28/89

Case No. 519/87

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

F.P.S. LIMITED ..... Appellant

AND

TRIDENT CONSTRUCTION (PTY.) LIMITED .... Respondent

Coram: BOTHA, VAN HEERDEN, VIVIER, EKSTEEN JJ A et

GROSSKOPF, A J A

Heard: 20 February 1989

Delivered: 29 March 1989

J U D G M E N T

EKSTEEN, JA :

The appellant's acronym - F.P.S. - stands for Financial Planning Services and would seem to be descriptive of the business it sets out to do. From the evidence it appears to have been a company which acted as an agent and broker for clients wishing to invest money or take out insurance policies. It had standing arrangements with various life insurance companies, building societies, banks, and other financial institutions. It employed so-called "consultants" who visited prospective clients, gave them financial advice as to the insurance policies they might require or the investments they might wish to make, and then took out the policies or made the investments for them. The client would not be charged for these services but the appellant (hereinafter referred to as F.P.S.) would receive a commission from the insurance company or the financial institution concerned.

During July 1982 the managing director of respondent company, one Broadbent was looking out for a profitable investment for some R26,000 which he had in hand. A friend of his advised him that "Roberts from F.P.S." was a good person to discuss the matter with. F.P.S. was at that stage no stranger to Broadbent as it had, on a previous occasion, assisted him in taking out an insurance policy. Before Broadbent could do anything about getting in touch with Roberts, however, Roberts contacted him and arranged a meeting in Broadbent's office.

At this meeting Broadbent told Roberts that he had this amount of R26,000 invested in an account with Barclays Bank where it was earning a comparatively low rate of interest, and that he was looking for a more profitable investment. Roberts thereupon informed Broadbent that he (i.e. Roberts) was in a position to "pool" respondent's money with that of other investors, and that the "pooled" amount would then command a higher rate of interest when invested with Nedbank. Nedbank was one of the financial

institutions with which, to the knowledge of Broadbent, F.P.S. maintained an association.

Broadbent took time to consider this proposition, and, having eventually decided to accept it, he phoned Roberts at F.P.S.'s offices and informed him of that fact. Roberts thereupon again visited Broadbent on 29 July 1982 and was handed respondent's cheque for R26,000 made out to Nedbank. The evidence shows that Roberts took this cheque and deposited it in his own account with Nedbank, without informing F.P.S. about the transaction in any way. On 1 August 1982 he wrote Broadbent a brief note on a plain sheet of paper without any letterhead, reading as follows:

"

D. Roberts
P.O. Box 475
Pietermaritzburg
3200

1st August 1982

Mr. Eddie Broadbent
Trident Construction
P.O. Box 47410

Greyville
4023

Dear Eddie,

Re: Investment of R26,000

This letter serves to confirm that we have deposited on your behalf R26 000 with Nedbank bearing interest at 18% until advised by you.

Yours sincerely
Dugald Roberts."

Broadbent says that it struck him as being strange that Roberts had not written to him on paper bearing F.P.S.'s official letterhead, so he checked the post office box number appearing on the letter with F.P.S.'s address as reflected in the telephone directory, and found that it was indeed F.P.S.'s address. A few days later, he says, he received his cheque back and noticed that it had been deposited with Nedbank. He received no further receipt or acknowledgment of his investment either from appellant or from Roberts.

During April 1984 Broadbent says he heard some

disquieting rumours about investments that Roberts had made in the past, and this prompted him to phone Mr. Homan the manager of F.P.S.'s Pietermaritzburg branch, to enquire about respondent's investment that Roberts had attended to. Homan obviously knew nothing about the investment, and when Broadbent indicated that he intended holding F.P.S. liable for any loss respondent may have suffered, Homan asked him to put his claim in writing and to support it with whatever documentary proof he may have. This Broadbent did.

It subsequently transpired that during August 1982 - that is very shortly after he had taken respondent's cheque from Broadbent - Roberts agreed to lend some R36,000 to one Olivier, and that on 24 August 1982, without any reference to respondent, he had withdrawn the full amount of R26,000 from his account and lent it to Olivier. Thereafter Olivier "ran into financial difficulties" and appears to have gone insolvent. In any event respondent's whole investment of R26,000 was lost.

Respondent thereupon instituted action against F.P.S.

in the Natal Provincial Division for the recovery of the capital amount of R26,000 together with interest thereon. It succeeded in its claim, and judgment was given in its favour in an amount of R46,084.92 (which included interest up to 31 August 1986) together with further interest a tempore morae from 1 September 1986 to date of payment. It is against this order that F.P.S. now appeals.

In the Court a quo the respondent based its claim firstly on contract, and then in the alternative on delict. In its main contractual claim it alleged that it, represented by Broadbent, entered into a contract with F.P.S., represented by Roberts in terms of which it agreed to pay the appellant R26,000, and F.P.S. agreed "to cause the said sum to be invested in a wholesale call account with Nedbank Limited at the Nedbank Limited wholesale call rate of interest", and to repay the said sum of R26,000, together with accrued interest, to the respondent upon reasonable notice to do so. It went on to allege that it had paid the amount of R26,000 to F.P.S. and that on 3 May 1984

it had given F.P.S. reasonable notice to repay. F.P.S. however failed to repay the said sum to respondent. In the alternative it alleged that F.P.S., in breach of its obligations in terms of their agreement, failed to invest the R26,000 in Nedbank Limited, and that as a result of this breach of their agreement the respondent suffered damages in the sum of R46,084.92 - being the capital amount of R26,000 together with interest thereon to the 31st August 1986.

In its alternative delictual claim the respondent pleaded as follows:

"16. During or about July 1982 and at Pietermaritzburg, Natal, the aforesaid Mr. Dugald Roberts wrongfully and unlawfully stole the sum of R26,000 from the plaintiff.

17. The said Roberts was at the time acting in the course and scope of his employment with the defendant.

18. As a result of the said theft the plaintiff has suffered damages:
(a) in the capital sum of R26,000; and
(b) in the further sum of R20,084
in respect of lost interest up to and inclu-

ding 31 August 1985;

(c) will continue to suffer damages with effect from 1 September 1986 until date of payment being lost interest on the aforesaid amounts at a rate of not less than 10% per annum, which damages were reasonably foreseeable.

19. The defendant is accordingly liable to compensate the plaintiff for its aforesaid damages."

In a request for further particulars to paragraph 17 of the particulars of claim F.P.S. asked:

"In what capacity was Roberts acting at the time of the theft of the money?"

to which respondent replied:

"As an employee."

In its plea F.P.S. disclaimed all knowledge of Roberts having contracted with Broadbent on its behalf, and, in the alternative pleaded that

"in the event that this Court finds that Roberts purported to conclude an agreement with the plaintiff on the defendant's behalf, the defendant specifically denies that Roberts had authority to conclude such agreement on defendant's behalf."

It consequently denied that respondent had paid the sum of R26,000 to F.P.S., or alternatively, if the money had been paid to Roberts, that Roberts was authorised to receive it on F.P.S.'s behalf. It admitted that it did not invest the money for the benefit of the respondent but denied that it was obliged to do so.

On the delictual portion of respondent's claim F.P.S. pleaded as follows:

"11. Ad paragraph 16
The defendant has no knowledge as to the allegations herein contained and accordingly denies them.

12. Ad paragraph 17

(a) The defendant admits that during about July 1982 Roberts was employed as a consultant by the defendant.

(b) Save as aforesaid the defendant denies each and every allegation herein contained as if specifically traversed."

It consequently denied all knowledge of the damages alleged to have been suffered by respondent, and denied that it was liable to compensate the respondent for any loss it may have suffered.

In a reply to a request for further particulars for the purposes of trial, F.P.S. furnished a copy of the terms of the agreement of employment between it and Roberts.

The learned Judge in the Court a quo came to the conclusion that the respondent had failed to make out his case on the contractual grounds, but found for it on its claim based on delict. Before dealing more specifically with the reason for the learned Judge coming to the conclusion that he did, I propose dealing with one or two other aspects of the matter which were raised before us on appeal. F.P.S. contended before us, as it

did in the Court a quo, that the respondent had failed to show that Roberts was a servant of F.P.S. In dealing with this submission the trial Judge referred in the first place to those portions of the pleadings which I have quoted and held that the question as to whether or not Roberts was a servant of F.P.S. had not been placed in issue on the pleadings. In the course of his judgment he remarks that

> "I find it unbelievable that if it was the intention of the defendant to allege that Roberts was not employed by them and that they were accordingly not responsible for his defalcations, that they would not have pleaded it directly."

In my view the learned Judge was fully justified in coming to this conclusion. One of the prime functions of pleadings is to clarify the issues between the parties. To this end the Rules of Court require a defendant in his plea to

> "Admit or deny, or confess and avoid all the material

> facts alleged in the combined summons or declaration or state which of the said facts are not admitted and to what extent .... " (Rule 22(2).)

A defendant must therefore give a fair and clear answer to every point of substance raised by a plaintiff in his declaration or particulars of claim, by frankly admitting or explicitly denying every material matter alleged against him. In the present case the respondent in its particulars of claim was clearly relying on the relationship of master and servant alleged to have existed between F.P.S. and Roberts in order to hold F.P.S. liable for Roberts' actions. To expressly admit therefore that Roberts was at the relevant time employed by F.P.S. "as a consultant" cannot, in my view, be read as a denial of the respondent's allegation that Roberts was an employee, but amounts rather to an admission of it. The dictum of Solomon JA in Neugebauer & Co. Ltd. v. Bodiker & Co. (S.A.) 1925 A.D. 316 at p. 321 that

> "(t)he duty of the defendant then is to set forth his

> defence with sufficient precision to enable the plaintiff to ascertain what the defence is."

seems to me to be particularly apposite in the present instance.

In any event I cannot agree with the submission of Counsel for F.P.S. that the written contract of employment entered into between Roberts and it, a copy which was attached to the further particulars supplied by F.P.S. on request, showed that in fact that Roberts was not a servant for whose actions F.P.S. could be vicariously liable, but that his relationship with F.P.S. was rather than of an independent contractor. For this submission it relied on cases such as Colonial Mutual Life Assurance Society v. MacDonald 1931 A.D. 412 and Smit v. Workmen's Compensation Commissioner 1979 (1) SA 51 (A). This argument, too, was rejected by the trial Judge, and again I am not prepared to differ from him on the conclusion to which he came. It was submitted before us that the fact that consultants received no salary but were remunerated only by way of commission

earned; that their working hours were left to their individual discretion; and that they were required to provide their own motor vehicles for the performance of their duties (albeit that they were assisted in acquiring motor cars on favourable terms through a financial scheme run by F.P.S), all pointed to the fact that consultants were independent contractors or agents of F.P.S. rather than its servants. On the other hand the contract provided that "the consultant shall devote the whole of his working time to his work as set out in this agreement"; that "the consultant shall cary out such functions and duties as are from time to time assigned to him by the company"; that he "shall obey the reasonable directions of and conform with the policy laid down by the company from time to time"; that he "shall monthly account to the company for all amounts received by him on behalf of clients whether in respect of insurance premiums, investments, fees, or of any other nature or from any other source whatsoever"; and that "the consultant shall, whenever required to do so by the company, submit a full report

of all business written or otherwise effected by him for the company and supply a statement of all monies received by him for account of the company". Moreover the contract also required consultants to join the company's staff pension scheme, medical aid scheme, and sickness and accident scheme, all of which were run by F.P.S. for its employees. These features seem to me to reflect a considerable measure of supervision and control by the company over the activities of its consultants, and tend to indicate that their relationship was that of master and servant. As was pointed out by Joubert JA in Smit v. Workmen's Compensation Commissioner (supra) at p. 62 E-F:

> "The greater the degree of supervision and control to be exercised by the employer over the employee the stronger the probability will be that it is a contract of service."

The provisions of Roberts's contract of employment to which I have referred above therefore afford cogent support for the

conclusion to which the learned Judge a quo came.

I turn now to consider the delictual claim and in particular whether it has been shown that Roberts was acting within the course and scope of his employment when he dealt with Broadbent, and whether Broadbent dealt with him in his capacity as a servant of F.P.S., or in his personal capacity.

It was common cause on the evidence that Roberts was authorised in terms of his conditions of employment to have approached Broadbent in the way he did and to have offered to invest his money for him with Nedbank. He was also authorised - and indeed it was the common practice of F.P.S.'s consultants so to perform their functions - to accept a cheque from Broadbent in order to go and invest it in some financial institution or other. He was not, however, authorised to recommend or offer to administer a so-called "pooled" or "syndicated" investment under the aegis of F.P.S. Apart from this aspect, therefore, everything he did in his discussion with Broadbent, and in taking the respondent's cheque away with him, fell within the express

authorisation of his terms of employment.

The crucial question in this appeal, however, is whether, in accepting Roberts's suggestion of investing respondent's money in a syndicated investment, Broadbent intended to deal with Roberts in his personal capacity, or with F.P.S. acting through its servant, Roberts. If Broadbent knew that Roberts was not authorised by F.P.S. to solicit or accept money intended for a syndicated investment, but nevertheless entrusted his money to Roberts, in his personal capacity, for that purpose, then F.P.S. could not be held liable for Roberts's subsequent defalcation. If, on the other hand, Broadbent intended throughout to deal with Roberts in his capacity as an employee and servant of F.P.S. acting within the scope of his employment - i.e. in the exercise of the functions to which he was appointed - then F.P.S. would be liable for the loss the respondent subsequently suffered. (See Mkize v Martens 1914 AD 382 at 390; Feldman (Pty.) Ltd v Mall 1945 AD 733 at p. 736.)

On this issue the learned trial Judge may seem to have

been somewhat equivocal. In the course of his judgment he indicated that on the evidence he was satisfied that when Roberts first approached Broadbent he did so within the course and scope of his employment with F.P.S. "and as part of his duties as a financial planner". He also found that Broadbent had

> "made the point that he placed his faith in F.P.S. and in Roberts as a representative of theirs. He knew them to be a reputable company, who he had dealt with in the past and accepted what he had been told by Roberts. Broadbent at the time appeared to be truthful in this regard and his behaviour, although not what one would have expected from someone experienced in financial transactions, was that of a reasonable man in Broadbent's position."

However, he then goes on to find that during the course of their meeting their relationship altered when Roberts told Broadbent about the "syndicated" or "pooled" investments

> "which he alleged he arranged .... and that Broadbent thereafter decided to entrust the money to Roberts to invest in some such scheme, which would provide a

> higher rate of interest than the normal investment arranged by F.P.S."

Later on, in holding F.P.S. delictually liable for the loss suffered by the respondent, the learned judge again held that he was satisfied

> "that Broadbent would not have contracted with Roberts had he not known that Roberts was in the employment of defendant."

There is much in the evidence to support both these points of view. The onus clearly rested on the respondent (as plaintiff) to show that Broadbent dealt with Roberts throughout in his capacity as a servant of F.P.S. acting within the course and scope of his employment. Broadbent's evidence is quite clear that this is what he did. There are, however, certain facts which tend to indicate the contrary, e.g. his acceptance without further enquiry of the strange "personal" note dated 1

August 1982 from Roberts informing him of the investment of his money with Nedbank, and his subsequent failure, over the following two years, to make any enquiries from F.P.S. about his investment. At no stage did respondent receive any receipt from F.P.S. for the money, nor did respondent's ledger contain any reference to F.P.S. in respect of this money. When respondent's auditors came to audit its books Broadbent referred McCoy, the audit clerk, to Roberts for an explanation of what had happened to the money. All those features tend to point to Broadbent having intended to deal with Roberts in his personal capacity and not as a servant of F.P.S.

On the other hand it is clear from the evidence that Broadbent did not know Roberts at all. All he knew about him was that he worked for F.P.S. It is also clear that when Roberts first approached Broadbent he did so as a representative of F.P.S., and it was on this basis that their discussions began. When and how, during the course of their meeting, their relationship changed, as the learned trial Judge found, I find it

difficult to appreciate in the light of the positive findings of Broadbent's attitude to which I have referred above. It was in Roberts's interests and to his advantage to secure the investment from Broadbent, and even if, during their discussions, Broadbent may have enquired about the possibility of a higher return on a syndicated investment, it seems unlikely that Roberts would then have told Broadbent that this form of investment would not enjoy the reputable protection of F.P.S., but that his money would have to be entrusted solely to Roberts himself - a man about whom Broadbent knew nothing at all. At the trial Roberts was called as a witness by the respondent, and in the course of his evidence unequivocally alleged that throughout his dealings with Broadbent he professed to be acting as an employee of F.P.S. Roberts was admittedly not a good witness but he was never taken up on this issue in cross-examination, and there does not seem to be any reason why he should have denied acting in a purely personal capacity if in fact he had done so.

Broadbent did not know that Roberts did not have

F.P.S.'s express authority to arrange syndicated investments, and the fact that Roberts went beyond his authority in this respect does not in my view affect the issue, since what he did fell within the exercise of the functions to which he was appointed. Hence Roberts acted within the scope of his employment.

On all the evidence therefore the preponderance of probabilities justifies the conclusion that throughout his negotiations with Roberts, Broadbent was under the impression that he was dealing with F.P.S. and that he intended so to deal. Roberts, as I have indicated, has been shown to have been a servant of F.P.S. and he acted throughout the negotiations within the course and scope of his employment. Whether, he stole the money immediately when he received it from Broadbent on 29 July, as alleged by respondent, or only when he withdrew it from his personal account at Nedbank on 24 August to lend it to Olivier, does not matter either. The fact that on receipt of the cheque from Broadbent he immediately paid it into his own personal account, and kept it there until he withdrew it on 24 August

tends to show that he stole the money on 29 July. But even if it be held that the theft only occurred on 24 August when he lent the money to Olivier, it does not make any real difference, and cannot effect the result of this appeal.

The learned Judge was therefore correct in coming to the conclusion to which he did and the appeal is consequently dismissed with costs.

J.P.G. EKSTEEN, JA

BOTHA, JA)
VAN HEERDEN, JA)
VIVIER, JA) concur
GROSSKOPF, AJA)