THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 094/2010

In the matter between

LAW SOCIETY OF THE NORTHERN PROVINCES	**1st APPELLANT**
THE SECRETARY OF THE LAW SOCIETY OF THE NORTHERN PROVINCES	**2nd APPELLANT**

and

PETRUS JACOBUS VILJOEN	**RESPONDENT**

and: In the matter between **Case No: 648/10**

LAW SOCIETY OF THE NORTHERN PROVINCES	**1st APPELLANT**
THE SECRETARY OF THE LAW SOCIETY OF THE NORTHERN PROVINCES	**2nd APPELLANT**

and

PETER ARTHUR DYKES	**1st RESPONDENT**
CHERYL RAMSAMMY	**2nd RESPONDENT**
PHASUDI DOCTOR SEGOGOBA	**3rd RESPONDENT**
JOHAN VAN HEERDEN	**4th RESPONDENT**

Neutral citation: ***Law Society of the Northern Provinces v Viljoen*** **(094/2010);** ***Law Society of the Northern Provinces v Dykes*** **(648/2010) [2010] ZASCA 176 (02 December 2010)**

Coram: **Heher, Bosielo, Shongwe JJA and R Pillay *et* K Pillay AJJA**

Heard: **24 November 2010**

Delivered: **02 December 2010**

Summary: Legal practitioners – s 42(3)(a) of the Attorneys Act 53 of 1979 – Interpretation. The powers of a secretary of the Law Society to refuse to issue a fidelity fund certificate in the prescribed form to a legal practitioner against whom there are pending proceedings by the Law Society to have him or her suspended or his or her name removed from the roll of practising attorneys.

ORDER

On appeal from: North Gauteng High Court (Pretoria), (in case no 094/10 Tuchten AJ sitting as a court of first instance) and (in case no 648/10 Sapire AJ sitting as court of first instance)

The following orders are made:

In the Law Society of the Northern Provinces v Viljoen (appeal no. 094/10)
On appeal from the North Gauteng High Court (Tutchten AJ sitting as court of first instance)

1. The appeal is dismissed with costs.

In the Law Society of the Northern Provinces v Dykes (appeal no. 648/10)
On appeal from the North Gauteng High Court (Sapire AJ sitting as court of first instance)

1. The appeal is dismissed with costs.

JUDGMENT

BOSIELO JA (Heher, Shongwe JJA and R Pillay and K Pillay AJJA concurring)

[1] The appeals before us raise the question about the correct interpretation and scope of s 42(3)(a) of the Attorneys Act 53 of 1979. As both appeals concern the same legal issue, it is convenient and practical to deal with both at the same time.

[2] The first appellant in both matters is a law society duly incorporated in terms of s 56 of the Act. One of the first appellant's responsibilities is to provide for the regulation and effective control of the professional conduct of attorneys (s 58(g) of the Act).

[3] The respondents in both matters are attorneys who specialise in conveyancing. They all fall under the first appellant's jurisdiction. On 23 December 2009, the first appellant sent a letter to Viljoen (respondent in the first matter) reminding him to apply for a fidelity fund certificate on the prescribed form (s 42(1) of the Act). In response to this reminder and on 14 December 2009, Viljoen applied in the prescribed form for his fidelity fund certificate for the year 2010. On 5 January 2010, the second appellant, relying on a council resolution dated 22 June 2009, advised Viljoen that he would not be issued with a fidelity fund certificate 'in the light of policy considerations as there was a pending

application to have his name removed from the roll of attorneys'. In refusing to issue the fidelity fund certificate, the second appellant purportedly relied on s 42(3)(a) of the Act. No mention of the resolution was made in the first appellant's invitation to Viljoen to apply for a fidelity fund certificate in terms of s 42 of the Act. Viljoen had never been notified of the existence of the council resolution.

[4] A similar application by Dykes and his partners (respondents in the second matter), made on 22 October 2009, suffered the same fate. By a letter dated 14 December 2009, and relying on the same resolution the second appellant advised Dykes and his partners that no fidelity fund certificates would be issued to them as there was an application pending for the removal of their names from the roll. In so refusing the second appellant once again purported to act in terms of s 42(3)(a) of the Act.

[5] Aggrieved by the decision of second appellant to refuse to issue the fidelity funds certificates, respondents in both matters approached the North Gauteng High Court separately by way of motion for a mandamus compelling the second appellant to issue fidelity fund certificates to them for the year 2010. The first application was heard by Tuchten AJ and the second by Sapire AJ. Both judges granted orders compelling the second appellant to issue fidelity fund certificates for 2010 to the respondents. The appellants are appealing against those orders with leave of both the courts below.

[6] As the decision in this appeal hinges on the correct interpretation of s 42(3)(a) of the Act, I deem it appropriate to quote the provisions which are relevant to the dispute herein:

'42 Application for and issue of a fidelity fund certificate

(1) A practitioner practising on his own account or in partnership, and any practitioner intending so to practise, shall apply in the prescribed form to the secretary of the society concerned for a fidelity fund certificate.

(2) Any application referred to in subsection (1) shall be accompanied by the contribution (if any) payable in terms of section 43.

(3) (a) Upon receipt of the application referred to in subsection (1), the secretary of the society concerned shall, if he is satisfied that the applicant has discharged all his liabilities to the society in respect of his contribution and that he has complied with any lawful requirement of the society, forthwith issue to the applicant a fidelity fund certificate in the prescribed form.

(b) A fidelity fund certificate shall be valid until 31 December of the year in respect of which it was issued.'

[7] I do not think that it will serve any useful purpose to overburden this judgment with the evidence of the litany of complaints lodged against the respondents and their responses thereto. It suffices, in my view, to state that the first appellant had received various complaints against the respondents in both matters which it regarded as serious. Following thereupon, the first appellant instituted proceedings in the North Gauteng High Court, Pretoria, for the respondents' names to be struck off the roll of attorneys on the basis that they are no longer fit and proper to continue practising. Having had sight of the appellants' affidavits, I harbour no doubt that the allegations made against the respondents are

serious and if proven to be true, might justify a striking off of the respondents' names by the court.

[8] It is trite that the first appellant has a statutory duty, once it has received information that a member is guilty of unprofessional conduct, to investigate such information or allegations and to take appropriate action. This is what the first appellant did in the two matters. The applications are vigorously opposed and the respondents have filed answering affidavits disputing the allegations contained in the founding affidavits filed by the appellants. The proceedings for striking off against the respondents in both matters are still pending.

[9] Central to the second appellant's refusal to issue the fidelity fund certificates to the respondents in the two cases is a resolution of 22 June 2009. The resolution reads thus:

'Where the Council has resolved to proceed with an application for the suspension of or the removal of the name of a member from the roll of attorneys a Fidelity Fund Certificate should not be issued to the member concerned, unless the Council for good reason otherwise decides.'

[10] It is common cause that the resolution was not made public or distributed to the members of the first appellant. This is notwithstanding the fact that the resolution was essentially introducing a new element into the concept of 'any other lawful requirement of the society' as it appears in s 42(3)(a) of the Act. Counsel were agreed that although the resolution does not amount to a suspension from

practice by a legal practitioner, the practical effect thereof is that a practitioner who has not been issued with a fidelity fund certificate is not allowed to practice on his own account or in partnership. It is trite that any legal practitioner who practices without a fidelity fund certificate is committing a professional misconduct.

[11] It was submitted on behalf of the appellants that the courts below erred in their interpretation of s 42(3)(a). The contention is that the Council of the first appellant has the authority in terms of s 69 of the Act to set up whatever lawful requirement it might regard as proper and appropriate to regulate the conduct of practitioners. It was argued further that the resolution was lawful and necessary as it enabled the first appellant to be careful regarding the issuing of the fidelity fund certificates to its members so that it can reduce or minimise the risk to which the fidelity fund might be exposed in issuing fidelity fund certificates to legal practitioners who are not fit to practise. Counsel for the appellants submitted further that the mere fact that the resolution was not communicated to the respondents, does not necessarily mean that it is invalid. He submitted that it remained valid, and moreover the respondents had been invited to make representations to change the second appellant's decision not to issue the certificates.

[12] Counsel for Viljoen, launched a two-pronged attack against the resolution. First, he submitted that the resolution is so vague that it fails to inform Viljoen of the exact nature of the complaint to which he was required to respond. He

submitted that the lawful requirements contemplated in s 42(3)(a) are the payment of the required sum of money by an applicant and submission of an audited financial report. Secondly, he contended that the requirement imposed by the resolution to the effect that where there are proceedings pending either for the suspension or removal of a practitioner from the roll, such a practitioner will not be issued with a certificate unless good cause is shown, is not related to the legislative purpose of s 42(3)(a). His contention is that the new requirement, if one might call it that, tilts the scale more towards an enquiry into the ethical fitness of an applicant to remain a practitioner, which is a function of the courts, rather than an enquiry into his or her ability to maintain the financial affairs of his or her practice properly and in terms of the rules.

[13] Counsel for Dykes and his partners, supported the submission by Counsel for Viljoen that the resolution does not amount to a requirement as envisaged by s 42(3)(a). In other words, it falls outside the ambit of the section.

[14] It is clear from s 42(3)(a) that the person who has the authority to issue fidelity fund certificates is the second appellant. It is neither the Council nor Management Committee of the first appellant. The authority of the second appellant to issue fidelity fund certificates is clearly circumscribed by s 42(3)(a). This section sets out two requirements to be met by a legal practitioner for him or her to qualify for a fidelity fund certificate. The first requirement is that such a practitioner must satisfy the secretary that he or she has discharged all his or her

liabilities to the society in respect of his or her contribution and, secondly, that he or she has complied with any other lawful requirement of the society. Once the two requirements have been met, s 42(3)(a) compels the second appellant to forthwith issue the fidelity fund certificate in the prescribed form to the applicant.

[15] The first appellant's Council purported to introduce an additional lawful requirement by adopting the resolution on 22 June 2009. In the context of s 42, a 'lawful requirement' means one that:

(i) relates to the purpose served by the issue of a fidelity fund certificate;

(ii) unequivocally informs the practitioner what it is that the society requires of him or her;

(iii) the practitioner is capable of complying with, since the section is designed to enable the practitioner to carry on practice subject to satisfying the requirement.

For the reasons which follow I am of the view that the terms of the resolution of 22 June 2009 do not meet any of the above-stated criteria.

[16] It is important to bear in mind that a practitioner is enjoined by s 42(1) to apply for a fidelity fund certificate in the prescribed form. A perusal of the prescribed form makes it clear from the questions that such a practitioner has to answer that the major focus is on the question whether the practitioner is managing his trust accounts in strict compliance with the rules of the society and not whether he or she is fit and proper to practice. This is underscored by the request to a

practitioner in the prescribed form to disclose the balances in his or her trust account at the end of each quarter of the year. Furthermore, this is bolstered by the requirement that such a practitioner shall submit his or her audited financial statements. It is clear to me that this enquiry is intended solely to assess any risk attendant on the secretary issuing a fidelity fund certificate so as to ensure that the Fidelity Fund is not overexposed. Manifestly, this has nothing to do with issues of ethics or whether such a practitioner is fit and proper to continue to practice. The enquiry regarding the fitness of a practitioner to continue to practice is the preserve of the courts.

[17] To my mind, the resolution in issue is so vague and broad that it may encompass even transgressions that have nothing to do with a practitioner's ability and competence to manage his or her trust account properly in terms of the rules. Clearly it has no relation to the legislative purpose contemplated in s 42(3)(a) regarding the issuing of a fidelity fund certificate to a practitioner. Furthermore, it is so vague that it fails to inform the applicant in clear and specific terms of what it is that he or she is alleged to have done which justifies the refusal by the secretary to issue the fidelity fund certificate. It follows that it will be difficult for the applicant to respond to the allegations if he or she does not know the precise nature of the complaint against him or her. The invitation by the Council to such an applicant to make representations will thus remain an illusion.

[18] Counsel for the appellants had difficulty explaining exactly what the council resolution is aimed at, because it is couched in very wide and vague terms. It is

clear that the resolution creates a general ban against any practitioner against whom there are proceedings pending either for suspension or removal from the roll without reference to the exact nature of the complaint.

[19] The fact that a practitioner may avoid the full force of the resolution by advancing ‘good reason’ does not change matters. If the general prohibition does not satisfy the test of ‘a lawful requirement’ it cannot be served by the opportunity to provide reasons why it should not operate in any particular case. To my mind the resolution is fatally flawed. It follows that both appeals must fail.

[20] Both respondents argued for costs against the appellants. The principal submission is that the appellant’s decision to refuse to issue fidelity fund certificates was flawed from the beginning as it was based on a bad judgment. It was argued that it would be wrong and unfair for the respondents to be left out of pocket in circumstances where the respondents have been put to considerable financial loss due to some bad judgment on the part of the appellants.

[21] The appellants argued against any costs being awarded against them. It was contended that a law society is a special litigant in the sense that it does not come to court for its own interests. As a body with statutory powers to administer the affairs of its members, it has a statutory duty to approach a court in any matter where it is of the opinion that a practitioner is guilty of conduct which impugns his

or her fitness to continue to practise. It was argued further that it does this in the public interest as well as that of the court. We were further urged to consider the fact that there are conflicting judgments on this aspect by the North Gauteng High Court and that the appellants were justified to approach this court for clarity.

[22] I have no doubt that in the circumstances of both cases, the appellants were not entitled to refuse to issue fidelity fund certificates to the respondents. It is clear to me that the second appellant's decision was indeed misconceived. Furthermore, even after the appellants had lost both cases in the high court, they still zealously pursued the appeal in this court, thus exposing the respondents to substantial legal costs. Notwithstanding the long standing and salutary practice of not mulcting a Law Society with an adverse order of costs as it is a special litigant acting in the public interest, I am of the view that it would be unfair, given the facts of this case, not to award costs to the respondents.

[23] Contrary to the appellants' submission, I do not perceive any conflict between these two matters and the two unreported judgments of the North Gauteng High Court involving a Mr Setshogoe to which we were referred. The facts were different. The Law Society had obtained an interdict from the high court, restraining Mr Setshogoe from practising at the time when he applied for a fidelity fund certificate. It was in these circumstances that the secretary refused to issue the fidelity fund certificate. That is not the case here.

[24] In the result, the following orders are made:

In Law Society of the Northern Provinces v Viljoen (appeal no. 094/10)

On appeal from the High Court, North Gauteng (Tutchten AJ sitting as court of first instance)

1. The appeal is dismissed with costs.

In Law Society of the Northern Provinces v Dykes (appeal no. 648/10)

On appeal from the High Court, North Gauteng (Sapire AJ sitting as court of first instance)

1. The appeal is dismissed with costs.

L O Bosielo
Judge of Appeal

APPEARANCES:

For Appellant:	E C Labuschagne SC
	Instructed by: Rooth & Wessels Inc.: Pretoria Naudes Attorneys: Bloemfontein
For Respondent: (Viljoen)	I M Bredenkamp SC
	Instructed by: P Viljoen Inc.: Pretoria Hugo & Bruwer Inc.: Bloemfontein
For Respondent: (Dykes and Partners)	Q Pelser SC
	Instructed by: Maponya Attorneys: Pretoria Vermaak & Dennis: Bloemfontein