

REPUBLIC OF SOUTH AFRICA

**ATTORNEYS
AMENDMENT BILL**

(As introduced in the National Assembly)

(MINISTER OF JUSTICE)

[B 7—98]

REPUBLIEK VAN SUID-AFRIKA

**WYSIGINGSWETSONTWERP OP
PROKUREURS**

(Soos ingedien in die Nasionale Vergadering)

(MINISTER VAN JUSTISIE)

[W 7—98]

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GENERAL EXPLANATORY NOTE:

Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Attorneys Act, 1979, so as to limit liability of the Attorneys Fidelity Fund; to insert transitional provisions relating to liability of the Attorneys Fidelity Fund for investments; to extend the jurisdiction of the Attorneys Fidelity Fund to practitioners in the areas of the former Republics of Bophuthatswana and Venda; and to empower the Law Society of the Transvaal to exercise certain powers in respect of practitioners practising in the areas of the former Republics of Bophuthatswana and Venda; to repeal certain laws; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 47 of Act 53 of 1979

1. Section 47 of the Attorneys Act, 1979 (hereinafter referred to as the principal Act), is hereby amended— 5
- (a) by the addition to subsection (1) of the following paragraph: 5
- “(g) by any person as a result of theft of money which a practitioner has been instructed to invest on behalf of such person after the date of commencement of this paragraph.”; and
- (b) by the addition after subsection (3) of the following subsections: 10
- “(4) Subject to subsection (5), a practitioner must be regarded as having been instructed to invest money for the purposes of subsection (1)(g), where a person—
- (a) who entrusts money to the practitioner; or 15
- (b) for whom the practitioner holds money, instructs the practitioner to invest all or some of that money in a specified investment or in an investment of the practitioner’s choice. 15
- (5) For the purposes of subsection (1)(g), a practitioner must be regarded as not having been instructed to invest money if he or she is instructed by a person— 20
- (a) to pay the money into an account contemplated in section 78(2A) if such payment is for the purpose of investing such money in such account on a temporary or interim basis only pending the conclusion or implementation of any particular matter or transaction which is already in existence or about to come into existence at 25

- the time that the investment is made and over which investment the practitioner exercises exclusive control as trustee, agent or stakeholder or in any fiduciary capacity;
- (b) to lend money on behalf of that person to give effect to a loan agreement where that person, being the lender—
- (i) specifies the borrower to whom the money is to be lent;
 - (ii) has not been introduced to the borrower by the practitioner for the purpose of making that loan; and
 - (iii) is advised by the practitioner in respect of the terms and conditions of the loan agreement; or
- (c) to utilise money to give effect to any term of a transaction to which that person is a party, other than a transaction which is a loan or which gives effect to a loan agreement that does not fall within the scope of paragraph (b).
- (6) Subsection (1)(g) does not apply to money which a practitioner is authorised to invest where the practitioner acts in his or her capacity as executor, trustee or curator or in any similar capacity in so far as such investment is governed by any other law.”.

Insertion of section 47A in Act 53 of 1979

2. The following section is hereby inserted after section 47 of the principal Act:

“Transitional provisions relating to liability of fund for investments

- 47A.** (1) The fund is not liable for loss of money caused by theft committed by a practitioner, candidate attorney, employee or agent of a practitioner where the money is invested or should have been invested on instructions given before the date contemplated in section 47(1)(g) and where—
- (a) the money is to be repaid, at any time after that date, to the beneficiary specified in any agreement whether with the borrower or practitioner;
 - (b) the theft is committed at any time after the expiration of 90 days after the investment matures or after the expiration of 90 days after the date contemplated in section 47(1)(g);
 - (c) repayment is subject to the lender making a demand or is subject to the occurrence of an impossible or uncertain event; or
 - (d) the repayment date is not fixed.”.

Substitution of section 55 of Act 53 of 1979, as substituted by section 1 of Act 116 of 1981 and amended by section 22 of Act 87 of 1989

3. The following section is hereby substituted for section 55 of the principal Act:

“Application of Chapter in respect of persons exercising legal professions in area of former Republic of Transkei, Bophuthatswana, Venda or Ciskei

- 55.** (1) For the purposes of this Chapter—
- (a) ‘practising practitioner’ includes any person who exercises a legal profession in—
 - (i) the former Republic of Transkei or Ciskei; or
 - (ii) the former Republic of Bophuthatswana or Venda, on his or her own account or in partnership, and—
 - (aa) who is required by a law of the former Republic of Transkei or Ciskei, or by section 5(1) of the Attorneys Amendment Act, 1998, as the case may be, as a prerequisite for exercising such profession, to be in possession of a valid fidelity fund certificate issued to him or her in terms of section 42(3); and

- (bb) who is in possession of such a certificate; and
- (b) a person referred to—
- (i) in paragraph (a)(i) must be regarded as being a practitioner who is a member of the society known as the Law Society of the Cape of Good Hope;
 - (ii) in paragraph (a)(ii) must be regarded as being a practitioner who is a member of the society known as the Law Society of the Transvaal.
- (2) This Chapter shall apply with the necessary changes in respect of any theft committed in the area of the former Republic of Transkei, Bophuthatswana, Venda or Ciskei, as the case may be, by a practising practitioner, his or her candidate attorney, employee or agent, of any money or other property referred to in section 26.”

Insertion of section 84A in Act 53 of 1979

4. The following section is hereby inserted in the principal Act after section 84:

“Law Society of Transvaal may exercise certain powers in respect of practitioners practising in areas of former Republics of Bophuthatswana and Venda

84A. Notwithstanding any other law, the Law Society of the Transvaal and its council, president and secretary, may in respect of practitioners practising in the areas of the former Republics of Bophuthatswana and Venda, perform any function which is similar to a function assigned to that Law Society, council, president or secretary, as the case may be, by section 22(1)(d) or (e), (2), 67(2), 69(a), (e) or (m), 70, 71, 72, 73, 74(1)(a), (e) and (f), 78, 81(1)(e) and (f), (2)(a), (d), (e), (i) or (j), (5) or 83(9), (13) or (15).”

Savings and repeal of certain provisions

5. (1) Any practising practitioner contemplated in section 55(a)(ii) of the principal Act who, at the commencement of this Act, is not in possession of a fidelity fund certificate must, within 21 days after that date and subject to the rules of the Law Society of the Transvaal relating to the issue of a fidelity fund certificate, apply for such a certificate.

(2) Notwithstanding section 55 of the principal Act, as amended by section 3 of this Act, the Attorneys Fidelity Fund does not incur any liability, in respect of any practising practitioner referred to in section 55(a)(ii) of the principal Act, for any theft committed prior to the day upon which he or she becomes the holder of a valid fidelity fund certificate as contemplated in subsection (1) and issued in terms of section 42(3) of the principal Act.

(3) Notwithstanding any other law, section 83(10) of the principal Act applies to any practising practitioner who fails to comply with subsection (1) after 60 days have elapsed from the date on which this Act takes effect.

(4) Chapter II of the Attorneys, Notaries and Conveyancers Act, 1984 (Act No. 29 of 1984), of the former Republic of Bophuthatswana and Chapter II of the Attorneys Act, 1987 (Act No. 42 of 1987), of the former Republic of Venda, are hereby repealed.

Short title and commencement

6. This is the Attorneys Amendment Act, 1998, which takes effect on a date fixed by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE ATTORNEYS AMENDMENT BILL, 1998

PART 1

OBJECTS AND EXPLANATION

1.1 Section 26 of the Attorneys Act, 1979 (Act 53 of 1979) (hereinafter referred to as the Act), provides that the Attorneys Fidelity Fund (hereinafter referred to as the Fund) must be applied for the purpose of reimbursing persons who may suffer pecuniary loss as a result of, *inter alia*, theft committed, by a practising practitioner, of money or other property entrusted to the practitioner by or on behalf of such persons.

1.2 The Board of Control of the Fund points out that attorneys administer substantial sums of money entrusted to them for investment purposes which, in itself, creates an opportunity for theft. In terms of the present provisions of the Act, the Fund is exposed to the risk of considerable loss. The Board of Control holds the opinion that if the Fund has to cover the theft of moneys entrusted to attorneys for investment purposes, the possibility exists that it would not be able to meet its primary obligation of protecting members of the public against loss of moneys entrusted to attorneys in the ordinary course of their practice.

1.3 The former TBVC states, after having obtained legislative powers, enacted their own laws in certain instances. The former Bophuthatswana and Venda enacted their own laws regulating the attorneys' profession in their areas. Although these laws, as is the case with the South African Attorneys Act, 1979, provide for the establishment of an Attorneys Fidelity Fund and matters related thereto, no such Funds exist in the above areas at present. The result is that members of the public in the said areas are not protected. In order to overcome this problem it has been decided, as an interim measure until the rationalisation of the attorneys' profession has been finalised, to extend the fidelity fund cover offered by the Attorneys Fidelity Fund, established in terms of the South African Attorneys Act, 1979, to those areas.

1.4 In view of the above the Board of Control requested the Department of Justice to amend the Act.

PART 2

CLAUSE BY CLAUSE ANALYSIS

Clauses 1 and 2

2.1 Clauses 1 and 2 seek to amend section 47 so as to provide that money received by an attorney for investment on behalf of his or her client are, in the case of theft, not covered by the Fund. They also provide for transitional matters that relate to the liability of the Fund for investments.

Clause 3

2.2 Clause 3 seeks to amend section 5 so as to provide for the application of Chapter II in respect of practitioners in the areas of the former Republics of Transkei, Bophuthatswana, Venda and Ciskei.

Clause 4

2.3 Clause 4 seeks to empower the Law Society of the Transvaal to exercise certain powers in respect of practitioners in the areas of the former Republics of Bophuthatswana and Venda.

Clause 5

2.4 Clause 5 provides for savings and repeals.

Clause 6

2.5 Clause 6 states the short title and date of commencement.

PART 3

OTHER BODIES CONSULTED

The Department consulted the following bodies:

- * The Attorneys Fidelity Fund
- * The Association of Law Societies of the RSA
- * National Association of Democratic Lawyers
- * Black Lawyers Association
- * Law Society of Bophuthatswana
- * Transvaal Law Society
- * Law Society of Venda
- * Regional Representatives of the Department of Justice (Mmabatho and Thohoyandou)

PART 4

PARLIAMENTARY PROCEDURE

In the opinion of the Department and the State Law Advisers this Bill should be dealt with in terms of section 75 of the Constitution since it does not contain any provision to which the procedure established by section 74 or 76 applies.