REPUBLIC OF NAMIBIA

CASE NO. A28/2012

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION

HELD AT WINDHOEK

In the matter between:

CAREL JACOBUS WICHARD VAN DER MERWE Applicant

and

THE DIRECTOR OF THE LAW SOCIETY OF NAMIBIA 1st Respondent

THE COUNCIL OF THE LAW SOCIETY OF NAMIBIA 2nd Respondent

THE LAW SOCIETY OF NAMIBIA 3rd Respondent

MARINDA COLEMAN

4th Respondent

THE LEGAL PRACTITIONERS FIDELITY FUND 5th Respondent

THE LEGAL PRACTITIONERS FIDELITY FUND 6th Respondent

BOARD OF CONTROL

CORAM: **VAN NIEKERK, J**

Heard: 2 March 2012

Delivered: 6 March 2012

REASONS FOR JUDGMENT

VAN NIEKERK, J: [1] On 27 February 2012 the applicant lodged a review application in which he prays for, *inter alia*, an order in the following terms:

> "1. Calling upon the first respondent and/or the second respondent and/or the third respondent to show cause why –
>
> 1.1 The decision taken on or about 7 December 2011 by the first respondent and/or the second respondent and/or the third respondent to the effect that the fidelity fund certificate issued by the first respondent to the applicant was to be valid only until 29 February 2012,

should not be reviewed and set aside.

1.2 The decision taken on or about 2 February 2012 and confirmed on 20 February 2012 by the first respondent and/or the second respondent and/or the third respondent to the effect that –

"At this stage no permission or confirmation can be given to any of you [being the applicant and the fourth respondent] *with regard to the use of the name of the present firm, the continuation of the firm* [being a reference to Van der Merwe Coleman], *fidelity fund certificates and trust account or the names of a new firm(s) to be established"*

should not be reviewed and set aside.

1.3 Alternatively that the aforesaid decisions should not be declared to be –

1.3.1 *ultra vires* the powers of the first respondent and/or the second respondent and/or the third respondent;

in conflict with Article 18 of the Constitution of Namibia and Article 21(1)(j),

and accordingly null and void.

1.4 Directing the first respondent to issue a fidelity fund certificate to the applicant in the firm Van der Merwe Coleman, to be valid from 1 March 2012 to 31 December 2012;

<u>Alternatively</u>

Directing the first respondent to extend the period of validity of the applicant's fidelity fund certificate practising in Van der Merwe Coleman to be valid from 1 March 2012 to 31 December 2012."

[2] On 2 March 2012 the applicant moved an urgent application in which he prayed for, *inter alia*, an order that the relief sought in paragraph 1 as quoted above operate as interim orders pending the final determination of the review application. In the alternative he sought an order directing the first respondent to issue a fidelity fund certificate to the applicant whilst practising in the firm Van der Merwe Coleman, to be valid from 1 March 2012 to 31 December 2012, alternatively to the final determination of the review application, should the review relief be refused or the interim order be discharged. In the further alternative the applicant claimed an order directing the first respondent to extend the period of validity of the applicant's fidelity fund certificate whilst practising in Van der Merwe Coleman to be valid from 1 March 2012 to 31 December 2012, alternatively to the date of

the final determination of the review application, should the review relief be refused or the interim order be discharged.

[3] It should be noted that the applicant seeks no relief against the fourth, fifth and sixth respondents, but cites them only in so far as they may have an interest in the outcome of the proceedings.

[4] The application is opposed by the first, second, third and fourth respondents. The first, second and third respondents filed an answering affidavit deposed to by the first respondent in which they deal only with the urgent relief sought under part B of the notice of motion.

[5] After hearing the application I ruled on 6 March 2012 that the matter was urgent and directed the first respondent to issue a fidelity fund certificate to the applicant, without specifying the name of his practice, to be valid from 1 March 2012 to 31 December 2012. I further ordered that the parties shall each pay their own costs. The reasons for these orders now follow.

<u>The facts</u>

[6] The facts in this matter are in many respects common cause. For purposes of this judgment I shall not summarize them in any detail. The applicant and the fourth respondent are admitted legal practitioners, conveyancers and notaries public. Since March 2006 they were practicing in partnership under the name and style of Van der Merwe Coleman. No written partnership was concluded. The

partners orally agreed to pool their resources and divide their profits equally.

[7] The applicant alleges that during August 2011 the fourth respondent gave him notice of her intention to withdraw from the partnership. The fourth respondent alleges that she gave notice of her intention to dissolve the partnership and not to "withdraw" from it. It is, however, common cause that on either version the partnership would have to be dissolved. She later indicated that she intended forming a new partnership with other legal practitioners to be called Angula Coleman. From the outset the applicant indicated that he wished to continue practicing under the name Van der Merwe Coleman. The applicant's case is that, although the fourth respondent was initially opposed to the idea, she later conceded that he could do so. He therefore relies, *inter alia*, on an oral agreement. The fourth respondent states that she initially did not expressly address the issue. However, later she repeatedly and consistently told the applicant that she would not consent to him using her name after the dissolution of the partnership. She expressly denies the existence of any agreement as alleged by the applicant.

[8] As legal practitioners usually do towards the end of each year, both the applicant and the fourth respondent applied on 6 December 2011 for the annual renewal of their fidelity fund certificates, in this case for the year 1 January – 31 December 2012. The application form at the time required that one form be completed by all partners and

that their names and the name of their practice be furnished as well. The applicant and fourth respondent did not give any indication on the form that the partnership was to be dissolved. The form at the time did not require that notification be given of any such intentions. It is common cause that the fourth respondent orally and by letter and email informed the first respondent on the same day that the partnership would be dissolved on 29 February 2012 and that she requested the first respondent to issue their fidelity fund certificates only for the period 1 January - 29 February 2012. There is a dispute on the papers about whether the applicant knew about these requests and whether the correspondence, specifically her letter dated 6 December 2011 ("CM6"), was addressed based on any consensus reached between them. For purposes of this application it is not necessary to determine the precise extent and detail of the factual dispute or to attempt to resolve this dispute, except to record that it is my understanding of the facts that the applicant did not agree that the fourth respondent should request the first respondent to issue a 2 month fidelity fund certificate in his name.

[9] During the second half of January 2012 the applicant received a copy of his fidelity fund certificate, which had been issued by the first respondent with effect from 7 December 2011 and which stated that it was "for the year ending 29 February 2012", instead of 31 December 2012.

[10] On 23 January 2012 the fourth respondent informed the

applicant in writing that she would be commencing practice on 2 March 2012 under the name Angula Coleman. She formally recorded her objection to him continuing to use the name Van der Merwe Coleman for his firm. The reasons she furnished were that the two names are too similar and will cause confusion in the general public; that the name is intimately connected with them personally as “attorneys”; and that it has only existed for the 6 years of their partnership.

[11] During January 2012 the applicant had several telephonic discussions with various administrative officers of the third respondent regarding the continued use of both the name and the trust bank account of Van der Merwe Coleman after the dissolution and further correspondence was addressed to the first respondent around these issues. He also questioned the legality of a fidelity fund certificate valid for two months only. It is not necessary to set these out in any detail except to state that the applicant requested to be furnished with reasons for any decisions taken.

[12] On 2 February 2012 the first respondent wrote a joint letter to both the applicant and the fourth respondent, setting out certain views on the matters raised by both parties in the various telephonic conversations and correspondence. The first respondent indicated that “it has been standard practice when partnerships terminate that the trust account is closed.” In this regard the applicant points out that there is no requirement in the Act or the regulations promulgated pursuant thereto which requires closure of the account in such

circumstances. He points out that he and the fourth respondent have divided the various clients between them. He will act for his clients in the firm Van der Merwe Coleman and the fourth respondents will act for her share of the clients in her new firm. He points out that all that has to happen is that the monies in the trust account must be separated according to the division of the clients and the fourth respondent's trust monies must be transferred from the account to the trust account of Angula Coleman. The fourth respondent does not deny these contentions, while the first, second and third respondents merely note them. I must say that, in the absence of contrary indications, there does not appear to be any flaw in the applicant's reasoning regarding the trust account.

[13] The first respondent further states in this letter:

> "As a general rule, the fidelity fund certificates issued to the partners would therefore not be regarded as valid after the dissolution of such firm, even if the certificates were issued until 31 December because the LSN was unaware of such dissolution. It is the practice of the Law Society to insist on the return of invalid certificates to protect the Fidelity Fund and the public.

In my view, fidelity fund certificates are not issued solely for and linked to a particular legal practitioner regardless of how he/she carries on practice. In this regard I refer you for instance to the application form of fidelity fund certificates and the certificate issued. In the premise the fact that I have issued you with fidelity fund certificates which will expire at the end of February 2012 will be bona fide and legitimate.

The Director must evaluate and monitor compliance with the lawful

requirements of the Law Society. In this regard I refer you to Section 68.

A change in status of a firm and of its partners could have a direct bearing and/or negatively impact on a possible claim against the fidelity Fund. It is for this reason that Section 68 requires the Director to monitor compliance with the lawful requirements of the Law Society upon receipt of an application for a fidelity fund certificate."

[14] The first respondent further stated that consultations with various persons on the legal position pointed to a generally held view that "whenever there is a termination of partnership/dissolution of a legal firm it would be possible for the remaining partner to keep the name and the bank account number, but that this would be subject to an agreement." However, the first respondent indicated that she still wished to consult with the second respondent and seek the "input and guidance of management" before taking any decisions on the issues raised. She suggested that the two partners attempt to resolve their differences amicably before the expiration of the fidelity fund certificates and indicated that if they failed to do so by 15 February 2012, she would place the matter before the second respondent to properly consider at its meeting on 20 February 2012. The parties were further informed that "at this stage no permission or confirmation can be given to any of you with regard to the use of the name of the present firm, the continuation of the firm, fidelity fund certificates and trust account or the name if the new firm(s)to be established. You

<u>shall be advised of the decision of Council in due course</u>."

[15] On 9 February 2012 the third respondent forwarded to the applicant a new application form for a fidelity fund certificate for the year 1 January 2012 – 31 December 2012. This form differs from the previous one in that additional information is required, namely, details of any new practice. The applicant declined to complete this form, *inter alia* because he was of the view that he is entitled to a certificate for the year 2012 based on the application dated 6 December 2012.

[16] On 15 February 2012 the applicant's lawyers wrote a letter to the first respondent setting out fully their view of the legal position regarding the issues in dispute. The purpose of the letter was to make representations to the first respondent for tabling at the second respondent's meeting on 20 February 2012.

[17] On 21 February 2012 the first respondent replied:

> "...................this matter was placed before Council for consideration and to provide me with guidance before I exercise my discretion to issue a fidelity fund certificate as demanded.

An application for a Fidelity Fund Certificate was submitted in December 2012 signed by the partners of Van der Merwe Coleman Legal Practitioners ("the existing partnership"). I subsequently received a letter from one of the partners, Mrs Coleman informing me that the partnership will dissolve on 29 February 2012 and that I should issue the fidelity fund certificates only up to that date. I had no reason to believe that Mrs Coleman did not have the authority to write this letter and as a result issued the Fidelity Fund Certificate

in the manner requested. In fact, it could be wrong to allow a member to practice under an old certificate which as a result of a change in circumstances (factual or legal) no longer complies with the provisions of the Act. I could not issue a Fidelity Fund Certificate to any of the partners in respect of the existing partnership which is effective beyond the date on which the partnership would dissolve.

I have since then not received any application from your client to issue him with a Fidelity Fund Certificate in respect of his new firm which he would be operating after 29 February 2012, even though we furnished Mr van der Merwe with such application form. Kindly advise your client that I will consider his application upon receipt thereof.

I must however caution that should he persist in using the name of the existing partnership and there remains an objection by Mrs Coleman, I will not issue the certificate until the parties have resolved the issue. The issue of the use of the name of the partnership is an issue which should have been catered for in a partnership agreement or an agreement regarding the dissolution of the partnership. If the parties cannot come to an agreement about the issue they should make use of the remedies available instead of involving the Law Society in their dispute.

I trust this clarifies my position."

[18] The applicant requested a copy of the minutes of the second respondent's meeting, but was informed that these would only be available after approval at the next meeting to be held on 19 March 2012, i.e. after this application was heard.

[19] In summary it may be said that the applicant complains that the first respondent had regard to irrelevant considerations when she refused to issue a fidelity fund certificate to him in the absence of as dispute regarding the name of the firm; that she acted *ultra vires* by issuing the first fidelity fund certificate for only two months instead of for the year ending 31 December 2012; and that she failed to apply her mind to the matter; that she acted unfairly, unreasonably, arbitrarily and capriciously; that she failed to hear the applicant; and that she acted in a biased manner. For the reasons stated below it is not necessary to deal with all these grounds for review.

Urgency

[20] The applicant set out in some detail why this application is urgent. The gist of his allegations is that, without a fidelity fund certificate he may not continue to practice as a legal practitioner after 29 February 2012 without committing a criminal offence. He may also not operate a trust account. The prejudice in terms of his income, practice, staff, clients and pending and imminent transactions is obvious. There is no need to repeat the detail here. These facts are not disputed. Although the first, second and third respondents on the papers disputed the urgency of the matter, it was placed on record at the hearing that these respondents did not take issue with urgency any longer.

[21] Mr *van Vuuren* on behalf of the fourth respondent submitted

that the applicant has not made out a case for urgency. He submitted that the applicant already knew since mid-January that the new fidelity fund certificate would expire on 29 February and yet he took no action to lodge these proceedings, but waited until 27 February when the lapsing of the certificate and the dissolution of the existing partnership was imminent. He argued that any urgency is self-created. I do not agree. It is clear that very soon after becoming aware that the new certificate would expire at the end of February, the applicant took up the issue with the first and second respondent and also made enquiries to establish the reasons for this state of affairs. As he had been unaware of the request by the fourth respondent for a 2 month certificate, he also needed time to establish the facts concerning her communications with the first respondent. By 31 January 2012 the applicant had addressed a number of oral and written communications to all the relevant parties. The correspondence between the fourth and first respondents only came to hand on 10 February. Most importantly, the first respondent in her letter dated 2 February 2012 suggested to the applicant and the fourth respondent to attempt to settle the matter amicably and afforded them time until 15 February 2012. She further indicated that the matter, if not resolved by the partners, would serve before the second respondent on 20 February. The applicant took the opportunity to make representations for purposes of this meeting. I agree with Mr *Corbett's* submission that it was prudent in the circumstances of this matter for the applicant to await the outcome of the meeting and the first respondent's reply.

The time period between the reply of 21 February and the lodging of the application on 27 February 2012 is reasonable in all the circumstances.

[22] Mr *van Vuuren* further contended that the matter is not urgent because the applicant is free to apply for a fidelity fund certificate in his own name, which certificate would probably be granted and he referred to the first applicant's invitation that the applicant should do so. This contention cannot be upheld. The applicant is entitled to have the question of urgency decided on the basis that he is entitled to the relief sought on the merits of the application. (See *Twentieth Century Fox Film Corporation and Another v Anthony Black Films (Pty) Ltd* 1982 (3) SA 582 (W) at 586G; *Bandle Investments (Pty) Ltd v Registrar of Deeds and others* 2001 (2) SA 203 (SE) at 213E-F; approved in *Mweb Namibia (Pty) Ltd v Telecom Namibia Ltd and others* (unreported Full Bench judgment delivered on 31 July 2007 in Case No. A91/2007). On this assumption he is entitled to a fidelity fund certificate for the year 1 January – 31 December 2012 based on the application of 6 December 2011 using the name of Van der Merwe Coleman. Instead, a two month certificate was issued coupled with a persistent refusal to issue a certificate for the remainder of the period. With the expiry of the two months period looming, the matter is clearly urgent.

<u>The fourth respondent's second, third and fourth points *in limine*</u>

[23] On the view I take of the matter it is convenient not to consider the issues raised therein separately from the merits of this application.

The relevant legislative provisions

[24] The legislative regime applicable to this case is governed by the Legal Practitioners Act, 1995 (Act 15 of 1995), and the rules and regulations promulgated thereunder.

[25] An application for a fidelity fund certificate is made in terms of section 68 of the Act. It reads:

"**68 Application for and issue of fidelity fund certificate**

(1 A legal practitioner practising or intending to practise on his or her own account or in partnership shall, unless he or she is exempted in terms of section 67, apply in the prescribed form to the secretary of the Law Society for a fidelity fund certificate.

(2) An application in terms of subsection (1) shall be accompanied by the contribution, if any, payable in terms of section 69.

(3) Upon receipt of the application in terms of subsection (1), the secretary of the Law Society shall forthwith issue to the applicant a fidelity fund certificate in the prescribed form if he or she is satisfied that the applicant-

(a) has discharged all his or her liabilities to the Law Society in respect of his or her contribution; and

(b) has complied with any other lawful requirement of the Law Society.

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

(5) A document purporting to be a fidelity fund certificate which has been issued contrary to the provisions of this Act shall be null and void and shall on demand be returned to the Law Society."

[26] It is common cause that regulations 2, 3, 4, 5, 6 and 7 of the Regulations under the Legal Practitioners' Fidelity Fund Act, 1990 (this Act itself was repealed by Act 15 of 1995) under Government Notice No. 135 of 11 November 1993 still apply *mutatis mutandis* to applications for a fidelity fund certificate. These regulations read as follows (the insertions in square brackets are mine):

"2. An application for a fidelity fund certificate shall be substantially in the form as set out in Annexure "A".

3. (1) In order to facilitate the annual applications of practitioners for fidelity fund certificates in terms of section 19 [now section 68] of the Act, the secretary [i.e. the Director] shall not later than the first day of November of every year send by post or deliver or cause to be delivered to every practising attorney –

(a) an application form referred to in regulation 2; and

(b) a statement showing the amount of the contribution, if any, which the practitioner concerned is liable to pay in accordance with the provisions of section 20 of the Act to obtain a fidelity fund certificate in respect of the ensuing year.

(2) Every practitioner shall return the application form,

duly completed, together with the amount of the said contribution, if any, to the secretary not later than the first day of December of the year within which such application form was sent or delivered to him or her in terms of subregulation (1).

(3) Subregulation (1) shall not be so construed as to exempt any practitioner, who in terms of the Act is required to obtain a fidelity fund certificate, from the obligation to apply for such a certificate in a case where such a practitioner has not received (irrespective of the reason therefor) an application form and statement pursuant to the provisions of the said subregulation.

4. An application for a fidelity fund certificate may be made on behalf of a practitioner by any other practitioner who qualifies to be issued with such a certificate in terms of the Act.

5. The secretary may require any applicant for a fidelity fund certificate to furnish, in addition to the information disclosed on his or her application, such further information as the secretary may consider to be relevant in relation to the applicant's application.

6. A fidelity fund certificate shall be substantially in the form as set out in Annexure "B" and shall be signed by the secretary.

7. The secretary may on application and payment of the amount of N$1 issue to any practitioner a duplicate of his or her fidelity fund certificate."

[27] In Annexure A the prescribed form is set out. It requires, *inter alia*, that the applicant legal practitioner states the "name under which practice will be carried on".

[28] Annexure B to the regulations after modification *mutatis mutandis* provides for a fidelity fund certificate in this form:

"LAW SOCIETY OF NAMIBIA

FIDELITY FUND CERTIFICATE

Pursuant to the provisions of the Legal Practitioners Act, 1995 (Act 15 of 1995), I hereby certify that ....

....

of ....

has complied with the provisions of section 68 and 69 of the said Act in respect of the year ending 31 December ....

Date: ....

DIRECTOR"

[29] It is common cause that in the blank space after "I hereby certify that" the full names of the legal practitioner should be inserted and that in the space after the word "of" the name of the practice in which he or she practices should be inserted.

<u>The proper approach to the exercise of a discretion in terms of section 68</u>

[30] Counsel were *ad idem* that the first respondent has a statutory mandate and may only exercise her powers within the ambit of the Act and the regulations. One of the first respondent's duties is to issue

fidelity fund certificates to practicing legal practitioners as provided for in section 68(3) provided that she is satisfied as contemplated in section 68(3)(a) and (b), the latter paragraph being of particular importance in the context of this case, i.e. the first respondent may only issue a certificate if she is satisfied that the applicant "has complied with any other lawful requirement of the Law Society." It is on the question of how this provision should be applied that the parties differ. I shall revert to this.

[30] All counsel in this matter relied in argument on the case of *Law Society of the Northern Provinces and another v Viljoen; Law Society of the Northern Provinces and another v Dykes and others* 2011 (2) SA 327 SCA. In this case the SCA dealt with section 42(3)(a) of the Attorneys Act, 1979 (Act 53 of 1979), of South Africa, which is almost identical to section 68(3) of the Namibian Act. In this case the appellants were attorneys who applied for fidelity fund certificates. The relevant Law Society refused to issue these certificates based on its council's resolution that such certificates should not be issued to applicants in respect of whom there were pending applications for suspension of membership or for striking of their names from the attorney's roll. In dealing with the arguments before the Court, BOSIELO JA stated (at 330D-331G):

> "[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 of 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 practise on his own account or in partnership. It is trite that any legal practitioner who practises 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 (the secretary of the law society). 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 of 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."

[31] Before me counsel were in unison that the interpretation given by the SCA to the words "lawful requirement" in section 42(3)(a) of the South African Act is sound and that section 68(3)(b) of the Namibian Act should be given the same interpretation. I agree.

[32] The question then arises, is it a lawful requirement that there should be no dispute regarding the name of the practice which an applicant legal practitioner uses before a fidelity fund certificate may be issued to that legal practitioner? Or, to put it differently, is the matter of the name of the practice and any dispute in regard thereto related to the purpose for which the fidelity fund certificate is issued?

[33] Counsel for applicant pointed to the fact that, as in *Viljoen's* case, the requirement set by the first respondent is essentially introducing a new element into the concept of 'any other lawful requirement' of the Law Society as it appears in section 68(3) of the Act without any prior notification that such would in future be a requirement. In any event, counsel further submitted, the requirement that no dispute regarding the name must exist is not a lawful requirement in the context of section 68(3) as it does not relate to the purpose for which the fidelity fund certificate is issued.

[34] In their heads of argument counsel for the first, second and third respondents submitted (the insertions in square brackets are mine):

> "16. Once an application has been received (section 68(1)) and the first respondent is satisfied that the requirements of section 68(3)(a) [and] (b) are complied with, she issues a fidelity fund [certificate] in the "prescribed form" as follows:
>
> "Piet Pompies ***of*** *Pompies and Pretorius"* [by way of example] – the latter being the name under which the individual applicant legal practitioner practices law in Namibia.
>
> 17. Thus, when a fidelity fund certificate is issued to an individual legal practitioner, the *"prescribed form"* in which the certificate is issued, contains a reference to the trade name of the practitioner, i.e. the manner in which he practices, be it on his own for his own account or in partnership (see section 68(1)). Where there is a pending dispute about the use of the trade name, and on application of the law in such disputes, the first applicant could not issue a certificate to the applicant *"in the prescribed form."* "

[35] The argument is developed further in the heads and during oral submissions to essentially state that the legal position is that, in the absence of an agreement, the applicant, being the one partner, may not use the name of the fourth respondent, being the other partner of the partnership, after the dissolution of the partnership without her consent. As there is no agreement, (or as there is at least a dispute of fact about the existence of such an agreement), and there is no such consent, the applicant would be committing a delict should he continue to use the fourth respondent's name. Further, the

argument went, the first respondent cannot be expected to assist the applicant in delictual conduct and therefore the first respondent could not be satisfied that the applicant has complied with a lawful requirement of the Law Society in terms of section 68(3)(b). The result is that the first respondent was not in a position to forthwith issue a fidelity fund certificate "in the prescribed form". This part of the argument was only faintly foreshadowed in the answering papers and does not appear to be the basis of the first respondent's decision as evidenced in the correspondence. Be that as it may, there is no need to deal with it for the reasons to follow.

[36] In answering the question posed above I shall adopt the same approach as the Court in *Viljoen's* case when it considered whether the council decision in that case met the three criteria for a "lawful requirement". The Court had regard to the contents of the prescribed application form and stated (at 331H-332F):

> "[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 practise. 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 practise. The enquiry regarding the fitness of a practitioner to continue to practise 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 saved 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.”

[37] Having regard to the prescribed application form under the Namibian dispensation it is apparent that the application form completed by the applicant on 6 December 2011 requires more information than the prescribed form. Nevertheless, it is "substantially" in the prescribed form as required by regulation 2. From the information required to be filled in, the questions to be answered and the documents to be attached, it is clear that the major focus here is whether the legal practitioner or the partnership is strictly complying with the provisions of sections 25 and 26 of the Act and with Rules 17 and 18 of the Rules of the Law Society in keeping proper trust books of account. Bearing in mind the purpose of the Fidelity Fund as set out in section 54 of the Act, which is to reimburse persons who have suffered losses as a result of theft by legal practitioners of money or other property held in trust, this makes perfect sense. As was found in *Viljoen's* case, the "enquiry is intended solely to assess any risk attendant on the .....[Director] issuing a fidelity fund certificate so as to ensure that the Fidelity Fund is not overexposed." In my view the name of the practice and the fact that there is a dispute regarding the name manifestly has no bearing on these issues.

[38] On behalf of the respondents it was repeatedly emphasized that the applicable legislation requires the first respondent to issue a fidelity fund certificate in the prescribed form, which requires mention of the name of the firm or practice in which the practitioner practices.

Relying on this aspect, the first respondent in her letter of 2 February stated that "fidelity fund certificates are not issued solely for and linked to a particular legal practitioner regardless of how he/she carries on practice." None of the respondents advanced any other compelling reason why the mention of the name has any significance. The respondents further overlook that the legislation requires that the certificate be issued "substantially" in the prescribed form. As the name of the practice and the existence of any dispute about it are not related to the purpose for which the certificate is issued, it seems to me that a fidelity fund certificate without any mention of the name would be substantially in the prescribed form.

<u>The use of the name Van der Merwe Coleman</u>

[39] The applicant contended that the use of the name is a side issue and irrelevant to the dispute between him and the first, second and third respondents, but one on which the first respondent, in contradictory fashion, seeks to rely, on the one hand, while she, on the other hand, states that it is an issue for the applicant and the fourth respondent to resolve. I agree that the issue of the use of the name is a side issue and not one which needs to be resolved in this application. Although the applicant would clearly prefer that any fidelity fund certificate to be issued as a result of these proceedings specifies the name of his practice as being Van der Merwe Coleman, the gist of the application before me which requires urgent relief is that he needs a fidelity fund certificate for the period 1 March 2012 to 31 December

2012. In my view he need not re-apply as the application dated 6 December 2011 is still valid. I do not understand the first respondent to have any issue with his application apart from the name.

[40] For the reasons given above, it is not necessary to specify the name of his practice in the fidelity fund certificate and I see no reason why it should not be issued to him without any reference to the name. If the applicant continues to use the name Van der Merwe Coleman and the fourth respondent persists in her objection thereto, this issue may be dealt with in separate proceedings such as the parties might elect to pursue.

Costs

[41] The applicant was partly successful in that he succeeded in obtaining a fidelity fund certificate for the period 1 March 2012 to 31 December 2012. He did not succeed in obtaining an order that the certificate should specify the name Van der Merwe Coleman. As a result of the stance he adopted, the fourth respondent was compelled to participate in the urgent application, although the applicant claims no relief against her. She took the position that the applicant should apply for a fidelity fund certificate in another name or in his own name so that it could be issued as such. The Court held that the applicant need not re-apply and that the fidelity fund certificate to which he is entitled need not specify the name of the practice. It seems to me that each party was partly successful. In view of this I thought it fair

to make an order that they should each pay their own costs.

[42] As far as the first, second and third respondents are concerned, it appears that there is a “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” (see *Viljoen’s* case at p333B) and as the statutory professional body regulating and overseeing the affairs of the legal profession. Unlike in the *Viljoen* case where an adverse cost order was indeed made, the first, second and third respondents have not had the advantage of court judgments on the very issues to be adjudicated to serve as metaphorical red lights warning them against the perils of continuing litigation and exposure of the applicant to substantial legal costs. In light hereof I decided to order that the applicant and these respondents bear their own costs in respect of this application.

VAN NIEKERK, J

Appearance for the parties

For the applicant: Mr A W Corbett

Instr. by Fisher, Quarmby & Pfeifer

For the 1st, 2nd and 3rd respondents: Mr R

Heathcote SC

(with him Ms H Schneider)

Instr. by Diedericks Incorporated

For the 4th respondent:
Mr A S van Vuuren

Instr. by Etzold-Duvenhage