THE HIGH COURT OF SOUTH AFRICA
NORTH GAUTENG - PRETORIA

CASE NO 77720/09

30/4/2010

[illegible] NOT APPLIC[illegible]

(1) [illegible]: ~~YES~~/NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.

(3) [illegible]ISED.

30.04.2010 DATE

SIGNATURE

DYKES, PETER ARTHUR
1ST APPLICANT

RAMSAMY, CHERYL
2ND APPLICANT

SEGOGOBA, PHASUDI DOCTOR
3RD APPLICANT

VAN HEERDEN, JOHAN
4TH APPLICANT

V

LAW SOCIETY OF THE NORTHERN PROVINCES
1ST RESPONDENT

THE ATTORNEYS FIDELITY FUND BOARD OF CONTROL
2ND RESPONDENT

THE SECRETARY OF THE LAW SOCIETY OF THE NORTHERN PROVINCES
3RD RESPONDENT

APPLICATION FOR MANDAMUS TO COMPEL ISSUE OF FIDELITY CERTIFICATES

JUDGMENT

This was an application heard by me as matter of urgency in the December 2009 recess. After hearing argument it became clear to me that the matter was indeed urgent and that the Applicants were entitled to the relief they sought. I made an appropriate order and indicated that my reasons, if required would follow.

In January the Respondents asked for my reasons. These are they. My delay in answering the request, for which I ask to be excused, is that the complete court file containing material to which I wished to refer has gone astray. This also resulted in the request coming to my attention later than would otherwise have been the case.

The applicants sought an order requiring the 3rd Respondent to issue to each of them, a Fidelity Fund Certificate in the prescribed form for the period 1 January to 31 December 2010. They also asked for costs. The respondents opposed the application represented by counsel, who appeared as I recall on behalf of all of them. The relief claimed was against the Third Respondent only.

The urgency lay in the fact that unless fidelity fund certificates were issued to them before January 1st they could no longer continue lawfully in their practice as attorneys. They were at the time holders of certificates which would lapse by superannuation on 31 December 2009. The certificates in question are provided for in section 42 of the Attorneys Act 1979 (the Act). The section reads

> "S42 **Application for and issue of fidelity fund certificate**
>
> (1) A practitioner practicing on his own account or in partnership, and any practitioner intending so to practice, 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 other 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.
>
> (4) Any 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 society concerned. "

On 22nd October 2009 the Applicants who practice in association with each other as Dykes van Heerden Inc., made application in due form for the issue to them of the certificates entitling them to continue in practice after 31 December 2009. Their applications were in order and there has been no suggestion of non compliance with any of the provisions of section 42 (2).

On 9 December 2009 the Head: Professional Affairs of the Law Society sent a reminder to third applicant stating that according to the Society's records no application for a fidelity certificate had yet been received and calling for this to be attended to.

The Head: Professional Affairs, on behalf of the 1st Respondent, on 14th December2009 acknowledged receipt of the applications of all the applicants but informed the applicants that the certificates would not be issued. The Applicants were referred to a resolution of the first Respondent taken on 26th June 2009, which according to the letter sent to the applicants reads

> "Where the Council had resolved to proceed with an application for the suspension 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."

There is no evidence of this resolution having been published and the applicants claim that they had not until so being informed been aware of the existence of the resolution. Whether the applicants were aware of the resolution or not, is not material to the outcome of this application.

The resolution itself is open to criticism. It has to be seen as an instruction to the Secretary of the Society not to issue fidelity certificates to attorneys if at the time of the application proceedings are pending for the striking off, or suspension of the attorney from the roll.

It may be that it was passed in view of criticism by the courts of the Society for issuing certificates to attorneys in such circumstances. Particular reference was made to the observations made in B S Setshogoe v The Law Society, an unreported case. The observations appeared to be passing comment and obiter. The portions of the judgment quoted express the view that where an application for the suspension or removal of an attorney from the roll of attorneys is to be made by the society in terms of a resolution made by it and such application is pending, it would be irresponsible on the part of the Society to issue a fidelity certificate to such attorney.

The observations do not appear to take into account the considerations which persuaded me to grant the relief sought by the applicants and to which I now advert.

The issuing of Fidelity Certificates in terms of Section 42 is the function of the Secretary of the Society, not the Society itself. It is to the secretary that applications for issue of certificates have to be made. It is the Secretary, not the Society, who has in terms of Section 42(3) (a) to be satisfied

> "...that the applicant has discharged all his liabilities to the society in respect of his contribution and that he has complied with any other lawful requirement of the society".

If so satisfied the Secretary, not the Society, according to the wording of the section, must issue a certificate to the practitioner applying for such a certificate.

In the present proceedings the secretary, who is the Third Respondent, against whom the relief is claimed has not filed an affidavit to the effect that he is satisfied that any one or all of the applicants have not discharged all their liabilities to the society or that they or any specific one of them has not complied with any other lawful but unspecified requirements of the Society. It is the secretary's personal decision which is operative, and the criteria which he has to take into account and upon which he has to be satisfied are specified and limited to what is expressly stated in the section quoted above. The only affidavit filed by the Respondents is that of Grobler, who the Director of the 1st Respondent is. He cannot testify as to matters on which the Secretary has to be satisfied. This being so the peremptory wording of the Act is clear, the certificates must be issued.

The words "any other lawful requirements of the Society" require comment. The words usually refer to the auditor's certificate which has to be filed annually. It seems that they must be limited to some requirement of the Society relating to the matters dealt with in section 42. The purpose of the issue of certificates in terms of the section is to provide a degree proof that a practitioner in good standing with the society in respect of his contributions, and is, as far as can be ascertained from his books of account, a good risk as far as the Fidelity Fund is concerned. It is unlikely in most cases that any client or prospective client will have sight of the certificate. In the present case no other lawful requirement of the society, which has not been fulfilled, has been mentioned.

The pending application for the removal of the Applicants from the roll is not such a lawful requirement. It is difficult to see how the applicants could be said to be required to comply with it. The applicants can do no more than oppose the application as they have done. There is no presumption that while the application is pending that the applicants' continuing in practice, presents an undue risk to the Fidelity Fund, their clients, or potential clients.

In the previous year, when the application for suspension or removal of the Applicants was already pending, and all the allegations on which the application was based were known to the Respondents, the Applicants were not refused their fidelity fund certificates. Nor, it is to be observed has the Society considered it necessary to approach the court to suspend the applicants from practice pending the outcome of the striking off application. No such application has been made notwithstanding the extended period over which the application has remained pending. It is only the court which can suspend or terminate the Applicants' right to practice as attorneys. The provisions of Section 42 were not intended to provide an alternative method of interrupting practitioners, who were in full compliance with the requirements of Section 42, in the pursuit of their profession. Such provisions do not afford an opportunity to anticipate an order of court.

The Respondents suggested that the Applicants should have not made their application before the executive of the Society had reviewed the matter. The next meeting of the executive was then scheduled for 21st

January 2010, and no decision was to be expected before then. Clearly if the applicants practiced after 31st December 2009, they would be doing so illegally. To meet this, Respondents suggested that if on reconsideration of the matter it was decided to issue the certificates this could be done retrospectively to 1st January. I am not convinced that this would have been possible or would have met the case. Applicants were entitled to certainty, and to be sure that they were not breaking the law. In any event and above all, there was nothing to show why the Secretary, with whom alone the decision rested, could not act before the end of the year.

For these reasons the Second respondent was ordered to issue the certificates forthwith.

Costs followed the result.

S W Sapire AJ

WEDNESDAY, 28 APRIL 2010

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