THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case No.: 185/2015

In the matter between:

LAW SOCIETY OF THE NORTHERN PROVINCES **FIRST APPELLANT**

M J S GROBLER **SECOND APPELLANT**

And

LOUW DE WITT LE ROUX **FIRST RESPONDENT**

GIDEON FRANCOIS DU PLESSIS **SECOND RESPONDENT**

DE LOUW LE ROUX & DEOFRANN DU PLESSIS INCORPORATED t/a LE ROUX DU PLESSIS ATTORNEYS **THIRD RESPONDENT**

Neutral citation: *Law Society of the Northern Provinces v Le Roux* (185/2015) [2015] ZASCA 168 (26 November 2015)

Coram: Maya DP, Shongwe, Majiedt, Petse and Mathopo JJA

Heard: 6 November 2015

Delivered: 26 November 2015

Summary: Attorneys Act 53 of 1979 – Law Society's resolution introducing a requirement to its rules for the submission of an acceptable, unqualified audit certificate for the issue of fidelity fund certificates under s 42(3)(*a*) of the Act constituted administrative action within the meaning of the Promotion of Administrative Justice Act 3 of 2000 and is binding until set aside on review – wrong relief sought by insolvent attorneys from whom the Law Society's secretary withheld

the certificates because their firm's trust account was in deficit and its audit certificate accordingly qualified as a result of fraudulent misappropriation of funds from the account by their associate – should have taken the resolution on review instead of merely challenging the secretary's refusal to issue the certificates – appeal thus upheld.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Tuchten J sitting as court of first instance):

1 The appeal is upheld with costs, including the costs of two counsel, on the scale as between attorney and client.

2 The order of the Gauteng Division of the High Court, Pretoria, is set aside and replaced with the following order:

'The application is dismissed with costs on the scale as between attorney and client.'

JUDGMENT

MAYA DP (SHONGWE, MAJIEDT, PETSE and MATHOPO JJA concurring):

[1] This is an appeal against the judgment of the Gauteng Division of the High Court, Pretoria (Tuchten J) which compelled the secretary of the first appellant (the Law Society) to issue fidelity fund certificates to the first and second respondents. The matter serves before us with the leave of the court a quo.

[2] The first and second respondents practise as attorneys in the third respondent, an incorporated firm (the firm). In October 2014, they unsuccessfully applied to the secretary of the Law Society (the secretary) for the renewal of their fidelity fund

certificates. The reason given for the refusal, which sparked these proceedings, was that they had 'not complied with the lawful requirements of the Law Society in terms of Section 42(3)(a) of the Attorneys Act, 1979 having regard to the problems … identified relating to [their] firm's trust account and the allegations of a trust shortage'.

[3] This decision was made against the backdrop of the stringent regulatory framework provided by law for the regulation and control of attorneys' trust accounts. An important cog in that framework is the Attorneys' Fidelity Fund,[1] which is meant to protect the public against the misappropriation of their money entrusted to attorneys. It is chiefly financed by means of contributions made by practising attorneys in terms of s 43 of the Attorneys Act 53 of 1979 (the Act) and the interest the attorneys earn on their trust bank accounts in terms of s 78(3) of the Act. Its purpose is set out in s 26(*a*) of the Act which provides that 'the fund shall be applied for the purpose of reimbursing persons who may suffer pecuniary loss as a result of … theft committed by a practising practitioner, his or her candidate attorney or his or her employee, of any money or other property entrusted by or on behalf of such persons to him or her or to his or her candidate attorney or employee in the course of his or her practice or while acting as executor or administrator in the estate of a deceased person or as a trustee in an insolvent estate or in any similar capacity'.

[4] The attorneys' trust accounts are regulated by ss 78 and 79 of the Act which, inter alia, require attorneys to hold all money entrusted to them in separate trust banking accounts[2] which do not form part of the attorney's assets;[3] and to keep proper accounting records containing particulars and information of the money held in trust[4] which shall be inspected by the council of the society of the province in which the

[1] Established by s 8 of the Attorneys' Admission Amendment and Legal Practitioners' Fidelity Fund Act 19 of 1941.
[2] Section 78(1).
[3] Section 78(7) and s 79.
[4] Section 78(4).

attorney practises to satisfy itself that they are kept properly.[5] These provisions are supported by rules 68 to 70 of the Rules of the Law Society[6] which impose similar requirements and enjoin attorneys, inter alia, to ensure prompt deposit of trust money received;[7] that the money in a trust account is not less than the total amount of the credit balances of its trust creditors;[8] that no account of any trust creditor is in debit;[9] and that withdrawals from the trust account are only in respect of payments to or for or on behalf of a trust creditor.[10] Rule 70(1) obliges a firm,[11] at its expense once in each calendar year, or at such time as the council may require, to appoint an accountant approved by the council to act on behalf of and as the representative of the fund to discharge the duties assigned to him or her in terms of rule 70.4.[12] These duties are essentially the preparation of an audit report in the form prescribed by the Third Schedule to the rules, once a year, and to report to the council on the firm's compliance with the requirements of the Act and the rules regarding its accounting.

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[5] Section 78(5).

[6] In this instance the rules of the Law Society of the Northern Provisions (Incorporated as the Law Society of the Transvaal) made under the authority of s 74 of the Act and promulgated in *GG* 7164 of 1August 1980, as amended.

[7] Rule 69.1.

[8] Rule 69.3.1.

[9] Rule 69.3.2.

[10] Rule 69.5.

[11] Defined in Rule 1.9 as a partnership of practitioners, a sole practitioner for his own account, a professional company who or which in each case conducts the practice of a practitioner.

[12] Section 70.4 provides:

'Duties of accountant

Every accountant who has accepted an appointment in terms of rule 70.1 shall –

70.4.1 within six months of the annual closing of the accounting records of the firm concerned, or at such other times as the Council may require, furnish the council with a report which shall be in the form of the Third Schedule to these rules;

70.4.2 without delay report in writing directly to the council if, at any time during the discharge of his function and duties under this rule–

70.4.2.1 it comes to his/her notice that at any date the total of the balances shown on trust accounts in the accounting records of the firm exceeded the total amount of the funds in its trust banking account, its trust investment account and its trust cash;

70.4.2.2 any material queries regarding its accounting records which he/she has raised with the firm have not been dealt with to his/her satisfaction;

70.4.2.3 any reasonable request made by him/her for access to its accounting records and supporting documents or for any authority referred to in rule 70.2 has not been met to his/her satisfaction.'

[5] Section 41 of the Act bars an attorney from practising for his or her own account without a fidelity fund certificate.[13] Section 83(10) of the Act criminalises breach of these provisions by providing that '[a]ny person who directly or indirectly purports to act as a practitioner or to practise on his or her own account or in partnership without being in possession of a fidelity fund certificate, shall be guilty of an offence and on conviction liable to a fine not exceeding R2 000 or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment'. Section 42(1) of the Act obliges the attorney to apply in the prescribed form to the secretary of the society concerned for the certificate. Subsection (2) requires such application to be accompanied by the contribution (if any) payable in terms of s 43.[14]

[6] In addition to rule 70, the Law Society resolved, on 30 September 2013, to amend the 'lawful requirements' for the issue of a fidelity fund certificate, in terms of s 42(3)(*a*) of the Act. The resolution required timeous submission of the original completed and signed application form for the certificate and the lodgement with the Law Society of an acceptable, unqualified audit certificate for the relevant period. The Law Society duly notified its members (which included the respondents) of the resolution.[15] Failure to comply would also deprive the members of the Attorneys Indemnity Insurance cover.

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[13] Section 1 of the Act makes reference to 'a practitioner' which is defined as an 'attorney, notary or conveyancer'. A fidelity fund certificate is defined as 'a certificate issued in terms of section 42'. Section 41 provides that:
'(1) a practitioner shall not practise or act as a practitioner on his or her own account or in partnership unless he or she is in possession of a fidelity fund certificate.
(2) Any practitioner who practises or acts in contravention of subsection (1) shall not be entitled to any fee, reward or disbursement in respect of anything done by him or her while so practising or acting'.

[14] Section 43 determines the contributions which practitioners practising for their own account are required to make to the Attorneys Fidelity Fund annually. In terms of s 42(3)(*b*) the certificate shall be valid until 31 December of the year in respect of which it was issued

[15] Law Society Notice 4 September 2013.

[7] It is the respondents' failure to comply with the requirements for an unqualified audit requirement which led to the secretary's refusal of their applications for renewal of their fidelity fund certificates. The respondents' audit certificate was heavily qualified because their trust account had been plundered and was accordingly in disarray. Three of the firm's trust creditors had debit balances amounting to R545 758 and a sum of R5 024 041 appeared to have been misappropriated from the firm's trust account, in breach of rules 68.1, 69.3 and 69.5.

[8] The culprit was the second respondent's brother, Mr Andries Christiaan Dormehl du Plessis (Du Plessis), who worked at the firm until his expulsion for his misdeeds on 16 July 2014. From 2007 until his admission as an attorney on 24 March 2014 he was a candidate attorney at the firm. Thereafter, he practised as a sole proprietor under the name of Dormehl Du Plessis Incorporated but ran his practice in association with the firm from its premises under a lease. He also used its personnel, office facilities and trust account for all deposits in respect of his matters. He referred all his conveyancing work to the firm as he was not a qualified conveyancer.

[9] The association ended abruptly when Du Plessis confessed to the second respondent that he had misappropriated several millions of rands from the firm's trust account over several months. Pursuant to this disclosure he was immediately removed from the premises. The respondents took various steps to rectify the situation, including reporting him to the Law Society, laying fraud charges against him, launching sequestration proceedings against his estate, mandating a forensic audit and placing their own immovable property on the open market for sale to raise funds to rectify the trust deficit.

[10] In August 2014, the Law Society appointed an independent auditor, Mr Ashwin Reddy, to conduct a forensic audit on the firm. He made the following findings:

'[Du Plessis] was able to defraud the firm's trust bank account by taking advantage of certain weaknesses in the firm's system of internal controls. In particular, the firm did not obtain suitable confirmation of the client's bank account details as well as confirming the client's bank accounts details prior to payment. [Du Plessis] recognised the weakness and took advantage of the weakness by falsifying correspondence from clients wherein they confirm their bank account details. Suitable proof of banking details would be a cancelled cheque, a letter from the bank or a bank stamped bank statement.

Due to the significant trust shortage … as well as the claims lodged with the Attorney's Fidelity Fund, I am of the opinion that the firm poses a high risk to the Attorney's Fidelity Fund and trust creditors.

In my opinion [the first and second respondents] were not party to the fraudulent activities of [Du Plessis] however as the directors of the firm they are ultimately reliable for establishing, maintaining and monitoring the firm's system of internal controls with the objective of preventing and detecting fraud as well as safe-guarding trust assets. Furthermore the Directors of the firm are responsible for the supervision and oversight of all staff members. I thus recommend that my report be referred to the Disciplinary Department to consider further appropriate steps against [the first and second respondents].

In light of [Du Plessis's] fraudulent and dishonest actions which has resulted in financial loss to the firm, trust creditors and ultimately the Attorney's Fidelity Fund, I recommend my report be referred to the Council to consider further appropriate steps.'

[11] Mr Reddy described the disorder he found in the firm's trust account as follows:

'During my inspections of the accounting records I quantified the trust shortage to be an amount of R4,690,070, based solely on the information I was provided. The directors of the firm are not in the financial position to reimburse the trust creditors, the funds which have been misappropriated. Furthermore the accounting records are not accurate in that the fraudulent payments to Mr Du Plessis have been accounted for as legitimate payments towards trust creditors. This places the firm in a predicament as they are unable to properly account to the trust creditors, nor are they able to

identify the actual liability towards each trust creditor. The effect of this is that the directors are unable to provide satisfactory responses to the queries of the affected trust creditors.'

In essence, the gravamen of the report was that the respondents are factually and commercially insolvent.

[12] Pursuant to Mr Reddy's report, the Law Society launched an application, which was subsequently struck off the roll for lack of urgency, for the suspension of the first and second respondents from practice pending the finalisation of an application for the removal of their names from the roll of Attorneys.[16] In the meantime, the respondents had lodged their applications for fidelity fund certificates for 2015. When the applications were refused, they successfully brought an urgent application in the Gauteng Division, Pretoria (Tuchten J), to compel the secretary to issue the certificates.

[13] The court a quo found that the first and second respondents had 'shown themselves to be fit and proper people to practise … caught up in a situation which was not of their own making'. In the court's view, s 42(3)(*a*) of the Act enjoined the secretary to assess the risk attendant on the issue of the certificate which it believed was 'very low' in this case. The court then found the requirement of an unqualified audit certificate unlawful because it did not 'address the situation of an entirely unblameworthy applicant who is unable through circumstances beyond his control to comply with it' and required the respondents to do what they were objectively incapable of in circumstances where they were blameless and the risk to the Law Society and the Fidelity Fund, if the certificates were issued, were negligible. Interestingly, the court recognised that deposits into the firm's trust account in deficit by the respondents' future trust creditors would likely be exposed to risk. But it held

[16] The application was subsequently struck off the roll for lack of urgency and it does not appear that it was pursued thereafter.

that such risk could be 'mitigated to some extent by a direction that the [respondents] open a fresh banking account into which trust deposits must be deposited and … that such deposits will not carry the risk that the depositors in relation to amounts previously deposited will suffer as a result of the misbehaviour of [Du Plessis]'.

[14] On appeal before us, it was argued for the respondents that the requirement of an acceptable, unqualified audit certificate is invalid because it 'is overbroad, vague and leaves no room for discretion' as it does not cater for exceptions or instances such as where the qualification may be trivial, or the applicant practitioners are not blameworthy and cannot comply with the requirement through circumstances beyond their control. It was further argued that the respondents were entitled to mount a collateral challenge against the validity of the Law Society's resolution and that the court a quo was correct to set aside the secretary's decision and substitute its own decision.

[15] I agree with the Law Society's contention that the chief hurdle for the respondents is that their application targeted the wrong party. The respondents' main complaint in their papers and in argument before us, as set out above, concerned the scope and validity of the resolution. But the only relief sought in their notice of motion was an order compelling the secretary to renew their fidelity fund certificates. The difficulty with this approach is that it neither reckons with the statutory provisions in terms of which the secretary acts when considering applications for fidelity fund certificates nor the nature of the resolution and the effect thereof.

[16] The empowering provisions are couched in s 42(3)(*a*) of the Act which provides that '[u]pon receipt of the application [for a fidelity fund certificate], the secretary of the society concerned shall, if he or she is satisfied that the applicant has

discharged all his or her liabilities to the society in respect of his or her contribution and that he or she has complied with any other lawful requirement of the society, forthwith issue to the applicant a fidelity fund certificate in the prescribed form'. These provisions clearly circumscribe the secretary's role to merely satisfying herself that the application complies with the relevant, lawful requirements. Whilst that exercise involves some judgment on her part, she nevertheless enjoys no discretion to go beyond simply granting the application if it meets the requirements or declining it if it does not. As the respondents' applications did not meet the requirement of an unqualified audit certificate the secretary had no option but to decline them.

[17] But the more fundamental problem arises from the fact that the resolution, which remains extant, was a decision of an administrative nature made by an organ of state or a juristic person exercising a public power and performing a public function under an empowering statutory provision, which had a direct external legal effect on practitioners and adversely affected their rights. Thus, it constituted administrative action within the meaning of s 1(*a*) and (*b*) of the Promotion of Administrative Justice Act 3 of 2000. It is trite in our law that invalid administrative action may not simply be ignored, but may be valid and effectual, and may continue to have legal consequences until set aside on judicial review.[17] The resolution was therefore binding on the secretary and the respondents. Furthermore, the principles of fairness embedded in our law militate against invalidating the requirement without affording the Law Society an opportunity to explain the requirement. And this could be done only in review proceedings. The respondents should, therefore, have challenged the resolution in such proceedings and followed a wrong procedure.

[17] *Oudekraal Estates (Pty) Ltd v City of Cape Town & others*2004 (6) SA 222 (SCA) paras 26 and 40 (41/2003) [2004] ZASCA 48 (28 May 2004); *MEC for Health, Eastern Cape & another v Kirland Investments (Pty) Ltd t/a Eye and Lazer Institute* 2014 (3) SA 481 (CC) paras 87-106; *Incorporated Law Society, Transvaal v Visse & others* (1); *Incorporated Law Society, Transvaal v Viljoen* (2)

[18] Having thus found, it is not necessary or even prudent to determine the validity of the resolution and the appeal should succeed on that basis alone. But a few material misdirections committed by the court a quo bear mention. For its finding that the requirement was unlawful the court relied on this court's statement in *Law Society of the Northern Provinces & another v Viljoen; Law Society of the Northern Provinces and another v Dykes & others*.[18] There, the court determined that a lawful requirement under s 42(3)(*a*) of the Act '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'.[19] In the court a quo's view, (iii) invalidated the requirement because it required practitioners 'to do things which they are objectively not capable of doing in situations where they are not blameworthy and where the risk to the law society and to the fund is as small as it is in the present case'.

[19] The first problem with this finding, ie that any risk that might arise from the issue of the certificates was 'very low' or 'small', is belied by Mr Reddy's undisputed findings to the contrary. The second problem is that the court a quo's interpretation of (iii) above overlooks the context in which the statement was made and accordingly misconceives its meaning. The court in *Viljoen* also remarked that the enquiry conducted by a secretary dealing with an application for a fidelity fund certificate is 'intended solely to assess any risk attendant on the secretary … so as to ensure that the Fidelity Fund is not overexposed'. In the circumstances, the court's statement in (iii) could only have meant that the requirement must be capable of objective fulfilment. The court simply could not have meant that the secretary was obliged to issue a

[18] *Law Society of the Northern Provinces & another v Viljoen; Law Society of the Northern Provinces & another v Dykes & others* 2011 (2) SA 327 (SCA); [2010] ZASCA 176 (2 December 2010).
[19] Ibid, para 15.

fidelity fund certificate to an insolvent practitioner with a trust account in deficit, such as the respondents, which would patently place the Fidelity Fund at risk.[20]

[20] This finding finds support in the court a quo's own order for the opening of a new trust account and the attempt to immunise deposits of new trust creditors' funds made into that account, which was a key condition to the issue of the certificates. This unprecedented order clearly attests to the court a quo's recognition of the real risk that any fresh trust funds would be swallowed up by the trust account in deficit to the prejudice of the new trust creditors. Needless to say, neither the Law Society nor the secretary could grant such a remedy. And it remains highly doubtful that the court a quo itself could, as the order impermissibly sought to alter the ranking of claims in insolvency in the absence of the relevant creditors.

[21] The following order is accordingly made.

1 The appeal is upheld with costs, including the costs of two counsel, on the scale as between attorney and client.

2 The order of the Gauteng Division of the High Court, Pretoria, is set aside and replaced with the following order:

'The application is dismissed with costs on the scale as between attorney and client.'

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M M L MAYA

Deputy President of the Supreme Court of Appeal

[20] According to the first and second respondents, the trust deficit amounts were initially in the region of R7 million which they reduced by a sum of R1,5 million which was all they were able to raise to rectify the situation. The respondents are therefore actually and commercially insolvent.

APPEARANCES

For the Appellants:	W Trengrove SC (with H Vorster) Instructed by: Rooth & Wessels Attorneys, Pretoria Phatshoane Henney, Bloemfontein
For the Respondents:	JGW Basson Instructed by: Clarke & Van Eck Attorneys, Pretoria Martins Attorneys, Bloemfontein