends that the statement on behalf of the Fund, that he was properly aware of the theft as early as 15 May 2012, stems from the fact that that is the date when Pavoncelli signed the letter of undertaking. Love contends that nowhere in the letter of undertaking does it remotely appear that the money was unlawfully stolen. In fact, Pavoncelli contended that the amount was utilised in order to make payment of the shares that Love allegedly purchased in the company, Echo Globe Lighting Solutions (Pty) Limited.

[50] Love further explains that the allegations relating to the contents of his affidavit dated 28 November 2012 emanated from an affidavit that he made in provisional sentence summons proceedings that he instituted against Pavoncelli based on the letter of undertaking signed by Pavoncelli on 15 May 2012. The incorrect dates in this affidavit as to when he paid the R10million into the relevant trust account is clearly erroneous but can hardly be held against him in these proceedings given the contents of the affidavit that constitutes the claim lodged against the Fund.

The provisional sentence proceedings

[51] After Pavoncelli did not honour the undertaking as set out in his letter of undertaking, a provisional sentence summons was issued against Pavoncelli, claiming payment of the amounts that he had undertaken to pay. Pavoncelli filed an answering affidavit in the provisional sentence proceedings, a copy of which is annexed as RL9. In this answering affidavit, three defences are raised:

51.1 defences relating to the National Credit Act;

51.2 defence of *lis alibi pendens*; and

51.3 a defence which he calls a “defence on the merits”.

[52] Insofar as the defence relating to the *lis alibi pendens* is concerned, Pavoncelli states that Turnbull & Associates Incorporated and he are in fact one and the same person and says that:

“8.10 It is furthermore clear from that which is more fully referred to above that but for the fact that the plaintiff had deposited the funds into the trust account of Turnbull, the plaintiff would have looked directly to me for the repayment of the sum of R10 000 000.00 since for all intents and purposes, the plaintiff regarded Turnbull as simply my alter ego and an institution which had acted in a facilitatory position. The plaintiff was nevertheless precluded by law, from instituting legal proceedings against me personally and accordingly, in law, was obliged to institute action against Turnbull.

8.11 I was accordingly in law sufficiently identified with Turnbull and I was regarded and being a so-called “privy” of Turnbull. I was for all intents and purposes deemed to be the same person as Turnbull and was privy to the parties in the second action.”

[53] Love responded to Pavoncelli’s answering affidavit in the provisional sentence proceedings, a copy of which is annexed as RL10. The Fund is now relying on what is stated in RL10 in order to substantiate its submission that, in the latter affidavit, Love admitted that the theft had occurred. Love submits that, as appears from the affidavit, this statement is incorrect. The relevant passage in this affidavit reads as follows:

“The reason why he has undertaken to make payment of this amount is because he has personally misappropriated the R10 million as appears from what I set out hereunder.”

[54] The “misappropriation” alluded to here was not necessarily tantamount to theft. Love thereafter set out, in the same affidavit, the various withdrawals from the trust account and states that:

“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 attorneys’ trust account being administered by the defendant, was improperly used by the defendant.” (my emphasis)

[55] Love contends he could not at that point in time have known that the money was stolen nor could he, by the exercise of reasonable care, have become aware of the theft. In his view, he simply had no facts at his disposal to have concluded that the theft had occurred or that he could have become aware that the theft had occurred. Love states that he did not know what happened to the money once it had been transferred out of the trust account of Turnbull & Associates Incorporated. Nowhere in the affidavit made by Pavoncelli, is it even remotely suggested that he unlawfully took the money.

[56] Hence Love disputed the stance by the Fund that he knew by no later than 28 November 2012 and probably as early as 15 May 2012 that the monies were stolen by Pavoncelli.

[57] For the purposes of the present application, I need not deal with this any further, other than to state that execution steps were taken against Pavoncelli in terms of a court order annexed as RL11 and it appeared that Pavoncelli did not have the assets as represented or the assets have been bonded and/or leased.

[58] Love states that from what he has set out above it is clear that, he tried his best to recover by means of legal process the R10 000 000.00 (that was paid into the attorneys' trust account as stated previously). Eventually he obtained judgments which have not realised any income.

- [59] His primary point in the affidavit remains thereafter that it is clear that it was not until September 2013 that he became aware that a theft had occurred and that he could not do anything prior to receipt of the business cheques account statements of Turnbull & Associates Incorporated to establish whether or not a theft had taken place.
- [60] In the circumstances he submits that there was compliance with section 48(1)(a) of the Act and, in the event of the Court in considering the facts being of the view that notice was not within the three-month period, he requests that the Court extends the three-month period and issues an order in terms of the notice of motion that it is reasonable to accept that it was not until he obtained the bank statements in September 2013 that he could have known that the money was stolen i.e. that the period in terms of section 48(1)(a) should be extended in terms of section 48(2).
- [61] Love further contends that, from the reasoning advanced by the Fund, it is clear that, despite the request by his attorney in the letter dated 31 July 2014, annexure RL5, that the Fund exercises its discretion in terms of section 48(2) of the Act and extends the period until 7 October 2013 on the basis that there exists good reason to extend the applicable time limits, having regard to the merits of Love's case, the Fund has decided not to extend the date for the filing of the claim until 7 October 2013. Only in the alternative does he submit that the provisions of section 48(1)(a) of the Act is unconstitutional.
- [62] He further contends that in terms of the provisions of PAJA the Court is entitled to set aside the Fund's decision and rejection of his claim. He submits that the Act is of application by virtue of the fact that what the Fund did is an administrative action as defined in section 1 of PAJA. The Fund took a decision by exercising a public power or by performing a public function in terms of an empowering position as he

has already stated. He submits that the Court is entitled to review that administrative action taken by the Fund by virtue of the provisions of sections 6(2)(e)(ii), (iii), (v) and (vi). He also submits that the decision and the action of the Fund was not rationally connected to the information before it as envisaged in section 6(2)(f)(ii) and (cc). Hence, Love requests that the Court, in terms of the provisions of section 6(1) of PAJA, reviews the administrative action taken by the Fund. He also annexes an affidavit by his attorney, marked RL12, confirming what he had stated.

[63] Love specifically states that the Fund in taking the decision, prevents action against itself to proceed. There is a potential claim of R10 000 000.00 which is brought against the Fund. If it is able to prevent the claim from proceeding by virtue of the decision that it has taken, no further action can be taken and the Fund therefore stultifies and prevents further legal action to be taken against it for the recovery of the amount that was paid into the attorneys' trust account. The reasons that were advanced for the taking of the decision, is with respect, not borne out by the objective facts and it is submitted that the decision was taken:

63.1 Because the Fund was biased or should reasonably be suspected of bias, because irrelevant considerations were taken into account and relevant considerations were not considered;

63.2 In bad faith, arbitrarily or capriciously and the action itself was not rationally connected to the information before the Fund.

[64] Consequently, Love request that the Court, in terms of the provisions of Section 6(1) of PAJA reviews the administrative action taken by the

first respondent. He clearly regards the failure to invoke and apply section 48(2) as an administrative decision.

[65] It is also clear from the background and other litigation as well as the submissions made in argument before me that the review is aimed at the extension provided for in section 48(2) given that the SCA has already decided the status of Love's claim in terms of section 48(1)(a) of the Act in *The Attorneys Fidelity Fund Board of Control v Love* (Case No 170/2020) [2021] ZASCA 44 (14 April 2021).

THE HIGH COURT ACTION

[66] As stated above the aforesaid decision came about after Love instituted proceedings in the South Gauteng Division of the High Court (the trial court) for payment of the R10 million. According to the SCA report the action against the Fund was instituted on "13 August 2013". I should point out that paragraph 4 of the SCA judgment states that the proceedings were instituted on the aforesaid date but same must be a typographical error. On that date the Fund had not even been notified about the claim (as is evident from paragraph 3 of the SCA judgment) or even rejected the claim, which decision was only made on 4 September 2014. The late PAJA request for reasons were only made on 20 January 2015 and the Fund only provided the reasons in response hereto on 18 February 2015. I am fortified in the view that same is a typographical error given that Love's legal representative filed a detailed chronology listing the correct dates in respect of the above events and the Fund's legal representatives accepted same as correct. In its own heads of argument, the Fund indicates that the action was instituted on 13 August 2015.

[67] 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 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"

[68] 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. I should mention that it is clear from the Condonation Application for the late filing of the applicant's heads of argument that Makose AJ dealt with 4 special pleas raised by the Fund and only one of these special pleas was ultimately decided by the SCA on Appeal.

[69] The special pleas unsurprisingly included a defence of *lis alibi pendens*, Love's failure to comply with section 48(1)(a) of the Act, the lack of entrustment, that Pavoncelli did not act in the course and scope of the practice of an attorney¹ and that the monies constituted an investment by Love and The Fund was not liable for such loss.

¹ See paragraph 23 of the Fund's Answering Affidavit in the Condonation Application,

After the Fund abandoned the defence of *lis alibi pendens* the trial proceeded, and all four special pleas were dismissed.² A copy of Mokose AJ's judgment is annexed to the Fund's answering affidavit as JLSCA "1". It is clear from Mokose AJ's judgment paragraph 20 that the special plea of entrustment was dismissed. Paragraph 23 of the judgment reflects that the defence that Pavoncelli did not act in the course and scope of the practice of an attorney was dismissed and Paragraph 30 of the judgment clearly shows that the defence that the monies constituted an investment by Love was also dismissed. Paragraph 40 of the judgment reflects that the defence of late notice in terms of section 48(1)(a) was also dismissed.

[70] The Fund delivered an application for leave to appeal on 21 September 2017 but was requested by the Registrar to launch an application for condonation which was ultimately refused by Mokose AJ on 14 December 2017. The Fund thereafter applied for leave to Appeal to the SCA under case number 025/2018. On 7 March 2018 the SCA granted limited leave to Appeal to the Full Court of the Gauteng Local Division in respect of paragraph 1 of Mokose AJ's order which states that Love had complied with section 48(1)(a) of the Act.³

[71] 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

² See paragraph 31 of the Funds Answering Affidavit in the Condonation Application,

³ See Annexures "JLSCA2" read with "JLSCA5" to the Fund's answering affidavit in the condonation application.

leave to appeal on the ground that it was late and had no prospect of success.

[72] On 7 March 2018, on petition to the SCA leave to appeal was granted to the Gauteng Division of the High Court, Johannesburg 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.'

I observe that the other special pleas thus became res judicata as between the Fund and Love.

[73] On 25 October 2019, the full court dismissed the appeal with costs.⁴ Special leave to appeal was granted to the SCA on 5 February 2020⁵

[74] The SCA per Carelse AJA (Zondi, Molemela and Nicholls JJA and Mabindla-Boqwana AJA concurring) upheld the appeal against the full court's refusal to condone the late application for leave to appeal for reasons that are irrelevant to the present analysis.

[75] I refer to the SCA judgment in some detail given the "mootness" defence raised by the Fund in its objection to the condonation for the late filing of Love's heads of argument and the contrary view it took of

⁴ See Annexure "JLSCA 7" to the Fund's answering affidavit in the condonation application.

⁵ See Annexure "JLSCA8" to the Fund's answering affidavit in the condonation application.

Love's conduct, to which I am bound in as much as the mootness and the need to apply section 48(2) may be affected.

[76] With regard to Loves' compliance with section 48(1)(a) of the Act the SCA first analysed the section as follows:

"[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 Fund⁶ 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 Dictionary(OED)) - thus to "become aware" is to acquire knowledge of something not previously known⁷

. . .

What constitutes "knowledge" in this context? In the first instance it is personal knowledge⁸

. . .

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

. . .

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

⁷ *SVV supra at 584J*

⁸ *SVV fn 6 at 585B.*

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.)”

[77] In dealing with the Fund’s special plea the court noted that Love did not replicate thereto. It further stated that:

“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:

⁹ SVV fn 6 at 585D.

¹⁰ SVV fn 6 at 585D-F.

¹¹ SVV fn 6 at 586B-C.

'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.” (emphases supplied)

[78] The aforesaid reasoning and judgment on which same is based was delivered on 14 April 2021 by the SCA.

[79] Hence the present emphasis on section 48(2)) and the PAJA review application,

[80] The Fund answered this application in this matter by way of an affidavit of one Jerome Losper (“Losper”), who is the claims executive

¹² See SVV fn 6 at 586B-C.

of the Fund, and a non-practising attorney. He sets out the reasons for the rejection of the claim for the loss of R10 million as follows:

80.1 that Love's statement that he did not know about the theft of the funds until he obtained the business accounts of Turnbull & Associates Incorporated, during or about September 2013, is untrue. He relies, as already stated in the affidavit of 28 October 2012 filed in case number 37352/2012, on 29 November 2012, where Love states that:

"a. Pavoncelli had signing powers on the trust account of Turri bull;

b. Pavoncelli had personally misappropriated the R10 million which is now claimed from the Fund;

c. Applicant had paid amounts of R4 million and R2 million into the trust account on 2 April 2012 and a further amount of R4 million into the said trust account on 4 April 2012;

d Pavoncelli had transferred monies out of that into the business account of Turnbull, beginning on 4 April 2012 in an amount of R500 000.00 and had again transferred monies out of the said trust account into the said business account on 11 April 2012 in amounts of R1 million, R26 081.32, R19 000.00 and R5 490.00, and had again on 12 April 2012 similarly transferred amounts of R300 000.00, R23 600.00, R13 313.00 and finally on 16 April 2012 in two amounts of R6 200.00 and R350 000.00, respectively.

7.2 Although the amounts mentioned above do not amount to R10 million, Applicant boldly states in paragraph 15.1 of the sworn statement in question that Pavoncelli had personally appropriated R10 million.

7.3 Moreover, Applicant attached to his aforesaid affidavit copies of the bank statements of Michael Trapido Trust which he knew clearly to be the same account as the Turnbull trust account - account number 1469143372 held with Nedbank, dated 21 November 2012 for the period

from 1 March 2011 to 31 October 2011. A perusal of those bank statements shows that the first deposit of R4 million on 2 April 2011, not 2 April 2012 and that the dates of all the other deposits referred to in the affidavit were in 2011, not 2012. Moreover, it is clear that prior to the first deposit by Love in the amount of R4 million, the balance in the Turnbull trust account was R55 162-14 and that after the last deposit of R4 million on 4 April 2011, the balance was R10 060 322-30 and that the deposits made into that trust account by parties other than Love for the period between 2 April 2011 and 4 April 2011 were negligible. Furthermore it is evident that although no further noteworthy deposits were made to the account, the entire R10 million deposited by Love had been stripped out of the account by the end of July 2011 and that large amounts had been transferred periodically to the business account of Turnbull & Associates Incorporated in the period between 4 April 2011 and 28 July 2011. There was clearly an objective basis for Love's stated conviction that Pavoncelli had misappropriated the R10 million that he had deposited.

7.4 Applicant also stated explicitly that Pavoncelli made the offer of 15 May 2012 to him (Love) because Pavoncelli had misappropriated the R10 million.

7.5 it is clear then that Applicant 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.

7.6 Applicant's claim was therefore submitted 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, No 53 of 1979."

80.2 Losper also states that Love nowhere states that Pavoncelli was an attorney or that he believed that Pavoncelli was an attorney. According to him:

"What the Applicant does state is that Pavoncelli offered to sell him shares in Swordfern Trading (Pty) Ltd and instructed him to make payment for the shares into the trust account of Turnbull Although Applicant alleges that Pavoncelli was apparently allowed to operate an attorney's practice under the guise of Turnbull, that cannot suffice to establish that the theft

must have been committed in the course and scope of the practice of an attorney, which is a requirement implicit in section 26 of the Act if the Fund is to be liable for the loss of money.

11. However, even if it be held that the money was paid over into the trust account of Turnbull in the course and scope of the practice of an attorney who is not identified or specified, there was no entrustment of monies for the purposes of the Act. The payment into Turnbull's trust account was made in discharge of Applicant's obligations in terms of an agreement with Pavoncelli, who was acting on behalf of the seller of shares in the company Sword Fern Trading (Pty) Ltd and, in his capacity as the agent of that seller, contracted with Applicant, to sell the shares to him for the agreed price of R10 million. In terms of the agreement between Pavoncelli, acting as the agent of the seller of the shares, and Applicant, the purchaser, the full amount of the purchase price was to be paid into the trust account of Turnbull. By paying the amount of R10 million into the said trust account, Applicant was not entrusting money to an attorney, but was instead simply paying for shares that he had bought. The fact that a written agreement of sale was still to be finalised is of no consequence. Applicant clearly did not pay money over into the trust account of Turnbull with an instruction that Turnbull is to hold over the money until a written agreement of sale had been concluded in respect of the shares or until instructed by Applicant to pay the money over to Pavoncelli. He paid the money over because Pavoncelli asked him to do so to pay for the shares that he was purchasing.

80.3 Finally, Losper contends that the liability of the Fund is excluded by section 47(1)(g) of the Act which provides that the fund shall not be liable for the loss suffered by a person as the result of theft of money which a practitioner has been instructed to invest on behalf of such person.

[81] In addition, Losper states that Love was informed that the reasons given may not be exhaustive and, over and above the non-compliance with section 48(1)(a) of the Act, that the Fund's rights are fully reserved, in the event of it later appearing that additional grounds for rejection of the claim may exist. He then sets out further grounds for

the rejection of the claim on the assumption that, had Love given timely notification thereof, which grounds Losper states have become apparent from Love's founding affidavit, and they are briefly set out as follows:

- 81.1 Pavoncelli is not and has never been an admitted attorney, that Love doesn't believe that Pavoncelli was an attorney or believed that he was an attorney;
- 81.2 Love alleges that Pavoncelli was apparently allowed to operate an attorney's practice under the guise of Turnbull and that that cannot suffice to establish that the theft must have been committed in the course and scope of the practice of an attorney, which is a requirement implicit in section 26(8) of the Act in order to establish liability against the Fund;
- 81.3 Even if it be held that the money was paid over into the trust account of Turnbull in the course and scope of the practice of an attorney, who was not identified or specified, Losper contends there was no "entrustment of monies for the purposes of the Act".
- 81.4 He alleges that the payment into Turnbull's trust account was made in discharge of Love's obligations in terms of an agreement with Pavoncelli.
- 81.5 It is contended that, by paying an amount of R10 million into the trust account, Love was not entrusting money to an attorney but was ostensibly paying for shares that he had bought. Losper submits that the fact that the written agreement of sale was still to be finalised is of no consequence. Love did not pay the money into the trust

account of Turnbull with an instruction that Turnbull was to hold over the money until a written agreement of sale had been concluded in respect of the shares or until instructed by Love to pay the money over to Pavoncelli. He paid the money over because Pavoncelli asked him to do so to pay for the shares that he was purchasing.

81.6 Even on the assumption that the money was paid into the trust account of Turnbull in the course and scope of practice of an unknown attorney and even if there was an entrustment to an unknown and unspecified practitioner, Losper submits that the liability of the Fund is excluded by section 47(1)(g) of the Act, which provides that the Fund shall not be liable for the loss suffered by a person as the result of theft of money which a practitioner has been strictly instructed to invest on behalf of such person.

81.7 Consequently, Losper suggests that the monies were either a payment for

81.8 certain shares or on the understanding that Pavoncelli was to invest the money in shares in Sword Fern Trading on Love's behalf.

81.9 Even if the Fund had not rejected the claim for want of compliance under the provisions of section 48(1)(a) of the Act, it would have several other grounds for not allowing the plaintiff's claim.

[82] I do not comment on Losper's contentions regarding the unconstitutionality of section 48(1)(a) given the conclusions I have arrived at below. As to the balance of the Fund's answering Affidavit,

he admits that the Fund's decision constitutes administrative action and that the provisions of PAJA are applicable. He denies, however, that the Fund's decision is susceptible to review under sections 6(2)(e)(ii), (iii), (v) and (vi or 6(2)(f)(ii) and that (cc) of PAJA are applicable.

[83] I heard the matter on 7 August 2023, and, during argument, Mr Marcus made the following submissions: At the core of the matter lies access to justice inasmuch as it entails a limitation period within which claims against the Fund must be instituted. Although the Act has been repealed by the Legal Practice Act, due to the fact that this matter arose prior to the Legal Practice Act, it must be decided in terms of the Act. He submitted that the limitation and access to justice flows from section 48 of the Act, which stipulated a period within which a notice of claim must be given. If not given timeously, section 48(2) of the Act permits the Fund to extend the time period.

[84] At the heart of this matter remains the issue of an application to and the failure by the Fund to extend the time period This is so due to the decision which was arrived at in the SCA matter of referred to above.

[85] In the SCA matter, it upheld the appeal by the Fund and set aside a previous order made by the High Court to the effect that the claim should be admitted and finding that condonation for the late filing of the notice of appeal is granted and the special appeal is upheld with costs.

[86] Mr Marcus submits that Love filed his heads of argument late and has applied for condonation for such late filing and that only the Fund, and not the Minister, opposes condonation. The core basis of the opposition by the Fund is that the late application lacks prospects of success. Given that any application for condonation, as already stated

in the SCA matter, is inextricably linked to the Fund's prospects of success, he submitted that it should be dealt with at the outset.

[87] He further submitted the following:

87.1 The limitation on access to justice flows from section 48 of the Attorneys Act which stipulates a period within which notice of a claim must be given. Where notice is not given timeously, section 48(2) of the Attorneys Act permits the Fund, having regard to all circumstances, to extend the time period.

87.2 This case concerns an application to, and the failure by, the Fund to extend the time period.

87.3 On 31 July 2014 Love's attorney requested the Fund to extend the period of notice period and although not so stated it could only have intended that the Fund do so under section 48(2) of the Act.

87.4 The letter contained the following grounds in support of the extension request:

87.4.1 In the action proceedings against Turnbull, the claim for R 10 million was based on breach of contract not theft.

87.4.2 In its plea, Turnbull states that the money was released to Centrosphere, pursuant to an oral instruction by Mr Love.

- 87.4.3 Mr Love had sought to recover the money from Mr Pavoncelli, following his breach of an undertaking to pay the money.
- 87.4.4 Whilst Mr Love knew that the money had been transferred from Turnbull's trust account to its business account, he learned that it was transferred out of the business account only in September 2013.
- 87.4.5 It was only in September 2013, a month before filing the notice, that Mr Love subjectively believed that the money had been stolen.
- 87.4.6 On 4 September 2014, the Board rejected Mr Love's claim.
- 87.4.7 Despite having been expressly asked to extend the time periods applicable to the filing of the claim, the rejection letter makes no reference to section 48(2) of the Act. It states only that the claim is rejected "*on the grounds that the requirement of Section 48(1)(a) have not been met*".
- 87.4.8 It is clear that the Board never considered the request in terms of section 48(2). It simply rejected the claim because it concluded that section 48(1)(a) had not been complied with but did not exercise its discretion in terms of section 48(2).
- 87.5 It is contended that the Fund's failure to extend the time period was unlawful, for two reasons:

87.5.1 First, the Fund failed to consider Mr Love's request for an extension. It therefore failed to exercise its discretion in terms of section 48(2) at all.

87.5.2 Second, if it had exercised its discretion, the Fund would have been legally bound to extend the period that is prescribed by section 48(1)(a) of the Act.

The Fund's failure to exercise its section 48(2) discretion.

[88] Mr Love expressly asked the Fund to extend the time periods set out in section 48(1) of the Act and provided substantive reasons in support of his request. I should at this stage already point out that the Fund contends that no application in terms of section 48(2) was ever made.¹³ This is simply wrong. Even more so in view of the admission made by Losper in respect of paragraph 21 of the Applicants Founding Affidavit in paragraph 37 of the Fund's Answering Affidavit.

[89] For three reasons, it is clear that the Fund never considered Mr Love's request for an extension in terms of section 48(2). First:

89.1 The letter of rejection of claim makes no reference to the request for an extension;

89.2 The letter from the Fund, dated 4 September 2014, rejecting the claim, simply says:

"Further to previous correspondence herein, I wish to advise that the Fund's Board of Control has resolved that this claim be rejected, on the grounds that the requirements of Section 48(1)(a) have not been met."

¹³ See para 69 of the Funds Heads of Argument

89.3 The letter makes no reference to the request for an extension whatsoever, and does not purport to provide any reasons for a refusal to grant such extension. It does not mention section 48(2) at all.

89.4 It is therefore clear that the Fund failed to consider Mr Love's request for an extension in terms of section 48(2) but rejected the claim on the basis of non-compliance with the time periods contained in section 48(1)(a).

[90] Second - the Fund's reasons make no reference to the request for an extension.

90.1 On 20 January 2015, Mr Love asked the Fund for reasons for its rejection of his claim.

90.2 On 18 February 2015, the Fund provided those reasons.

90.3 The Fund's reasons explain in some detail the Board's conclusion that section 48(1)(a) was not satisfied. But they make no reference whatsoever to the power to extend in section 48(2).

90.4 Nor do they contain any reason which could possibly justify a refusal of the request for an extension.

90.5 It is accordingly clear from the reasons given for its decision by the Board that the Board did not consider or decide Mr Love's request for an extension in terms of section 48(2) of the Act.

[91] Third, the Board has since, in an affidavit deposed to under oath in the parallel proceedings, confirmed that it never exercised its discretion in terms of section 48(2) of the Act.

91.1 Mr Love sought leave to appeal to the Constitutional Court against the SCA's decision in the action.

91.2 The Fund's Claims Executive, who is also the deponent to the answering affidavit in these proceedings, Mr Jerome Losper, deposed to the answering affidavit before the Constitutional Court.

91.3 In that affidavit, Mr Losper says the following:

"(Mr Love has never sought, and the (Board) was never required, and, accordingly, has never refused, to extend the three-month period in terms of section 48(2) of the Attorneys Act".¹⁴

91.4 This makes it unequivocally clear that the Board never considered Mr Love's request for an extension of time periods in terms of section 48(2) of the Act.

91.5 Mr Losper's statement is incorrect when he said under oath that Mr Love did not ask for an extension. From the above it is clear he did. The Fund either did not consider the request or considered it and disregarded it.

[92] It is thus clear that the Fund failed to exercise the discretion conferred on it by section 48(2).

¹⁴ Para 16 of the answering affidavit in the Constitutional Court, Annexure "FA2" to the CA

[93] The Constitutional Court and the SCA have held that a failure to exercise a statutorily conferred discretion when asked to do so is unlawful.

[94] In *Ombud for Financial Services v CS Brokers*¹⁵, an ombud refused a request to allow oral and written evidence in a dispute before it. The applicable statute conferred on the ombud a discretion as to the appropriate procedure to be adopted. The ombud failed to exercise that discretion and applied a predetermined policy without reference to the facts before it.

[95] The SCA held that this was unlawful:

“[16] During argument, counsel for the Ombud readily conceded that the application required a specific ruling along with reasons. The reason given for not holding a hearing with oral evidence is simply that the Ombud does not do so. The response is one which clearly indicates that no discretion at all was exercised on the application. Instead, a predetermined policy was applied, without reference to the specific issues in the matter before her. This when the Ombud is invested with a wide range of procedural options which can be tailored to different situations and complaints. This does not constitute an improper exercise of her discretion but an approach which, as the Board put it in the appeal determination, ‘disregards her statutory obligation to exercise her discretion’. With this statement, I can find no fault. (emphasis supplied)

[17] In argument, the Ombud referred to the final determination to attempt to demonstrate that reasons were given. What is said in the determination is:

‘Storm’s attorneys criticize this office for not holding hearings to resolve “material factual disputes”. This office does not have a policy that prohibits the holding of hearings. Where it is appropriate, a hearing will be held. In this case there are no material disputes of fact that require such a hearing.’

¹⁵ (781/2020) [2021] ZASCA 117 (17 September 2021)

This clearly contradicts the refusal at the time on the basis that ‘this Office does not hold hearings’. It is the latter statement by which the Ombud responded to the application. In any event, the reasons given in the determination do not address the factual disputes noted by the Ombud herself which go to the heart of the claim of Mr Wallace. It suffices to say that it is difficult to discern which factors weighed and occupied her mind when she gave her decision. To say that there were no material disputes of fact when the parties disagreed whether Mr Wallace had already decided to invest in Sharemax when he met with Mr Storm simply beggars belief.

*[18] It is therefore unnecessary to address the manner in which the discretion of the Ombud should be exercised and the test for interference with it on review. **If no discretion is exercised, when the Ombud was indeed vested with a discretion, that has to be the end of the matter.** As was agreed by the parties before us, the entire appeal turns on this single issue. It is clear in these circumstances that the appeal must fail.” (emphasis supplied)*

[96] Reliance was also placed on *Saidi*¹⁶ where the Constitutional Court held that the failure by a refugee reception officer to exercise a statutory discretion when asked to do so was unlawful. Upon being asked to exercise the power to extend an asylum seeker permit, she was obliged to use the power, and could not lawfully refuse to do so.

[97] In the circumstances Mr Marcus submitted that the law is clear: Where a statute confers a discretion on an administrator, and the administrator is asked to exercise the discretion, but fails to do so, its decision is unlawful and will be reviewed and set aside.

[98] Hence the Fund’s failure to exercise its discretion in terms of section 48(2) accordingly violates:

98.1 section 6(2)(d) of PAJA, to the extent that its failure to consider Mr Love’s request to extend the notice period was materially influenced by an error of law;

¹⁶ *Saidi and Others v Minister of Home Affairs and Others* 2018 (4) SA 333 (CC) paras 16,

- 98.2 section 6(2)(e)(iii) and/or (vi) of PAJA, in that the Board failed to consider the reasons for extending, properly or at all;
- 98.3 section 6(2)(f)(i) of PAJA, as it breaches the obligation in section 48(2) of the Act to extend when notices are filed as soon as practicable; and/or
- 98.4 section 6(2)(i) of PAJA, as it is otherwise unconstitutional and unlawful.

The Fund was required to extend the time periods.

- [99] If it had decided Mr Love's request for an extension, the Fund would have been required to grant the request. Section 48(2) of the Act empowers the Board to extend the period prescribed by section 48(1) (a) of the Act:

"If the board of control is satisfied that, having regard to all the circumstances, a claim or the proof required by the board has been lodged or furnished as soon as practicable, it may in its discretion extend any of the periods referred to in subsection (1)."(emphases supplied)"

- [100] The exercise of the Board's power to extend, which it must exercise after having regard to all the circumstances:

100.1 is administrative action, for it is a public power or public function exercised in terms of an empowering provision, which adversely affects the rights of persons, and has a direct, external legal effect;¹⁷ and

¹⁷ Section 1(a)(ii) of the Promotion of Administrative Justice Act, 2000 ("PAJA").

100.2 must be lawful, rational and reasonable, failing which it "would be subject to normal judicial review by the High Court".¹⁸

[101] In *Northern Province Development* the court per Moseneke J held that:

"[40] Lastly, Mr Delpont referred me to the provisions of s 48(2) of the Act and these read as follows:

'(2) If a board of control is satisfied that, having regard to all the circumstances, a claim or the proof required by the board has been lodged or furnished as soon as practicable, it may in its discretion extend any of the periods referred to in ss (1).'

Clearly the board of control has a dispensatory power to be found in ss (2). In its discretion, the board of control may condone any late filing of a claim or extend any relevant time limits prescribed by ss (1). What is more, there is no time limit within which such power may be exercised. It is clear from ss (2) that such extension is in the discretion of the board of control. The board is obliged, however, to have regard to all the circumstances and may call for such proof as it may consider necessary. Such proof must be furnished as soon as practicable.

[41] No case law has been placed before me in support of the proposition that the exercise by the board of control of the statutory power to be found in ss (2) is subject to judicial review. In my view, there is no doubt that when the board of control exercises the statutory function conferred on it by s 48(2), such conduct would be subject to normal judicial review by the High Court. In such review proceedings the Court may direct that the board of control takes such steps as may be fair and just, regard being had to all the circumstances related to the dispensation which the affected applicant seeks. It therefore seems to me that it is entirely unnecessary at this stage and for purposes of this case to grant an order of condonation as sought by Mr Dunn. Nor is it necessary or appropriate to direct that leave be given to the applicant to bring such an application for condonation. The right to so proceed can be inferred from s 48(2) of the Act. There appears to be no limit on when an application for an extension of time for complying with s 48 may be filed with the board of control. There is consequently no merit in any of the arguments advanced, nor is it appropriate to grant the condonation order sought by the plaintiff. It follows that constitutional issues raised cannot find application in this case." (emphases supplied)

¹⁸ *Northern Province Development Corporation v Attorneys Fidelity Fund Board of Control* 2003 (2) SA 284 (T) ("**Northern Province Development**") para 41, per Moseneke J.

[102] It was thus submitted that for the reasons that follow, that if the Fund had considered Mr Love's request for an extension, it was duty bound to exercise its discretion in his favour.

The facts underpinning the request for an extension.

[103] It is clear on the facts that Mr Love's claim was submitted as soon as practicable. He could only submit his claim once he subjectively believed that the funds had been stolen, which occurred on 2 September 2013.

[104] The facts on which the Board relied when deciding to reject Mr Love's claim are as follows:

104.1 On 28 November 2012, Mr Love deposed to an affidavit in which he said that Mr Pavoncelli personally misappropriated the R 10 million.¹⁹

104.2 Mr Love attached to this affidavit bank statements which showed that the money had been transferred from Turnbull's trust account to its business account.²⁰

104.3 On 15 May 2012, Mr Pavoncelli offered to pay to Mr Love the R 10 million that had been misappropriated.²¹

¹⁹ AA paras 7.1.b (pp. 460-461), 33.2.b (p. 471) and 43 (p. 475).

²⁰ AA paras 7.3 (p. 462), 33.4 (pp. 472-473) and 38.1 (p. 474).

²¹ AA para 7.4 (p.462).

[105] Whilst these facts are not disputed, they do not demonstrate that it would have been practicable for Mr Love to lodge his claim before 2 September 2013.

[106] Before 2 September 2013, which is the date upon which Mr Love was provided the business statements, he did not know that his funds had been transferred out of Turnbull's business accounts, and therefore that they had been stolen in the common law sense of the term.²²

[107] Mr Marcus submitted that to see this it is essential to contextualise the facts relied on by the Fund, for doing so demonstrates that Mr Love acted as soon as practicable:

107.1 First, the context of the 28 November 2012 statement that Pavoncelli had misappropriated the R 10 million is as follows:

107.1.1 In October 2011, Mr Love issued a summons against Turnbull, in which he claimed that Turnbull breached their agreement in terms of which it would not pay Centrosphere for the Sword Fern shares until Love had instructed it to do so.²³

107.1.2 In its plea, Turnbull stated that the R 10 million had been paid to Centrosphere.²⁴

²² Under the common law theft requires an intention to deprive the owner permanently of their property (R v Sibiyi 1955 (4) SA 247 (A) 257C).

²³ RA para 7.15 (p. 494), read with annexure RA1 to RL1 to the FA (pp. 55-66).

²⁴ Annexure RA4 to RL4 to the FA, plea para 2.1.5 (p. 72).

107.1.3 In an affidavit by Mr Pavoncelli, dated 25 January 2012, he stated that the R 10 million had been "*paid out to Centrosphere*"²⁵

107.1.4 In an affidavit, dated 26 October 2012, Mr Pavoncelli again stated that the money was paid to Centrosphere.²⁶ He also said that "*for all intents and purposes, [Mr Love] regards Turnbull as simply my alter ego*", but that Mr Love had to claim the R 10 million directly from Turnbull.²⁷

107.1.5 It was in response to the admissions by Pavoncelli, that he in his capacity as Turnbull's alter ego, breached the agreement not to pay the money to Centrosphere for the Sword Fern shares until Love had instructed it to do so, that Love stated, Pavoncelli had personally misappropriated the money.²⁸

107.2 Second, regarding Love's access to Turnbull's business account bank statements, its relevant context includes the following:

107.2.1 Whilst Love knew that his money had been transferred from Turnbull's trust account to its

²⁵ RA para 7.14 (pp. 493-494), read with para 5.25 of the affidavit attached as annexure "J" to annexure RL10 to the FA (p. 410). See also RA para 11 (p. 497).

²⁶ Para 8.6 to annexure RL9 to the FA (pp. 151-152).

²⁷ RA para 7.15 (p. 494), read with para 8.10 of the affidavit attached as RL9 to the FA (p. 153).

²⁸ RA para 7.18 (p. 495).

business account, he did not know the fate of the money after that transfer.²⁹

107.2.2 It was only after Love received copies of Turnbull's business account statements that he learned that the money was in fact not paid to Centrosphere.³⁰

107.2.3 As noted, Pavoncelli had said that "*the R 10 million paid to the trust account*" has been "*paid out to Centrosphere*".³¹

107.2.4 The Fund argues that Love could not have believed that the money had been used for this purpose, as Mr Keith Mountjoy, of Sword Fern, had offered at a meeting to repay the money from the account of Sword Fern.³²

107.2.5 It is not explained why this belief was unreasonable.

107.2.6 The meeting with Mr Mountjoy concerned repayment of the R 4.3 million loan. At the meeting, Mr Mountjoy said that he would make sure Love's money would be repaid. He did not indicate how, nor did Love to enquire any further.

²⁹ FA para 25 (pp. 24-25).

³⁰ RA para 7.17 494).

³¹ Para 5 25 of annexure J to RL10 to the FA (p. 410). See also RA paras 35.4 (pp. 513-514) and 39 (p. 515).

³² AA para 38.1 (p. 474).

107.2.7 Love only wanted his money back.³³

107.3 Third, regarding the offer made by Mr Pavoncelli to Love, the context in which it was made is as follows:

107.3.1 The offer to pay the R 4.3 million loan and the R 10 million paid on trust to Turnbull, was made by Pavoncelli in the context of two sets of legal proceedings: liquidation and action.

107.3.2 Love's application to have Sword Fern liquidated, for its failure to repay the R 4.3 million loan:

(a) Pavoncelli was a director of Sword Fern.

(b) The offer was made by Pavoncelli "*in a final bid to obtain a further postponement of the liquidation application*".³⁴

(c) From Love's perspective, the undertaking was an effort by Pavoncelli to save his company from liquidation.

(d) Indeed, when Sword Fern was finally wound up, Pavoncelli was personally ordered to pay costs.

107.3.3 Mr Love's action against Turnbull, for its failure to repay Mr Love his R 10 million:

³³ RA para 30.1 (p. 508).

³⁴ FA para 12.2 (pp. 14-15), about which the Board admits no knowledge (AA para 28.2 (p. 468-469)).

(a) As noted, from Love's perspective, Turnbull was the "alter ego" of Pavoncelli.³⁵

(b) Thus, whether payment came from Pavoncelli or Turnbull was of little interest to Love.

107.3.4 Given Pavoncelli's position in Sword Fern and Turnbull, it was, from Love's perspective, reasonable for Pavoncelli to make the offer in his personal capacity.³⁶

107.3.5 Pavoncelli says in his 26 October 2012 affidavit, his motive for the offer was to settle the litigation with Love, as "*our relationship has soured substantially*".³⁷

107.3.6 That Pavoncelli made the offer to repay the loan amount and trust amount, therefore, was not an admission by him that he had stolen these amounts.

[108] It was thus submitted that the evidence demonstrates the following:

108.1 Love held a bona fide but mistaken belief about the legal character of Turnbull's and/or Pavoncelli's dealing with his money.

³⁵ RA para 7.15 (p. 494), read with para 8.10 of the affidavit attached as RL" to the FA (p. 153).

³⁶ RA para 32.3 (pp. 510-511).

³⁷ Para 9.6 to annexure RL9 to the FA (p. 159).

108.2 He did not think that his money had been stolen. He thought only that it had been transferred out of the trust account and into the business account against his instructions.

108.3 Until he saw the business bank account statements, he never knew that the money had been transferred out of the business account with the intention of permanently depriving him thereof.

108.4 Until that time, Love had no grounds to believe that his money had been stolen.

[109] Holding this bona fide but mistaken belief, Love made every conceivable effort to recover his money from those to whom he had entrusted it:

109.1 He initially tried to recover the money from Turnbull.

109.2 He secured an undertaking from Mr Pavoncelli.

109.3 He met with Mr Mountjoy of Sword Fern, who assured him that the money would be returned.

109.4 All the while, he was informed under oath by Pavoncelli, that whilst his money was not in Turnbull's trust account, this was because it had been paid out to Centrosphere.

109.5 And when he learnt of the true fate of the money, he immediately gave notice in terms of section 48(1)(a) of the Act.

[110] It would not have been practicable for Love to submit a claim until the date on which he learned, subjectively, that the funds had been stolen, which occurred on 2 September 2013.

[111] Objectively speaking, therefore, it is clear that the claim was submitted as soon as practicable.

The duty to extend.

[112] Because it was objectively established in Love's 31 July 2014 letter that he lodged his claim as soon as was practicable, the Board was required to extend the periods referred to in section 48(1)(a).

112.1 Whilst section 48(2) uses the word "may", as noted by Wade and Forsyth, cited approvingly by the Constitutional Court³⁸ "may" often signifies the existence of a power coupled with a duty:

*"The hallmark of discretionary power is permissive language using words such as 'may' or 'it shall be lawful', as opposed to obligatory language such as 'shall'. But this simple distinction is not always a sure guide, for there have been many decisions in which permissive language has been construed as obligatory. This is not so much because one form of words is interpreted to mean its opposite, as because the power conferred is, in the circumstances prescribed by the Act, coupled with a duty to exercise it in a proper case."*³⁹
(emphases added)

³⁸ Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening) 2002 (5) SA 246 (CC) [*] para 182 fn 163.

³⁹ Wade and Forsyth in Administrative Law (8th ed, Oxford University Press, Oxford, 2000) 239.

112.2 As explained by Sachs J sometimes "*may*" just signifies that there is "*an authorisation to exercise a power coupled with a duty to use it if the requisite circumstances [are] present.*"⁴⁰

[113] It was thus submitted that the aforesaid approach to section 48(2) of the Act is the one that best gives effect to the purpose of the Act:

113.1 The Fund is a statutory body performing a public function, whose primary purpose is to reimburse people who suffer loss as a result of the theft of money entrusted to an attorney.

113.2 A primary purpose of the Fund is to reimburse people who suffer loss due to the theft of trust monies.⁴¹ The Fund thus has a duty in its capacity as *custos morum* to protect the public.⁴²

113.3 This purpose must inform the interpretation of the requirement to act "*as soon as practicable*". An interpretation of this requirement, in other words, that furthers the purpose of section 26 of the Act, must, where the language allows for it, be adopted.

113.4 Faced with a claim by a member of the public, the Board's exercise of its discretionary power must be informed by constitutional values.

⁴⁰ South African Police Service v Public Servants Association 2007 (3) SA 521 (CC) para 15.

⁴¹ Section 26 of the Act.

⁴² Veriave and Others v President, SA Medical and Dental Council and Others 1985 (2) SA 293 (T); Johannesburg Society of Advocates and Another v Nthai and Others 2021 (2) SA 343 (SCA) at para 33.

113.5 The Constitutional Court has held that a "*decision by the State whether or not to invoke prescription in a particular case must be informed by the values of our Constitution.*"⁴³ Just as the state has an obligation to facilitate not frustrate social security, the Fund has an obligation to facilitate not frustrate *bona fide* claims that are made by innocent members of the public.

[114] Thus, once the Fund is satisfied that, on objectively reasonable grounds, a claimant acted as soon as practicable, it must exercise its power to extend the notice period.

[115] Its failure to do so in this case renders its decision unlawful and reviewable for the reasons already listed above and now repeated:

115.1 section 6(2)(d) of PAJA, to the extent that its failure to consider Love's request to extend the notice period was materially influenced by an error of law;

115.2 section 6(2)(e)(iii) and/or (vi) of PAJA, in that the Fund failed to consider the reasons for extending, properly or at all;

115.3 section 6(2)(f)(i) of PAJA, as it breaches the obligation in section 48(2) of the Act to extend when notices are filed as soon as practicable; and/or

115.4 section 6(2)(i) of PAJA, as it is otherwise unconstitutional and unlawful.

⁴³ Njongi v MEC, Department of Welfare, Eastern Cape 2008 (4) SA 237 (CC) ("Njongi") para 79.

[116] Having stated its case for the extension of the period in terms of section 48(2) of the Act Mr Marcus addressed the *ex post facto* reasons.

The *ex post facto* reasons.

[117] The Fund, in its answering affidavit, but not in the original reasons provided for rejecting the claim, nor in the reasons given after Mr Love's request for reasons, cites three additional grounds for rejecting the claim as set out above in Losper's affidavit.

[118] The Board, however, is bound by the reasons given for the decision at the time. Its *ex post facto* attempt to supplement and modify the reasons for the decision is not permissible.

[119] The SCA as confirmed by the Constitutional Court has held that:

"The duty to give reasons for an administrative decision is a central element of the constitutional duty to act fairly. And the failure to give reasons, which includes proper or adequate reasons, should ordinarily render the disputed decision reviewable. In England, the courts have said that such a decision would ordinarily be void and cannot be validated by different reasons given afterwards —even if they show that the original decision may have been justified. For in truth the later reasons are not the true reasons for the decision but rather an ex post facto rationalisation of a bad decision."⁴⁴

[120] In any event, the Board's *ex post facto* rationalisation does not bear scrutiny. It now offers three additional reasons for rejecting the claim:

⁴⁴ National Lotteries Board and Others v South African Education and Environment Project 2012 (4) 504 (SCA) at para 27 (emphasis added, footnotes omitted), confirmed in National Energy Regulator of South Africa and Another v PG Group (Pty) Limited and Others 2020 (1) SA 450 (CC) para 39.

- 120.1 First, Pavoncelli is not an attorney, and Love does not establish that the theft of the R10 million was committed in the course and scope of the practice of an attorney.⁴⁵
- 120.2 Second, Love's R10 million was not entrusted to Turnbull, but rather was paid to Turnbull in discharge of Love's obligations under a sale of shares agreement.⁴⁶
- 120.3 Third, and alternatively,⁴⁷ the money was paid to Turnbull for investment purposes, and so is excluded by section 47(1)(g) of the Act.⁴⁸
- 120.4 These *ex post facto* reasons formed the basis of the Fund's special pleas in the action. The High Court dismissed each of those special pleas and refused leave to appeal. As a result, it is not open to the Board to advance those reasons in these proceedings, as they have been determined and the issues, they raise are *res judicata* between the Fund and Mr Love.
- 120.5 Having read the SCA judgment pertaining to the section 48(1) (a) claim in this action and the fact that leave to appeal was only granted on one of the special pleas and having read the judgments annexed to the application for condonation I am satisfied that these *ex post facto* reasons are *res judicata* between the parties by virtue of the initial High Court Decision delivered by Mokose AJ.

⁴⁵ AA paras 10 (p. 464), 20 (p. 466), 25 (p. 467), 29 (p. 469)

⁴⁶ AA paras 11 (p. 464), 27 (p. 468)

⁴⁷ AA para 14 (p. 464).

⁴⁸ AA paras 12-13 (p. 465).

[121] In view of the conclusions, I arrived at it is unnecessary to deal with the constitutional challenge against section 48(1)(a) of the Act.

Extending the notice period

[122] For the reasons provided, Mr Marcus submitted that the Fund's failure to extend the period in section 48(1)(a) of the Act was unlawful and irrational.

[123] Whenever an administrative action breaches PAJA, a court must declare it to be unlawful. This is required by section 172(1)(a) of the Constitution, read with section 8 of PAJA providing content to the remedy that follows.⁴⁹

[124] Under section 8(1) of PAJA, after a declaration of invalidity, this Court may grant any order that is just and equitable.

[125] It was submitted that it would be just and equitable in the circumstances for this Court to make the following order:

125.1 Review and set aside the failure to extend as unlawful and irrational; and

125.2 extend the notice period for Love's filing of his claim for R10 million to 7 October 2013.

[126] To the extent that the extension of the notice period would constitute substitution of the Fund's power to extend, it is submitted that this is warranted by the principles articulated by the Constitutional Court in *Trencon*:

⁴⁹ Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others [2014] 1 SA 604 (CC) para 25.

126.1 In considering whether to order substitution, a court must start by asking itself whether:

126.1.1 it is in as good a position as the administrator to decide; and

126.1.2 the administrator's decision is a foregone conclusion.

126.2 After this, it must consider other factors, like delay, bias or incompetence of the administrator.

126.3 Ultimately, substitution must be just and equitable.⁵⁰

[127] It was submitted that:

127.1 Having all the facts before it, this Court is in just as good a position as the Board to decide whether, objectively speaking, Love acted as soon as practicable;

127.2 In the light of the undisputed facts, the outcome of the Board's decision whether to extend the period is a foregone conclusion. It is inconceivable that section 48(2) of the Act, properly applied, could lead to an outcome other than extension.

127.3 Lastly, it would not be just and equitable to require Mr Love, after so many years of having his rightful claim frustrated, to endure further delays at the hands of the officials of the Board.

⁵⁰ Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd 2015 (5) SA 245 (CC) para 47.

[128] For that reason, it is submitted that the relief sought in paragraph 3 of the notice of motion ought to be granted.

CONDONATION

[129] Under this rubric Mr Marcus sets out the progress of the proceedings i.e. notice of motion being issued on 3 March 2015 with the Fund's answering affidavit on 8 April 2015 and Love's replying affidavit filed on 8 May 2015. Thereafter Love instituted action seeking payment of the R10 million against the Fund whereafter the Fund raised the special plea i.e. non-compliance with section 48(1)(a) of the Act. Hence the Application was held in abeyance pending conclusion of the action,

[130] He also relies on the fact that after multiple judgments and appeals the Constitutional Court held that this application must be determined by this Court before the Constitutional Court will consider Love's appeal against the SCA decision. The Constitutional Court dismissed the application for leave to appeal "*as it is not in the interests of justice to hear it at this stage*".

[131] From this it is submitted it is clear that the Constitutional Court was not prepared to hear Mr Love's appeal at the time because it regards the issues raised in the main application to be significant, and because those issues must be determined by this Court before the appeal against the SCA's decision in relation to the action can properly be heard.

[132] Hence the submission that this application had to be reactivated and the substantive application for condonation for the late filing of Love's heads of argument. This application was filed on 12 April 2022 and the Fund filed its answering affidavit on 28 April 2022. The replying

affidavit was due on 13 May 2022, but Love's attorney tested positive on 7 May 2022 and had to be isolated in terms of the prevailing protocols.

Despite the fact that the replying affidavit in the condonation application was drafted it could not be commissioned until 16 May 2022, the next court day after his isolation period expired. Thereafter it was served on 17 May 2022.

[133] On instruction of Mr MacGregor, the deponent to the founding affidavit for condonation, Mr Hamilton was instructed to convey the following to the Fund's legal representatives:

133.1 that Mr Macgregor had contracted Covid-19 and had been isolated; and

133.2 that he would not be able to depose to the affidavit by 13 May 2022; and

133.3 Consent was sought to allow for the late filing of the replying affidavit.

[134] This email is attached to the replying affidavit as "RA3".

[135] At 12h45 on 13 May 2022 Mr Hamilton on instructions from Mr Macgregor directed another email to the Fund's legal representatives recording that multiple telephonic attempts had been made to discuss the request for consent for the late filing of the Replying Affidavit and that consent was once more sought for the late filing of same. A copy of this email is attached as "RA4". At 17h16 on the same day a further email was directed to the Fund's legal representatives recording that the Fund failed to answer telephone calls and failed to respond to

emails. In addition, an unsigned copy of the replying affidavit was enclosed with same.

[136] In emails respectively dated 16 and 17 May 2022 the Fund's attorneys declined to grant consent for the late filing of the replying affidavit.

[137] Mr MacGregor submits in his condonation application that it is in the interests of justice that the court condones the late filing of the replying affidavit in the application for condonation for the following reasons:

137.1 The delay will not cause the Fund prejudice;

137.2 The condonation application and the replying affidavit are being filed expeditiously following his release from isolation;

137.3 The court will not be prejudiced by the late filing of the replying affidavit;

137.4 The replying affidavit is necessary to address the irrelevancies raised by the Fund in its answering affidavit as well as the Fund's misconstrual of the relief that is sought in the main application.

[138] No formal objection was filed against the application for the late filing of the replying affidavit and same is thus condoned to the extent necessary, given Mr Macgregor's illness.

[139] In substance the application for condonation for the late filing of Love's heads of argument is based on the fact that the main application was held in abeyance pending the determination of the

action. The primary reason for the institution of the action was that Love was of the view that he had lodged his claim against the Fund timeously and having regard to other disputes of fact which could only be resolved on trial, which if resolved in his favour would finalise the matter. In addition, section 49(2) of the Act required him to institute action within 12 months of the Fund rejecting his claim. The Fund had raised a special plea to the effect that he did not comply with section 48(1)(a) of the Act and was time-barred.

[140] In the pre-trial Love suggested a consolidation of the main application and the review action. No agreement was reached until the trial date when the Fund agreed not to proceed with the *lis alibi pendens* defence in the trial and for same to be decided only on the four special pleas raised by the Fund. The parties agreed that if the defences failed that would determine the matter in favour of Love. I observe that “the matter” in the context can only mean the trial issue in respect of section 48(1)(a) of the Act.

[141] An application was then made for the separation of the four special pleas (in the action). As a result, Love then suspended his prosecution of the main application given that if he succeeded on section 48(1)(a) of the Act no further relief would be required on the main application. The Fund also did not pursue the main application further and did not proceed with the plea of *lis alibi pendens*.

[142] In my view the pre-trial was the time and place to agree that the trial court hear both the main application and the action so as to cover all outstanding issues. I am of the view that it is incompetent to consolidate a trial with an application they could have been heard together. Since the latter procedure was not followed it remained a given that there will remain the section 48(2) remnant should Love not have a final decision in his favour under section 48(1)(a) of the Act. By

instituting the action and focusing on section 48(1)(a) Love was most certainly not abandoning the relief sought under section 48(2) or the declaration of unconstitutionality. The notion that by instituting the action he made an election is also of no help. Before any of the aforesaid conclusions can be arrived at his conduct has to be tantamount to a waiver of those remedies. I do not believe that a waiver of the remaining remedies took place by instituting an action based on section 48(1)(a) of the Act.⁵¹

[143] After the tortuous route already discussed and the observation by the Constitutional Court the remnant under section 48(2) and the alternative that section 48(1)(a) is unconstitutional could only be prosecuted now. In short then the aforesaid are the fundamental reasons why the heads of argument in respect of the remnant remained in abeyance.

[144] The SCA only upheld the special plea pertaining to the Fund's defence under section 48(1)(a) on 14 April 2021 and same gave rise to Love's application for leave to appeal to the Constitutional Court on 6 May 2021. The Fund answered same on 18 May 2021 and on 20 May 2021 Love filed a replying affidavit with an application for leave to file same. Copies of these affidavits are annexed to the founding affidavit for the condonation application as Annexures "FA1", "FA2" and "FA3" respectively.

[145] On 8 December 2021, the Constitutional Court issued directives (Annexure "A4") to the effect that the parties should file affidavits as to the status of the main application and Mr Love's intended course of action in respect of the main application. Mr Love and the Fund filed their respective affidavits on 14 and 17 December 2021.

⁵¹ See Amler's Precedents of Pleadings, 9th Edition as edited by Harms p 378.

- [146] On 11 February 2022, the Constitutional Court dismissed the Application for Leave to Appeal “*as it is not in the interests of justice to hear it at this stage*”.
- [147] The inference Love seeks to draw from the aforesaid is that the Constitutional Court regards the issues raised in the main application as significant and that same must be determined before the Appeal against the SCA decision can be heard. Hence the need to obtain a judgment on the need to extend the notice period alternatively the constitutionality of that period.
- [148] The main application was ripe for hearing save for the filing of heads of argument and hence the application for condonation for the late filing of same.
- [149] The Fund focused its counterattack in its heads of argument on the condonation application for the late filing of the applicant’s heads of argument dated 12 April 2022. It quite correctly pointed out in its heads of argument that prayers 1 and 2 of the Notice of Motion in the main application has been abandoned given that same is at present *res judicata* due the SCA decision. This leaves the prayer for extension of the time period and the alternative regarding the constitutionality of section 48 (1)(a) open to further challenge by the Fund. It sought to do so under three rubrics “Patent lack of Merit in the Main Application”, “Mootness of Main application” and “Applicant has made its bed”.
- [150] The “mootness” argument allegedly arises from the findings made in the SCA case to the effect that the applicant’s claim against the Fund has been dismissed on the basis of all the facts adduced in evidence before the trial court and after the bringing of the main application applicant elected to abandon the application and institute an action

based on the same cause of action in which neither the constitutionality nor the provision of section 48(2) were raised and in respect of which no evidence, or submissions, were tendered in relation to either of these aspects, which could easily have been done, and, having made that election Applicant must be held to have made his bed and must now lie on it.

[151] After rehashing the facts and tortuous history of the matter the Fund emphasised that Applicant stated, in paragraph 12 of his Affidavit filed in compliance with the directives of the Constitutional Court, that he accepted that it would not be in the interests of justice for that Honourable Court to determine his appeal against the SCA judgment "at this stage" and that he intended proceeding with his unheard application before this Honourable Court.

[152] That being so, the Fund then contended that what Love was asking of the Honourable Constitutional Court was unprecedented, namely, to hold his application for leave to appeal a judgment and order of the SCA in abeyance until such time as this Honourable Court has determined this application under Case No. 7793/2015. The Constitutional Court accordingly refused Applicant's application for leave to appeal the judgment and order of the SCA. A copy of that judgment is annexed to Applicant's affidavit in support of his application for condonation.

[153] I should add that prior to the dismissal of the application for leave to appeal the outcome of the SCA decision, Love sought leave to file a replying affidavit in response to the Fund's affidavit in the Constitutional Court to demonstrate that it raised section 48(2) of the Act in the main application and that the Fund effectively rejected same. The paragraph in the Fund's affidavit before the Constitutional

Court that triggered the exceptional request for leave to file such affidavit arose from the following paragraph in the Fund's affidavit:

"16.However, since Applicant has never sought, and Respondent was never required, and, accordingly, has never refused, to extend the three month period in terms of section 48(2) of the Attorneys Act — which it may also only do, if Applicant can show that the notice of the claim given "as soon as was practicable", and Applicant has not ever, in any proceedings regarding its claim, alleged that to have been the case — that review application is clearly misconceived."

- [154] Ultimately the Constitutional Court responded to the effect that it has considered the application for leave to appeal. It concluded that the application for leave to appeal should be dismissed as it is not in the interests of justice to hear it at this stage. The Court has not awarded costs and ultimately formulated the order as follows: "Leave to appeal is refused".
- [155] How any of the aforesaid demonstrates mootness of the remaining relief sought in the main application is beyond me. As far as I am concerned no court has as yet pronounced any view pertaining to section 48(2) of the Act or on the constitutionality of section 48(1)(a). I will in due course refer to Mr Marcus' submissions on the topic.
- [156] I readily accept that the Fund is entitled to challenge the application for late filing of the Applicant's heads of argument on the basis that the remaining remnants of the main application has no prospects of success. In support hereof it repeats its claim that there was no section 48(2) application ever placed before the Fund and it pertinently challenges the notion that the letter already referred to constituted such a request.
- [157] It contends that in the said letter applicant did not in fact request an extension of the time period, but simply stated as a fact, albeit

unsubstantiated, that there was no good reason not to extend the date and, accordingly, the Fund (although the heads of argument refers to "the Applicant" I assume it is a typographical error) was not required to exercise its discretion in terms of section 48(2). I have already stated above that in my view the letter intended to refer to section 48(2) of the Act. Of more import is the submission that applicant's contentions do not anywhere deal with what the position is where the jurisdictional grounds stated in the statute for the exercise of that discretion simply do not exist and there is no lawful basis for the exercise of the discretion in question.

[158] It is submitted that the provisions of sections 48(1)(a) and 48(2) of the Act must also be understood in the context of the provisions made by the Legislature for claims against the Fund. Such claims do not arise in contract, delict or unjustified enrichment, but are created in the very statutory regime of which sections 48(1)(a) and 48(2) are part. The Legislature has created a claim in statute and the statute must stipulate when and how the claim arises and the conditions that have to be met to establish a valid claim.

[159] Nevertheless the Fund contends that the time-bar effected by section 48(1)(a) is not "a prescription provision proper" as contemplated in the unanimous judgment of the Constitutional Court in *Competition Commission of South Africa v Pickfords Removals SA (Pty) Ltd* , but rather a "procedural time- bar" as contemplated in that judgment.⁵²

[160] A prescription provision proper would place an absolute prohibition on the submission of claims outside the period stipulated in section 48(1) (a), as indeed Love contends is the Fund's interpretation of that section.

⁵² CCT 123/19 at paras 32 and 33.

- [161] A mere procedural time-bar can be condoned.⁵³ Ordinarily condonation is not a mere formality and good cause has to be shown before it is justified.⁵⁴
- [162] In the instant case, the Legislature has made express and specific provision for condonation in section 48(2) of the Act, and the inquiry regarding whether or not the non-compliance with the procedural time-bar may be condoned, must begin with the terms of section 48(2) of the Act which provides as follows: "*If the Board is satisfied that, having regard to all the circumstances, a claim ... has been lodged ... as soon as practicable, it may in its discretion extend ... the... [period] referred to in subsection 1*"
- [163] It is thus submitted that the statute requires that, before the Fund may extend the period stipulated in section 48(1)(a), it has to be satisfied that the claim has been lodged as soon as practicable.⁵⁵
- [164] The Oxford South African Concise Dictionary, Second Edition, defines "practicable" as "*1. able to be done or put into practice successfully. 2. useful.*" Hence the Fund submits that "practicable" in section 48(2) means: "able to be done or put into practice successfully" or capable of being accomplished; feasible".
- [165] The Funds thus submits that what had to be apparent from the aforementioned letter of Applicant's attorneys is that it was not practicable to lodge the notice of claim within the prescribed period of

⁵³ CCT 123/19 at para32(b).

⁵⁴ cf Competition Commission of South Africa v Pickfords Removals SA (Pty) Ltd. supra, at para 54.

⁵⁵ qv Oxford South African Concise Dictionary, Second Edition (2010)

3 months from the date of Applicant having become aware of the theft.

[166] It also submits that:

166.1 there was nothing in the documents submitted to the Fund or in the oral evidence given by Love in the Rule 8bis enquiry conducted by Respondent, which would have justified a finding that the claim had been submitted as soon as had been practicable;

166.2 Love's position throughout has been that the claim had been submitted within the required 3-month period, in which case no extension of time was required to be contemplated;

166.3 Love also did not set out any basis that would remotely have justified a finding that the claim was submitted as soon as practicable, as was required by section 48(2).

[167] It is further submitted that it must be abundantly clear that the Fund is required to exercise the discretion afforded it in terms of section 48(2) in a judicious manner and, in the absence of the jurisdictional fact(s) required for the exercise of that discretion, any decision by the Fund to extend the time period stipulated in section 48(1)(a) in this case would have been tantamount to an arbitrary exercise of its discretion and therefore unlawful and, in any event in violation of the express provision by the Legislature for the extension of the period concerned.

[168] In addition, what Love now seeks is an order that the Fund be compelled to exercise its discretion in terms of section 48(2) in his favour when there is, objectively, no basis at all for doing so.

- [169] It is also submitted that the findings of the SCA confirm that there was, and is, no basis for Love to contend that the Fund could have found that his claim was lodged as soon as practicable even though it was lodged outside of the time period stipulated in section 48(1)(a).
- [170] Put somewhat differently, as I understand the reasoning, Love knew earlier and did not lodge his claims within the prescribed period under section 48(1)(a) as confirmed by the SCA and hence he cannot expect the Fund to extend the period given the absence of the jurisdictional requirements for section 48(2).
- [171] The problem with the aforesaid argument is that it totally decontextualizes the background and surrounding circumstances as skillfully set out by Mr Marcus and with which I dealt in paragraphs 103 – 111 above. The context within which Love for instance uses the word “misappropriate” is of the utmost importance. On the assumption that the SCA finding is correct in that Love did not comply with section 48(1)(a) *non constat* that there is no room for the application of section 48(2). If anything in my view and as demonstrated in paragraphs 103 to 111 above there is ample room to invoke section 48(2) and to extend the time period in section 48(1)(a). Love is a layman and despite his suspicions he in my view had to tread lightly before making unsubstantiated and reckless allegations against an attorney. Given the wide powers the Fund enjoy as set out in *Northern Province Development* the Fund had ample grounds to extend the section 48(1)(a) period till 7 October 2013.
- [172] The Fund’s foolhardy denial that there was no section 48(2) application before it at any stage coupled with its present persistence in the submission that there was nothing in the documents submitted to it, or in the oral evidence given by Applicant in a Rule 8bis enquiry conducted by it, which would have justified a finding that the claim had

been submitted as soon as had been practicable is indicative of a mindset aimed at dismissing Love's claim at any cost. The affidavit filed by Losper in the proceedings before the Constitutional Court to the effect that Love never relied on section 48(2) of the Act and which gave rise to the need for Love to seek leave to file a replying affidavit is also supportive of the aforesaid mindset.

[173] Mr Marcus also submitted in respect of the condonation of the late filing of the heads of argument that the interests of justice compel condonation also for the following reasons:

173.1 The cause of delay is entirely due to the need to suspend the main application owing to the overlap in facts and legal issues between the application and the action;

173.2 The delay will not cause the Fund or the Minister any prejudice;

173.3 The affidavits in the main application has been filed, the Fund has been actively and continuously involved, by way of the action, the essence of the issues which are the subject of the (remaining relief) in the application since Love suspended his prosecution of same in 2015 (pending the conclusion of the action) and the only interest of the Minister is purely legal in nature;

173.4 The Fund also required condonation for the late filing of its application for leave to appeal to the SCA;

173.5 This condonation application and the outstanding heads of argument are being filed expeditiously following the

Constitutional Court's dismissal of Love's application for leave to appeal against the SCA order;

173.6 The court will not be prejudiced by Love's delay in filing the heads of argument;

173.7 For all the reasons captured in the affidavits and his heads of argument Love has strong prospects of success;

173.8 The relief sought is of general public significance as it concerns the constitutionality of a statutory time-bar in social legislation, the purpose of which is to protect the public.

[174] To the extent that the Fund attempts to justify its refusal as to why the application to extend was refused it advances an extensive argument that, even if it had exercised its discretion, it would have refused same. Mr Marcus countered same with the argument this is untenable for four reasons:

174.1 It is not permissible to resort to *ex post facto* reasoning;

174.2 The section vests the power in the Fund, but it is common cause that the Fund has never exercised that power;

174.3 The argument amounts to the impermissible reliance on the "no difference" principle — that even though the Fund failed to exercise its statutory discretion, this would make no difference to the outcome rejecting the request.⁵⁶

⁵⁶ See for example: Van der Walt v S 2020 (2) SACR 371 (CC); 2020 (11) BCLR 1337 (CC) at paras 28-30; Psychological Society of South Africa v Qwelane 2017 (8) BCLR 1039 (CC) ("Qwelane ") at paras 32 to 35; My Vote Counts NPC v Speaker of the

174.4 Our courts have repeatedly recognised that the path of the law is strewn with open and shut cases which somehow were not.⁵⁷

174.5 This argument was not foreshadowed in the papers.

[175] Whereas in the present case, the decision is taken for no reason it is arbitrary and unconstitutional. See *Minister of Justice and Another v SA Restructuring and Insolvency Practitioners' Association and Others* 2018 (5) SA 349 (CC), at paragraphs 49 to 54. The Fund's suggestion that to have extended the time period would have been arbitrary is in my view devoid of any substance.

[176] It was also submitted on behalf of Love that it is well-established that, where a statute confers a power, the failure to exercise that power when called upon to do so is unlawful. This follows from three guiding principles:

176.1 the failure to exercise a discretion is a reviewable irregularity and, since the Fund denies wrongly that it was called upon to exercise any discretion, it does not take issue with this principle;

National Assembly 2016 (1) SA 132 (CC) ("My Vote Counts") at para 176; Minister of Defence and Military Veterans v Motau 2014 (5) SA 69 (CC) ("Motau") at para 85; Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency and Others 2014(1) SA 604 (CC) at para 26 and Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another 2009 (4) SA 529 (CC) at paras 152 to 154.

⁵⁷ See John v Rees [1969] 2 All ER 274 (Ch) at 402 My Vote Counts (supra) at para 176 and Motau (supra) at para 85.

176.2 *ex post facto* reasoning is impermissible.⁵⁸ The Fund did not address this principle at all, even if it were permissible for the Fund to resort to *ex post facto* reasoning, the reasons it advances do not bear scrutiny.

176.3 section 48(2) creates a power coupled with a duty. Although section 48(2) uses the word “may”, this does not connote a choice not to extend if the facts justify such an extension.⁵⁹

[177] As stated above the Fund seeks to bypass all of this by contending that the present application is moot by virtue of the SCA decision involving Love. Mr Marcus’ counter to the above is that the Fund mischaracterises the issue as one of mootness. He contends that a “*case is moot and therefore not justiciable if it no longer presents an existing or live controversy*”.⁶⁰

[178] Mr Marcus further submits that the Fund is mistaken in contending that the SCA judgment “*finally determined Mr Love’s claim for compensation for the Fidelity Fund on the same cause of action that he relies on herein.*”

⁵⁸ See Tsogo Sun Caledon (Pty) Ltd and others v Western Cape Gambling and Racing Board and Ano 2023 (2) SA 305 (SCA) at para 19; Umgeni Water v Sembcorp Siza Water (Pty) Ltd and others 2020 (2) SA 450 (SCA) at para 52; Zuma v Democratic Alliance and others 2018 (1) SA 200 (SCA) at para 24.

⁵⁹ See above paragraph 112.1

⁶⁰ See National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs and others 2000 (2) SA 1 (CC) at para 21 fn 18; Normandien Farms (Pty) Ltd v South Africa Agency for Promotion of Petroleum Exploration SOC Ltd 2020 (4) SA 409 (CC) at para-47.

[179] The sole issue before the SCA was comprised of section 48(1)(a) of the Attorneys Act due to the fact that in the High Court the Fund had raised a special plea and Love had not complied with section 48(1)(a) of the Act.⁶¹ He further submits that the High Court dismissed the special plea and granted judgment in Love's favour and that the appeal to the Full Court by the Fund failed but the SCA granted special leave to appeal. Hence, he submits, the SCA judgment deals exclusively with compliance with section 48(1)(a). This arises from the basis that the Fund filed the special plea and therefore the judgment sets out:

179.1 the requirements for compliance with section 48(1)(a);

179.2 the terms of the special plea;

179.3 the Trial Court's finding on the special plea;

179.4 the factual errors in the Trial Court and Full Court's finding on the special plea;

179.5 the conclusion that the special plea should have been upheld.

[180] The mootness argument must thus fail. It does not constitute a basis to refuse condonation. In reality there are two remaining live issues in the application before me:

180.1 the failure by the Fund to consider the extension application;
and

180.2 the constitutional challenge to section 48(1)(a).

⁶¹ See the SCA judgment paragraph 34

[181] Relief in either case will have a practicable effect inasmuch as it will permit Love to pursue his claim for the loss of money entrusted to his attorney.

[182] It is clear from the facts before me that the Fund never considered that the application under section 48(2) for extension. It also clearly never intended to do so as is clear from the above notwithstanding the fact that as a matter of law it was obliged to do so. Nothing in the SCA judgment, as far as I am concerned, precludes such an application for extension to be heard by me and, hence, I am of the view that, given that the Fund did not extend the application or respond thereto, this Court is entitled to order the Fund to do so.

[183] Given all the circumstances and the context already referred to within which Love was acting, coupled with legal advice, Mr Marcus is, in my view, quite correct that I am entitled to review the Fund's failure to make such a decision.

[184]

184.1 The only just and equitable remedy at this stage would be to extend the notice period for filing Love's claim to 7 October 2013;

184.2 Although section 48(2) requires the Fund to be satisfied, this requires an objective standard.⁶²

184.3 The Fund contends, contrary to the evidence, that it has never been called upon to exercise its powers in terms of section 48(2);

⁶² See Walele v City of Cape Town and Others 2008 (6) SA 129 (CC) at para 60.

184.4 The Fund cannot bring an impartial mind to bear on the matter, but has already decided against Love, come what may;⁶³

184.5 Finally, there is absolutely no evidence at all to contradict the facts put up by Love.

[185] The aforesaid brings this matter within the purview of the *Trencon* - case in that:

185.1 I am in as good a position as the Fund to make the decision;

185.2 The Fund's position is that it has already decided the question of extension.

[186] In view of the aforesaid conclusions there is no need to pronounce on the constitutionality of section 48(1)(a) since same is not an absolute time-bar interfering with Love's rights under section 34 of the Constitution. I have considered the heads of argument of the Minister but given the conclusions arrived at no need exists to deal with the submissions made therein.

[187] It follows that condonation for the late filing of Love's heads of argument should be granted.

8 In the premises, I make the following order:

⁶³ See Trencon (supra) at para 54; Minister of Local Government and Land Tenure v Inkosinathi Property Developers (Pty) Ltd and Another 1992 (2) SA 234 (TCA) at 239-240 and the cases referred to there.

1. The period within which the Applicant had to lodge its claim with the Fund is herewith extended until 7 October 2013;
2. The late filing of the Applicant's heads of argument is hereby condoned.
3. The First Respondent is ordered to pay the Applicant's costs including the costs of 2 counsel where employed;
4. No order of costs is made in respect of the Second Respondent's costs.

S, VAN NIEUWENHUIZEN AJ

ACTING JUDGE OF THE HIGH COURT

Date application heard: 7 August 2023

Date judgment reserved: 7 August 2023

Date judgment delivered: 18 January 2023

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No appearance for the Law Society of the Northern Provinces, Pretoria

The Law Society of the Northern
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